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B. & Ald.	Barnewall and Alderson. K. B.
B. & C.	Barnewall and Cresswell. K. B.
B. & S.	Best and Smith. Q. B.
B. C. C.	Lowndes and Maxwell. Bail Court.
B. C. Rep.	Saunders and Cole. Bail Court.
Ball & B.	Ball and Beatty. Ch. (Ireland).
Bar. & Arn.	Barron and Arnold. Election.
Bar. & Au.	Barron and Austin. Election
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Beat.	Beatty. Ch. (Ireland).
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A. HIGHWAYS.

1. NATURE AND CREATION OF.

a. Generally.

Through Private Property.]—Although a public way may pass through private property, it must have at each end a public terminus. *Young* v. *Cuthbertson*, 1 Macq. H. L. 455.

Over Place not a Thoroughfare.]—A public highway may in law exist over a place which is not a thoroughfare; whether in fact it does exist or not is a question for the jury. *Bateman* v. *Bluck*, 18 Q. B. 870; 21 L. J., Q. B. 406; 17 Jur. 386.

When Stopped at one End.]—Quære, if a road, long used as a thoroughfare by the public, is lawfully stopped at one end, whether the right of way over the remainder is gone. Per Patteson, J., it is not. *Rex* v. *Downshire (Marquis)*, 4 A. & E. 698; 6 N. & M. 92; 5 L. J., M. C. 72.

When a Cul-de-sac.]—A public footpath was rendered a cul-de-sac by buildings authorised by act of parliament; the defendant obstructed the path at a place between which and the end of the cul-de-sac there was no opening or thoroughfare. Upon an indictment for this obstruction, the jury found the defendant guilty; but also found that this part of the path, which the obstruction stopped, had ceased to be of any public utility;—Held, that a public path was still a highway, although it had become a cul-de-sac; and that the measure of public inconvenience caused by the obstruction of such a highway could be considered only with regard to the punishment of the person causing it. *Reg.* v. *Burney*, 31 L. T. 828.

In 1871 the plaintiff became the purchaser in fee-simple of hereditaments, described in the deed of conveyance as "all that piece of ground with the sixteen messuages thereon." The houses were divided into two blocks by a cul-de-sac or passage open at one end only, which had been dedicated to the use of the public for twenty years, but the soil of which the plaintiff claimed as his private property by virtue of his conveyance. A railway company, being about to tunnel under this cul-de-sac, gave the plaintiff a notice to treat in respect of three houses on each side of it, but not in respect of that part of the cul-de-sac between them, the company contending it was a public way or street;—Held, that the cul-de-sac was a public way or street, and that the company was entitled to tunnel under it without paying the plaintiff any compensation. *South* v. *East London Ry.*, 42 L. J., Ch. 477; L. R. 16 Eq. 108; 21 W. R. 590.

The terminus of a public way may be sufficient, although it has not in the ordinary sense an exit. It may be a cul-de-sac. *Young* v. *Cuthbertson*, supra.

But a mere private place, not admitting of a passage through or beyond it, cannot form the terminus of a public way. *Ib.*

The terminus ad quem being laid to be a public highway, is proved by evidence of a public footway. *Allen* v. *Ormond*, 8 East, 4; 9 R. R. 363.

Consideration of the circumstances under which a cul-de-sac may be a highway. *Bourke* v. *Davis*, 44 Ch. D. 110; 62 L. T. 34; 38 W. R. 167.

When rendered Inaccessible.]—A way ceases to be a public highway where the access to it at either end has become impossible by reason of ways leading to it having been legally stopped up. *Bailey* v. *Jamieson*, 1 C. P. D. 329; 34 L. T. 62; 24 W. R. 456.

An ancient footpath led from one point to another in a high road, being a loop or short cut for pedestrians. The court of quarter sessions made an order diverting the part of the high-road in connection with the footpath, and substituting another road at some distance which did not communicate with the footpath. The order did not expressly refer to the footpath; but its effect was to stop both ends of it:—Held, that the footpath ceased to be a highway, and that the public right of way over it was by necessary implication extinguished by the order of quarter sessions. *Ib.*

—— **Extinguishment by Act of Parliament.**]—A provisional order made by the Board of Trade, under the general Pier and Harbour Act, 1861, sanctioned by a confirmation act, authorised the construction of a pier at the end of a street, and blocking it up:—Held, that any public right of way from the street to the beach was taken away. *Yarmouth Corporation* v. *Simmons*, 47 L. J., Ch. 792; 10 Ch. D. 518; 38 L. T. 881; 26 W. R. 802.

A public right of way is not saved as a right of the crown under the above sections of the general act. *Ib.*

Sufficiency of Way.]—A right of way for all the king's subjects to pass and repass with their carts and carriages, is not restrained because all carriages cannot pass and repass. *Rex* v. *Lyon*,

5 D. & R. 497 ; 1 Car. & P. 527 ; 3 L. J. (O.S.) K. B. 92 ; 27 R. R. 530.

Extent of Public Rights—Nature of Easement.]—The right of the public in a highway is an easement to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose is an infringement of the right of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public. *Harrison* v. *Rutland (Duke)*, 62 L. J., Q. B. 117 ; [1893] 1 Q. B. 142 ; 4 R. 155 ; 68 L. T. 35 ; 41 W. R. 322 ; 57 J. P. 278.

If a person uses the soil of a highway for any other purpose than that in respect of which the dedication was made, he is a trespasser. *Ib.*

—— **Breadth of Way.**]—The right of the public to use a highway extends to the whole road, and not merely to the part used as via trita. *Nicol* v. *Beaumont*, 53 L. J., Ch. 853 ; 50 L. T. 112.

In an ordinary highway running between fences the right of passage primâ facie, extends to the whole space between the fences, and the public are not confined to that part which is metalled and kept in repair for passengers. *Reg.* v. *United Kingdom Electric Telegraph Co.*, 3 F. & F. 73 ; 2 B. & S. 647, n. ; 31 L. J., M. C. 166 ; 8 Jur. (N.S.) 1153 ; 6 L. T. 378 ; 10 W. R. 538 ; 9 Cox, C. C. 174.

In 1811 a public road was set out across a common by inclosure commissioners of a width of fifty feet, and allotments of the land on either side were at the same time made. About twenty-five feet only of the fifty feet allotted had been used as the actual road, the sides having become covered with furze and heath ; and fir trees had been allowed to come up through the furze. In 1868 the highway board advertised a sale of some of these fir trees growing within the fifty feet allotted by the commissioners in 1811 for the highway :—Held, that the right of the public was to have the whole width of the road, and not merely the via trita, preserved free from obstructions ; and such right had not become extinguished by the fact that the trees had been allowed to grow up within the fifty feet for the period of twenty-five years. *Turner* v. *Ringwood Highway Board*, L. R. 9 Eq. 418 ; 21 L. T. 745 ; 18 W. R. 424.

—— **Adverse User by Individual for Twenty Years.**]—The adverse user by an individual of a public highway, or any part thereof, for more than twenty years, is no bar to the assertion by the public of their right over the highway, or the portion thereof, so adversely used. *Ib.*

—— **Encroachment by Adjoining Owners.**]—The common notion that owners of land on the sides of a highway may encroach or enclose up to within fifteen feet of the centre is an error. *Reg.* v. *Johnson*, 1 F. & F. 657.

—— **Proof of Boundaries—Map—Inclosure Award.**]—A map attached to an old inclosure award shewing a highway existent at the date of the award is not admissible as evidence of reputation to prove the boundaries of the highway at that date against a person whose property adjoined the highway, but over which the inclosure commissioners had no jurisdiction. *Reg.* v. *Berger*, 63 L. J., Q. B. 529 ; [1894] 1 Q. B. 823 ; 10 R. 245 ; 70 L. T. 807 ; 42 W. R. 541 ; 17 Cox C. C. 761 ; 58 J. P. 416.

Sufficiency of Description in Pleadings.]—It is sufficient in pleading a public highway to allege, that it is a common public highway, without shewing how it became so, or that it has been so time immemorial. *Aspindall* v. *Brown*, 3 Term Rep. 265.

It is not necessary to state any termini. *Rouse* v. *Bardin*, 1 H. Bl. 351.

Jurisdiction to Determine.]—The court of chancery has no jurisdiction to decide the question of a public or private right of way upon a motion in a petition suit. *Pryor* v. *Pryor*, 27 L. T. 257—L.JJ.

b. Creation by Statute.

A highway may be created by an act of parliament. *Sutcliffe* v. *Greenwood*, 8 Price, 535 ; 22 R. R. 771.

Strictness of Conditions.]—A highway cannot be created by statute unless the provisions of the statute creating it are strictly followed. *Cubitt* v. *Maxse*, 42 L. J., C. P. 278 ; L. R. 8 C. P. 704 ; 29 L. T. 244 ; 21 W. R. 789.

—— **Road Formed and Completed, what is.**]—By the General Inclosure Act (41 Geo. 3, c. 109), ss. 8 and 9, the commissioner, before making the allotments of the land to be inclosed, was to set out such roads as he should judge necessary, and to appoint a surveyor to form and complete the same, and until so formed and completed the parish was not to be bound to repair such roads, but after that time they were to be for ever after kept in repair by the parish. An inclosure commissioner appointed to act under a local act, subject to the provisions of 41 Geo. 3, c. 109, duly set out a road which he described in his award made in 1808, but although such road was staked out on the ground and fenced off, it was never formed and completed as required by 41 Geo. 3, c. 109, nor was it ever used by the public :—Held, that as the requirements of the statute had not been complied with, the road was not a highway created by statute, and as there had been no user by the public, it was not otherwise a highway. *Ib.*

When Completion a Condition Precedent.]—A local turnpike act recited, "that the making and maintaining a new road from Leeds to join the Wakefield and Halifax turnpike road, at a certain point, and several branch roads (therein also described) from out of the main turnpike road, would be an advantage to the inhabitants of Leeds and Halifax, and to the public in general" ; and it authorised the making of the said several roads, and enacted, "that the new roads should not be respectively open to the public, or become public roads until two justices should have certified that the roads respectively, and the works thereon respectively, were completely made, and fit to be travelled upon, throughout the whole length of such roads respectively." Semble, per Littledale and Taunton, JJ., that the making of all the branch roads was not a condition precedent to the main road becoming a public road. *Rex* v. *Yorkshire (W. R.) JJ.*, 5 B. & Ad. 1003 ; 3 N. & M. 86 ; 3 L. J., M. C. 54.

Rights Reserved by Owner.]—The provisions of the Highway and Metropolitan Local Management Acts, so far as they apply to roads and streets, are subordinate to the paramount rights reserved by the owner. *St. Mary Newington Vestry* v. *Jacobs*, 41 L. J., M. C. 72; L. R. 7 Q. B. 47; 25 L. T. 800; 20 W. R. 249.

c. Dedication.

By the Crown.]—The crown, if owner of the soil, may dedicate it to the public. *Reg.* v. *East Mark Tything*, 11 Q. B. 877; 17 L. J., Q. B. 177; 12 Jur. 332; 3 Cox, C. C. 60.

Evidence of Intention—User.]—To constitute a dedication of a way to the public by an owner of the soil, there must be an intention so to dedicate, of which the user by the public is evidence, subject to be rebutted by contrary evidence. *Poole* v. *Huskinson*, 11 M. & W. 827.

If a road has been used by the public for a great number of years, a dedication by the owner of the soil may be presumed; and it is not material to inquire who the owner was, or whether he intended to dedicate the road to the public. *Reg.* v. *East Mark Tything*, 11 Q. B. 877; 17 L. J., Q. B. 177; 12 Jur. 332; 3 Cox, C. C. 60.

Public user of a road for some time is sufficient primâ facie evidence of a dedication to the public, and it is not necessary to shew by whom the dedication was made. *Reg.* v. *Petrie*, 4 El. & Bl. 737; 3 C. L. R. 829; 24 L. J., Q. B. 167; 1 Jur. (N.S.) 752; 3 W. R. 243; 6 Cox, C. C. 512.

A user of a road for eighteen months, accompanied with a declaration of an intention to devote it to the public, may be sufficient evidence of a dedication. *North London Ry.* v. *St. Mary Vestry, Islington*, 27 L. T. 672; 21 W. R. 226.

A road led from a highway to the gates of a park; through the park was a bridleway, terminating at another highway, but carriages could not go through the park without permission, the gates being occasionally locked. The parish had repaired the road from time immemorial, taking stones from the park for that purpose, but there had not been any user except for the purpose of seeking admission to the park:—Held, that the evidence did not shew a sufficient dedication to the public and user by them, and the road was not a public highway. *Reg.* v. *Hawkhurst*, 7 L. T. 268; 11 W. R. 9.

A public footway over crown land was extinguished by an inclosure act, but for twenty years after the inclosure the public continued to use the way:—Held, that this was not evidence of a dedication to the public, as it did not appear to have been with the knowledge of the crown. *Harper* v. *Charlesworth*, 4 B. & C. 574; 6 D. & R. 572; 3 L. J. (O.S.) K. B. 265; 28 R. R. 405.

It is by the continued passage of people who wish to go along a particular way, that evidence of there being a highway is established. *Eyre* v. *New Forest Highway Board*, 56 J. P. 517—C. A.

—— **By Scots Law.**]—In an action claiming a public right of way over a track or natural mountain pass about fourteen miles long, running through a thinly populated district of the Highlands of Scotland and connecting by the shortest route Braemar and Clova, it appeared from the evidence of user that the track in question had been used by the public on foot; by drovers twice a year driving sheep from a market held at Braemar to one held near Clova; that public subscriptions had been collected for a bridge in the line of the track; that some distance up the disputed track there was an old milestone, and, that a proprietor in planting trees had specially left a space for the track:—Held, that the amount of user, having regard to the character of the district, was such as might have been expected if the track had been admittedly a public way and not the subject of mere tolerance, and that the evidence was sufficient to establish the right of way. *Macpherson* v. *Scottish Rights of Way and Recreation Society*, 13 App. Cas. 744—H. L. (Sc.)

According to the law of Scotland, the constitution of a public right of way does not depend upon any legal fiction, but upon the fact of user by the public as matter of right, continuously and without interruption for forty years. And the amount of user must be such as might have been reasonably expected if the road in dispute had been an undoubted public highway. Also, the user must be a user of the whole road as a means of passage from one terminus to the other, and must not be such a user as can be reasonably ascribed either to private servitude rights or to the licence of the proprietor. The continued exclusion of the public from the use of an alleged public road for thirty-seven years will not, per se, destroy a pre-existent right of public way unless it is maintained for the prescriptive period of forty years, but it is strong evidence that no such public right ever existed. *Mann* v. *Brodie*, 10 App. Cas. 378—H. L. (Sc.)

Upon the trial of an issue directed to try whether, for forty-six years prior to 1822 there existed a public road from G. to C., it was proved that from 1755 to 1789 the road was used by the public without interruption, and that stiles had in 1789 been placed in the fences by the owners of the land over which the road passed. From 1797 there were frequent interruptions down to the date of the trial. The judge at the trial directed the jury that the interruptions proved were not sufficient to defeat the right in the public to the footway in question, which right must in the evidence be presumed to have been established by having been used for forty years and upwards from the date of the interruption, as stated in the issue. Upon a bill of exceptions to this direction:—Held, that on proof of thirty-four years' uninterrupted exercise of the right, it was competent for the jury to presume, and that they might in point of law be directed to presume an enjoyment corresponding with the manner in which the road had been enjoyed during the thirty-four years, establishing, according to the law of Scotland, a prescriptive right of way. *Harvie* v. *Rogers*, 3 Bligh. (N.S.) 440.

—— **When Land in the Hands of Lessees.**]—If the land has been out on lease, the acquiescence of the tenant will not bind the landlord, without evidence of his knowledge sufficient to presume a grant from him. *Rugby Charity* v. *Merryweather*, 11 East, 376, n.; 10 R. R. 528.

If a way has been used by the public for a great number of years over a close in the hands of a succession of tenants, the privity of the landlord and a dedication may be presumed, although he was never in the actual possession

of the close himself, and he is proved not to have been near the spot. *Rex* v. *Barr*, 4 Camp. 16; 15 R. R. 721.

Where a way has been used by the public for a great number of years over a close, leading only to the houses of lessees, there being no thoroughfare, the privity of the landlord, and a dedication by him to the public, are essential to constitute it a public highway; and evidence that the locus in quo has been paved and lighted for the like number of years, under an act of parliament, in which it is enumerated amongst the public streets, within the scope of the statute, will not prejudice the rights of the owner of the fee. *Wood* v. *Veal*, 1 D. & R. 20; 5 B. & Ald. 454; 24 R. R. 454.

In order to prove that a way was public, evidence was given of user extending over nearly seventy years; but during the whole period the land had been on lease. The judge told the jury that they were at liberty, if they thought proper, to presume a dedication of the way to the public by the defendant or his ancestor, anterior to the land being leased:—Held, a proper direction. *Winterbottom* v. *Derby* (*Earl*), 36 L. J., Ex. 194; L. R. 2 Ex. 316; 16 L. T. 771; 16 W. R. 15.

No dedication to the public of a right of way will be presumed to have been made by the reversioner in fee of land during the existence of a term of years under a lease. *Bermondsey Vestry* v. *Brown*, 35 Beav. 226; 11 Jur. (N.S.) 1031; 13 L. T. 574; 14 W. R. 213.

Two owners of freehold property, by agreement in 1808, undertook, after a part should have been let on building leases, to demise the remainder to trustees for C. for sixty-one years, to lease upon the like plan as should have been adopted with respect to the other part, or in such manner as C. should think fit. In pursuance of the agreement, a lease was accordingly granted in 1813 to C.'s trustees, the lease reciting the agreement, and shewing by a plan the manner in which the other part of the property had been dealt with. Upon this plan there appeared a street, part of the land comprised in the lease adjoining one end of the street. C. and his trustees leased this land for building purposes for the whole term, less ten days, to D., who erected houses in such a manner as to continue the street. The street was used by the public for upwards of twenty years:—Held, that there had been a direction by the freeholders to continue the street, and that it had become a public road. *Pryor* v. *Pryor*, 26 L. T. 758. *And see* 27 L. T. 257.

—— **Streets and Roads—Within 18 & 19 Vict. c. 120, s. 88.**]—A vestry proposed to erect a public urinal in a mews, not a thoroughfare, the freehold of which was in the plaintiffs as trustees. The mews had for seventy years or more been open to the public at all times; no barrier had ever been put across the entrance. The mews had been lighted, cleansed and paved by the vestry. The land adjoining the mews was in lease during the whole period. The lessees had applied to the vestry for leave to interfere with the soil of the mews, but such applications were made without the knowledge of the trustees:—Held, that the soil of the mews had been dedicated to the public, and it was "a street," being a highway within the meaning of 18 & 19 Vict. c. 120, s. 88. *Vernon* v. *St. James's Vestry*, 49 L. J., Ch. 130; 42 L. T. 82. *See also* (per Lush, L.J.) 50 L. J., Ch. 81; 16 Ch. D. 449; 44 L. T. 229; 29 W. R. 222—C. A.

The actual site of the urinal had up to 1858 been occupied by a dung-pit, used by the tenant of stables adjoining the mews. About that year it was filled up:—Held, that the site of the dung-pit had been abandoned, and dedicated to the public with the rest of the mews. *Ib.*

—— **Setting out proposed Road.**]—H., a lessee for a term of seventy-five years of a plot of building land, laid out, in 1865, a proposed road across part of the land, and built six houses on one side of it, but subsequently abandoned her intention of making the road, and, in 1874, demised the remainder of the land, including the site of the abandoned road, for use as a timber-yard. The public had occasionally used the road from 1865 up to 1880, when the urban authority required H., as the owner of the houses, to sewer, flag and pave the same, and on the lessee declining, the urban authority executed the works:—Held, that the mere setting out of a road was not such an act that the person who did it, and allowed the public to traverse and use the road, was to be taken to have dedicated the same to the public; and that the urban authority had no right to cast upon the lessee the whole expense of sewering and paving the road. *Hall* v. *Bootle Corporation*, 44 L. T. 873; 29 W. R. 862.

Commission to set out meet ways for passages. *Oxford* (*Custos, &c.*) v. *Everall*, Cary, 75.

—— **Continuation by a Lessee—Jurisdiction.**]—Two owners of freehold property, by agreement, in 1808 undertook, after a part should have been let on building leases, to demise the remainder to trustees for C. for sixty-one years, upon trust to lease upon the like plan as should have been adopted with respect to the other part, or as C. should think fit. In pursuance of the agreement, a lease was granted in 1813 to C.'s trustees, the lease reciting the agreement, and shewing by a plan the manner in which the other part of the property had been dealt with. Upon this plan there appeared a street, part of the land comprised in the lease adjoining one end of it. C. and his trustees leased this land for building purposes for the whole term, less ten days, to D., who erected houses to continue the street. The street was used by the public for upwards of twenty years:—Held, that there had been a direction by the freeholders to continue the street, and that it had become a public road. *Pryor* v. *Pryor*, 26 L. T. 758. Held, on appeal, without going into the merits, that the court had no jurisdiction. *S. C.*, 27 L. T. 257.

—— **Agreement in expired Lease.**]—In 1850 the owner in fee of a plot of land near a town demised the coals under it for six years to K., the owner of the adjoining land; and in the lease was an agreement that a street, to be called Union Street, should within five years be made across the land under which the coal lay and K.'s land; that a sewer should be made under such road; that the lessor and lessee should, at their own cost, construct and repair so much of the road and sewer as should extend along their respective lands; and that the road should be used as a public road for ever thereafter, and should be maintained by each of the parties, until it should be adopted by the surveyor of highways. The road and sewer were never made, and there was no dedication of a highway to the public by

notice under the highway act. A brickfield, and afterwards (in 1851) a colliery, were opened on K.'s land, and gaps were opened through which access was obtained to the premises for carts and foot passengers. In 1869 posts and chains were placed across one of the openings, but after a few months the chains were removed. In 1870 K.'s land was sold, and in 1871 conveyed to the plaintiff in fee, and in 1872 the local board of health called upon him to sewer and pave the alleged street under the Public Health Act, 1848:—Held, that the agreement in the expired lease had been abandoned and could not be enforced; and that it did not amount to a dedication of a way to the public. *Healey* v. *Batley Corporation*, 44 L. J., Ch. 642; L. R. 19 Eq. 375.

—— **Rights of Reversioners.**]—A dedication of a highway is not to be presumed against a reversioner. *Baxter* v. *Taylor*, 1 N. & M. 13; 4 B. & Ad. 72; 2 L. J., K. B. 65.

No dedication to the public of a right of way will be presumed to have been made by a reversioner in fee of land during the existence of a term of years under a lease. *Bermondsey Vestry* v. *Brown*, 35 Beav. 226; 11 Jur. (N.S.) 1031; 13 L. T. 574; 14 W. R. 213.

A tenant for life cannot dedicate a way as a highway as against the remainderman. *Eyre* v. *New Forest Highway Board*, 56 J. P. 517.

Occasional User—Effect of.]—The occasional user of a farm road by strangers, is evidence of a public rather than of a private way, and may be evidence of a dedication to the public, but must be well weighed with reference to all the circumstances, tending to shew whether the owner ever intended such a dedication, especially if it leads to a place of resort for mere purposes of pleasure. *Mildred* v. *Weaver*, 3 F. & F. 30; 6 L. T. 225.

Over Copyholds.]—Where evidence of user is given in support of a presumed dedication of a public way over copyhold, it does not lie on the persons claiming such right to shew that the lord has had possession. *Powers* v. *Bathurst*, 49 L. J., Ch. 294; 42 L. T. 123; 28 W. R. 390.

Of a Sea Wall.]—There is nothing inconsistent with the purposes of a sea or a river wall or an embankment, erected to protect neighbouring lands, in a right of way along the surface; and the same evidence of user will raise a presumption of dedication by the owner in the case of such an embankment as in any other case of uninterrupted user by the public. *Greenwich Board of Works* v. *Maudslay*, 39 L. J., Q. B. 205; L. R. 5 Q. B. 397; 23 L. T. 121; 18 W. R. 948.

Of Road originally intended for Special Persons.]—By their act of incorporation, the proprietors of the Surrey canal were to erect and maintain bridges over the canal where it intersected any public highway, bridleway, or footpath, and for the use of the owners and occupiers of lands adjoining the canal. In 1804 the company erected a swivel bridge (of sufficient dimensions for a carriage across the canal) at a spot where there had formerly been a public way, which at the most was only a bridleway This bridge was originally intended for the exclusive accommodation (as a carriage-way) of the tenants of an estate adjoining, called the Rolls estate. The neighbourhood having become populous, and a church having been built near the bridge, the public, from 1822 to 1832, used it as a carriage-way. In 1832 the company for the first time imposed a toll upon all carriages traversing the bridge, except those belonging to the tenants of the Rolls estate; and in 1840 they removed the old swivel bridge, and erected a stone bridge in the place of it. In an action against the defendant for passing over the bridge without paying toll, the judge told the jury, that, supposing the bridge to have been originally erected for the exclusive accommodation of the tenants of the Rolls estate, still if, by the acts of the company, an idea grew up in the minds of the public that the company had dedicated the way to the public use, they might find such dedication:—Held, that this was not a misdirection; and that the evidence warranted the jury in finding a dedication. *Grand Surrey Canal Co.* v. *Hall*, 1 Scott (N.R.) 264; 1 Man. & G. 392; 9 L. J., C. P. 329.

Held, also, that there was nothing in the constitution of the company, or in their property, to prevent them from dedicating the bridge to the public. *Ib.*

Where a road was set out by commissioners under a local act, and certain persons only were entitled to use it, but in fact it had been used by the public for many years:—Held, that this was not sufficient evidence of a dedication to the public. *Rex* v. *St. Benedict*, 4 B. & Ald. 447; 23 R. R. 441.

Land vested in Company for Statutory Purposes.]—Land acquired by a company under an act of parliament for the purposes of their undertaking as specified by such act may be dedicated by them as a public highway, if such use by the public be not incompatible with the objects prescribed by the act. Therefore, where land was acquired and used by a canal company under their statutes for the purpose of a towing-path, and it appeared that the use of it as a public footpath was not inconsistent with its use as a towing path by the company:—Held, that the company could dedicate the land as a public footpath subject to its use by them as a towing-path. *Rex* v. *Leake* (5 B. & Ad. 469) approved and followed. *Grand Junction Canal Co.* v. *Petty*, 57 L. J., Q. B. 572; 21 Q. B. D. 273; 59 L. T. 767; 36 W. R. 795; 52 J. P. 692—C. A.

Where drainage commissioners were directed by act of parliament to purchase lands, cut drains, and cleanse them when cut, by placing the mud upon the banks:—Held, that it was competent to them to dedicate such banks to the public as a highway. *Rex* v. *Leake*, 2 N. & M. 595; 5 B. & Ad. 469.

Of Vague Tracks.]—The mere use by people of tracks in a wood, where they were free to wander as they pleased, is not necessarily enough to shew a dedication of such tracks to the public as public footways. *Chapman* v. *Cripps*, 2 F. & F. 864.

Evidence that in a place of resort for pleasure, as a wood, or the like, people have gone wherever they pleased, there being no definite trackway in any particular direction, but merely transitory tracks, and varying every season, and never shewn to be repaired, is not evidence of either a public highway or a public right of resort for air and exercise, or a prescriptive right of way. *Selwinge* v. *Dowell*, 2 F. & F. 845.

Of Open Space—Absence of Termini.]—No right of way is acquired by user, enjoyed over

every part of an open space and not between any definite termini, such user not being sufficient evidence of an intention on the part of the owner to dedicate to the public the whole surface of the space. *Robinson* v. *Cowpen Local Board*, 63 L. J., Q. B. 235 ; 9 R. 858—C. A.

Limited Dedication—To Part of Public.]—There cannot be a dedication to a limited part of the public, as to a parish ; and such a partial dedication is simply void. *Poole* v. *Huskinson*, 11 M. & W. 827.

A parish may possess, as private property, an exclusive right of way, but it must be by express grant from the owner of the land ; and no such right can be presumed to have arisen from dedication, inasmuch as there can be no such thing as a dedication to a part of the public. *Bermondsey Vestry* v. *Brown*, 35 Beav. 226 ; 11 Jur. (N.S.) 1031 ; 13 L. T. 574 ; 14 W. R. 213.

—— **For Limited Purpose.**]—There may be a dedication to the public for a limited purpose, as for a footway. *Poole* v. *Huskinson*, supra.

Semble, that there may be a limited dedication of a highway to the public, as for carts laden with coal. *Stafford (Marquis)* v. *Coyney*, 7 B. & C. 257 ; 5 L. J. (O.S.) K. B. 285 ; 31 R. R. 186.

—— **For Limited Time.**]—There can be no dedication of a way to the public for a limited time ; if dedicated at all, it must be dedicated in perpetuity. Neither can the public by nonuser release their rights. *Dawes* v. *Hawkins*, 8 C. B. (N.S.) 848 ; 29 L. J., C. P. 343 ; 7 Jur. (N.S.) 262 ; 4 L. T. 288.

—— **Evidence of mere Licence.**—Where a landowner suffered the public to use for several years a road for all purposes, except that of carrying coals :—Held, that this was either a limited dedication to the public, or no dedication at all, but only a licence ; and that a person carrying coals along the road after notice not to do so, was a trespasser. *Stafford (Marquis)* v. *Coyney*, supra.

A road had been used by the public for about thirty years, but it appeared that in 1814, twenty-two years before the action, an agreement was made by the owner on one side, and a company and a surveyor of highways of the hamlet and others on the other side, by which the owner agreed to let them use the road on the company paying five shillings a year, and finding cinders, and the hamlet loading and spreading them :—Held, that although the evidence of user per se would shew a dedication by the owner of the soil, it was explained by the agreement, which only amounted to a licence to use the road while the conditions in it should be observed. *Barraclough* v. *Johnson*, 3 N. & P. 233 ; 8 A. & E. 99 ; 1 W., W. & H. 162 ; 7 L. J., Q. B. 172 ; 2 Jur. 839.

—— **Dedication of Street—Notice of—Neglect of Duty by Surveyor.**]—Under 5 & 6 Will. 4, c. 50, s. 23, when a person is about to dedicate a new road to the public, and seeks to made it repairable by the parish, and gives notice to the surveyor that at the end of three months it will be dedicated, it is the duty of the surveyor to call a vestry meeting of the inhabitants, and if such meeting decides that the road is not of sufficient utility to justify its being kept in repair, it is his further duty to summon the party proposing to dedicate before the justices at the next special sessions for highways, who are to decide on the question of the utility of the road ; but if the surveyor omits to summon the party, at the next special sessions after such vestry meeting, the parish is not liable to repair the road, and a mandamus will not lie to the justices, after the three months mentioned in the notice have expired, to view and certify that the road has been substantially made. *Reg.* v. *Bagge*, 44 L. J., M. C. 45 ; 31 L. T. 585 ; 23 W. R. 165.

Held, also, that the neglect of the surveyor to call a meeting did not enable the landowner to dedicate the highway to the parish, and the acceptance by the vestry was a condition precedent to dedication. *Ib.*

—— **Effect of Public Health Act.**]—In 1798, by a local act, trustees were appointed to repair, &c., the streets of a township, and to levy rates on the inhabitants, who on paying them were to be exempt from all other charges, for paving, &c. In 1816, A. laid out a street on his land, which in 1819 became dedicated to the public. In 1823, by another local act, the former act was repealed, and trustees were appointed for similar purposes, and it was provided that all persons should be exonerated from statute duty and compositions and all liability for highway repairs, that surveyors should be appointed to be in the position of surveyors of highways, all costs to be paid by the trustees out of rates, and when any new streets were properly paved, &c., on application by the owners of adjoining houses, to declare them public, they were to be public and repaired by the trustees, and where any streets set out on private property had been opened and used for three years, on application to cause them to be paved, &c., they should be deemed public. In 1851, the Public Health Act, 1848, was applied to the township and the local acts repealed ; and the local board having paved the street before mentioned, called on A. to contribute as an adjoining owner, under s. 69 of the last-mentioned act, which excepts highways defined by 15 & 16 Vict. c. 42, s. 13, to be repairable by the inhabitants at large. Rates had been paid in respect of the premises under the local acts, but the street had never been paved, &c., never been dedicated under 5 & 6 Will. 4, c. 50, and no steps taken by the trustees or the local board to make it public :—Held, that the first local act did not prevent a dedication to the public, that the second only applied to streets then in course of construction or afterwards constructed, and that therefore the street was a highway within the exception in s. 69 of the Public Health Act, 1848, and A. not liable. *Hirst* v. *Halifax Local Board*, 40 L. J., M. C. 43 ; L. R. 6 Q. B. 181 ; 19 W. R. 279.

—— **Evidence of.**]—If the owners of land suffer the public to have the free passage of a street in London, though not a thoroughfare, for eight years without any impediment, it is sufficient to presume a general dedication of it to the public. *Rugby Charity* v. *Merryweather*, 11 East, 376, n. ; 10 R. R. 528.

The plaintiff erected a street, leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated from the end of the street by the defendant's fence for twenty-one years, during nineteen of which the houses were completed, and the street publicly watched, cleansed and lighted :—Held, that this street was not so dedicated to the public, that the defendant

pulling down his wall might enter it at the end adjoining to his land, and use it as a highway. *Woodyer* v. *Hadden*, 5 Taunt. 125 ; 14 R. R. 706.

Ely Place, part of the liberty of Saffron Hill, Hatton Garden, and Ely Rents, is private property ; and, though it is generally open to the public during the day, has never been dedicated to the public. *Paul* v. *Jones*, 1 G. & D. 316 ; 1 Q. B. 832 ; 10 L. J., Q. B. 246.

If a passage leading from one part to another of a public street (though by a very circuitous route), made originally for private convenience, has been open to all the world for a great number of years, without any bar or chain across it, and without any person meeting with interruption, it is to be considered as dedicated to the public and it becomes a highway, to obstruct which is an indictable offence. *Rex* v. *Lloyd*, 1 Camp. 260 ; 10 R. R. 674.

Effect of Repairing.]—The defendant, to prove a public right of way over the plaintiff's land, shewed acts of repair done in a certain year by C., the township surveyor. The plaintiff offered to prove in answer an agreement made in that year, between C. and the steward of the plaintiff's predecessor, that C., in consideration of repayment by the steward, should repair a road which according to the plaintiff's case was the road now in question. The defendant's counsel objected, because it did not appear that the steward had authority to make such agreement. The judge received the evidence, and the plaintiff had a verdict. On motion for a new trial the former objection was renewed, and it was urged also that the evidence, when given, did not shew that the road to which the agreement related was the same as the one now in question :—Held, first, that (assuming the roads to be identified) the agreement, even if the steward had no sufficient authority, was evidence to explain the fact of repair, and was properly admitted. *Ferrand* v. *Millman*, 7 Q. B. 730 ; 15 L. J., Q. B. 103.

Held, secondly, that if the evidence failed to identify the roads, the objection should have been made when the defect appeared, and that the point could not now be raised. *Ib.*

Acts to Prevent Dedication.]—If a person opens his land so that the public pass over it continually, they would, after the user of a very few years, be entitled to pass over it and use it as a way ; and if the person does not mean to dedicate it as a way, but only to give a licence, he should do some act to shew that he gives a licence only. The common course is to shut it up one day in the year. *British Museum Trustees* v. *Finnis*, 5 Car. & P. 460.

The erection of a bar, although it may have been knocked down, rebuts the presumption of a dedication to the public. *Roberts* v. *Karr*, 1 Camp. 262.

A gate being kept across a way is not conclusive that it is not a public way, as the way may have been granted to the public, with a reservation of the right of keeping a gate across it, to prevent cattle straying. *Davies* v. *Stephens*, 7 Car. & P. 570. S. P., *Rex* v. *Bliss*, 1 Jur. 960.

Occupation Roads.]—Occupation roads laid out through an estate for the use and convenience of the inhabitants are not thereby dedicated to the public. *Selby* v. *Crystal Palace District Gas Co.*, 30 Beav. 606 ; 31 L. J., Ch. 595 ; 8 Jur. (N.S.) 422 ; 10 W. R. 432. *S. C.*, on appeal, 4 De G. F. & J. 246 ; 10 W. R. 636.

There may be both an occupation-way and a public highway over the same road, for it does not, on becoming a highway, cease to be an occupation way. Per Lord Denman, C.J., at nisi prius. *Brownlow* v. *Tomlinson*, 1 Man. & G. 484 ; 1 Scott (N.R.) 428.

Deviation from ancient Path—Dedication of new Way—Evidence of.]—The right of deviation is not an inseparable incident to the grant of a highway, and is not to be presumed in the absence of evidence, shewing that it has been either granted by the owner of the soil or enjoyed from time immemorial. *Arnold* v. *Holbrook*, 42 L. J., Q. B. 80 ; L. R. 8 Q. B. 96 ; 28 L. T. 23 ; 21 W. R. 330.

A passer-by is not entitled to remove hurdles standing on land immediately adjoining a highway, on the ground that they may be at night dangerous to the public. *Ib.*

The plaintiff was the occupier of an arable field, across which was a public footpath, but he and his predecessors had the right to plough up the footpath when ploughing the field. The public, when the way was muddy, having deviated on to the plaintiff's field, he, to prevent them from straying from the line of footpath, placed hurdles on the sides of it, some of which were thrown down by the defendant :—Held, that the footpath having been dedicated to the public, with a reservation of the right to plough it up, on its becoming impassable after being ploughed up the public had no right, in the absence of evidence of such a prescriptive right, to pass over the adjoining parts of the plaintiff's field ; and that the defendant was liable in an action of trespass. *Ib.*

An ancient highway over a common or a down, was without authority or interference from the owner of the soil, diverted by an adjoining proprietor, who substituted for it a new road which was used by the public for more than twenty years. After the lapse of that period, the original road was re-opened to the public, and the owner of the soil, over which the substituted road passed, built a wall and planted trees across it. In an action against a party for pulling down the wall and cutting down the trees :—Held, that these facts afforded no evidence of a dedication of the road to the public, the public user being referable to the right of the public to deviate on to the adjoining land whenever the owner of the soil illegally stops a highway or suffers it to become founderous. *Dawes* v. *Hawkins*, 8 C. B. (N.S.) 848 ; 29 L. J., C. P. 343 ; 7 Jur. (N.S.) 262 ; 4 L. T. 288.

If there is an old way near to a person's land, and, by the fences decaying, the public come on the land, that is no dedication of the land as a way. *British Museum Trustees* v. *Finnis*, 5 Car. & P. 460.

In an action for an injury to the wife of the plaintiff, through the negligence of the defendant, in leaving an open vault or cellar unfenced, whereby she fell in, and was injured, the evidence was that persons were in the habit of going across the spot where the vault was, for the purpose of making a short cut from a street to the main road, by avoiding an angle ; but that the owner of the premises, as often as he saw them, turned them back :—Held, no evidence of a public way. *Stone* v. *Jackson*, 16 C. B. 199.

Rights of Owner.]—Subject to the right of the public to pass and repass, the owner of the soil of

a highway has the same estate in the soil as he had previously to this right being acquired by the public. *Harrison* v. *Rutland* (*Duke*), 62 L. J., Q. B. 117; [1893] 1 Q. B. 142; 4 R. 155; 68 L. T. 35; 41 W. R. 322; 57 J. P. 278.

The owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage, and may exercise all other rights of ownership consistent with such dedication; and the appropriation, made to and adopted by the public of a part of the street to one kind of passage and another part to another, does not deprive him of any rights as owner of the land which are not inconsistent with the right of passage by the public. *St. Mary Newington Vestry* v. *Jacobs*, 41 L. J., M. C. 72; L. R. 7 Q. B. 47; 25 L. T. 800; 20 W. R. 249.

The provisions of the highway and metropolis local management acts, so far as they apply to roads and streets, are subordinate to the paramount rights reserved by the owner. *Ib.*

Therefore, when on a summons under 5 & 6 Will. 4, c. 50, s. 72, it appeared that the owner of premises adjoining a public street had caused heavily-laden waggons to be dragged to and from his premises across the footway, and had thereby injured it, the magistrate having found that such user was necessary to the reasonable enjoyment of the freehold premises, and was not inconsistent with the general welfare:—Held, that the summons was properly dismissed. *Ib.*

—— **Right to Plough up a Path.**]—There may, in law, be a dedication to the public of a right of way, subject to the right of the owner of the soil to plough it up in due course of husbandry, and to destroy all trace of it for the time. *Mercer* v. *Woodgate*, 39 L. J., M. C. 21; L. R. 5 Q. B. 26; 21 L. T. 458; 18 W. R. 116.

As far as living memory went, the occupier for the time being of a field over which a footpath crossed, had been in the habit, in due course of farming, of ploughing up the whole field, and so destroying the footpath. There was no evidence of the existence of the footpath before living memory:—Held, that the inference to be drawn was, that the owner had originally dedicated the right of way to the public, subject to this right of periodically ploughing it up. *Ib.*

A footway across a field had from time immemorial at all times of the year been used by all persons, as of right, but the occupier of the field and his predecessors had also from time immemorial ploughed up the footway in such parts as they thought fit, and in other parts lifted the plough across it:—Held, that the surveyors of highways were not justified in repairing the way with hard materials so as to prevent it from being ploughed, or the plough from being lifted over it so easily as before, as it must be presumed to have been dedicated to the public subject to the inconvenience of being occasionally ploughed up. *Arnold* v. *Blaker*, 40 L. J., Q. B. 185; L. R. 6 Q. B. 433; 19 W. R. 1090—Ex. Ch.

—— **Power of Magistrates to make Road over Land held for Public Recreation.**]—Magistrates for a burgh held the links from time immemorial for the inhabitants, and, inter alia, subject to the obligation of preserving the same for the game of golf and for the recreation of the inhabitants. They had from time to time exercised powers of administration and management over the links. The magistrates proposed to make a macadamised road along the outside boundary of the links, where that boundary adjoined certain feus let off by them in 1820, which feus are no longer, in point of law, part of the links. P., an inhabitant of the burgh and member of the principal golfing club there, and others, the appellants, sought to restrain the magistrates either from making the road or from permitting any road to be used in that place for wheel traffic:—Held, substantially affirming the decision of the court below, but altering their interlocutor, that the proposed road would have no substantial interference with the obligation of golfing, &c., and that the road might be reconciled with its due observance; but that it was inconsistent with that obligation for the magistrates to alienate any part of the solum of the ground in question, or to abdicate their existing powers of administration, either by granting private easements to particular individuals, or, having made the road, to create a public easement by dedicating it to the public. *Paterson* v. *St. Andrews* (*Provost*), 6 App. Cas. 833—H. L. (Sc.)

Reservations—Right to make Cuts for Drainage.]—There can be no dedication to the public of land as a highway, with the reservation of a right of making cuts through the land for the purposes of drainage. *Rex* v. *Leake*, 2 N. & M. 595; 5 B. & Ad. 469.

—— **Tolls.**]—The promoters of an intended road by deed declared that the road should not only be enjoyed by them for their individual purposes, but "should be open to the use of the public at large for all manner of purposes, in all respects as a common turnpike road," but subject to the payment of tolls by the persons using it:—Held, that this was not a dedication of the road to the public, and that the road was not a highway repairable by the inhabitants at large under s. 150 of the Public Health Act, 1875. *Austerberry* v. *Oldham Corporation*, 55 L. J., Ch. 633; 29 Ch. D. 750; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532—C. A.

Semble, an individual cannot, without legislative authority, dedicate a road to the public if he reserves the right to charge tolls for the user; and the mere fact that a number of persons form themselves into a company for making and maintaining a road, and erect gates and bars and charge tolls, does not make the road a "turnpike road," in the sense of a turnpike road made such by act of parliament, and so dedicated to the public. *Ib.*

Subject to existing Rights.]—A highway may be dedicated to the public, subject to a pre-existing right of user by the occupiers of adjoining land for the purpose of depositing goods thereon. *Morant* v. *Chamberlin*, 6 H. & N. 541; 30 L. J., Ex. 299.

—— **Effect on Rent-charge.**]—A rent-charge issuing from lands adjoining certain roads, and granted at a time when the roads were private occupation roads, in respect of the use of such roads, and the use of a sewer laid down in one of them, is not determined by the roads becoming highways repairable by the inhabitants at large, and the sewer becoming vested in and discontinued by the local authority; and it matters not that the grantor of the rent-charge had covenanted in the grant to keep the roads and sewers in repair. *Merrett* v. *Bridges*, 47 J. P. 775.

—— **Dangerous Obstructions.**]—If a highway is dedicated to the public with a dangerous

obstruction upon it, such as would have been a nuisance on an ancient way, as, a flight of steps, or a projecting flap, no action can be maintained against the person dedicating it for an injury caused thereby. *Robbins* v. *Jones*, 15 C. B. (N.S.) 221; 33 L. J., C. P. 1; 10 Jur. (N.S.) 239; 9 L. T. 523; 12 W. R. 248.

An action will not lie against the owner of a house having a covered area adjoining a public footway, which area was in existence before and at the time of the dedication of the highway, and before 5 & 6 Will. 4, c. 50, for an injury to an individual from the giving way of the covering of the area in consequence of the wear and tear by public user. *Ib.*

Where an erection or an excavation exists upon land which is dedicated to the public as a highway, the dedication must be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things. *Fisher* v. *Prowse*, 2 B. & S. 770; 31 L. J., Q. B. 212; 8 Jur. (N.S.) 1208; 6 L. T. 711.

A. occupied a house adjoining to a public street, with a cellar belonging to it. The mouth of this cellar opened into the footway of the street by a trapdoor. During the day this trapdoor was open, but at night it was closed by a flap, which slightly projected above the footway, and had so projected as long as living memory went back. B. coming along the footway at night, stumbled over this flap, fell and sustained injury, for which he brought an action against A.:—Held, that the cellar flap had existed as long as the street, and that the dedication of the way to the public was with the cellar flap in it, and, therefore, that A. was not liable, as the maintenance of such an ancient cellar flap was not unlawful. *Ib.*

A railway bridge spanned a road within the defendant's district, and whilst in that condition the road was dedicated to the public and vested in the defendants. There was less space between the road and the bridge on one side than on the other, and the plaintiff while driving along was injured by his head coming in contact with the bridge:—Held, that as the road was dedicated subject to this obstruction, the action against the defendants could not be maintained. *Warner* v. *Wandsworth Board of Works*, 53 J. P. 471.

Widening Highway—Dangerous Condition.]—The defendants were the owners of land on each side of a highway, which was originally ten feet wide. On one side of the highway there was a declivity gradually sloping down to a brook. The defendants widened the highway by increasing its width to about thirty-four feet on the side towards the brook, and it became necessary to bank up that side. The highway had never been fenced. It was in a hilly district, and was steep. The plaintiff was leading his horse and cart up the highway, and drew the horse across the widened part of the road to rest it. The horse staggered and fell over the embankment. The plaintiff brought an action for damages, complaining that the defendants had created a new danger alongside of the highway:—Held, that the defendants were not liable. *Owen* v. *De Winton*, 58 J. P. 833—C. A.

d. Adoption by Parish.

Under 5 & 6 Will. 4, c. 50, s. 23.]—Sect. 23 of 5 & 6 Will. 4, c. 50 (Highway Act, 1835), is not retrospective in respect of roads completely public by dedication at the time of the passing of the act; it applies to roads then made, and in progress of dedication. *Reg.* v. *West Mark* (*Tithing*), 2 M. & Rob. 305.

The formalities necessitated by the said statute before a road dedicated to the public can become such a highway, do not apply to a road made by trustees under a turnpike act. *Reg.* v. *Thomas*, 7 El. & Bl. 399; 3 Jur. (N.S.) 713; 5 W. R. 321.

—— **Notice for Repairs.**]—If a road has been dedicated to the public and used, but the necessary steps have not been taken by notice, under the above section, to make it repairable by the parish, it is still a highway in other respects, and an action is maintainable for obstructing it to the plaintiff's damage. *Roberts* v. *Hunt*, 15 Q. B. 17.

—— **Satisfaction of Local Board.**]—A landowner gave notice to the local board of his intention to dedicate a road as a highway; to which the board replied that they would not adopt the road, as it had not been sewered, levelled, &c., to their satisfaction. The landowner, however, obtained and enrolled the certificate of two justices, and the public then used the road, which was kept in repair by the landowner for twelve months; after which, it being out of repair, an indictment was preferred against the inhabitants:—Held, that the inhabitants were not liable, inasmuch as the road had not become a highway; for that, assuming the above provision to apply to the case, the road had not been made to the satisfaction of the local board, who were the surveyors. *Reg.* v. *Dukinfield*, 4 B. & S. 158; 32 L. J., M. C. 230.

—— **Magistrates' Certificate.**]—Justices, after a parish had resolved that a road proposed to be dedicated to the public was of sufficient utility, were called upon to certify that it was made in conformity to 5 & 6 Will. 4, c. 50, s. 23. They refused to grant their certificate, being of opinion that it was but a part of a road, which in another part was not of the requisite width:—Held, that they were right in their decision. *Reg.* v. *Surrey JJ.*, 3 L. T. 808.

—— **Appeal against Order of Justices.**]—Under 5 & 6 Will. 4, c. 50, s. 23, a special sessions was held after the vestry had deemed a highway not to be of sufficient utility to justify its being kept in repair at the expense of the parish. The justices made an order, in conformity with the determination of the vestry, that the highway was not of sufficient utility:—Held, that an appeal to the quarter sessions lay by the persons dedicating the highway against this order. *Reg.* v. *Derbyshire JJ.*, El. Bl. & El. 69; 27 L. J., M. C. 189; 4 Jur. (N.S.) 755; 6 W. R. 444.

At Common Law.]—Where a way has been recognised as public in an act of parliament, it is not necessary that it should be adopted by the parish to make it a public way. *Rex* v. *Lyon*, 5 D. & R. 497; 3 L. J. (O.S.) K. B. 92; 27 R. R. 530.

A road dedicated to and used by the public becomes a highway, which the parish must repair, although neither such dedication nor such user has been adopted or acquiesced in by the parish. *Rex* v. *Leake*, 2 N. & M. 583; 5 B. & Ad. 469.

Where a public road has been made such pursuant to an act, which was to continue in force for a limited period, and the inhabitants of a parish through which it passed were thereby bound to do statute duty:—Held, that the

performance of such duty was not an adoption of the road by the parishioners; and that, at the expiration of the act, they were not bound by common law to repair such road. *Rex* v. *Mellor*, 1 B. & Ad. 32; 8 L. J. (O.S.) M. C. 109.

By a local act for the better governing a parish, it was enacted that no road which had not been repaired by the parish should be repaired out of the parochial funds until such road should have been surveyed by two surveyors, and certified by them to have been properly made and drained, one of the surveyors to be appointed by the vestry and one by the freeholder or his lessee. A road had been set out by the proprietors, for the purpose of letting the frontage, 5,660 feet, as building ground. Eight houses had been built and were inhabited, and twenty-six carcases erected. The road had been formed and constructed, made and drained, and used by the public for six months, and the freeholder and his lessee had appointed a surveyor, and required the vestry to appoint one, which they refused. The court refused to grant a mandamus to the vestry to compel them to appoint a surveyor, as such appointment would have the effect of throwing on the parish the burden of repairing a road which would not be so much for the benefit of the public as for the peculiar benefit of the freeholder during the time his buildings were being erected. *Rex* v. *Paddington Vestry*, 9 B. & C. 456; 8 L. J. (O.S.) M. C. 4.

e. Property in the Soil.

i. *Of Highway.*

Title of Parish—Presumption of Grant to Trustee for—Long User.]—In pursuance of an inclosure act passed in 1774, the commissioners thereby appointed set out a lane as a public way over certain land in the manor of T. Since 1778 this lane had been let by the vestry of the parish every Easter to persons who paid for the hire of it and depastured it. There was no evidence to shew to whom the soil of the lane belonged before the passing of the inclosure act. Nor was there evidence of any grant thereof at any time to any trustee of the parishioners. The defendant, to whom the lane was so let by the vestry for a year, used it for grazing sheep thereon, though one of the terms of his lease was that he should not turn sheep into it. An action was brought by the lord of the manor of T. asking for a declaration that the soil of the lane belonged to him, and an injunction to restrain the defendant from grazing sheep thereon:—Held, first, that the true presumption was that the soil of the lane was not in the lord of the manor, but, notwithstanding 9 Geo. 2, c. 36, s. 3, and the absence of any enrolled grant, was vested in some persons as trustees for the parishioners, and that, by virtue of 59 Geo. 3, c. 12, s. 17, the churchwardens and overseers of the parish were such trustees; secondly, that apart from all presumptions the parish had gained a title to the lane by the statute of limitations, subject to the public right of way; and, thirdly, that the fact that the defendant had broken one of the conditions of his lease by putting sheep into the lane did not entitle the lord of the manor to treat him as a trespasser. *Haigh* v. *West*, 62 L. J., Q. B. 532; [1893] 2 Q. B. 19; 4 R. 396; 69 L. T. 165; 57 J. P. 358—C. A.

Rights of Adjoining Owners.]—Ownership of land adjoining either side of the road is primâ facie evidence of a right to the soil extending to the centre of the road. *Cooke* v. *Green*, 11 Price, 736.

And a recent right, founded on an inclosure under an act, does not make a distinction with regard to the general law. *Ib.*

The soil of a public highway is presumably vested in the owner of the adjacent land ad medium filum viæ. *Salisbury* (*Marquis*) v. *G. N. Ry.*, 5 C. B. (N.S.) 174; 28 L. J., C. P. 40; 5 Jur. (N.S.) 70; 7 W. R. 75.

There is nothing in 3 Geo. 4, c. 126 (General Turnpike Act), to alter this presumption, or to vest the soil of that description of roads in the trustees. *Ib.*

If the lord of the manor, being owner of close A., adjacent to one side of a highway, and also of close B., adjacent to the opposite side, conveys both in one deed to one vendee, the soil of the road passes to the vendee, although the acreage of each of the closes is stated in the conveyances, unless there is enough in the deed to shew that the soil of the road was intended to remain in the vendor. *Ib.*

The presumption that the soil of a road, usque ad medium filum viæ, belongs to the owners of the adjoining lands applies equally to a private as to a public road. *Holmes* v. *Bellingham*, 7 C. B. (N.S.) 329; 29 L. J., C. P. 132; 6 Jur. (N.S.) 534.

Where the boundary of property is described as abutting upon a highway, such boundary must be taken (in the absence of evidence the other way) to extend to the middle of such highway. *Reg.* v. *Strand Board of Works*, 4 B. & S. 551; 33 L. J., M. C. 33; 11 L. T. 183; 12 W. R. 828—Ex. Ch.

—— **Evidence.**]—The right of the owner of land abutting on a highway to the soil of the highway ad medium filum viæ is founded on a presumption of law which exists only in the absence of evidence of ownership. *Beckett* v. *Leeds Corporation*, L. R. 7 Ch. 421; 26 L. T. 375; 20 W. R. 454.

In opposition to a claim of the owners of houses abutting upon an ancient street in a town that they were entitled to the soil of the street ad medium filum viæ, evidence was adduced, that the lords of the manor used formerly to receive tolls in respect of markets held in the street, which tolls they subsequently sold to the corporation of the town; that in 1694 they had, in consideration of a yearly rent of 3*l.*, granted a licence to persons to dig up any streets of the town in order to lay pipes for the purpose of supplying the town with water, which rent was paid to them down to 1858, when it was bought up by the corporation for 75*l.*; and that payments had on several occasions been made to the lords of the manor by owners of houses abutting on the street in respect of encroachments made upon the soil of the street:—Held, that the evidence of ownership in the lords of the manor was sufficient to rebut the presumption of law, that the owners of the lands abutting upon the street were entitled to the soil of the street ad medium filum viæ, and that consequently the lords of the manor had shewn a good title to the soil in question. *Ib.*

Though the right of the soil in a public highway belongs to the owner of the adjoining closes (when no other proprietor appears), usque ad medium filum viæ, this is only a presumption of law in his favour, when the original dedication

of the road cannot be shewn by positive evidence. *Headlam* v. *Hedley*, Holt, N. P. 463.

The plaintiff granted to the defendant two pieces of land separated by, and each described as abutting on, a strip of land called a street, which the plaintiff intended to dedicate as a highway, but which was in fact never so dedicated. For more than twenty years before action the defendant used this piece of land for the purposes of his business in such a way as to make it impassible, save for foot passengers. Within twenty years both the plaintiff and the defendant had repaired some railings which separated this intended street from an adjoining highway; and within the same period the defendant had first enclosed a small portion of the street, and then fenced it in at each end, where it abutted on two highways. In an action to recover possession of the land:—Held, that the presumption that the soil to the middle of a highway belongs to the owner of the adjoining closed land, does not apply where such land abuts on an intended highway which has not at the time of the conveyance been dedicated to the public. *Leigh* v. *Jack*, 49 L. J., Ex. 220; 5 Ex. D. 246; 42 L. T. 463; 28 W. R. 452; 44 J. P. 488—C. A.

—— **By Conveyance.**]—Where a piece of land which adjoins a highway is conveyed by general words, the presumption of law is that the soil of the highway, usque ad medium filum, passes by the conveyance, even though reference is made to a plan annexed, the measurement and colouring of which would exclude it. *Berridge* v. *Ward*, 10 C. B. (N.S.) 400; 30 L. J., C. P. 218; 7 Jur. (N.S.) 876. *S. C.*, at Nisi Prius, 2 F. & F. 208.

Where a deed of conveyance of land contiguous to a highway described the parcels, giving the acreage to the thousandth part of an acre, by reference to an ordnance map, and to a schedule and plan drawn on the conveyance, the measurements and corresponding numbers, and colouring of which did not include any portion of the highway, and further contained a recital that the trees on the land to be sold had been valued and the amount of the valuation, which, in fact, did not include any of the trees upon the highway, formed part of the purchase-money:—Held, that the presumption of law that a moiety of the highway passed by the conveyance was rebutted. *Berridge* v. *Ward*, supra, distinguished. *Pryor* v. *Petre*, 63 L. J., Ch. 531; [1894] 2 Ch. 11; 7 R. 424; 70 L. T. 331; 42 W. R. 435.

Strips of land lying along a highway, even though indirectly connected with parts of a waste, may well pass under a conveyance of the adjacent inclosure, though the deed purports to state the quantity of acres within the fences that were therein conveyed, if the words "more or less" were added. *Dendy* v. *Simpson*, 7 Jur. (N.S.) 1058; 9 W. R. 743—Ex. Ch. Affirming 8 C. B. (N.S.) 433; 6 Jur. (N.S.) 1197.

—— **Access to Esplanade.**]—An owner of land which runs right up to a public highway is entitled to access to that highway from his land, and that is so whether he is the presumptive owner of the soil of the highway or not. Where, therefore, a landowner, whose land adjoined a public promenade which had been also for many years used as a public highway for foot passengers, was deprived of his access to the promenade by a fence erected by a local board in whom the promenade had been vested:—Held, that a mandatory injunction must issue to compel the removal of the fence, and an inquiry as to damages be directed. *Ramuz* v. *Southend Local Board*, 67 L. T. 169.

—— **Encroachments.**]—The common notion that owners of land on the sides of a highway may encroach or enclose up to within fifteen feet of the centre is an error, and the question will always be as to the extent of the highway by user. *Reg.* v. *Johnson*, 1 F. & F. 657.

Rights of Owners — Nature of Estate.] — Subject to the easement acquired by the public, the owner of the soil of a highway retains the same estate therein as he had previously to any easement being acquired by the public. *Harrison* v. *Rutland (Duke)*, 62 L. J., Q. B. 117; [1893] 1 Q. B. 142; 4 R. 155; 68 L. T. 35; 41 W. R. 322; 57 J. P. 278.

—— **Injunction to prevent Laying Down of Pipes.**]—The owner of the soil in a public way is entitled to an injunction to prevent a stranger from laying down pipes therein, and from keeping there any already laid. *Goodson* v. *Richardson*, 43 L. J., Ch. 790; L. R. 9 Ch. 221; 30 L. T. 142; 22 W. R. 337.

—— **Removal of Obstructions.**]—The owner of the soil of a highway may remove anything thereon not justified by the easement, though not a nuisance to the way. *Reg.* v. *Mathias*, 2 F. & F. 570.

One of the public has no right to remove an incumbrance to the soil of a highway unless a nuisance to the way. *Ib.*

ii. *Of Adjoining Land.*

Presumption.]—The presumption is, that waste land which adjoins to a road belongs to the owner of the adjoining inclosed land, and not to the lord of the manor. *Steel* v. *Prickett*, 2 Stark. 463; 20 R. R. 717.

And that, whether he is a freeholder, a leaseholder, or a copyholder. *Doe* d. *Pring* v. *Pearsey*, 7 B. & C. 304; 9 D. & R. 908; 31 R. R. 209.

When strips of land lie between the highway and the adjoining inclosure, the legal presumption is, that the soil belongs to the owner of the adjoining old inclosure. *Scoones* v. *Morrell*, 1 Beav. 251.

The ordinary presumption is, that strips of land lying along a highway, even though indirectly connected with parts of the waste, belong to the owner of the adjacent inclosed land between which and the actual beaten road they lie, and not to the lord of the manor, especially if the adjacent owner has done acts of ownership without interruption upon the land. *Simpson* v. *Dendy*, 8 C. B. (N.S.) 433; 6 Jur. (N.S.) 1197. *S. C.*, affirmed, 7 Jur. (N.S.) 1058; 9 W. R. 743.

Primâ facie the presumption is, that a strip of land lying between a highway and the adjoining inclosure is, as well as the soil of the highway ad medium filum viæ, the property of the owner of the inclosure. But if the strip of land communicates with open commons or other larger portions of land, the presumption is either done away or considerably narrowed; for the evidence of ownership which applies to the larger portions applies also to the narrow strip which communicates with them. *Grose* v. *West*, 7 Taunt. 39; 17 R. R. 437.

Where the lord of a manor has conveyed land to A., and afterwards other land to B., and it appears that a narrow strip of land passed by one or other of the conveyances, but it is doubtful by which, no presumption arises in favour of A. from the fact that the strip of land lies between a highway and land undisputedly comprised in the conveyance to A. *White* v. *Hill*, 6 Q. B. 487 ; 14 L. J., Q. B. 79 ; 9 Jur. 129.

Evidence to Rebut Presumption.]—Where the question was, whether a slip of land, between some old inclosures and the highway, belonged to the lord of the manor or the owner of the adjoining freehold :—Held, that evidence might be received of acts of ownership by the lord of the manor on similar slips of land not adjoining his own freehold in various parts of the manor. *Doe* d. *Barrett* v. *Kemp*, 7 Bing. 332 ; 5 M. & P. 173.

Evidence of acts of ownership in the lord of the manor is admissible to repel the presumption that waste adjoining a road belongs to the owner of the adjoining enclosed land. *Anon.*, Lofft, 358.

Upon a question whether waste land on the side of a road belonged to the owner of the adjoining inclosure, or to the lord of the manor, grants made by the lord of the waste lands lying on both sides of the road at a considerable distance from the spot in dispute, but in continuity with it, are admissible in evidence ; acts of ownership having been proved to have been exercised by the lord, on the waste in the immediate vicinity of the wastes adjoining to the plaintiff's inclosure. *Doe* d. *Barrett* v. *Kemp*, 2 Scott, 9 ; 2 Bing. (N.C.) 102 ; 1 Hodges, 231 ; 4 L. J., Ex. 331.

But grants made by the lord, of waste lands in other parts of the manor, which were not in continuity with the spot in dispute, are not admissible in evidence. *Ib.*

Though it is the presumption of law that a strip of waste land between an old inclosure and a highway belongs to the owner of the old inclosure, yet that presumption may be rebutted by shewing that there is other land also adjoining the strip to which it may have formerly belonged. *Doe* d. *Harrison* v. *Hampson*, 4 C. B. 267 ; 17 L. J., C. P. 225.

"Roadside Waste"—Not Vesting in County Council.]—The land lying between the metalled part of a main road and the hedges on either side is "roadside waste" within s. 11, sub-s. 1 of the Local Government Act, 1888, and does not vest in the county council under s. 11, sub-s. 6, of that act. *Curtis* v. *Kesteven County Council*, 60 L. J., Ch. 103 ; 45 Ch. D. 504 ; 63 L. T. 543 ; 39 W. R. 199.

2. Stoppage and Diversion of.

a. Under Inclosure Acts.

See Common.

b. By Order of Justices.

i. *Generally.*

Under 13 Geo. 3, c. 78.]—The 13 Geo. 3, c. 84, s. 63, only referred to diversions under writs of ad quod damnum, and under 13 Geo. 3, c. 78, s. 19. *Rex* v. *Netherthong*, 2 B. & Ald. 179.

—— **Widening of Roads.**]—The power of two justices, under 13 Geo. 3, c. 78, s. 16, to order any highway to be widened, extended to roads repairable ratione tenuræ. *Rex* v. *Balme*, Cowp. 648.

Sects. 6 and 63 of 13 Geo. 3, c. 78, did not authorise the surveyor to widen a road to thirty feet by removing a fence, unless the fence supposed to be an encroachment was actually upon the highway. *Lowen* v. *Kaye*, 6 D. & R. 20 ; 4 B. & C. 3 ; 3 L. J. (O.S.) K. B. 123.

—— **Rendering Footpath a Cul de Sac.**]—By 13 Geo. 3, c. 78, justices were empowered to divert and stop up certain highways, and to sell the part stopped up ; but by s. 17, if they found it necessary, the old highway was to be sold, subject to the right of way and passage to any lands, house or place, according to the ancient usage in that respect. In 1827 orders for diverting, stopping and selling a portion of a highway were confirmed at quarter sessions, containing the reservation of a free passage for persons on foot only over and along the land and soil of the highway to and from a certain public footpath communicating therewith at the letter E., as delineated on an annexed plan, according to the ancient usage thereof :—Held, that the effect of these orders was to render another public footpath which communicated with the old highway at another point, and was not marked in the annexed plan, a cul de sac ; and that a landowner was justified in closing a door at the point of communication. *Reg.* v. *Waller*, 31 L. T. 777.

—— **Setting out of New Highway—Necessity of.**]—Under 13 Geo. 3, c. 78, s. 19, a new highway must have been set out before an old one could be stopped up ; and it was not sufficient that another old highway was widened in parts to answer the purpose of a new road. *Welch* v. *Nash*, 8 East, 394 ; 9 R. R. 478. But see *Reg.* v. *Phillips*, post, col. 30.

Where a road was stopped up by order of justices, and a new one was substituted, partly over the ground of a stranger, and partly over an accustomed road, that was a sufficient compliance with the act, provided the new road conveyed the public to the same place as the old one did. *De Ponthieu* v. *Pennyfeather*, 1 Marsh. 261 ; 5 Taunt. 634 ; 15 R. R. 603.

Application to the court to set aside an ad quod damnum, on a suggestion of surprise upon the neighbouring inhabitants when the inquisition was taken, and for want of a new road being set out (in lieu of the road taken away by the person who issued the writ) in his own ground. Lord Chancellor held there was no surprise, nor was it necessary the new road should be set out on the party's own soil. *Vennor, Ex parte*, 3 Atk. 766.

—— **Sufficiency of Certificate.**]—Where an order of justices for the diversion and turning of a road recited that they had viewed the new road and found it to be in good condition and repair :—Held, to be a sufficient certificate under 13 Geo. 3, c. 78, s. 19. *De Ponthieu* v. *Pennyfeather*, supra.

—— **Presentment under—Effect of 5 & 6 Will. 4, c. 50, upon.**]—A presentment under 13 Geo. 3, c. 78, was in progress when 5 & 6 Will. 4, c. 50, which repealed that statute, came into operation :—Held, that the court could not give judgment upon it. *Reg.* v. *Mawgon* (*Inhabitants*), 8 Ad. & E. 496 ; 3 N. & P. 502 ; 7 L. J., M. C. 98.

ii. *Prior to Highway Act*, 1835.

Contents of Order.]—An order of sessions for stopping up footpaths must distinctly describe the parish they are in, their length and breadth, and order them to be sold. *Rex* v. *Kenyon*, 6 B. & C. 640 ; 9 D. & R. 694.

Semble, that to an order for diverting a road made by justices under 13 Geo. 3, c. 78, the names of the owners of the land through which the road is to pass are not essential. *Rex* v. *Casson*, 3 D. & R. 36.

In an order of justices for stopping up an unnecessary highway under 55 Geo. 3, c. 68, it must be stated that it appeared to the justices on view that the way was unnecessary. *Rex* v. *Worcestershire JJ.*, 8 B. & C. 254 ; 2 M. & Ry. 289 ; 7 L. J. (O.S.) M. C. 72.

Justices could not make an order for stopping up part of a highway as unnecessary, under 55 Geo. 3, c. 68, s. 2, unless they had viewed the highway together ; nor unless the finding that it was unnecessary was the result of that view. *Rex* v. *Cambridgeshire JJ.*, 5 N. & M. 440 ; 4 A. & E. 111 ; 1 H. & W. 600 ; 5 L. J., M. C. 6.

By an order of justices, it was stated that three justices having particularly viewed the public roads within a parish thereinafter described, and being satisfied that they were unnecessary to be continued, did order that such roads should be stopped up and extinguished :—Held, that this order was invalid, inasmuch as it did not appear upon the face of it that the justices were, upon the view, satisfied that the roads were unnecessary. *Rex* v. *Downshire* (*Marquis*), 6 N. & M. 92 ; 4 A. & E. 698 ; 1 H. & W. 673 ; 5 L. J., M. C. 72.

An order of justices under 55 Geo. 3, c. 68, s. 2, for stopping a highway, began with this recital, "we," &c., "having viewed a certain public highway," &c., "and it appearing to us that such highway is unnecessary," we do order, &c. :—Held, a bad order, the words not necessarily implying that it was made upon the view "of the said justices" according to the act. *Reg.* v. *Jones*, 12 A. & E. 684 ; 4 P. & D. 520 ; 1 Arn. & H. 113 ; 9 D. P. C. 504 ; 10 L. J., M. C. 5.

Quære, whether the order should include an order for the sale of the unnecessary highway, and contain a description of its breadth, and a reservation of the rights of the parties ; and whether the order, as set out in the case, sufficiently shews that the parties were acting at a special sessions. *Ib.*

Validity of Order.] — An order of justices, under 55 Geo. 3, c. 68, stopping up more than the highway, was void. *Rex* v. *Milverton*, 1 N. & P. 179 ; 5 A. & E. 841 ; 2 H. & W. 435 ; 6 L. J., M. C. 73.

Such an order, stopping up part only of a highway, was void. *Ib.*

Justices had no authority to narrow a highway. *Ib.*

An order of justices under 55 Geo. 3, c. 68, for diverting a public footway and substituting a new one, which contained also an order for the stopping up the old footway, was void. There should have been two separate orders : the one for diverting, the other for stopping up. *Rex* v. *Middlesex JJ.*, 1 N. & P. 92 ; 2 H. & W. 407 ; 5 A. & E. 626 ; 6 L. J., M. C. 10.

An order of justices for diverting a public highway and substituting a new one for it, containing also an order for stopping up the old highway, is bad, inasmuch as they have no power to stop up the old road until the new one has been made. An order for diverting an old highway and substituting a new one, must shew, on the face of it, that the justices viewed the line of the proposed new road. *Rex* v. *Kent JJ.*, 10 B. & C. 477 ; 8 L. J. (O.S.) M. C. 73.

If a new highway be not set out before the old one be stopped up, the legality of the orders of the justices for diverting the old road and stopping it up may be questioned in an action of trespass, notwithstanding such orders were confirmed by the sessions on appeal stating the fact of a new road being set out in lieu of the old one. The defendant cannot justify, under the general issue, the cutting the posts and rails of the plaintiff, though erected upon the defendant's own land ; there being no question raised as to the property remaining in the plaintiff. *Welch* v. *Nash*, 8 East, 394 ; 9 R. R. 478.

An order for diverting and stopping up a highway and substituting for it a new road is bad, unless it appears that the public acquire as permanent a right in the latter as they had in the former. *Rex* v. *Winter*, 3 M. & Ry. 433 ; 8 B. & C. 785 ; 7 L. J. (O.S.) M. C. 15.

Justices by 55 Geo. 3, c. 68, s. 2, might make an order for stopping a footway as unnecessary, without ordering it to be sold. *Rex* v. *Glover*, 1 B. & Ad. 482 ; 9 L. J. (O.S.) M. C. 38.

—— **By what Justices.**]—By 2 & 3 Will. 4, c. 64, s. 36, sched. (O.) 30, Clifton is made a part of the parliamentary borough of Bristol, which is a county of itself. Except so far as that act operated, it was in the county of Gloucester :—Held, that after the passing of the Corporations Act (5 & 6 Will. 4, c. 76, ss. 7, 8), the Gloucestershire justices could not make an order for diverting a footway in Clifton, their jurisdiction, in such cases, being transferred to the justices of Bristol. *Rex* v. *Gloucester JJ.*, 4 A. & E. 689.

Justices in petty session having made an order for stopping a highway under a local act, giving an appeal, and the time for appeal having elapsed, it cannot be contended, on a prosecution for obstructing such way, that the order was bad, because the justices were not properly summoned to the petty session. *Rex* v. *Downshire* (*Marquis*), 4 A. & E. 698 ; 6 N. & M. 92 ; 1 H. & W. 673 ; 5 L. J., M. C. 72.

—— **Consent of Parties.**]—An order made by justices of peace, under 55 Geo. 3, c. 68, s. 2, for stopping up an old highway, and setting out a new one, must shew that it was made with the consent in writing, under the hand and seal of the owner of the land through which the new highway was proposed to be made. *Rex* v. *Denbighshire JJ.*, 2 D. & R. 52. *S. C.*, nom. *Rex* v. *Kirk*, 1 B. & C. 21.

So, where an order of justices for turning a footpath was founded upon a consent, signed and sealed by the attorney of the parties in and through whose ground the new road was to pass, there being nothing to bind the principal :—Held ill, and quashed by the court, after confirmation by sessions. *Rex* v. *Crewe*, 3 D. & R. 6. *S. C.*, nom. *Rex* v. *Kent JJ.*, 1 B. & C. 622.

—— **Description of Order—Plan Annexed—Notice without Plan.**]—An order of justices for diverting a highway, and stopping up a part of it, described the highway by termini, and by reference to a plan ; the part to be stopped up was described as so many yards of the said high-

way, lying between certain letters on the plan, and coloured blue. Notice was published (pursuant to 55 Geo. 3, c. 68) of the order having been made; but the notice had no plan annexed, and merely described the road by termini and the part to be stopped up as so many yards of such road:—Held, that the order explained by a plan annexed was good, but that the notice was insufficient. *Rex* v. *Horner*, 2 B. & Ad. 150.

See *S. C.*, on motion for the rule, sub nom. *Rex* v. *Kent JJ.*, 1 L. J., M. C. 29.

"On Notice being given."]—By 59 Geo. 3, c. 134, s. 39, an order of the church building commissioners for stopping paths through a churchyard is to be made with consent of two justices, and on notice being given in the manner and form prescribed by 55 Geo. 3, c. 68; and no appeal lies against the order. By 55 Geo. 3, c. 68, s. 2, the stopping up was to be by an order of two justices, provided that were given in the form annexed, which form stated that the order had been signed; but there was an appeal to the sessions, and if no one appealed, or the order was confirmed on appeal, the way was to be stopped, and the proceedings conclusive:—Held, that an order of the commissioners being final when made, must be preceded by notice, and that the words "on notice being given," in 59 Geo. 3, c. 134, s. 39, must, with reference to such an order, be read "after notice given." *Reg.* v. *Arkwright*, 12 Q. B. 960; 18 L. J., Q. B. 26; 13 Jur. 300.

Notice of Special Sessions, by whom to be given.]—The notices of holding a special sessions for the purpose of diverting a public highway, when given to the justices of the peace of the county acting within the district, must be given by the high constable of the hundred. *Rex* v. *Surrey JJ.*, 5 B. & C. 241; 7 D. & R. 857; 4 L. J. (O.S.) K. B. 246.

Proof of Highway—Evidence of Order.]—An award, made in 1830, under an inclosure act, which empowered the commissioners to stop up highways, subject, nevertheless, to the order and concurrence of two justices, directed a public highway for carriages to be stopped up. Ever since the award (i.e. for twenty-eight years) the road had been stopped up by a gate, and had never been used by the public with carriages or horses. There had been, however, some user by foot passengers. No proof was given that the requisite order of justices had ever been made:—Held, that from the non-user of the road for so long a period, the jury might presume that there was such an order. *Williams* v. *Eyton*, 4 H. & N. 357; 28 L. J., Ex. 146; 5 Jur. (N.S.) 770; 7 W. R. 291—Ex. Ch.

iii. *Since the Highway Act*, 1835.

Power to Order on a Contingency.]—Justices of the peace have no power under 5 & 6 Will. 4, c. 50, s. 85, to order a highway to be stopped up because, in consequence of matters to arise at some future time, another road not yet made will be nearer or more commodious to the public. *Reg.* v. *Midgley Local Board*, 5 B. & S. 621; 33 L. J., M. C. 188; 10 Jur. (N.S.) 1125; 12 W. R. 951.

Validity of Certificate—Authority to make Application.]—When a highway, which was situate locally within the boundaries of a parish, was also within the limits of a local improvement act, and the commissioners appointed by that act were liable to repair, and entitled to the control and management of the highway, but no provision was made by the local act for its diversion, the inhabitants of the parish in which the road was situate, in vestry assembled, have no authority under 5 & 6 Will. 4, c. 50, s. 82, to direct their surveyors to make an application to the justices to view the same in order to its being stopped up or diverted, and a certificate of two justices grounded on such an application is void. *Wright* v. *Frant*, 4 B. & S. 118; 32 L. J., M. C. 204; 10 Jur. (N.S.) 39; 8 L. T. 455; 11 W. R. 883.

—— **Sufficiency of Statements in.**]—A certificate of a justice for the diversion of a highway, need not state that the proposed new highway is nearer and more commodious; it is sufficient if the statement is in the alternative. *Reg.* v. *Phillips*, 35 L. J., M. C. 217; L. R. 1 Q. B. 648; 12 Jur. (N.S.) 920; 14 W. R. 791.

It is not necessary that the new highway should be over entirely new land; it is a sufficient substitution if an old narrow highway is widened so as to form a more commodious road. *Ib.*

It is sufficient if the certificate states that the old highway will be unnecessary when the proposed alterations are completed. *Ib.*

Proceedings were taken under 5 & 6 Will. 4, c. 50, ss. 84, 85, to divert a footpath which crossed the corner of the grounds of an asylum, the new path being of greater length round the fence, and upon what had been a ditch between the fence and the highway. Two justices certified that the new path was more commodious than the old, but made no mention in their certificate of any consent of the owner. A written consent of the proprietors of the asylum was inrolled with the certificate and plan by the quarter sessions. This consent professed to be by the owners of the lands or grounds through, along or adjoining which the footpath was intended to be diverted and turned, and they consented to the making and continuing the new path through, along or adjoining their lands or grounds:—Held, that this was a substitution of a new path, that the certificate need not mention the consent of the owner, and that this consent contained in effect what was mentioned in the scheduled form. *Reg.* v. *Surrey JJ.*, 26 L. T. 22.

Two justices proceeding under s. 84 of the Highway Act (5 & 6 Will. 4, c. 50), for the diversion of a footway, found that the proposed line was "nearer and more commodious" than the old one. An appeal was made against this proceeding, under s. 88 of the same act; and the appellants set forth, in the statement of their grounds of appeal, that the proposed new way was not "nearer and more commodious" than the old one: a jury being empanelled to try the appeal, found that the proposed new way was "nearer," but not "more commodious," than the old one:—Held, that on this finding the court of quarter sessions could not make an order for diverting the footway. The justices in their certificate described this footway as "leading from W. to A." It appeared that the old footway led, in fact, from W. to a point in the highway leading from A. to several other places, and consequently that the footway was a mode of communication between W. and those places, and that the new footway, joining the highway at a part nearer to A. than the old one, was nearer as between W. and A., but longer as between W.

and other places. In the ground of appeal it was stated that "reference being had to the different places, &c., with which the footway communicated, the new way was not nearer than the old one":—Held, that the jury were properly directed to construe the word "nearer," not as between W. and A., but as between the point at which the new and old footway parted, and the point where the old footway reached the high road. *Reg.* v. *Shiles*, 1 Q. B. 919; 1 G. & D. 304; 10 L. J., M. C. 157.

A party, desirous of stopping up a highway in a metropolitan parish, required the vestry of the parish, pursuant to 5 & 6 Will. 4, c. 50, s. 84, and 19 & 20 Vict. c. 112, s. 9, to give notice to and direct the clerk of the vestry to convene and assemble a meeting of the vestry for the special purpose of considering her desire. All the other steps preliminary to stopping up a highway, as required by ss. 84 and 85 of the former act, were duly carried out, but the two justices who viewed the highway omitted to state in their certificate that the surveyors had first duly obtained the consent of the inhabitants of the parish in vestry assembled, or were acting under an order of the chairman:—Held, that this technical objection to the form of the certificate did not invalidate the order of sessions by which the highway was shut up. *Reg.* v. *Hervey*, 44 L. J., M. C. 1; L. R. 10 Q. B. 46; 31 L. T. 505; 23 W. R. 231.

—— **When no Appeal.**]—When there is no appeal, it is the duty of the sessions to be satisfied that the certificate is correct on its face, and accompanied by plan and proof, such as required by the 5 & 6 Will. 4, c. 50, s. 85. *Reg.* v. *Worcestershire JJ.*, 3 El. & Bl. 447; 2 C. L. R. 1333; 23 L. J., M. C. 113; 18 Jur. 424.

—— **Must be Founded on Inspection of Justices, not upon Inquiries.**]—Justices in certifying under 5 & 6 Will. 4, c. 50, s. 85, that they have viewed a highway proposed to be diverted, and that the proposed new highway is nearer or more commodious to the public, must so certify from their own inspection, and not as the result of inquiries from other persons. When, therefore, justices certified that the proposed new highway would be more commodious to the public than the present highway because, "upon inquiries," they found that the old path was inconvenient, and the new path convenient:—Held, that the certificate was invalid. *Reg.* v. *Wallace*, 4 Q. B. D. 641; 40 L. T. 518.

—— **Delegation of Discretion to Surveyor.**]—Mandamus to remove obstructions on a highway. Return shewing that proceedings were taken under 5 & 6 Will. 4, c. 50, s. 82, for diverting the highway, that two justices viewed the highway, and the proposed new highway, and certified that they had done so, and that the proposed highway was more commodious to the public, which certificate was laid before the quarter sessions; that no appeal was made, and the proceedings were regular up to the order of the sessions; that the order directed the surveyor to stop the old highway, and before doing so to make the new one, and in doing this not to pull down any house or building, or take away the ground of any yard. The return shewed that the proposed line passed over a building and a yard, and that the surveyors bonâ fide made the new line as near to the old line as could be without pulling down the building and taking the yard, and then stopped up the old way:—Held, that either the order of sessions was bad as delegating to the surveyors a discretion as to the line of the new highway to be made, or if the words to this purport were rejected, it did not appear that the order was obeyed; and the old highway was not shewn to have been effectually stopped. *Reg.* v. *Newmarket Ry.*, 15 Q. B. 702; 4 New Sess. Cas. 241; 19 L. J., M. C. 241.

—— **Neglect to give Prescribed Notices.**]—Three roads, each in a separate parish, formed one system, and consisted of three limbs, running from three turnpike roads at the points A., B. and C., and meeting at a point D., so as to form a figure like that of the letter Y. The justices, purporting to act under 27 & 28 Vict. c. 101, s. 21, made three certificates as to each of the highways. The roads referred to in the certificates were described, one as running from D. to A., another as running from D. to B., and a third as running from D. to C. The certificates also recited that the requisite notices had been given. A notice had been placed at the points A., B. and C., but not at the central point D. The certificates having been affirmed on appeal:—Held, that a certiorari must issue for the purpose of quashing the order of sessions, as each of the orders related to a separate highway, one end of which was at D., so that the prescribed notices had not been given, and the certificate was invalid. *Reg.* v. *Surrey JJ.*, 39 L. J., M. C. 145; L. R. 5 Q. B. 466.

The applicant for the certiorari resided in the neighbourhood of the highways to which the certificates related:—Held, that, by reason of his residence, he was a person grieved, and entitled to the certiorari as of right. *Ib.*

Expenses—Right to employ Solicitor.]—The charges of a solicitor employed by an urban authority to conduct proceedings at the instance of an individual for the stopping up or diverting a highway under ss. 84, 85, of the Highway Act, 5 & 6 Will. 4, c. 50, are not "expenses" within s. 84 of the act, so as to be recoverable in the manner pointed out by s. 101:—Semble, that all the steps required by s. 85 to be taken for the purpose of obtaining the order of sessions, are ministerial acts which ought to be done by the surveyor of the local authority. *United Land Co.* v. *Tottenham Local Board*, 53 L. J., M. C. 136; 13 Q. B. D. 640; 32 W. R. 798.

Notice of Vestry Meeting.]—Notice of a vestry meeting was given in the words following: "Hamlet of Trevecca,—I, the undersigned, hereby give notice that a meeting of the ratepayers of the above hamlet will be held at the vestry-room, &c. . . . . for the purpose of taking into consideration the proceedings now taken by Mr. John Parry, of ———, against Mr. Rhys Davies, surveyor of the Talgarth District Highway Board, respecting Blaenanbach road, and for other purposes connected with the highways of the above hamlet." The meeting so convened passed a resolution that the road should be stopped up, under 5 & 6 Will. 4, c. 50, s. 84:—Held, that, having regard to the fact that proceedings had been taken for compelling the parish to repair the highway, the notice sufficiently informed the public that any steps which might be necessary for defeating these proceedings, such as stopping up the highway, would be considered

by the vestry, and that the meeting was therefore duly convened. *Reg.* v. *Powell*, 42 L. J., M. C. 129; L. R. 8 Q. B. 403; 28 L. T. 697; 21 W. R. 867.

Place for affixing Notices.]—The Highway Act, 1835, provides by s. 85 that upon proceedings under that and the preceding section for turning, diverting, or stopping up a highway, notices shall be affixed by the surveyor "at the place and by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped up," and "on the door of the church of every parish in which such highway so proposed to be diverted, turned, or stopped up, or any part thereof, shall lie":—Held, that it is sufficient to affix notices at the commencement and termination of the particular portion of highway proposed to be dealt with, and on the church door of the parish or parishes in which such portion is situated. *Reg.* v. *Surrey JJ.*, 61 L. J., M. C. 153; [1892] 1 Q. B. 867; 66 L. T. 578; 40 W. R. 500; 56 J. P. 695—C. A.

iv. *Appeal against Order.*

To Quarter Sessions.]—An appeal to the quarter sessions lies under the 27 & 28 Vict. c. 101, s. 21, against an order directing that a highway should cease to be a highway which the parish is liable to repair. *Reg.* v. *Surrey JJ.*, 39 L. J., M. C. 49; L. R. 5 Q. B. 87; 18 W. R. 166.

—— **Time for—Notice of.**]—Where sessions are regularly held on certain fixed days, at certain places in different divisions of a county, and in each division of a county (except the first), by adjournment from the preceding, the ten days' notice of appeal against a certificate for stopping up a highway, under 5 & 6 Will. 4, c. 50, s. 88, is to be reckoned with reference to the first day of the sessions held in the first of such divisions, though the highway is not situate within such first division. *Reg.* v. *Suffolk JJ.*, 3 New Sess. Cas. 146; 5 D. & L. 558; 17 L. J., M. C. 143; 12 Jur. 480.

Notice of appeal against an order for closing a highway required by 5 & 6 Will. 4, c. 50, s. 88, must be given ten days before the commencement of the original quarter sessions; not ten days before the adjourned sessions of the district in which the highway is situate. *Swift* v. *Lancashire JJ.*, 22 W. R. 76.

Under 5 & 6 Will. 4, c. 50, s. 88, an appeal against a certificate of justices for stopping a highway cannot be brought unless ten days' notice has been given before the quarter sessions held next after the expiration of four weeks from the lodging of the certificate with the clerk of the peace. *Reg.* v. *Lancashire JJ.*, 8 El. & Bl. 563; 27 L. J., M. C. 161; 4 Jur. (N.S.) 375; 6 W. R. 74.

Where the sessions had entered and respited an appeal, of which such notice had not been given, the court quashed the order of sessions on certiorari. *Ib.*

Where the general quarter sessions commence on a certain day, and are in practice afterwards adjourned and held on another day in another place, for the purpose of deciding matters in its vicinity, the notice of appeal must be given ten days before the day first mentioned, though the highway is in the vicinity of the latter place. *Ib.*

The 12 & 13 Vict. c. 45, s. 1, which requires fourteen days' notice of appeal to be given upon appeals (with certain exceptions) to the quarter sessions, applies to an appeal against a certificate for diverting a highway under 5 & 6 Will. 4, c. 50. But the provisions in s. 84 of the 5 & 6 Will. 4, c. 50, which requires the chairman of the vestry to give an order in writing directing the surveyor to apply to two justices to view the highway do not apply to a case where the proceedings are taken at the instance of a private individual. *Reg.* v. *Maule*, 41 L. J., M. C. 47; 23 L. T. 859.

Therefore, when an individual took proceedings under 5 & 6 Will. 4, c. 50, to divert a highway, and the vestry assented to his proposal, but the chairman of the vestry did not give any order in writing to the surveyor to apply to the justices, and he appealed against the certificate, giving only ten days' notice of appeal, which notice the sessions held to be sufficient, and upon its being objected that the certificate of the justices was bad for not alleging that the chairman gave the surveyor an order in writing to apply to two justices to view, they held such order to be bad for such omission:—Held, that the quarter sessions were wrong upon both points, for that the notice of appeal was bad for not being fourteen days at least, and the certificate was good. *Ib.*

An order made under 55 Geo. 3, c. 68, s. 2, could not be confirmed till the sessions held next after the expiration of four weeks from the first day on which the notices required by law had been published. *Rex* v. *Denbighshire JJ.*, 2 D. & R. 52. *S. C.*, nom. *Rex* v. *Kirk*, 1 B. & C. 21.

Neglect to give Notice—Misdescription of Way.]—Upon a rule for a mandamus to compel the sessions to inrol an order of petty sessions, for stopping up a footway, there being fair ground for believing that many persons had been misled by the published description of the footway, and had therefore neglected to give notice of appeal, the court made a rule to let in the appeal. *Rex* v. *Suffolk JJ.*, 6 B. & C. 110; 9 D. & R. 11; 5 L. J. (O.S.) M. C. 27.

Statements in Notice—Party aggrieved.]—A notice of appeal, by an inhabitant of a parish, against an order for stopping up an unnecessary public footway, under 55 Geo. 3, c. 68, s. 2, must have stated that the appellant was injured, or aggrieved, pursuing the language of s. 3, or the party had no locus standi in curiâ. *Rex* v. *Essex JJ.*, 7 D. & R. 658; 5 B. & C. 431; 5 L. J. (O.S.) M. C. 65. S. P., *Rex* v. *Somersetshire JJ.*, 7 B. & C. 682, n.

By a local act, certain trustees of roads were authorised to make an order for stopping up part of certain old highways, and a right of appeal was given to any person who might be aggrieved by the making of any such order:—Held, that in a notice of appeal against an order of the trustees for stopping up a highway, it was necessary to state that the party intending to appeal was aggrieved by the order. *Rex* v. *Yorkshire (W. R.) JJ.*, 7 B. & C. 678; 1 M. & Ry. 547; 6 L. J. (O.S.) M. C. 59.

A notice of appeal against an order for stopping up a highway is sufficient if it states that the appellants are aggrieved by being compelled to go a greater distance to the next market town from their respective residences than they would have gone if the road intended to be stopped up were put and kept in a proper state of repair. *Rex* v. *Ady*, 4 N. & M. 365; 1 H. & W. 42; 4 L. J., M. C. 76.

In a notice of appeal against an order for stopping up a footway (under 55 Geo. 3, c. 68, s. 3), it sufficiently appeared that the appellant was a party aggrieved, if it was stated that he and his tenants, occupiers of a farm and lands near the way, and who had heretofore used, and had a right to use it, and also other persons and the public, would be put to great inconvenience. *Rex* v. *Yorkshire (W. R.) JJ.*, 4 B. & Ad. 685 ; 1 N. & M. 427 ; 2 L. J., M. C. 93.

Mandamus to Compel a Hearing — Appeal against several Orders.]—An appellant gave notices of appeal against three orders, all of the same date ; he attended the clerk of the peace to enter, and the entry was in the following form : "A., appellant, against an order of B. and C., esquires, dated, &c., for stopping up footways in," &c. He paid the fee as upon one appeal. At the sessions the appellant's counsel, being called upon to elect which appeal he would proceed with, proved his notices upon one, which was dismissed on a supposed defect of notice, and the order confirmed, as were the two others, nothing being said of the appeals against these, to which the same objections would have applied. On motion for a mandamus to enter continuances and hear the appeals, it appearing that the preliminary objection taken was unfounded, and that the appellant had in reality intended to enter his appeal against all the orders, the court made the rule absolute as to all three. *Ib.*

Defects in Certificate—Jurisdiction of Court.]—Upon appeal against an inrolment of a certificate by two justices for the diversion of a highway, and the stopping up of an old road under 5 & 6 Will. 4, c. 50, the sessions have jurisdiction to inquire into defects upon the face of it, and are not limited to the trying by a jury the three questions of fact stated in s. 89. *Reg.* v. *Worcestershire JJ.*, 3 El. & Bl. 447 ; 2 C. L. R. 1333 ; 23 L. J., M. C. 113 ; 18 Jur. 424.

Distinct Orders in Certificate.]—On appeal to the quarter sessions against a certificate of justices ordering certain roads to be diverted and others to be stopped up, the court may confirm the order as to the stopping up, and quash it as to the diverting. *Reg.* v. *Midgley Local Board*, 5 B. & S. 621 ; 33 L. J., M. C. 188 ; 10 Jur. (N.S.) 1125 ; 12 W. R. 951.

Costs—Discretion.]—The 5 & 6 Will. 4, c. 50, s. 90, by which "the court of quarter sessions is required to award costs to the party giving or receiving notice of appeal (against a certificate of justices for stopping up a highway), whether the same shall be tried or not," is imperative, and the court of quarter sessions has no discretion to disallow such costs in any particular case. *Pouncey, Ex parte*, 2 C. L. R. 1593.

Notice of appeal having been given against a certificate of justices for the diversion of a highway, the party at whose instance such certificate had been given gave notice to the appellant that he had abandoned further proceedings, and should make no application to the quarter sessions. The appeal was nevertheless entered at the quarter sessions, and placed on the list, and being called on in its turn, and no one appearing, it was struck out. Afterwards, on the same day, an application was made by the counsel for the appellant to reinstate the appeal, and make an order for the costs of the appellant : —Held, that, inasmuch as by 5 & 6 Will. 4, c. 50, s. 90, the court is required to give costs, whether the appeal is heard or not, they were bound to enter continuances and make such order for costs as by law required. *Reg.* v. *Yorkshire (W. R.) JJ.*, 2 B. & S. 811 ; 31 L. J., M. C. 271 ; 9 Jur. (N.S.) 118 ; 6 L. T. 494 ; 10 W. R. 757.

Two justices, by an order at special sessions, directed a footway to be diverted, under the authority of 55 Geo. 3, c. 68, s. 2, against which a party aggrieved gave notice of appeal to the next quarter sessions. In the interval, the justices gave notice to the appellant that they had abandoned the order, which had been filed with the clerk of the peace pursuant to the statute : —Held, that the sessions had no jurisdiction to award the appellant his costs of preparing to try the appeal, either under the appeal clause of the 55 Geo. 3, c. 68, s. 2, or under 13 Geo. 3, c. 78, s. 80. *Rex* v. *Wing*, 6 D. & R. 323 ; 4 B. & C. 184 ; 3 L. J. (O.S.) K. B. 201.

—— **Effect of Nonpayment.**]—The nonpayment of costs awarded by an order of quarter sessions, on the trial of an appeal against the stoppage of a highway, under 5 & 6 Will. 4, c. 50, s. 90, is not an offence forming a subject for a conviction under ss. 101 and 103 ; but the nonpayment of them may be enforced by a distress warrant, issued by two justices under s. 103, grounded directly upon the order of sessions. *Selwood* v. *Mount*, 1 G. & D. 358 ; 1 Q. B. 726 ; 10 L. J., M. C. 121.

Such a distress warrant is bad, if it does not shew on the face of it an order of sessions for the payment of a specific sum as costs. *Ib.*

c. By Individuals.

Indictment for—Evidence of Motive.]—Upon an indictment for stopping up a highway, it appeared that the road ran through a meadow ; that a party was the occupier of the meadow ; that he was dead ; that he had planted a willow in the meadow ; that, at the time of planting, he said he did it because that spot was the boundary of the road, and that he did it to mark the boundary :—Held, that the declaration of his motive for planting the willow was not evidence of reputation, although the act itself might be. *Rex* v. *Bliss*, 9 Jur. 959.

Where, upon an indictment for stopping up a highway which ran through a meadow, there was a general verdict for the crown, the jury finding specially that a gate at the entrance of the road was contemporaneous with the road, the court granted a new trial, as the gate might have been only to prevent cattle from straying, and not to exclude the public. *Ib.*

—— **Party Grieved.**]—The prosecutor of an indictment for stopping a common footway, who had used it for some years before it was stopped up, is a party grieved within 5 & 6 Will. & M. c. 11, s. 3. *Rex* v. *Williamson*, 7 Term Rep. 32.

—— **Practice.**]—In an indictment for stopping up a highway removed by a certiorari, and tried at the assizes, the counsel for the defendant may sum up his evidence at the close of his case, as in a civil action. *Reg.* v. *Broke*, 1 F. & F. 514.

Contractor acting under statutory Powers — Duty to prevent Passengers going astray.]—

A duty is cast upon those who, in the exercise of statutory powers, divert a public footpath, to protect, by fencing or otherwise, reasonably careful persons using the footpath, from injury through going astray at the point of diversion. *Hirst* v. *Taylor*, 54 L. J., Q. B. 310; 14 Q. B. D. 918; 33 W. R. 582; 49 J. P. 359.

3. User of.

a. Obstruction.

i. *What Amounts to.*

Encroachments generally.]—The erection of a building within fifteen feet of the centre of a carriage-way, which has been repaired by the surveyor for the six months preceding, but not on any part of the highway which has been lately used for passage, is not an encroachment of which justices can take summary cognizance under 5 & 6 Will. 4, c. 50, s. 69. *Chapman* v. *Robinson*, 1 El. & El. 25; 28 L. J., M. C. 30; 5 Jur. (N.S.) 434; 7 W. R. 12.

By 27 & 28 Vict. c. 101 (the Highway Act, 1864), s. 51, if any person shall encroach by making any hedge or other fence on the side of any carriage-way, or within fifteen feet of the centre thereof, he shall be subject on conviction for every such offence to a penalty, notwithstanding that the whole space of fifteen feet from the centre of such carriage-way has not been maintained with stones or other materials used in forming highways. A person erected a fence upon the site of an open and uninclosed ditch, which was his property, which, however, was within fifteen feet of the centre of a carriage-way:—Held, that this was not an encroachment within the meaning of the section. *Field* v. *Thorne*, 20 L. T. 563.

By 27 & 28 Vict. c. 101 (the Highway Act, 1864), s. 51, if any person shall encroach by making or causing to be made any building or pit, or hedge, ditch or other fence, on the side or sides of any carriage-way or cart-way within fifteen feet of the centre thereof, he shall be subject, on conviction for any such offence, to any sum not exceeding 40*s.*, notwithstanding that the whole space of fifteen feet from the centre of such carriage-way or cart-way has not been maintained with stones or other materials used in forming highways:—Held, that this enactment only applies to persons who have committed the encroachment upon the carriage-way or cart-way, or upon that part of the side which has been dedicated to the public. *Easton* v. *Richmond Highway District Board*, 41 L. J., M. C. 25; L. R. 7 Q. B. 69; 25 L. T. 586; 20 W. R. 203.

A post and wire fence was erected by A. within eight feet from the centre of a highway; he intended to keep it up for five years as a guard to a quick fence to be laid down at a distance of fifteen feet from the centre:—Held, that the justices should have convicted A. of unlawfully encroaching on the highway under s. 51 of the Highway Act, 1864. *Clarson* v. *Arnold*, 54 J. P. 630.

Ditches cut at side of Road.]—The right of the public to use a highway extends to the whole road, and not merely to the part used as via trita. Therefore, ditches fifteen inches wide and ten inches deep, cut completely across the strips of grass land at the sides of roads, so as to amount to a danger to persons walking along the strips, amount to a nuisance and obstruction. *Nicol* v. *Beaumont*, 53 L. J., Ch. 853; 50 L. T. 112.

Placing Bar across part of public Footway—Right to Use as private Carriage-way.]—See *Pullin* v. *Deffel*, 64 L. T. 134, post, col. 45.

Wall.]—Semble, that a wall inclosing part of a street is an obstruction to the safe and convenient passage along the street, within the Towns Improvement Clauses Act of 1847, whatever be the width of the uninclosed portion of the street. *Bagshaw* v. *Buxton Local Board*, 45 L. J., Ch. 260; 1 Ch. D. 220; 34 L. T. 112; 24 W. R. 231.

—— **Right to Remove.**]—*See* post, col. 44.

Putting up Stalls—Jurisdiction.]—Under 5 Eliz. c. 4, s. 48, it is lawful to hold petty sessions, otherwise called statute sessions, in all shires wherein such sessions have been used to be kept, but there cannot be a legal custom to put up stalls for refreshments at such sessions on the public highway. And if such stalls are put up so as to obstruct the free passage of a highway, the persons putting them up are liable to be convicted under 5 & 6 Will. 4, c. 50, s. 72. *Simpson* v. *Wells*, 41 L. J., M. C. 105; L. R. 7 Q. B. 214; 26 L. T. 163.

The jurisdiction of justices is not ousted by a claim of right to put up such stalls. *Ib.*

Depositing Rubbish.]—Upon hearing an information and a complaint, under 5 & 6 Will. 4, c. 50, s. 73, for a nuisance, by depositing rubbish on a highway, the defendant claimed to be owner of the land, subject to a private right of road only, and denied the existence of a highway:—Held, that it was competent to the justices, as a necessary preliminary to the exercise of their functions, to determine the question of highway or no highway, and that title to the land was not involved in such question. *Williams* v. *Adams*, 2 B. & S. 312; 31 L. J., M. C. 109; 8 Jur. (N.S.) 816; 5 L. T. 790.

Depositing Stones for Repairs—Liability of Surveyor.]—A local surveyor of highways, in repairing a road, placed stones thereon, and allowed them to remain at night insufficiently fenced, and without sufficient light to warn the public against the obstruction:—Held, that he was properly convicted under s. 72 of the Highway Act (5 & 6 Will. 4, c. 50), notwithstanding that he might also have been guilty of an offence under s. 56. *Fearnley* v. *Ormsby*, 4 C. P. D. 136; 27 W. R. 823.

Depositing Clay.]—The plaintiff having a right to use a road, the defendants (a railway company) contracted for 20,000 cubic yards of clay; and on the 2nd of March fifty loads of it were brought by the contractor, for the purpose of being removed into the defendants' premises, and were placed in the road opposite the plaintiff's gates, so as to obstruct the entrance. All further carting into the road was stopped upon plaintiff's application to defendants, but the clay was left on the road until the 9th, when its removal was commenced, and finished on the 13th. On the 10th the plaintiff filed his bill, and on the 12th obtained an ex

parte injunction to prevent the injury complained of, having, prior to the 10th, employed a person to remonstrate with the defendants, which caused the removal, although the plaintiff was not aware that the removal was intended when he filed his bill:—Held, first, that the contractor was the agent of the defendants, and that therefore they were liable for his acts; secondly, that the use of the road by defendants was unreasonable; and, thirdly, that the subsequent removal was no ground for dissolving the injunction, unless it could be shewn that the plaintiff was guilty of misrepresentation or concealment as to the probable continuance of the evil when he filed his bill. Ignorance of what the plaintiff ought to have known is not sufficient ground for dissolving the injunction. *Semple* v. *London and Birmingham Ry.*, 1 Railw. Cas. 480; 2 Jur. 560.

And see *S. C.*, 1 Railw. Cas. 120, where the Lord Chancellor, reversing the decision of the vice-chancellor, refused an injunction, because plaintiff had not established his right at law, the affidavits being conflicting on the question of nuisance.

Sweeping Snow off Tramway Line—Sprinkling Salt on Snow.]—See, *Ogston* v. *Aberdeen District Tramways*, post, col. 53.

Laying Timber.]—Under 5 & 6 Will. 4, c. 50, s. 73, which enacts, that if any timber is laid upon any highway, so as to be a nuisance, and shall not after notice be removed, it shall be lawful for the surveyor, by order in writing from a justice, to remove the timber, an order of a justice, reciting that the plaintiff's timber was laid on a highway, and directing its removal, is conclusive to shew that the locus in quo was a highway, so that the plaintiff, in an action against the justice who made the order, cannot dispute his jurisdiction on the ground that the locus in quo was not a highway. *Mould* v. *Williams*, D. & M. 631; 5 Q. B. 469.

Standing of Vehicles.]—The mere fact that a piece of ground, part of a public highway, has for twenty years been used by an innkeeper for the standing of the vehicles belonging to his guests, is no answer to a complaint for the obstruction under 5 & 6 Will. 4, c. 50, s. 72. *Gerring* v. *Barfield*, 16 C. B. (N.S.) 597; 11 L. T. 270.

Where the commissioners of pavement within a certain district were authorised by act of parliament to direct and regulate the stands of hackney-coaches within the district:—Held, that this gave them power to remove a stand from a street where it occasioned obstruction in the carriage-way. *Rex* v. *Rawlinson*, 6 B. & C. 23; 9 D. & R. 7; 5 L. J. (O.S.) M. C. 16.

Traction-engine on narrow Road.]—Persons using a traction-engine and trucks on a highway may be indicted for a nuisance, if they create a substantial obstruction and occasion delay and inconvenience to the public substantially greater than such as would arise from the use of carts and horses. *Reg.* v. *Chittenden*, 15 Cox, C. C. 725; 49 J. P. 503.

Roller left on Highway.]—The defendant left an agricultural roller between the hedge and the metalled part of the road, having removed it from a field on the opposite side of the road for his own convenience. A pony drawing a carriage in which the plaintiff's wife was riding, shied at the roller and upset the carriage, whereby the plaintiff's wife was killed:—Held, that the roller was an obstruction to the highway, and that it was an unreasonable user of the highway by the defendant. *Wilkins* v. *Day*, 12 Q. B. D. 110; 49 L. T. 399; 32 W. R. 123; 48 J. P. 6.

Where a steam-roller, though lawfully on the highway, constitutes a nuisance, the owners are liable for damage caused thereby, though they have not been guilty of any negligence. It is a question for the jury in each case, whether a steam-roller was or was not a nuisance on the occasion complained of. *Jeffery* v. *St. Pancras Vestry*, 63 L. J., Q. B. 618; 10 R. 554.

Use of Perambulators.]—The use of a public footway includes that of a perambulator as a usual accompaniment of a large class of foot passengers, if of a size and weight not to inconvenience other passengers, and not to injure the soil. *Reg.* v. *Mathias*, 2 F. & F. 570.

Whether, under the circumstances, the use of such a vehicle is justifiable, is a question of fact. *Ib.*

Riding on Footpaths.]—The 5 & 6 Will. 4, c. 50, s. 72, imposes a penalty on any person "who shall wilfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot passengers, or shall wilfully drive any horse, &c., cattle or carriage, upon any such footpath or causeway":—Held, that the enactment applies only to footpaths (as well as causeways) by the side of roads, and not to footways in general. *Reg.* v. *Pratt*, 37 L. J., M. C. 23; L. R. 3 Q. B. 64; 16 W. R. 146.

—— **Bicycle.**] — See *M'Gee* v. *M'Grath*, post, cols. 54, 55.

Collecting Crowd.]—The appellant was summoned under the provisions of s. 72 of the Highway Act, 1835, for wilfully obstructing the free passage of a public highway at Sedgley. It appeared that he had marched into the Bull ring (which was a highway) at the head of a band, and had taken up his position there, and had addressed a crowd for an hour and a half, during which period no person could, without considerable inconvenience and danger, have either walked or driven across that part of the highway where the appellant and his band and the crowd were stationed. The magistrate was of opinion that, although there was a passage round the crowd available for traffic, the appellant was not entitled to appropriate to himself any part of the highway; accordingly he was convicted:—Held, upon the above facts, that there was evidence on which the magistrate could properly convict the appellant of an offence under s. 72 of the Highway Act, 1835. *Horner* or *Homer* v. *Cadman*, 55 L. J., M. C. 110; 54 L. T. 421; 34 W. R. 413; 16 Cox, C. C. 51; 50 J. P. 454.

Cattle.] — Under 27 & 28 Vict. c. 101, s. 25, the owner is liable to a penalty if cattle, sheep, &c., are found lying about any highway, notwithstanding they are under the control of a keeper at the time. *Lawrence* v. *King*, 9 B. & S. 325;

37 L. J., M. C. 78; L. R. 3 Q. B. 345; 18 L. T. 356; 16 W. R. 966.

By 27 & 28 Vict. c. 101, s. 25, if any horse, ox, &c., is found straying on or lying about any highway, or across any part, or by the sides thereof, the owner shall be liable to a penalty not exceeding 5*s.* for each animal, provided that nothing in the act shall be deemed to extend to take away any right of pasturage which may exist on the sides of any highway:—Held, that the owner of cattle found straying on the metalled part of a highway was liable to the penalty, notwithstanding he had a right of pasturage on the sides of it. *Golding* v. *Stocking*, 10 B. & S. 348; 38 L. J., M. C. 122; L. R. 4 Q. B. 516; 20 L. T. 479; 17 W. R. 722.

By a local act, a barrier bank, made for drainage purposes in Lincolnshire, together with a road thereon, was vested in trustees, who were directed and required from time to time to let the herbage of the bank to be grazed with sheep only, at such yearly rent as could be reasonably had for the same. The road ran along the top of the bank, and was an open public highway. Sheep owned by a renter of the herbage, and depastured on the sides of the barrier bank, were found upon the metalled part of the highway, and the owner was convicted and fined under the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 25:—Held, that the conviction was right. *Bothamley* v. *Danby*, 24 L. T. 656.

By the Public Health Act, 1875, highways (not being turnpike roads) are, in urban districts, vested in and put under the control of the urban authority for the district, which in some places is the local board. In 1771 the commissioners under an inclosure act set out E. and C. as private roads. In 1818 E. became a public road, and as such has since been repaired by the parish. C. has always continued to be a private way. Until 1863 the surveyor of highways, and subsequently the local board (to whom the office of surveyor of highways was then transferred, and who in 1875 became the urban authority for the district under the Public Health Act), were accustomed, year by year, to let the right of pasturage on the sides of E. and C., though several persons in the neighbourhood had insisted on the right to put cattle in both places without making any payment. In February, 1876, the local board let to the plaintiff the right of herbage on the sides of both E. and C. for a term, notwithstanding which the defendant insisted, during the continuance of the term, on turning out his cattle to graze on the side of both roads. The plaintiff thereupon brought an action for trespass against the defendant:—Held, that the action was maintainable so far as related to the sides of E., which by virtue of s. 149 of the Public Health Act, 1875, had become vested in the local board in such a way as to confer the right of pasture; but that the plaintiff's claim failed as regarded C., the local board having no title, and there being no such actual or conclusive possession on the part of the plaintiff as would enable him to maintain an action for trespass against the defendant. *Cowerdale* v. *Charlton*, 47 L. J., Q. B. 446; 3 Q. B. D. 376; 38 L. T. 687; 26 W. R. 687. Affirmed, 48 L. J., Q. B. 128; 4 Q. B. D. 104; 40 L. T. 88; 27 W. R. 257—C. A.

—— **"Turned loose."**]—By the 2 & 3 Vict. c. 47 (Metropolitan Police Act), s. 54, a penalty is imposed on all persons who, to the annoyance of passengers shall turn loose any horse or cattle in a thoroughfare:—Held, that the expression "turned loose" means leaving the cattle without any control. *Sherborn* v. *Wells*, 3 B. & S. 784; 32 L. J., M. C. 179; 9 Jur. (N.S.) 1104; 8 L. T. 274; 11 W. R. 594.

Where, therefore, a person sent his cattle without any halter, but under the care of a boy, to graze on a highway:—Held, that this was not an offence within the act. *Ib.*

Overhanging Trees.]—By the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 72, if any person shall wilfully obstruct the passage of any footway, he is made liable to a penalty of 40*s.* A person was summoned under this section for obstructing a way. Evidence was given that trees and underwood on his land had grown over and across the way, so as to be an obstruction to the free passage along it:—Held, that the person, in merely suffering the trees to grow so as to be an obstruction, did not wilfully obstruct the way within s. 72. *Walker* v. *Horner*, 45 L. J., M. C. 34; 1 Q. B. D. 4; 33 L. T. 601; 24 W. R. 95.

—— **Power of Magistrates to cut down.**]—Magistrates have no power, under the 5 & 6 Will. 4, c. 50, to cut down trees which may damage the highway, if planted for ornament and shelter. *Frampton* v. *Tiffin*, 2 Jur. 986.

—— **Order of Justices on Occupier.**]—The word "owner" in s. 65 of the Highways Act (5 & 6 Will. 4, c. 50) means the person in actual occupation. An order of justices under s. 65 for lopping trees overhanging a highway, made on a summons served only on the occupying tenant of the land abutting on the highway:—Held, to be valid, and in form sufficient:—*Woodard* v. *Billericay Highway Board*, 48 L. J., Ch. 535; 11 Ch. D. 214; 27 W. R. 593.

—— **Lopping done by Surveyor on Default.**]—At a special session for the highways, an order of justices under 5 & 6 Will. 4, c. 50, s. 65, was made, reciting a complaint by the surveyors that the owner had refused and neglected to cut, prune, or plash certain hedges, and to prune or lop certain trees upon his farm, on the side of a carriage-way or cart-way, "whereby the sun and wind were excluded from the carriage-way or cart-way, to the damage thereof, and whereby also obstructions were caused in the carriage-way or cart-way"; that the owner had appeared, and the offence was proved; and the justices did thereby order the owner "to cause the hedges to be cut, pruned, or plashed, and the trees to be pruned or lopped, and the obstructions complained of, to the injury or damage of the highway, removed within ten days from the service hereof." Upon default of the owner to comply with this order, the surveyor cut one of the hedges, and removed the obstruction caused thereby, and, in so doing, cut down the thorn trees or thorns in question:—Held, that the order, if not valid, afforded no justification to the surveyor. *Jenny* v. *Brook*, 1 New Sess. Cas. 323; 6 Q. B. 323; 13 L. J., Q. B. 376; 8 Jur. 782—Ex. Ch.

Held, also, that the order, so far as the direction contained in it to cut, prune, or plash the hedges without any description of the extent to which it was to be done, was bad, but was good as to the residue, and justified the surveyor in removing any actual obstruction to the highways by hedges or trees, though, as to the trees, it was

defective, in omitting to state that they were not planted for ornament, &c. *Ib.*

Held, lastly, that a statement, that the hedges and trees were growing on the plaintiff's farm, and on the side of the highway, was equivalent to a statement that he was the owner of the land next adjoining the road; so that the order was not bad altogether for omitting to shew that fact. *Ib.*

—— **Recovery of Expenses—Mandamus to issue Warrant.**]—The court will not grant a rule nisi for a mandamus to compel justices to issue their warrant to levy the expenses of cutting a hedge, pursuant to 5 & 6 Will. 4, c. 50, s. 65, unless it appears that a demand has been made of the expenses from a person sought to be charged, and that the justices were informed of that demand. *Whitemarsh, Ex parte*, 8 D. P. C. 431; 4 Jur. 823.

Allowing Rain-water to Fall from Eaves of Building.]—C. was occupier of a stable, and also owner, but not occupier, of some cottages, and the dripping of the rain-water from the eaves of the stables and cottages obstructed the free passage of the adjacent public footways by flowing upon and over them, and caused public inconvenience to the passengers. C. had frequent notice of the obstruction, but did nothing to remove it:—Held, that he was not guilty of wilfully obstructing the free passage of the highway within 5 & 6 Will. 4, c. 50, s. 72. *Croasdill* v. *Ratcliffe*, 5 L. T. 834.

Making Fires.]—The lighting of a fire within fifty feet of the centre of the highway is not an offence within 5 & 6 Will. 4, c. 50, s. 72, unless done "to the injury of such highway, or to the injury, interruption, or personal danger of any person travelling thereon." *Stinson* v. *Browning*, 1 H. & R. 263; 35 L. J., M. C. 152; L. R. 1 C. P. 321; 12 Jur. (N.S.) 262; 13 L. T. 799; 14 W. R. 395.

H. was charged under 5 & 6 Will. 4, c. 50, s. 72, with unlawfully assisting in making a fire on the highway. He was rolling a tar-barrel that was alight, along a road, but no one was injured or endangered:—Held, that H. could not be convicted, as it was essential to the offence that passengers should be endangered or interrupted. *Hill* v. *Somerset*, 51 J. P. 742.

Removing Flagstones.]—Up to 1855 a footway across a brook had been by means of fourteen stepping-stones. In that year the highway surveyors reduced the number of stones, increased their height, and placed flagstones on the top of them, forming thereby a kind of bridge:—Held, that the surveyors were not justified in so doing, and that the owner of the land adjoining the brook having removed the flagstones, could not be convicted of obstructing the way under 5 & 6 Will. 4, c. 50, s. 72. *Sutcliffe* v. *Sowerby*, 1 L. T. 7; 8 W. R. 40.

Omission to remove Obstruction.]—Magistrates convicted the appellant of the offence of "wilfully obstructing the free passage of a highway," under 5 & 6 Will. 4, c. 50, s. 72, although the appellant had not done any act of obstruction:—Held, that an omission to remove an obstruction after notice to remove it might amount to wilful obstruction. *Gully* v. *Smith*, 53 L. J., M. C. 35; 12 Q. B. D. 121; 48 J. P. 309.

Obstruction of Cul-de-sac.]—A public footpath was rendered a cul-de-sac by buildings authorised by act of parliament; the defendant obstructed the path at a place between which and the end of the cul-de-sac there was no opening or thoroughfare. Upon an indictment for this obstruction, the jury found the defendant guilty; but also found that this part of the path, which the obstruction stopped, had ceased to be of any public utility:—Held, that a public path was still a highway, although it had become a cul-de-sac; and that the measure of public inconvenience caused by the obstruction of such a highway could be considered only with regard to the punishment of the person causing it. *Reg.* v. *Burney*, 31 L. T. 828.

ii. *Removal of.*

By County Council—Main Road.]—A county council is entitled to remove an obstruction upon a main road whether the soil is vested in the council or not. Such right is exercisable whether the obstruction has been created either before or after the passing of the Local Government Act, 1888. *Harris* v. *Northamptonshire County Council*, 61 J. P. 599.

By District Council—Absence of Conviction.]—An urban district council, as the successor to the urban sanitary authority, may remove encroachments on highways without a preliminary conviction, inasmuch as the highways are vested in them by s. 149 of the Public Health Act, 1875, and the alternative procedure given to them by that section or under the Highway Acts does not deprive them of their right summarily to remove encroachments. *Reynolds* v. *Presteign Urban Council*, 65 L. J., Q. B. 400; [1896] 1 Q. B. 604; 74 L. T. 422; 44 W. R. 479; 60 J. P. 296.

—— **Roadside Waste—Recovery of Expenses.**]—A district council in exercising the duties imposed upon them by s. 26 of the Local Government Act, 1894, are entitled to remove an obstruction which has been placed upon the roadside waste within their district, and they may recover the expenses of so doing in an action against the obstructor. *Louth District Council* v. *West*, 65 L. J., Q. B. 535; 60 J. P. 600.

By Surveyor.]—Semble, that after it has been judicially determined that a particular object is an obstruction to a public highway, the surveyors of highways may remove the obstruction. *Bagshaw* v. *Buxton Local Board*, 45 L. J., Ch. 260; 1 Ch. D. 220; 34 L. T. 112; 24 W. R. 231.

—— **Injunction to Restrain.**]—In a suit to restrain surveyors of highways from removing a wall inclosing a piece of ground alleged to form part of a highway, the high court of justice has jurisdiction to decide whether the land does or does not form part of the highway; and if the court comes to the conclusion that it does not form part of the highway, an injunction to prevent the removal of the inclosure cannot be granted. *Bagshaw* v. *Buxton Local Board*, 45 L. J., Ch. 260; 1 Ch. D. 220; 34 L. T. 112; 24 W. R. 231.

Semble, that a wall inclosing part of a street is an obstruction to the "safe and convenient passage along" the street within the meaning of the Towns Improvement Clauses Act, 1847,

whatever may be the width of the uninclosed portion of the street. *Ib.*

A public bridle-road and footway, fifteen feet wide, had been set out by an award which provided that the same should also be used as a private carriage and drift way by the owners of certain adjoining allotments. The plaintiffs, owners of these allotments, placed a bar across eleven and a half feet of the width of the way in order to preserve their exclusive right to the use of the way as a carriage and drift way, and brought an action for injunction against the surveyor of highways, who had removed the barrier for the purpose of repairing the way:—Held, that the public had the right to the use of the whole length and breadth of the way as a bridle-road and footway. *Pullin* v. *Deffel*, 64 L. T. 134.

—— **Right of to remove Watch-box—Action for Trespass—Defence.**]—By 13 Geo. 3, c. 78, s. 10, it is enacted that if any stone or timber, &c., shall be laid in the highway, and the party placing it there shall not remove it within a certain time after notice, the owner of lands adjoining may do so. By s. 12, the surveyors of the highway may remove nuisances, encroachments, obstructions, or annoyances made or committed contrary to the directions of the act. By s. 82, in actions brought against parties for anything done in pursuance of the act, they may plead the general issue, and give the act and special matter in evidence. The defendants erected a watch-box or house, of timber, upon the highway:—Held, that there were no words in the act which enabled the surveyor to remove such a building, as being against the direction of the act; therefore that they could not, on action of trespass being brought against them, justify the removal under the general issue, but should have pleaded the special matter. *Witham Navigation Co.* v. *Padley*, 4 B. & Ad. 69; 2 L. J., M. C. 29.

By Private Person — Wall — Trespass — Defence.]—To an action for entering a close and pulling down a wall there, the defendant pleaded that the close was a paved public place, within the Metropolitan Paving Act (57 Geo. 3, c. xxix.), and that the plaintiff had unlawfully, and contrary to the act, erected thereon the wall; and because the wall remained incumbering the pavement, and because the plaintiff, upon the request of the defendant, refused to remove the same, the defendant entered upon the close and pulled down the wall:—Held, that the plea was bad, as it did not shew any necessity for the defendant's using a portion of the pavement obstructed by the wall, or that it interfered with the exercise of his right of passage. *Bateman* v. *Bluck*, 18 Q. B. 870; 21 L. J., Q. B. 406; 17 Jur. 386.

iii. *Action for Injuries caused by.*

Particular Injury, Necessity of.]—To entitle any one to bring an action for an obstruction to a highway he must shew that he has sustained a "particular, direct and substantial" injury beyond that which is done to the public. *Benjamin* v. *Storr*, 43 L. J., C. P. 162; L. R. 9 C. P. 400; 30 L. T. 362; 22 W. R. 631.

In order to maintain an action for obstructing a public way, a person must suffer some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way. *Winterbottom* v. *Derby* (*Earl*), 36 L. J., Ex. 194; L. R. 2 Ex. 316; 16 L. T. 771; 16 W. R. 15.

In an action for obstructing a public way, the plaintiff proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged, in common with every one else who attempted to use it, either to pursue his journey by a less direct road, or to remove the obstruction:—Held, that he was not entitled to maintain the action. *Ib.*

An action will lie at the suit of a private individual who actually sustains an injury by reason of a public nuisance, which may possibly affect the public, and for which the person committing the nuisance would be indictable. *Rose* v. *Groves*, 5 Man. & G. 613; 6 Scott (N.R.) 645; 1 D. & L. 61; 12 L. J., C. P. 251; 7 Jur. 951. See *Hubert* v. *Groves*, 1 Esp. 148.

Where A. was delayed by an obstruction in a highway, and thereby prevented from performing the same journey as many times in a day as he otherwise would if the obstruction had not existed: — Held, that he might maintain an action against the person who raised the obstruction, as he had sustained an individual injury or inconvenience. *Greasley* v. *Codling*, 2 Bing. 263; 9 Moore, 489; 3 L. J. (o.s.) C. P. 262.

Proximity of Damage.]—A declaration alleged that there was a public footway from a field of the plaintiff to another field of the plaintiff, and that the defendant obstructed the way, whereby the plaintiff and his servants, employed in the management of his lands and in tending his cattle, were compelled to go by a longer route, and thereby the work and labour of the plaintiff and his servants were necessarily consumed to a greater extent, and the plaintiff was prevented from employing his servants during such excess as he otherwise would have done:—Held, a sufficient allegation of peculiar damage to enable the plaintiff to maintain the action. *Blagrave* v. *Bristol Waterworks Co.*, 1 H. & N. 369; 26 L. J., Ex. 57.

—— **Causing Trespass.**]—It is no ground of action that a person, by stopping up on his own land the continuation of a public footway over his neighbour's land, causes the public to trespass on other parts of his neighbour's land, to his damage. *Ib.*

Under Lord Campbell's Act—Roller left in Highway.]—The defendant left an agricultural roller between the hedge and the metalled part of the road, having removed it from a field on the opposite side of the road for his own convenience. A pony, drawing a carriage in which the plaintiff's wife was riding, shied at the roller, upset the carriage, and the plaintiff's wife was killed:—Held, that the roller was an obstruction to the highway; that it was an unreasonable user of the highway by the defendant, and that the plaintiff was entitled to recover damages for the death of his wife under Lord Campbell's Act. *Wilkins* v. *Day*, 12 Q. B. D. 110; 49 L. T. 399; 32 W. R. 123; 48 J. P. 6.

Effect of contributory Negligence.]—H. was driving a mare along a highway. The mare took fright at a house-van belonging to the defendant, which was standing on the grassy side of the highway; she kicked and fell, and H. was

thrown out of his vehicle and injured so severely that he died. The mare was a kicker, but H. did not know of her vice. The jury found that the van was a dangerous object; that the defendant had acted unreasonably in leaving it where it stood; and that the injury to H. was occasioned by two causes combined: (1) the van standing where it stood, and (2) the vice of the mare. They also found that H. was guilty of no contributory negligence:—Held, that on these findings his executors were entitled to recover against the defendant under Lord Campbell's Act. *Harris* v. *Mobbs*, 3 Ex. D. 268; 39 L. T. 164; 27 W. R. 154.

Unreasonable and unnecessary user of part of a highway is equivalent to the obstruction of the highway. *Ib.*

One who is injured by an obstruction in a highway, against which he fell, cannot maintain an action, if it appears that he was riding with great violence and want of ordinary care, but for which he might have seen and avoided the obstruction. *Butterfield* v. *Forrester*, 11 East, 60; 10 R. R. 433.

In an action to recover compensation for an injury occasioned by an obstruction in a highway, it was left to the jury to say whether or not the plaintiff was himself in any degree the cause of the injury: whether he had acted with such a want of reasonable and ordinary care as to disentitle him to recover:—Held, that the direction was proper. *Marriott* v. *Stanley*, 1 Scott (N.R.) 392; 4 Jur. 320.

In an action for killing an ass, which the declaration alleged to have been lawfully upon a highway when it met its death, it appeared that the animal, fettered by the fore feet, had been placed on the highway by the plaintiff, and was killed by being unable to get away from the defendant's waggon, which, without its driver, was coming at a smartish pace along the road:—Held, that the jury was properly directed that, although it was an illegal act on the part of the plaintiff to put the animal on the highway, still, unless its being there was the immediate cause of the accident, the plaintiff was entitled to recover against the defendant for the loss of the animal. *Davies* v. *Mann*, 10 M. & W. 546; 12 L. J., Ex. 10; 6 Jur. 954.

Defendants placed an obstruction across the footway during hours prohibited by the Metropolitan Police and Metropolitan Street Acts, so that foot passengers were obliged either to get over it, or go round vans in the roadway, or wait till the obstruction was removed. The obstruction was very slippery, and in attempting to get over it the plaintiff was injured. In an action for damages:—Held, that it was for the jury to decide what was the proper course for the plaintiff to have adopted, and whether or not his attempt to get over the obstruction was the act of a reasonable and prudent man, for if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence is liable for any injury that may result from an attempt to avoid such inconvenience. *Lee* v. *Nixey*, 63 L. T. 285; 54 J. P. 807.

Necessity of Precautions against Danger.]—A person placing a dangerous obstruction in a highway or in a private road over which persons have a right of way, is bound to take all necessary precautions to protect persons exercising their right of way; and if he neglects to do so is liable for the consequences. *Clark* v. *Chambers*, 47 L. J., Q. B. 427; 3 Q. B. D. 327; 38 L. T. 454; 26 W. R. 613.

The defendant had placed in a private road adjoining his ground a hurdle with a chevaux-de-frise on the top in order to prevent the public from looking over the barrier at athletic sports in his grounds. Some one, not known, removed the hurdle to another spot without his authority, and the plaintiff, passing of right along the road, soon afterwards, in the dark, and knowing the original position of the hurdle, but not that it was moved, ran his eye against the chevaux-de-frise and lost his sight. The jury, in an action for negligence, held that the original erection of this hurdle was unauthorised and wrongful, that the chevaux-de-frise was dangerous to the safety of persons using the road, and that there was no contributory negligence. They gave the plaintiff a substantial verdict:—Held, that the injury was not an improbable consequence of the defendant's act; that it was his duty to take all necessary precautions under the circumstances to protect persons exercising their right of way; and that the action was maintainable. *Ib.*

If a highway is dedicated to the public with a dangerous obstruction upon it, such as would have been a nuisance if placed upon an ancient way, as a flight of steps, or a projecting flap, no action can be maintained against the person dedicating it for an injury caused thereby. *Robbins* v. *Jones*, 15 C. B. (N.S.) 221; 33 L. J., C. P. 1; 10 Jur. (N.S.) 239; 9 L. T. 523; 12 W. R. 248.

An action will not lie against the owner of a house having a covered area adjoining a public footway, which area was in existence before and at the time of the dedication of the highway, and was dedicated to the public before 5 & 6 Will. 4, c. 50, for an injury to an individual from the giving way of the covering of the area in consequence of the wear and tear occasioned by public user. *Ib.*

Obstructing Access to a House.]—When the private right of the owner of a house adjoining a highway to access from his house to the highway is interfered with by an unreasonable user of the highway, he is entitled to recover damages from the wrongdoer in respect of loss of custom in the business which he carries on in his house. He is entitled also to recover damages on the ground that he has suffered a particular injury from a public nuisance. *Fritz* v. *Hobson*, 49 L. J., Ch. 321; 14 Ch. D. 542; 42 L. T. 225; 28 W. R. 459.

Rose v. *Groves* (5 Man. & G. 613) and *Lyon* v. *Fishmongers' Co.* (1 App. Cas. 662) followed. *Ricket* v. *Metropolitan Ry.* (L. R. 2 H. L. 175) distinguished. *Ib.*

The right of a landowner to use a public highway, e.g. for the purpose of bringing materials for the building of a house on his land, must be exercised reasonably. *Ib.*

If there are several ways of access to the land there is no absolute right to use the most convenient way exclusively without regard to the convenience of neighbouring landowners. *Ib.*

For any obstruction to a public highway, which is a nuisance, though such should obstruct the party's business, an action cannot be maintained by the party so obstructed; the only remedy is by an indictment. *Hubert* v. *Groves*, 1 Esp. 148.

A railway company, in the construction of its line of railway, and under the powers of its statute, temporarily obstructed a highway, adjoining which was a house occupied by a licensed victualler, whereby the number of passengers passing along the highway was diminished, and he sustained damage by the falling off of his business :—Held, that such damage was not the subject of compensation. *Ricket* v. *Metropolitan Ry.*, 5 B. & S. 149 ; 34 L. J., Q. B. 257 ; 11 Jur. (N.S.) 260 ; 12 L. T. 75 ; 13 W. R. 455—Ex. Ch. And 36 L. J., Q. B. 205 ; L. R. 2 H. L. 175 ; 16 L. T. 542 ; 15 W. R. 937—H. L. (E.)

Duty of Owners of Adjoining Land—Fencing of Excavations.]—Where an excavation is made near to, but not substantially adjoining, a public highway, at common law no action lies against the owner of the land by a person who has strayed off the highway, and fallen into such excavation. *Hardcastle* v. *South Yorkshire Railway and River Dun Co.*, 4 H. & N. 67 ; 28 L. J., Ex. 139 ; 5 Jur. (N.S.) 150 ; 7 W. R. 326.

A person while passing along a recently used way over the defendant's land instead of an ancient way close by, sustained injury by falling into a sand pit excavated by the defendant on his own land :—Held, that as there was no evidence of dedication of the new way by the defendant to the public, he was not responsible. *Neill* v. *Byrne*, 2 L. R., Ir. 287.

In an action for an injury to the wife of the plaintiff through the negligence of the defendant in leaving an open vault or cellar on his own premises unfenced, whereby she fell in and was injured, the evidence was that persons were in the habit of going across the spot where the vault was for the purpose of making a short cut from a street to the main road, by avoiding an angle, but that the owner of the premises as often as he saw them turned them back :—Held, that he was not liable. *Stone* v. *Jackson*, 16 C. B. 199.

Where owners of some waste land, which was bounded by two highways, and in which there was a quarry, worked it by their licensees, and the plaintiff, not knowing of the quarry, passed over the waste in the dark to get from one road to the other, and fell into the quarry :—Held, that no duty was cast upon the owners to fence, as the digging the quarry did not amount to a public nuisance. *Hounsell* v. *Smyth*, 7 C. B. (N.S.) 731 ; 29 L. J., C. P. 203 ; 6 Jur. (N.S.) 897 ; 1 L. T. 440 ; 8 W. R. 277.

A person who makes a hole in his own ground abutting on a public highway so that the use of the way is rendered unsafe, is responsible for an injury to a person accidentally falling into the hole while passing with ordinary caution along the highway. *Barnes* v. *Ward*, 2 Car. & K. 661 ; 9 C. B. 392 ; 19 L. J., C. P. 195 ; 14 Jur. 334.

If an excavation has been made so near to a highway since its dedication and adoption as to create or increase danger to the public, and an accident happens thereby, the person making the excavation is not absolved from liability by reason that a statutory obligation to fence the highway is imposed upon other parties, who have neglected to do so. *Wettor* v. *Dunk*, 4 F. & F. 298.

Parties Liable—Proximate Cause.]—If the proximate cause of damage is the plaintiff's unskilfulness, although the primary cause is the misfeasance of the defendant, he cannot recover ; at least, if the mischief is in part occasioned by the misfeasance of a third person not sued. *Flower* v. *Adam*, 2 Taunt. 314 ; 11 R. R. 591.

A. placed lime rubbish in a highway ; the dust blown from it frightened the horse of B., and nearly carried him into contact with a passing waggon, in avoiding which, he unskilfully drove over other rubbish placed in the road by C., and was overthrown and hurt :—Held, that B. could not recover against A. *Ib.*

—— **Highway Board.**]—A highway board are liable for damages in respect of an injury caused by a heap of stones projecting into the road, which had been placed there by one of their servants. *Tucker* v. *Axbridge Highway Board*, 53 J. P. 87.

—— **Local Board.**]—The defendants, as the highway and lighting authority, had erected a post in the centre of a footpath, and near the post a lamp was placed which was lighted at night. The plaintiff was injured by running against the post when the lamp was out or unlighted :—Held, that the defendants were liable. *Lamley* v. *East Retford Corporation*, 55 J. P. 133—C. A.

A heap of stones was left by the side of a road without light, and the plaintiff on a dark night drove his cart against it, and was upset and injured. The road was in the district of which the corporation was the local board of health, and the heap was left there by the negligence of persons employed by the corporation to repair the roads :—Held, that the corporation was liable, as the local board, to an action for the negligence of their servants ; and was not exempt from liability by reason of 11 & 12 Vict. c. 63, s. 117, which imposes on them the same duties and liabilities as a surveyor of highways. *Foreman* v. *Canterbury Corporation*, 40 L. J., Q. B. 138 ; L. R. 6 Q. B. 214 ; 24 L. T. 385 ; 19 W. R. 719.

—— **Owner of Traction Engine.**]—The owners of a traction engine are responsible for its general management on the highway by their servants. *Reg.* v. *Chittenden*, 15 Cox, C. C. 725 ; 49 J. P. 503.

—— **Negligence of Contractor.**]—A company contracted with A. for the laying down of their main gas pipes in the streets of a town, having no special legislative powers for such purpose. A.'s servants left a heap of earth and stones which had been thrown out of the trenches dug for receiving the pipe in one of the streets, and B., in passing along the street, tumbled over it and was injured:—Held, that the company was liable for the injury occasioned to B. *Ellis* v. *Sheffield Gas Consumers' Co.*, 2 El. & Bl. 767 ; 2 C. L. R. 249 ; 23 L. J., Q. B. 42 ; 18 Jur. 146 ; 2 W. R. 19.

A workman in a government dockyard, which he was not allowed to leave during the day, returning to his place of work from a necessary in the dockyard, which he habitually used, by one of several practicable routes which he was permitted to take, accidentally fell, and had his arm injured by a revolving shaft insufficiently fenced, which had been placed in the road by a government contractor, who placed his works on the spot by permission of the government :—Held, that the contractor was not responsible. *Bolch* v. *Smith*, 7 H. & N. 736 ; 31 L. J., Ex.

201 ; 8 Jur. (N.S.) 197 ; 6 L. T. 158 ; 10 W. R. 387.

—— **Negligence of Sub-contractor.**]—A. employed B. to construct a drain in a public highway, B. employed C. to fill in the earth over the brickwork and to carry away the surplus : C., in performing his work, left the earth raised so much above the level of the road, that D., driving in the dark, was thereby upset and sustained injury :—Held, that A. was not responsible for the negligence of C. *Peachey* v. *Rowland*, 13 C. B. 182 ; 22 L. J., C. P. 81 ; 17 Jur. 764.

—— **Mine-owner working subjacent Minerals—Subsidence—Level-crossing—Ballast placed by Railway to maintain Level—Nominal Damages.**]—Where a mine-owner, by properly working minerals under a highway vested in the local authority, caused a gradual subsidence of the highway, and a railway company, over whose line the highway crossed on the level, placed ballast under their line to prevent it sinking and thereby obstructed the highway, the mine-owner was held not liable to the local authority for damages for the obstruction so caused. Per Collins, J. (Wright, J., dubitante), that an action for nominal damages would lie for interference with the proprietary rights of the local authority, as it would in the case of an ordinary owner, although no appreciable damage had been done by the subsidence. *Att.-Gen.* v. *Conduit Colliery Co.*, 64 L. J., Q. B. 207 ; [1895] 1 Q. B. 301 ; 15 R. 267 ; 71 L. T. 771 ; 43 W. R. 366 ; 59 J. P. 70.

—— **Company in Possession of Way under Statutory Right—Accident—Liability of Owner of Way.**]—The defendants were the owners of a quay, over which there was a public right of way to their docks. The Great Eastern Railway Company by their private act were empowered to, and did enter into an arrangement with the defendants to lay tramways connecting the docks with the railway system. The company were to keep the tramways in good working order, under the Tramways Act, 1870. The company, as promoters, gave notice to the defendants of their intention to open and break up the road for the purpose of doubling the rails at a particular point. The company did break up the highway for their tramway purposes. The plaintiff was injured by being thrown from his cart through the defective condition of the roadway at the place where the works were being carried out, and brought his action for compensation against the defendants as owners of the highway. The jury at the trial found that the accident to the plaintiff had been caused by the negligence of the railway company, who were in possession of the spot where the occurrence took place, and that the roadway was in a defective condition owing to a breach of duty on the part of the railway company, and gave the plaintiff substantial damages :—Held, that as the railway company were carrying out their works not under the orders or as licensees of the defendants, but under their statutory powers, and were in sole possession of the place where the accident happened, which was entirely under their control, and the negligence causing the accident was that of the railway company and not of the defendants, the verdict ought to be entered for the defendants. *Barham* v. *Ipswich Dock Commissioners*, 54 L. T. 23.

iv. *Injunction.*

Injunction—Rights of Owner.]—The owner of the soil of a public way is entitled to an injunction to prevent a stranger from laying down pipes therein, and from keeping there any already laid. *Goodson* v. *Richardson*, 43 L. J., Ch. 790 ; L. R. 9 Ch. 221 ; 30 L. T. 142 ; 22 W. R. 337.

—— **Amount of Inconvenience.**]—A railway company, being in the use and occupation of a railway bridge over a highway, and being owners of the soil on either side of the road, commenced the construction of buttresses in the road, on a line with the existing abutments, for the purpose of widening their bridge. The plaintiffs, in whom the soil of the road was vested under the Metropolitan Management Act, as surveyors of the highways, filed a bill to restrain the company from further narrowing the road, on the ground of public inconvenience :—Held, that the inconvenience was not of sufficient magnitude for the interference of the court. *Wandsworth Board of Works* v. *L. & S. W. Ry.*, 31 L. J., Ch. 854 ; 10 W. R. 814.

—— **Subsidence — Level raised by County Council—Interference with Access to Adjoining Land.**] — A certain highway, which was not vested in the county council, but in certain frontagers, subsided from time to time, together with the adjoining land, owing to pumping operations. The highway formed one of the approaches to a bridge. The county council, in whom the roadway over the bridge was vested, resolved to raise it, together with the approaches, including the highway in question. The plaintiff, as one of the frontagers in whom the highway was vested, complained that the county council by raising the level of the highway would interfere with the access to his premises, and claimed an injunction to restrain the county council from carrying out the work of raising the level of the highway. At the trial before Day, J., the jury stated "in the absence of written evidence, they were not satisfied that the height of the roadway was going to be raised above the level at which it originally stood." Day, J., thereupon gave judgment for the county council :—Held, that such judgment was right. *Atherton* v. *Cheshire County Council*, 60 J. P. 6 —C. A.

—— **Dissolution of—Removal of Obstruction.**]—See *Semple* v. *London and Birmingham Ry.*, ante, col. 39.

—— **Costs.**]—Sect. 109 of the Highway Act (5 & 6 Will. 4, c. 50), which provides that where an action is brought against any person for anything done under the authority of the act, and judgment shall be given for the defendant, he shall have costs as between attorney and client, does not apply to an action for an injunction in the chancery division. *Pullin* v. *Deffel*, 64 L. T. 134.

Mandatory Injunction — Fence preventing Access to Promenade.] — Where a landowner whose land adjoined a public promenade which had been also used as a public highway for foot passengers was deprived of his access to the promenade by a fence erected by a local board in whom the promenade had been vested, it was held that a mandatory injunction must issue to

compel the renewal of the fence and an inquiry as to damages be directed. *Ramuz* v. *Southend Local Board*, 67 L. T. 169.

Injunction or Information.]—The vestry of a parish, who, by virtue of a local act, combined with the 25 & 26 Vict. c. 102, are constituted the custodians of ways within the parish, and are empowered, in case of obstruction of such ways, to take such proceedings for the opening them as they may think fit, must, if they institute proceedings in chancery for the removal of such an obstruction, do so by information in the name of the attorney-general, and not by bill. *Bermondsey Vestry* v. *Brown*, L. R. 2 Eq. 204; 11 Jur. (N.S.) 1031; 13 L. T. 574; 14 W. R. 213.

—— **Where Particular Injury.**]—Where a plaintiff suffers a particular injury from the obstruction of a public way, a bill for an injunction in equity will lie, and the attorney-general need not be a party. *Cook* v. *Bath Corporation*, L. R. 6 Eq. 177.

Scots Law—Interdict—Sweeping Snow off Tramway Line—Sprinkling Salt on Snow.]—Although road authorities are invested with large discretionary powers in regard to the cleaning of streets and the regulation of traffic, and a court of law would decline to interfere with a due exercise of that discretion, they have no power or discretion in the case of a nuisance, which the legislature has not expressly or by necessary implication sanctioned, either to commit it themselves or to authorise its commission by others. *Ogston* v. *Aberdeen District Tramways*, 66 L. J., P. C. 1; [1897] A. C. 111; 75 L. T. 633; 61 J. P. 436—H. L. (Sc.)

The appellant sued for an interdict to prevent the respondents from continuing the practice of sweeping away the snow from their tramway-rails, and sprinkling salt on the snow in order to melt it in such a way as to cause a nuisance. The court of session refused the note of suspension and interdict on the ground that the local authority, to which was entrusted the duty of seeing that the streets were cleared in such an emergency as a snowstorm, had approved the method adopted by the respondents. The house remitted the case to the second division of the court of session to pronounce decree of interdict. *Ib.*

iv. *Other Proceedings.*

Summary Proceedings—Several Convictions—Continuing Offence.]—A person was convicted at petty sessions, in June, 1893, for obstructing the free passage of a road by "erecting" a barbed wire fence thereon, and was afterwards convicted on four separate charges of obstructing, on August 7, 14, 21 and 28, 1893, respectively, the free passage of the road by "erecting and maintaining" a barbed wire fence thereon. The fence was the same one, the defendant not having removed it after the first conviction:—Held, that the convictions were good, the obstructing on each day being a separate offence. *Reg.* v. *Dublin County JJ.*, [1894] 2 Ir. R. 527.

—— **Suing for Penalty—Time for.**]—Under 27 & 28 Vict. c. 101, s. 51, which enacts that if any person shall encroach by making or causing to be made any building or fence on the side of any carriage way within fifteen feet from the centre thereof, he shall be subject to a penalty not exceeding 40*s.*, the encroachment is not a continuing offence, and the six months' limitation created by 11 & 12 Vict. c. 43, s. 11, commences from the completion of such building or fence. *Coggins* v. *Bennett*, 2 C. P. D. 568.

—— **Highway within Metropolitan Area—Power of Police to Prosecute.**]—A person, by singing hymns, occasioned a crowd to assemble, and thereby obstructed a certain highway within the metropolitan police district. An information was accordingly preferred against him by an inspector of police, under s. 72 of the Highway Act:—Held, that the provisions of s. 72 of the Highway Act were applicable to highways within the metropolitan area. Held, also, that a prosecution under s. 72 of the act might be initiated by any one, and therefore that the proceedings taken by the police were valid. *Back* v. *Holmes*, 57 L. J., M. C. 37; 56 L. T. 713; 16 Cox, C. C. 263; 51 J. P. 693.

—— **Dismissal of Charge—Appeal to Quarter Sessions.**]—A vestry summoned C. under s. 72 of the Highway Act, 1835, for unlawfully and wilfully obstructing the free passage of a highway by erecting a fence across it. The charge was dismissed by the justices who heard it. The 105th section of the same act provides that, "if any person shall think himself aggrieved by . . . any order, conviction, judgment, or determination made . . . by any justice . . . such person may appeal to the justices at the next general quarter sessions of the peace . . ." The vestry appealed against the dismissal of their summons, and the justices at the general quarter sessions declined jurisdiction:—Held, that s. 105 gave no appeal except in the case of a conviction. *Reg.* v. *County of London JJ., Fulham Vestry, Ex parte*, 59 L. J., M. C. 146; 25 Q. B. D. 357; 63 L. T. 243; 39 W. R. 11; 55 J. P. 56.

Indictment—New Trial—Misfeasance.]—The court has power to order a new trial not only in cases of mere non-feasance, but also where the defendant has been convicted of positive misfeasance. *Reg.* v. *Berger*, 63 L. J., Q. B. 529; [1894] 1 Q. B. 823; 10 R. 245; 70 L. T. 807; 42 W. R. 541; 17 Cox, C. C. 761; 58 J. P. 416.

b. Use of Bicycles.

Bicycle, whether a Carriage.]—A bicycle is a "carriage" within 5 & 6 Will. 4, c. 50, s. 78. *Taylor* v. *Goodwin*, infra.

A bicycle is a "carriage" under 14 & 15 Vict. c. 92. *M'Gee* v. *M'Grath*, infra.

A bicycle is a "vehicle" within s. 12 of the Liverpool Corporation Act, 1889. *Ellis* v. *Nott-Bower*, infra.

Riding on Footpath.]—To convict a person of riding or driving any carriage, e.g. a bicycle, on a footpath under s. 72 of the Highway Act, 1835, it is not necessary to prove that such person has caused injury to the highway, or injury, interruption or personal danger to any person travelling thereon. *Brotherton* v. *Tittensor*, 60 J. P. 72.

A person riding a bicycle on a footpath along the side of a public road in a country district, may, although no evidence can be produced of obstruction to the free passage of foot-passengers along that footpath, or of any foot-passenger on

the same footpath being in sight of the person riding, be summarily convicted, under sub-s. 3 of s. 13 of 14 & 15 Vict. c. 92, for wilfully preventing and interrupting the free passage of persons along the road of which the footpath forms a part. A bicycle is a "carriage." *M'Gee* v. *M'Grath*, 30 L. R., Ir. 41.

Riding Furiously.]—A person riding a bicycle on a highway at such a pace as to be dangerous to the passers-by, may be convicted of furiously driving a carriage, under 5 & 6 Will. 4, c. 50, s. 78. *Taylor* v. *Goodwin*, 48 L. J., M. C. 104; 4 Q. B. D. 228; 40 L. T. 458; 27 W. R. 489.

Travelling at Night without Lamp—Arrest by Police Constable—Assault.]—The powers given under s. 78 of the Highway Act, 1835, to apprehend without warrant drivers of carriages offending against that act, are not incorporated in s. 85 of the Local Government Act, 1888, which declares bicycles to be carriages within the highway acts, and a police constable cannot arrest a bicyclist who commits the offence under s. 85 of riding at night without a lighted lamp, and who refuses to stop when called upon. *Hatton* v. *Treeby*, 66 L. J., Q. B. 729; [1897] 2 Q. B. 452; 77 L. T. 309; 46 W. R. 6; 61 J. P. 586.

For Displaying Advertisements.]—A bicycle is a vehicle within the meaning of s. 12 of the Liverpool Corporation Act, 1889, which provides that it shall not be lawful in any street in the city to use any vehicle exclusively or principally for the purpose of displaying advertisements without the consent of the corporation. *Ellis* v. *Nott-Bower*, 60 J. P. 760.

c. Use of Locomotives.

Statutes.]—59 & 60 Vict. c. 36, *is the Locomotives on Highways Act*, 1896.

57 & 58 Vict. c. 37, *removes restrictions on the use of locomotive engines for threshing purposes.*

Locomotives, what are—Threshing-machine.]—A portable steam-engine, upon wheels and drawn by horse-power, used to drive a threshing-machine within a barn, but not fixed thereto or to the soil, is within 5 & 6 Will. 4, c. 50, s. 70. *Smith* v. *Stokes*, 4 B. & S. 84; 32 L. J., M. C. 199; 8 L. T. 425; 11 W. R. 753.

An owner of a steam threshing-machine lent it to hire to a farmer, and sent his man with it, who superintended it. The machine was erected within a distance of twenty-five yards from the highway, but there was no evidence to shew that the owner directed it to be so erected, and he was himself not present at the time. Being convicted under 5 & 6 Will. 4, c. 50, s. 70:—Held, that the conviction was bad. *Harrison* v. *Leaper*, 5 L. T. 640.

—— **Tricycle capable of being Propelled by Steam.**]—A tricycle was capable of being propelled by the feet of the rider, or by steam as an auxiliary, or by steam alone. There was no smoke, nor escape of steam into the air, nor anything to indicate that it was being worked by steam, nor anything which could frighten horses, or cause danger to the public using the highway beyond any ordinary tricycle. The weight was about two hundredweight, and the tires of the wheels about one and a half inch in width. The tires being of indiarubber, no injury would be done to the surface of the road by working the machine on it:—Held, that the tricycle was a "locomotive" within the definition in s. 38 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), and was therefore subject to the rules and regulations for the use of locomotives on highways prescribed by ss. 28 and 29 of that act, by the Locomotives Act, 1861 (24 & 25 Vict. c. 70), s. 12, and the Locomotives Act, 1865 (28 & 29 Vict. c. 83), ss. 3, 4, 7. *Parkyns* v. *Preist*, 50 L. J., M. C. 148; 50 L. J., Q. B. 648; 7 Q. B. D. 313; 30 W. R. 13; 45 J. P. 751.

Licence—Steam Roller being "Used."]—A steam-roller crossing one county to perform work in another is, whilst passing over highways in its journey, being "used" within the meaning of s. 32 of the Highways and Locomotives (Amendment) Act, 1878, and requires a licence in cases in which the county authority have made by-laws rendering a licence necessary. *London County Council* v. *Wood*, 66 L. J., Q. B. 712; [1897] 2 Q. B. 482; 77 L. T. 312; 46 W. R. 143; 61 J. P. 567.

Exemption from Licence—Agricultural Purpose.]—A traction engine that draws a threshing-machine from one farm to another along the highway is used "solely for agricultural purposes" within s. 32 of the Highways and Locomotives Act, 1878, and therefore does not require a licence. *Marsh* v. *Baker*, 55 J. P. 583.

A locomotive which is sometimes let out by its owners to farmers for the purpose of carrying straw and manure for use in farming operations, and which is sometimes used by the owner himself for the purpose of carrying for hire straw and manure to be used exclusively on farms, and is not used for any other purpose, is within the exemption in s. 32 of the Highways and Locomotives (Amendment) Act, 1878, as being "a locomotive used solely for agricultural purposes," and may be so used without a licence from the county authority. *Ellis* v. *Hulse*, or *Jesse* v. *Hales*, 58 L. J., M. C. 91; 23 Q. B. D. 24; 60 L. T. 836; 37 W. R. 557; 53 J. P. 598.

—— **Tramway.**]—The steam engines authorised by statute to be used on tramways are not locomotives within the meaning of the Highways and Locomotives (Amendment) Act, 1878, s. 32, and, therefore, do not require to be licensed by the county authority. *Bell* v. *Stockton Tramways Co.*, 51 J. P. 804.

Not Consuming Smoke—Onus of Proof.]—Upon a charge under s. 30 of the Highways and Locomotives Act, 1878, of unlawfully using a locomotive not consuming as far as practicable its own smoke, the onus of proof that it does so consume its smoke lies on the defendant. *Pitt-Rivers* v. *Glasse*, 55 J. P. 663.

Regulation of Railways—Rate of Speed.]—The S. railway company obtained the leave of parties interested in the soil of a highway and in streets of a town adjoining their terminus, and laid rails thereon, and ran their railway engines and carriages over such street to a place beyond their terminus. No express power so to use the highway was given by any statute:—Held, that the Locomotives Act (28 & 29 Vict. c. 83), s. 4, applied, and that the company could

not go at a greater speed than two miles an hour, this being a case of driving a locomotive along a public highway within the meaning of that act. *L. & S. W. Ry.* v. *Myers*, 45 J. P. 731.

—— **Gates for Level Crossings.**]—The provisions of the Highways Act (5 & 6 Will. 4, c. 50), s. 71, as amended by 2 & 3 Vict. c. 45, s. 1, and 5 & 6 Vict. c. 55 (for the better regulation of railways), s. 9, by which the proprietors of a railroad which crosses a highway at a level crossing are compelled to put up gates at such crossing, do not apply to a private line of railway, on private property, used by the proprietors exclusively for their private purposes. *Matson* v. *Baird*, 3 App. Cas. 1082; 39 L. T. 304; 26 W. R. 835—H. L.

A declaration stated that the railway of a railway company crossed a public highway on a level, yet the company, in contravention of the statutes in that behalf, did not keep the gates across the highway at the crossing point constantly closed, whereby two horses of the plaintiff, which were lawfully upon the highway, escaped from the highway into and upon the railway, and were by a locomotive engine and train run over and killed. Plea, that the horses were not lawfully upon the highway when the injury was done. The horses had leaped a hedge into a turnpike road, and had strayed thence into a new road formed by the company, leading across the railway into an old highway, and one of the gates at the crossing being open, had got upon the line:—Held, that the company being required by their act, and by 5 & 6 Vict. c. 55, s. 9, to keep the gates constantly closed, the horses were as against them lawfully on the highway, and the plaintiff might recover. *Fawcett* v. *York and North Midland Ry.*, 16 Q. B. 610; 20 L. J., Q. B. 222; 15 Jur. 173.

See also sub tit. RAILWAY.

Regulation of Locomotives—Shoes on Wheels.]—By the Locomotives Act, 1861 (24 & 25 Vict. c. 70), s. 3 (repealed by 41 & 42 Vict. c. 77, s. 28), every locomotive used on a highway and drawing any waggon shall have the tires of the wheels thereof not less than nine inches in width, and the wheels shall be cylindrical and smooth-soled, or used with shoes or other bearing surface of a width not less than nine inches. A locomotive was used on a highway, having the tires of the two driving-wheels eighteen inches wide. Upon the tires were strips or shoes nine inches and three quarters in width, measured across the tire parallel to the axis of the wheel, and three inches broad and one inch thick. The shoes were placed alternately on each edge of the tire, and in the centre they touched and overlapped one another by about one inch and a quarter. There was thus always a bearing surface of at least nine inches in width on the road:—Held, that no shoes or bearing surface would comply with the statute unless they were similar to the tires of the wheels prescribed, viz. uniform smooth-surfaced bands of the width of nine inches at least round the whole circumference of the wheels; that these bands must be continuous and unbroken (save in so far as the joints of the material used might render perfect continuity impossible); and that the engine in question did not comply with the statute. *Body* v. *Jeffery*, 47 L. J., M. C. 69; 3 Ex. D. 95; 38 L. T. 68; 26 W. R. 356.

The question of what are "shoes" within the meaning of s. 3 (repealed) of the Locomotives Act, 1861, is a question of fact to be determined by the justices. *Edmunds* v. *Savin*, 26 W. R. 755.

By the Locomotives Act (24 & 25 Vict. c. 70), s. 3 (repealed), every locomotive used on a highway and drawing any waggon shall have the wheels cylindrical and smooth-soled, or used with shoes or other bearing surface of a width not less than nine inches. An engine was so used, which had its wheels fitted with shoes four inches and a half broad, placed parallel to one another, and three inches apart, and bolted obliquely across the whole breadth of the wheel, so that when a length of less than nine inches of one shoe was in contact with the ground the deficiency was made up by the length of contact of the next shoe with the ground:—Held, that the bearing surface not being continuous, the engine was not in conformity with the act. *Stringer* v. *Sykes*, 46 L. J., M. C. 139; 2 Ex. D. 240; 36 L. T. 152; 25 W. R. 273.

—— **Person preceding Locomotive on Foot.**]—The 3rd section of 28 & 29 Vict. c. 83, which, as amended by 41 & 42 Vict. c. 77, s. 29, requires one of the three persons employed to conduct a steam locomotive on a public highway to precede such locomotive on foot by twenty yards, and in case of need to assist horses, or carriages drawn by horses, in passing the same, is not the less complied with because such person, whilst preceding the locomotive on foot, leads a horse and cart of his own. *Davis* v. *Browne*, 48 L. J., M. C. 92; 40 L. T. 557.

Liability for Injuries caused by.]—An action is maintainable by a person who had sustained an injury through his horses being frightened by a traction steam-engine used on a highway, under 24 & 25 Vict. c. 70, the jury finding that the engine was likely to frighten horses, and that the defendant knew it. *Watkins* v. *Reddin*, 2 F. & F. 629.

—— **Indictment.**]—Persons using a traction engine and trucks on a highway may be indicted for a nuisance if they create a substantial obstruction and occasion delay and inconvenience to the public substantially greater than would arise from the use of carts and horses. *Reg.* v. *Chitteden*, 15 Cox, C. C. 725; 49 J. P. 503.

—— **When no Negligence.**]—The defendant was possessed of a traction engine, which was propelled by steam power. Whilst it was being driven by the defendant's servants along a highway, some sparks escaping from it set fire to a stack of hay of the plaintiffs standing on a neighbouring farm. The engine was constructed in conformity with the Locomotive Acts, 1861, 1865; at the time of the accident it was being driven at a proper pace, and the defendant's servants were guilty of no negligence in the management of it:—Held, that the defendant was liable to compensate the plaintiffs for the injury done to the stack, upon the ground that the engine, being a dangerous machine, an action was maintainable at common law, and the locomotive acts did not restrict the liability of the defendant. *Powell* v. *Fall*, 49 L. J., Q. B. 428; 5 Q. B. D. 597; 43 L. T. 562—C. A.

—— **Negligent Management of by Bailee—Liability of Owner.**]—The defendant, who was

the owner of a traction engine, to which his name and address were affixed, as required by the Locomotives Act, 1865, s. 7, let the same for three months. Through the negligent management of the engine whilst it was being used upon a highway by the hirer, personal injuries were occasioned to the plaintiff, who was being driven in a carriage upon the highway:—Held, that the defendant was not liable in respect of such injuries. *Stables* v. *Eley* (1 Car. & P. 614), as reported, disapproved of. *Smith* v. *Bailey*, 60 L. J., Q. B. 779; [1891] 2 Q. B. 403; 65 L. T. 331; 40 W. R. 28; 56 J. P. 116—C. A.

d. Extraordinary Traffic.

i. *What is.*

Meaning of.]—"Extraordinary traffic," within the meaning of s. 23 of the Highways and Locomotives Amendment Act, 1878, is not confined to the carriage of unusual materials, nor to carriage for unusual purposes, but it includes all traffic which is so exceptional as regards the ordinary user of the road, either in respect of its quality, its quantity, or its frequency, as substantially to increase the burden imposed on the road by ordinary traffic, and cause damage and expense thereby beyond what is common. *Pickering Lythe East Highway Board* v. *Barry* (8 Q. B. D. 59) disapproved. *Hill* v. *Thomas*, 62 L. J., M. C. 161; [1893] 2 Q. B. 333; 4 R. 565; 69 L. T. 553; 42 W. R. 85; 57 J. P. 628—C. A.

The object of the section is not to prohibit extraordinary traffic, but to throw the expense of repairing the damage done thereby on those who cause it. *Ib.*

How Estimated.]—In determining what is "extraordinary traffic" within the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878, the justices should not take into account the ordinary traffic of the district, but only that of the particular road in question. *Hill* v. *Thomas* (supra) followed. *Etherley Grange Coal Co.* v. *Auckland District Highway Board*, [1894] 1 Q. B. 37; 9 R. 88; 69 L. T. 702; 42 W. R. 198; 58 J. P. 102—C. A.

Semble, that the surveyor in determining whether a person has carried extraordinary traffic, with a view to certifying for extraordinary expenses, is wrong in merely comparing that person's traffic with the traffic on part of the highway he is bound to repair. *Reg.* v. *Williamson*, 45 J. P. 505.

Conveyance of Stone.]—Justices having made an order upon the appellants to pay the expenses of repairing a highway as extraordinary expenses within s. 23 of the Highways and Locomotives (Amendment) Act, 1878, it appeared that the road, called Carter's hill, was used solely for agricultural traffic, and was in the parish of S., which, with some other parishes in the respondent's district, was situate upon a range of hills. There were several stone quarries upon this range of hills within the respondent's district, from which, for many years, the surrounding country, including the appellants', had drawn stones for the repair of the highways, the stone traffic being a recognised business there; but until 1882 there had been no stone taken from the parish of S. In 1882 a stone quarry was opened in S. at the top of Carter's hill, and the stone was conveyed by the appellants for the repair of their highways down Carter's hill in the manner customary in the stone traffic, that is, in heavy waggons with the wheels chained, and damage was in consequence done to the road:—Held, that the evidence warranted the justices in coming to the conclusion that the traffic was extraordinary on this particular road, and that the order therefore was right. *Tunbridge Highway Board* v. *Sevenoaks Highway Board*, 33 W. R. 306; 49 J. P. 340.

The appellant was summoned under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, for extraordinary expenses incurred by the respondents in repairing a highway between 1883 and 1890 by reason of the damage caused by extraordinary traffic and excessive weight passing along the same. It appeared that in 1883 the appellant had begun to use the road in question for carrying stone from a certain quarry in stone carts, and had continued to use it regularly for the same purpose until 1890, and that in consequence extraordinary expense was incurred in repairing it. The road was in 1883, and had since always remained, an ordinary country road used for ordinary light country traffic, and had never been adapted for or made to bear any other traffic, though stone had occasionally been carted from the quarry along the road prior to 1883, but not in sufficient quantities to cause any unusual damage to the road. The justices having found as a fact that the traffic was extraordinary and the weight excessive during the whole of the said period, and that extraordinary expenses had been incurred in repairing the road by reason of the damage caused by such extraordinary traffic and excessive weight, convicted the appellant:—Held, that the appellant had been properly convicted, and that the length of time which had elapsed before proceedings were commenced did not in any way diminish his liability to pay the amount of such expenses as were proved to the justices to have been incurred by reason of excessive traffic and weight having been carried over the road during the above-mentioned period. *Whitehead* v. *Sevenoaks Highway Board*, 61 L. J., M. C. 59; [1892] 1 Q. B. 8; 65 L. T. 855; 56 J. P. 214.

Upon the hearing of a complaint made by a highway board under the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23, for the purpose of recovering from the appellant extraordinary expenses incurred by the board by reason of traffic conducted by him, it appeared that he was owner or occupier of stone quarries in the district, and that the stone was conveyed in heavy loads over the highways, so as to make the cost of repairing them much larger than if they had been subject to ordinary agricultural traffic; but that the stone traffic was a recognised business in the neighbourhood, and the waggon loads of the usual weight in such traffic. The justices having upon these facts, found, first, that the traffic was not extraordinary; secondly, that the weights were excessive; and thirdly, that the expenses were extraordinary:—Held, that the first finding, which was warranted by the evidence, shewed that the expenses were not "extraordinary" within the meaning of the section, and that they could not be recovered from the appellant. *Wallington* v. *Hoskins* or *Hookins*, 50 L. J., M. C. 19; 6 Q. B. D. 206; 43 L. T. 597; 29 W. R. 152; 45 J. P. 173.

See further as to conveyance of stone

Northumberland Whinstone Co. v. *Alnwick Highway Board*, and *Lapthorne* v. *Harvey*, infra, cols. 63, 64.

Haulage of Timber in Timber District.]—In a group of twenty parishes there were large woods which came to maturity after ten or seventeen years' growth, and one or other wood was cut every year, and the timber hauled over one or other highway each winter. Before the haulage the roads were in fair repair, and the other traffic was chiefly caused by donkey carts or passengers. The haulage over one and a half mile caused extra expense of 12*l.* 10*s.*, for which the respondents were summoned under 41 & 42 Vict. c. 77, s. 23. The justices found that the weights were not excessive, and held that there was not extraordinary traffic, this being the ordinary trade of the district:—Held, that the justices were justified by the evidence in coming to their decision. *Raglan Highway Board* v. *Monmouth Steam Co.*, 46 J. P. 598.

Traffic caused in building a House.] — Materials for building a house were carried by the respondent over a highway, and he was summoned under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, by the appellants, to recover the amount of expenses incurred by them by reason of the damage to the highway. The justices dismissed the summons, subject to a special case in which they found that the traffic conducted by the respondent was, in aggregate weight and quantity, excessive and extraordinary as compared with the ordinary traffic along the highway, which was light agricultural traffic, that the highway had been damaged thereby, that the amount expended on the highway by reason thereof was in excess of the average expense of repairing highways in the neighbourhood, and was an extraordinary expense incurred by reason of such damage, but that the traffic did not materially differ in character from that to be expected on the highway:—Held, that the respondent was not liable for the damage to the highway. *Pickering Lythe East Highway Board* v. *Barry*, 51 L. J., M. C. 17; 8 Q. B. D. 59; 45 L. T. 655; 30 W. R. 246; 46 J. P. 215.

Traction Engine.]—The appellant employed on a highway a traction engine drawing two waggons for the carriage of materials and goods used for ordinary purposes on his estate (the engine being of less weight than was allowed by s. 28 of the Highways and Locomotives (Amendment) Act, 1878, and having its wheels constructed in accordance with the provisions of that section), and thereby did damage to the highway beyond that caused by the ordinary wear and tear:—Held, that this was "excessive weight" and "extraordinary traffic," the damage caused by which was properly chargeable upon the appellant under s. 23 of the act. *Aveland (Lord)* v. *Lucas*, 49 L. J., C. P. 643; 5 C. P. D. 351; 42 L. T. 788; 28 W. R. 571; 44 J. P. 360—C. A.

—— **Branch Road—Conveyance of Manure to Farm.**]—Justices having made an order charging the expenses of repairing a highway upon the appellants as being extraordinary expenses within 41 & 42 Vict. c. 77, s. 23, it appeared that the highway communicated at either end with main roads, and was principally used by farmers and occupiers of land adjoining it for ordinary farm traffic. The appellants having been employed to convey a quantity of manure to a farm adjoining the road, carried it there by means of a traction engine and trucks, the engine weighing eight and the truck five tons. The road, which had not been prepared for, and was not adapted to, the weight of traction engines, was, in consequence of such traffic, rendered unfit for use. The carriage of farm material and produce by traction engines was usual in the neighbourhood, though not upon this particular road:—Held, that the order was right, the passage of traction engines and trucks being "extraordinary traffic" upon the particular road. *Reg.* v. *Ellis* or *Ellis* v. *Maidstone Sanitary Authority*, 8 Q. B. D. 466; 30 W. R. 613; 46 J. P. 295. See also *Kent County Council* v. *Vidler*, infra, col. 63.

Locomotives — Road not constructed for Heavy Weights.]—Savin was adjudged to pay 500*l.* for damage done by the excessive weight of his locomotives and carriages along a highway near Oswestry. The highway had not been originally constructed for heavy weights and was not well formed, but owing to the damage done it was reconstructed and properly formed, and the expense of reconstruction could not be separated from the cost of repairs. The quarter sessions affirmed the order, but stated a case:—Held, that the order was right, it being immaterial that his engines were made and used in accordance with the statute. *Savin* v. *Oswestry Highway Board*, 44 J. P. 766.

String of Coal Carts—"Mode" of User of Road.]—For sixteen years prior to 1893, the appellants carted coal, every weekday, over a main road between a railway siding and the pumping station at their waterworks, a distance of about a mile and a quarter. In 1893-4 they adopted a plan of sending a string of four or five carts at a time in charge of two or three drivers; the average number of journeys every weekday being five each way. These carts followed each other in the same track. They were drawn by one horse apiece, and the individual loads were not excessive. About 7,855 tons of coal were carted during the year:—Held, that this was extraordinary traffic within s. 23. The mode of user of the road tended substantially to alter and increase the burden imposed by ordinary traffic. The definition of Bowen, L.J., in *Hill* v. *Thomas* ([1893] 2 Q. B. 333, 343) followed. *Wolverhampton Corporation* v. *Salop County Council*, 64 L. J., M. C. 179; 43 W. R. 494.

Large Number of Carts.]—W., owner of ironstone mines, sent his traffic to the railway station along a highway, in carts of the ordinary size and weight, but they made about seventy journeys per day. The other traffic was agricultural, and very small, and W.'s carts caused the chief traffic here. Other owners of mines sent their traffic by a private railway, and not over the highway in carts:—Held, the justices were wrong in holding that W. caused extraordinary traffic merely because he had many carts to send. *Reg.* v. *Williamson*, 45 J. P. 505.

Semble, the surveyor was wrong in merely comparing the traffic of W. with the traffic on part of the highway he was bound to repair. *Ib.*

ii. *Persons Liable.*

Persons contracting for Delivery of Materials, but not controlling the Carriage thereof.]—A purchaser who enters into contracts for the supply of materials to be delivered at a certain

price, has no property in the goods until they are delivered, does not employ or pay the persons conveying them, and does not direct or control the mode of carriage or the road by which they are to be carried, is not a person "by whose order" such traffic is conducted within the meaning of s. 23 of the Highways and Locomotives Act, 1878, and, such traffic being "extraordinary" in the statutory sense, is not liable for the expenses incurred in repairing the road in consequence of such excessive user. *Kent County Council* v. *Gerard* (*Lord*), 66 L. J., Q. B. 677; [1897] A. C. 633; 77 L. T. 109; 46 W. R. 111; 61 J. P. 804—H. L. (E.)

Employer or Contractor.]—Where contractors have the direction and regulation of traffic upon a highway which they carry out by using traction engines, regulating the number of waggons attached to each engine and the weight of each waggon, and giving orders as to the time the vehicles shall start, they are persons "by whose order such weight or traffic has been conducted," within the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878, notwithstanding that their employers indicate the time during which they will be ready to receive the goods which the contractors have undertaken to deliver. *Colchester, Wemyss & Co.* v. *Gloucestershire County Council*, 66 L. J., Q. B. 290.

W. bought timber near a railway station and contracted with a person to convey part of it, he himself sending the rest. The timber was conveyed in broad-wheeled waggons in sixty-seven loads, each load from three to five tons weight. The surveyor estimated that this caused 21*l.* extra expenses in repairs, and summoned W. under s. 23 of the Highways Amendment Act, 1878. The justices held that it was extraordinary traffic, and that whether W. or the contractors conveyed it was of no consequence, and made an order on W. for 21*l.*:—Held, by the court, that the justices were right. *Williams* v. *Davies*, 44 J. P. 347.

The owner of quarries had been ordered to pay a sum for damage caused by excessive weight and extraordinary traffic. Counsel admitted that the principle of the preceding case was conclusive against him. He, however, asked for leave to appeal, as that case was also under appeal. The court gave judgment for the respondents, and gave leave to appeal. *Northumberland Whinstone Co.* v. *Alnwick Highway Board*, 44 J. P. 360.

Contractor or Sub-Contractor.]—A person who is under a contract to supply ballast for the construction of a railway, and who employs different traction engine proprietors to draw the ballast from time to time to the places where it is required, giving a separate order on each occasion to the particular traction engine proprietor employed, is liable, under s. 23 of the Highways and Locomotives Act, 1878, as the person by whose order extraordinary traffic has been conducted, for extraordinary expense, incurred in repairing the highway. *Kent County Council* v. *Vidler*, 64 L. J., M. C. 77; [1895] 1 Q. B. 448; 14 R. 240; 72 L. T. 77; 43 W. R. 273; 59 J. P. 548—C. A.

L. was a contractor with the government to erect a rifle-range, and employed D., a sub-contractor, to cart the stone. Nothing in the contract between L. and D. specified the mode of conveying the stone. D. used traction engines, and caused excessive injury to the highway:—Held, that L. was not the person liable under the Highways and Locomotives Act, 1878, s. 23, but that D. was liable, being the only person by whose orders the excessive weights were carried. *Lapthorn* v. *Harvey*, 49 J. P. 709.

B. was employed by a contractor, C., to build a bridge over the H. railway for the railway company, and in doing so used a traction engine of nine tons to draw two trucks loaded with bricks, each truck being eight tons, and caused damage for several days which amounted to 137*l.* On a proceeding under 42 & 43 Vict. c. 77, s. 23, for causing extraordinary traffic:—Held, that B. was liable though employed by C., and that the remedy was applicable, though under the Railway Clauses Act, 1845, s. 58, the company might be proceeded against to make good all such damage. *Barnett* v. *How Highway Board*, 46 J. P. 805.

iii. Recovery of Expenses.

Summary Procedure founded on Tort.]—The summary procedure provided by section 23 of the Highways and Locomotives (Amendment) Act, 1878, for recovery of expenses incurred in repairing damage to roads caused by extraordinary traffic from the person by whose order it has been conducted, is founded on tort. Proceedings under the section cease on the death of the person in whose lifetime and by whose order the damage was caused. *Story* v. *Sheard*, 61 L. J., M. C. 178; [1892] 2 Q. B. 515; 67 L. T. 423; 41 W. R. 31; 56 J. P. 760.

Surveyor's Certificate—Time within which Summary Proceedings may be Taken.]—A complaint was preferred against G. on the 7th December, 1881, by a highway board to recover 322*l.* 5*s.* 3*d.* for extraordinary expenses under the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23. The damage was done before the 25th March, 1879, the surveyor made his certificate on the 19th May, 1879, and payment was demanded on the 15th September, 1881. By s. 36 of the Highways and Locomotives (Amendment) Act, 1878, all expenses under the act may be recovered before a court of summary jurisdiction in manner provided by 11 & 12 Vict. c. 43, and by the 11th section of that act, "where no time is already or shall hereafter be specially limited for making any such complaint, or laying any such information in the act or acts of parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose":—Held, that the six months' period of limitation within which a complaint may be preferred to recover extraordinary expenses under the 23rd section of the Highways and Locomotives (Amendment) Act, 1878, must be reckoned from the date of the surveyor's certificate and not from the time payment is demanded. *Pool and Forden Highway Board* v. *Gunning*, 51 L. J., M. C. 49; 46 L. T. 163; 31 W. R. 30; 46 J. P. 708.

Certain extraordinary traffic took place in the year ending March, 1880. The expense of 21*l.* thereby incurred was demanded from C. in

November, 1880, and in March, 1881; the surveyor's certificate being signed in February, 1881. The summons for nonpayment was in April, 1881:—Held, that the six months' limitation dated from the certificate and demand of payment, and not from the time when the repairs were made, and therefore that the summons was in time. *White* v. *Colson*, 46 J. P. 565.

The certificate of a surveyor of a highway board for extraordinary expenses incurred in repairing a highway within the district of the board is a good certificate, although it does not apportion the amount of extraordinary expenses incurred in repairing each particular road. On December 7, 1893, the surveyor of the W. highway board gave a certificate that extraordinary expenses to the extent of 285*l.* 6*s.* 11*d.* had been incurred in repairing certain highways owing to acts of one N. No proceedings were taken to recover the same within six months from the date of the certificate. On May 31, 1894, the surveyor gave a certificate that extraordinary expenses to the extent of 202*l.* 3*s.* 2*d.* had been incurred in repairing a highway owing to acts of N. Proceedings having been taken to recover the latter sum:—Held, that the justices were right in excluding evidence as to the extraordinary expenses alleged to have been incurred by the highway board prior to December 7, 1893, on the ground that the certificate of December 7, 1893, being a good certificate, proceedings to enforce payment of the amount alleged to be due should have been taken within six months from the date of such certificate. *Pool and Forden Highway Board* v. *Gunning* (51 L. J., M. C. 49) approved and followed. *Wirrall Highway Board* v. *Newell*, 64 L. J., M. C. 181; [1895] 1 Q. B. 827; 15 R. 309; 72 L. T. 535; 43 W. R. 328; 59 J. P. 183.

Finding of Justices—Appeal.]—The H. Company manufactured peat moss from a moor of 3,000 acres, and having works near a railway station were charged under 41 & 42 Vict. c. 77, s. 23, with causing 44*l.* extraordinary expense by their traffic. Their five drays were lighter than those used in other traffic, which was ordinary agricultural traffic, and passed each day over the highway. The justices found that this was a recognised industry, and that the traffic was not extraordinary:—Held, the justices' decision in dismissing the case could not be interfered with. *Lower Strafforth Highway Board* v. *Hatfield Chase Co.*, 57 J. P. 567.

Surveyor, Appointment of—Evidence.]—J. was not appointed district surveyor under seal, but only by minute of the rural sanitary committee signed by the chairman, but not countersigned by the clerk of the board. L. being summoned for damage caused by extraordinary traffic, set up the defence that the appointment of J. and his certificate and the proceedings were void:—Held, that as J. had acted de facto as surveyor the objection to J.'s appointment was rightly overruled, and the order on L. was valid. *Lancaster* v. *Harlech Highway Board*, 52 J. P. 805.

e. Other Offences on.

Waggon, Cart, or other such Carriage without Owner's Name on it.]—An information was laid against the respondent for using a cart on the highway without having his name painted thereon, as required by 5 & 6 Will. 4, c. 50, s. 76. The cart was a light spring cart with two wheels, used by the respondent in his business as an agricultural implement maker, in which he frequently carried agricultural implements to market, and drove his family about from place to place, and for which he paid duty under 32 & 33 Vict. c. 14, s. 18. The magistrates dismissed the information:—Held, that the "cart or carriage" contemplated by the 76th section of 5 & 6 Will. 4, c. 50, was "ejusdem generis" with a waggon, and that this was not such a cart, and that the magistrates were therefore right. *Danby* v. *Hunter*, 49 L. J., M. C. 15; 5 Q. B. D. 20; 41 L. T. 622; 28 W. R. 228; 44 J. P. 283.

Driving two Carts—Attaching Rein.]—5 & 6 Will. 4, c. 50, s. 77, provides that a person may act as the driver of two carts on a highway, provided that the carts shall not be drawn by more than one horse each, and the horse of the hinder cart shall be attached by a rein in length not exceeding four feet to the back of the foremost cart:—Held, that the provision was substantially complied with when a driver seated in the first cart had a rope attached to the head of the last horse passed over the back and fastened to the body of the first cart about the centre, and the last horse's head drawn close up to the back of the first cart, so that he had full command of both horses. *Robertson* v. *Burkitt*, 7 W. R. 50.

Driver not having Direction of Horses—Carriage "passing" upon a Highway—Carriage not in Motion.]—A carriage is "passing" upon a highway within the meaning of s. 78 of the Highway Act, 1835, where, in the course of a journey from one place to another, it is at a standstill. The driver of such carriage is therefore liable to the penalty imposed by that section if, negligently or wilfully, he is at such a distance from the carriage that he cannot have the direction and government of the horses drawing the same. *Phythian* v. *Baxendale*, 64 L. J., M. C. 174; [1895] 1 Q. B. 768; 15 R. 324; 72 L. T. 465; 43 W. R. 412; 18 Cox, C. C. 119; 59 J. P. 217.

Riding Furiously.]—The Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78, enumerates various acts and omissions by persons on highways having charge of carriages and animals, and also by persons interrupting others; amongst them, if any person, riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously, so as to endanger the life or limb of any passenger, then follow the words: "Every person so offending in any of the cases aforesaid, and being convicted of any such offence," shall "for every such offence forfeit any sum not exceeding 5*l.*, in case such driver shall not be the owner of such waggon, cart, or other carriage; and in case the offender be the owner of such waggon, cart, or other carriage, then any sum not exceeding 10*l.*" W. was convicted by justices of riding furiously on horseback along a highway, and fined a sum less than 5*l.*:—Held, that the penalty under 5*l.* was applicable to all offences mentioned in the section, whether the offenders were drivers of carriages or not; and that the conviction was right. *Williams* v. *Evans*, 1 Ex. D. 277; 35 L. T. 864.

—— **Bicycle is a Carriage.**]—A person, riding a bicycle on a highway at such a pace as to be dangerous to the passers-by, may be convicted of

furiously driving a carriage, under 5 & 6 Will. 4, c. 50, s. 78. *Taylor* v. *Goodwin*, 48 L. J., M. C. 104; 4 Q. B. D. 228; 40 L. T. 458; 27 W. R. 489.

Racing.]—A right of highway does not include a right to race; and a person who had been a party to a hurdle race is jointly liable for putting the hurdles on the ground, although he took no actual part in the race. *Sowerby* v. *Wadsworth*, 3 F. & F. 734.

Right to Remove Driver.]—Where the driver of a waggon committed an offence within 13 Geo. 3, c. 78, s. 60, in the view of a justice, and placed himself before the board on which his master's name was painted, so as to prevent the discovery of the owner, and the justice stopped the horses and laid hands on the driver, and removed him from his position before the board, and thereby informed himself of the ownership:—Held, that this was a trespass, and gave the driver a right of action. *Jones* v. *Owen*, 2 D. & R. 600; 1 L. J. (O.S.) K. B. 139. *See* 5 & 6 Will. 4, c. 50, s. 78.

Destroying Surface of Way—Footpaths.]—By 5 & 6 Will. 4, c. 50, s. 72, a penalty is imposed upon anyone who shall "wilfully destroy or injure the surface of any highway":—Held, that a footway across a field is a highway within the meaning of this section. *Brackenborough* v. *Thorsby*, 19 L. T. 692.

Breaking up without Statutory Authority—Prescription.]—The corporation of P., who had no parliamentary powers for the purpose, supplied water to the adjoining urban district of F., and claimed the right to enter upon and break up the streets of F., whenever occasion should require for the purpose of repairing their water pipes, relying, as regarded some of the streets, on alleged irrevocable licences granted by the predecessors of the local board of F. (i.e. the surveyors of highways), and as regarded other streets on prescription:—Held (1) that the claim of the corporation was to commit a nuisance; (2) that it was not in the power of the surveyors of highways to grant the alleged licences; (3) that, therefore, as a grant could not be presumed, the corporation could not obtain the right claimed by prescription. *Preston Corporation* v. *Fulwood Local Board*, 53 L. T. 718; 34 W. R. 196; 50 J. P. 228.

As to Breaking-up Streets.]—*See further*, WATER (WATER COMPANIES).

Sufficiency of Fence within Highways Act.]—A contractor for the construction of a railway made an excavation within five yards of, and fenced it off from, a highway. A horse attached to a cart containing a load of a ton weight, came in contact with the fence, which gave way, and the horse was killed by the fall into the excavation:—Held, that the fence was sufficient within s. 70 of the General Highways Act, 1835 (5 & 6 Will. 4, c. 50), and that there was no legal duty imposed upon the contractor to construct a fence of such strength as to withstand such a shock as that described. *Blakeley* v. *Baker*, 39 L. T. 359.

Removal of Dust and Cinders—Under Paving Acts.]—Ashes falling from a furnace of a brass-founder, and containing particles of metal, were subjected to a process whereby a portion of the metal was extracted. The residue, having been given to the apprentices as a perquisite, was by them sold to a brass-refiner, for the purpose of extracting a further quantity of metal. The plaintiff, who was employed by the brass-refiner, whilst conveying the ashes from the brass-founder's premises for this purpose, was apprehended by the defendant under 57 Geo. 3, c. xxix., which gives a power of apprehending all persons who, not being employed by or contracting with the commissioners under the act, shall carry away any dust, cinders or ashes within the district:—Held, that the ashes in question were not dust, cinders or ashes within the meaning of the act. *Law* v. *Dodd*, 1 Ex. 845; 17 L. J., M. C. 65.

Offences of Obstruction.]—*See* ante, OBSTRUCTION (cols. 37 et seq.).

f. Proceedings.

When One Conviction a Bar.]—W. was summarily convicted under 5 & 6 Will. 4, c. 50, s. 78, for that he, being driver of a carriage on a highway, by negligence and wilful misconduct, to wit, by striking a horse ridden by H., caused hurt and damage to H.; he was afterwards convicted, on the same facts, under 24 & 25 Vict. c. 100, s. 42, for unlawfully assaulting H.:—Held, that the first conviction was a bar to the second. *Wemyss* v. *Hopkins*, 44 L. J., M. C. 101; L. R. 10 Q. B. 378; 33 L. T. 9; 23 W. R. 691.

Appeal against Conviction.]—In appealing against a conviction under 5 & 6 Will. 4, c. 50, s. 72, on information by the surveyor, it is not necessary that the notice of appeal provided by s. 108 should be personally served upon the convicting justices. *Reg.* v. *Yorkshire (N. R.) JJ.*, 1 New Sess. Cas. 574; 7 Q. B. 154; 14 L. J., M. C. 91; 9 Jur. 425.

Leaving the notice at the dwelling-house is sufficient. *Ib.*

A party appealing against a conviction by two justices upon complaint of the surveyors, for an offence under 5 & 6 Will. 4, c. 50, s. 47, must serve notice of appeal, under s. 105, on both the justices. A notice addressed to both the justices and surveyors, and served on the latter, and on one justice only, is not sufficient. *Reg.* v. *Bedfordshire JJ.*, 3 P. & D. 21; 11 A. & E. 134; 9 L. J., M. C. 8; 4 Jur. 85.

Local Venue.]—The provisions of the Highways Act, 1835, s. 109, as to local venue are abolished by the Rules of Court, 1875, Ord. XXXVI., r. 1. *Phelips* v. *Hudham District Board*, 1 Cab. & E. 67.

—— **Notice of Action.**]—The provision of the above section as to notice of action does not apply where the principal object of the action is an injunction. *Ib.*

4. AUTHORITIES.

a. County Council.

Statutes.]—*The Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *confers powers on county councils with respect to main roads and other highways.*

54 & 55 *Vict. c.* 63, *confers further powers on county councils and other authorities with respect to main roads and other highways and bridges.*

Liability to Repair.]—*See* post, 5, *a.*

b. District Council, formerly Highway Board.

Statute.]—56 & 57 *Vict. c.* 73, *s.* 25, *confers on rural district councils the powers of highway authorities, &c., and enacts that highway boards shall cease to exist.*

Constitution—Time for Proceedings.] — By 54 Geo. 3, c. 91, s. 1, overseers of the poor are to be appointed on the 25th March, or within fourteen days next after. By 5 & 6 Will. 4, c. 50, s. 6, surveyors of highways are to be appointed at the same time. By 25 & 26 Vict. c. 61, s. 10, waywardens shall be elected in every parish forming part of a highway district at the meeting and time and in the manner at and in which surveyors of highways would have been chosen if the act had not passed. By 27 & 28 Vict. c. 101, s. 10, the first meeting of the highway board shall be held at such time as may be appointed by the provisional or final order of the justices, so that the time appointed be not more than seven days after the expiration of the time limited by law for the election of waywardens. A provisional order constituting a highway district ordered that waywardens should be elected for each of the parishes, and the final order made on the 7th April, 1865, confirming it, ordered that the first meeting of the highway board should be held on the first Thursday after the 25th March :—Held, that the quarter sessions were not bound to appoint on a day after the expiration of the time limited by law for the election of waywardens, and therefore the order was valid. *Reg.* v. *Lindsey JJ.*, 6 B. & S. 892 ; 35 L. J., M. C. 90 ; L. R. 1 Q. B. 68 ; 12 Jur. (N.S.) 314 ; 13 L. T. 524 ; 14 W. R. 179.

By 25 & 26 Vict. c. 61, s. 8, and 27 & 28 Vict. c. 101, s. 12, no objection shall be made at any trial or in any legal proceeding to the validity of any order after the expiration of three calendar months from the making of the order :—Held, that an objection to the validity of an order was made within three calendar months, if made on moving for a rule nisi for a certiorari within that time, though the rule was not returnable, and cause not shewn till after the three months. *Ib.*

—— **Appointment of Districts.**]—An ancient borough, having liberties and franchises, with charters containing non-intromittent clauses, was not a borough within the exception in 25 & 26 Vict. c. 61, s. 2. It was wholly surrounded by a county, and maintained its own poor and highways :—Held, that the justices of the county might take the proper proceedings in quarter sessions for making it a part of a highway district, under 25 & 26 Vict. c. 61, s. 5 ; and that they had jurisdiction to hear a complaint by the waywarden against the overseers of the poor of the borough, for not paying over to the treasurer of the highway board the sum ordered by the precept of the board to be levied in the borough. *Giles* v. *Glubb*, 12 Jur. (N.S.) 389 ; 13 L. T. 526.

The following description of the borough, "The several parishes, townships, tithings, hamlets, or places of Liskeard parish, &c., E., &c., shall be united, &c.," in the order constituting the highway district, was not such an imperfect description as to vitiate it. *Ib.*

A provisional order for forming a highway district constituted the township of E. and certain other parishes and places a highway district, and directed that one waywarden should be elected for each of the parishes, townships and places. E. was divided into three hamlets, each of which maintained its own highways. The separate hamlets were not named in the order : —Held, that the provisional order and the final order based on it were bad, as the provisional order did not state whether any or what waywardens were to be elected for the three hamlets. *Reg.* v. *Yorkshire, W. R., JJ.*, 34 L. J., M. C. 227 ; 12 L. T. 580 ; 13 W. R. 966.

Existing after Dissolution of Highway District.]—By the dissolution of a highway district, in respect of which a highway board had been constituted under the Highway Act, 1862, the highway board, though it ceases to have any control over the highways in its district, does not cease to exist as a corporate body for the performance of its other duties, such as those of suing or being sued, and of acting generally for the purpose of winding up its affairs. *Reg.* v. *Essex JJ.*, 11 Q. B. D. 704 ; 49 L. T. 394 ; 32 W. R. 220—C. A. Affirming 52 L. J., M. C. 124 ; 47 J. P. 725.

—— **Right to Notice of Action.**]—The members of a board for the repair of the highways in a parish having resolved that the surveyor should be directed to open the locus in quo to the public, on the suggestion that there was an ancient right of footway over it, the surveyor did in pursuance of such resolution remove a gate obstructing such supposed right of footway ; and an action being brought against the members of the board and the surveyor :—Held, that they were entitled to notice of action, it being admitted that the act was done bonâ fide. *Smith* v. *Hopper*, 9 Q. B. 1005 ; 16 L. J., Q. B. 93 ; 11 Jur. 302.

Election of Members—Waywardens.]—At a vestry meeting for the election of a waywarden, according to 25 & 26 Vict. c. 61, s. 10, A. and B. were duly proposed and seconded as candidates for election. A vote of those present at the meeting was then taken, when A. had a majority of votes, and a poll was demanded on behalf of B. It was then observed that no account had been taken of the plurality of votes, and a second vote was accordingly taken, when B. had a majority. A poll was demanded on behalf of A., and fixed for a later day. On the day appointed for the poll the vestry was closed, in consequence of a notice having been affixed to the vestry door without the authority of B., that he declined to stand as waywarden, and no poll was taken. B. then received a certificate of his having been duly elected waywarden, signed by the chairman of the meeting at which the votes were taken, according to 27 & 28 Vict. c. 101, s. 19, and proceeded to take his seat at the highway board :—Held, that there had been no valid election, since it appeared that the ratepayers had not wilfully abstained from voting, but were misled by the notice. *Reg.* v. *Cooper*, 39 L. J., Q. B. 273 ; L. R. 5 Q. B. 457.

—— **Refusal of Poll—Effect of.**]—A parish claimed to be exempt from being included in a highway district, under 25 & 26 Vict. c. 61, s. 5, by reason of its highways being under the superintendence of a board established under 5 & 6 Will. 4, c. 50, s. 18. The 25 & 26 Vict. c. 61, passed in July, 1862, and the highway board was constituted at a vestry meeting in November,

1862, by a majority of two-thirds of the vestrymen present, the chairman having refused to grant a poll which was demanded at the meeting:—Held, that a poll ought to have been granted, and that, therefore, the highway board, under 5 & 6 Will. 4, c. 50, was not properly created, and so the parish was not exempt from being included in the highway district under 25 & 26 Vict. c. 61, s. 5. *Reg.* v. *How*, 33 L. J., M. C. 53; 9 L. T. 385.

—— **Demand of Poll.**]—At a vestry meeting held to elect waywardens for eleven townships, different candidates were successively and separately nominated, proposed and seconded, and, after show of hands, declared by the chairman to be duly elected waywardens for each township. After waywardens had been thus elected for all the townships, an elector demanded a poll in respect of the sixth and seventh townships in order of election. The chairman ruled that the demand was too late, and refused a poll. On a rule for a mandamus to the defendants to reassemble the meeting, and proceed to an election of waywardens for the two townships:—Held, that the proceedings in respect of each township were a separate election, and that the demand for a poll was too late, as it should, in each case, have been made upon the declaration of the show of hands. *Reg.* v. *Thomas*, or *St. Asaph* (*Vicar*), 52 L. J., Q. B. 671; 11 Q. B. D. 282; 47 J. P. 792.

Jurisdiction—Removal of Obstructions.]—A highway board under 25 & 26 Vict. c. 61, has no authority to determine whether a disputed highway is or is not a highway, or to order the removal of an obstruction from a disputed highway. *Mill* v. *Hawker*, 43 L. J., Ex. 129; L. R. 9 Ex. 309; 30 L. T. 894; 23 W. R. 26. Affirmed, 44 L. J., Ex. 49; L. R. 10 Ex. 92; 33 L. T. 177; 23 W. R. 348—Ex. Ch.

—— **Personal Liability of Members.**]—The 25 & 26 Vict. c. 61, by s. 9, sub-s. 6, protects the members of the board from liability by reason of any "lawful act done by them in execution of any of the powers of the board"; but if the board, acting as a corporation, orders the surveyor to commit a trespass on private property for the purpose of removing an obstruction from a disputed highway, such an order is ultra vires, and the members of the board who concur in giving the order are personally liable, and may be sued for the trespass, though they have acted bonâ fide. *Ib.*

Construction of Dumbwell—"Drain"—Watercourse.]—A dumbwell, or shaft sunk into a porous stratum of chalk or gravel, into which surface water from a highway is conducted by pipes, and from which it percolates away through the subsoil, is not a "drain or watercourse" within the meaning of s. 67 of the Highway Act, 1835, and a highway authority having the powers of that act is consequently not authorised by that act to construct such a dumbwell in private land near to the highway as part of its drainage system, and to clean it out when necessary. *Croft* v. *Richmansworth Highway Board*, 58 L. J., Ch. 14; 39 Ch. D. 272; 60 L. T. 34—C. A.

Liability—Injury caused by Heap of Stones.]—A highway board are liable for damages in respect of an injury caused by a heap of stones projecting into the road, which had been placed there by one of their servants. *Tucker* v. *Axbridge Highway Board*, 53 J. P. 87.

Recovery of Expenses—Bill in Parliament.]—A board of waywardens of a highway who have incurred expenses in opposing a bill in parliament has no power under 27 & 28 Vict. c. 101, s. 32, to charge the parishes in the district or any of them with such expenses, even though the opposition was successful and the result beneficial to the district, the board having no legal authority to incur such expenses. *Reg.* v. *Kingsbridge Highway Board*, *Cornish*, *Ex parte*, 18 L. T. 554; 16 W. R. 1115.

—— **Allowance of Law Expenses.**]—Law expenses incurred in resisting a rule for a certiorari to remove the allowance, by a justice, of the accounts of the preceding waywardens, were expenses which a wayward might insert in his account, and which the justices might allow, if they thought proper. *Rex* v. *Fowler*, 3 N. & M. 826; 1 A. & E. 836.

All expenses bonâ fide incurred by a wayward, in the execution of the duty imposed upon him, might be inserted in his account, and might be allowed or disallowed by the justices in their discretion. *Ib.*

—— **Costs of Indictments.**]—A township was included in a highway district formed under 25 & 26 Vict. c. 61. The highway board indicted B. for an obstruction caused by him in a street in the township. B., having removed the indictment by certiorari, was upon the trial found guilty, and paid the taxed costs. There were extra costs, which the highway board charged on the township:—Held, that the costs of the indictment, including the extra costs, were expenses of repairing and keeping in repair the highway, which the surveyor of the highways would have been justified in incurring under 5 & 6 Will. 4, c. 50, ss. 6, 27, and which, therefore, the highway board, who is placed in the same position as the surveyor by 25 & 26 Vict. c. 61, s. 17, had properly charged on the township; and, per Cockburn, C.J., and Crompton, J., if not, they were expenses in relation to such highways, within 25 & 26 Vict. c. 61. s. 20. *Reg.* v. *Heath*, 6 B. & S. 571; 12 L. T. 492; 13 W. R. 805, sub nom. *Heath* v. *West Eddisbury Highway Board*.

c. Surveyors.

i. *Election and Appointment.*

For two Townships in one Parish.]—A sessions found that the parish of M. consisted of two townships, M. and K. N.; that, from the earliest period within living memory to 1799, surveyors were appointed for these townships, one for each; that from that time, to save expense, there had been one appointment of two surveyors for the parish at large, one of them always being an inhabitant of M., and the other of K. N.; and that each acted as surveyor in his own township; that distinct rates had been made for each township, and applied distinctly to the repairs of each; that the surveyors kept distinct accounts, but that these, as well as the rates (before they were taken to the magistrates), were examined and allowed at a general parish vestry; and that the occupiers of land had been rated, in respect of their occupation, to the repair of the highways of that township in which the houses they resided in were situate:—Held, sufficient evidence that

each township was immemorially bound to repair the roads in it, and consequently, that the appointment of surveyors for each township was proper. *Rex* v. *King's Newton*, 1 B. & Ad. 826; 9 L. J. (O.S.) M. C. 54.

By Parish divided into several Tithings.]—Where a parish was divided into eight tithings, each of which before 5 & 6 Will. 4, c. 50, maintained its own highways separately, and after the passing of that act each of the tithings elected one or more persons as surveyors, who formed a board for the parish, but rated the tithings separately as before the act:—Held, that the parish at large had no power to form a board under s. 18, and that a rate made by them was bad. *Reg.* v. *Bush*, 1 P. & D. 586; 9 A. & E. 820; 8 L. J., M. C. 39.

By Magistrates on Refusal or Neglect of Parish.]—The appointment of a surveyor of highways by justices at a special sessions, upon neglect or refusal on the part of a parish to nominate and elect a surveyor, under 5 & 6 Will. 4, c. 50, s. 11, is invalid, if made at the same sessions at which the neglect or refusal appears. *Reg.* v. *Best*, 5 D. & L. 40; 2 B. C. Rep. 90; 2 New Sess. Cas. 655. *S. C.*, nom. *Surrey JJ.*, 16 L. J., M. C. 102; 11 Jur. 489.

The 5 & 6 Will. 4, c. 50, s. 6, which enacts that the inhabitants of a parish maintaining its own highways shall proceed to an election of surveyors of highways at their first meeting in vestry for the nomination of overseers of the poor in every year, requires the vestry to be one of which due notice has been given, in pursuance of 58 Geo. 3, c. 69, s. 1. *Ib.*

Who may Vote.]—In the election of a surveyor of highways, an inhabitant occupying property liable to be assessed to the highway rate is entitled to vote, though he has never been actually rated to the highway rate. *Reg.* v. *Kershaw*, 6 El. & Bl. 999; 26 L. J., M. C. 19; 2 Jur. (N.S.) 1139; 5 W. R. 53.

Demand of a Poll.]—At a vestry held under 58 Geo. 3, c. 69, for the purpose of electing surveyors of highways, of which public notice had been given, it was agreed that the vote should be taken by a show of hands, leaving it open to any one to propose that the votes should be taken according to the statute. A. and B. were respectively proposed and seconded for the office of surveyor, and on a show of hands, A. had a majority. It was then proposed and seconded, on behalf of B., that the votes should be taken according to the statute. No objection was made; and on the votes being so taken, B. had a majority, and was declared duly elected. A. then demanded a poll of the whole parish:—Held, that the meeting having agreed to a poll being taken according to the statute, no one was entitled afterwards to demand a poll of the whole parish; that the election of B. was valid, and that a mandamus for another meeting to elect would not lie. *Reg.* v. *Hillingdon (Vicar)*, 18 Q. B. 718.

ii. *Powers and Duties.*

a. Personal Liability generally.

Injury to a Bank on the Roadside.]—A surveyor of highways is liable to a reversioner for subtraction of a portion of his bank by the roadside, although the property was the better fo what the surveyor had done. *Alston* v. *Scales*, 9 Bing. 3; 2 M. & Scott, 5; 1 L. J., M. C. 95.

Lowering of Soil—Under Local Police Act.]—Action against the commissioners for executing the Oldham Police Act, for entering the plaintiff's close and lowering the soil. Plea, justifying the acts as done in lowering a street under powers given by that act substantially the same as the 10 & 11 Vict. c. 34 (the Towns Improvement Act), s. 51. On the trial, it appeared that the close was part of a new street; that the commissioners had caused it to be paved and lowered in a manner that would have been justified if it had been an old street, or had been previously brought under their management:—Held, that the powers given to the commissioners were not applicable to such a new street, and that the plaintiff was entitled to recover. *Brown* v. *Clegg*, 16 Q. B. 681.

Removal of a Fence—Under 5 & 6 Will. 4, c. 50.]—To justify a surveyor of highways in taking down a fence, under 5 & 6 Will. 4, c. 50, s. 69, two things must concur: first, the fence must be within fifteen feet of the centre of the road; and, second, it must be on the road. *Evans* v. *Oakley*, 1 Car. & K. 125.

A road was nine feet wide; and there being a piece of uninclosed land at the side of it, also nine feet wide, which land was so rough and uneven that no carriage ever did or could go over it, the owner of the adjoining field took this land into his field, and put a fence round it. The surveyor of highways took down the fence:—Held, that he was not justified in so doing under 5 & 6 Will. 4, c. 50, s. 69, as the fence was not on the road. *Ib.*

Sects. 6 and 63 of 13 Geo. 3, c. 78, did not authorise the surveyor to widen a road to thirty feet by removing a fence, unless the fence supposed to be an encroachment was actually upon the highway. *Lowen* v. *Kaye*, 6 D. & R. 21; 4 B. & C. 3; 3 L. J. (O.S.) K. B. 123.

Pulling down Cottage.]—In an action for pulling down a cottage, it appeared that the plaintiff had been convicted, under 5 & 6 Will. 4, c. 50, s. 69, of building the cottage so as to encroach on the highway, but which was not in fact an encroachment within the meaning of the act; and the defendant justified as surveyor of the highways:—Held, that s. 69 required the surveyor, after a conviction, to remove the encroachment without a warrant; and therefore the conviction, though erroneous, was a defence. *Keane* v. *Reynolds*, 2 El. & Bl. 748; 2 C. L. R. 245; 18 Jur. 242.

Power to lop Trees on Lands adjoining.]—The power given by s. 65 of the Highway Act, 1835, to the surveyor of highways to "lop" trees growing on lands adjoining a highway, does not authorise him to cut off the tops of such trees, but only the lateral branches. *Unwin* v. *Hanson*, 60 L. J., Q. B. 531; [1891] 2 Q. B. 115; 65 L. T. 511; 39 W. R. 587; 55 J. P. 662—C. A.

Removal of Obstruction—Malicious Damage.]—T. was the occupier of a residence which communicated with an adjoining highway by means of a gateway; an inclosed drain and brickwork were put down at the gateway for the purpose of convenient access to his residence and also for the purpose of allowing the free passage of water

running by the side of the highway. The drain and brickwork, with the earth covering the same, formed a nuisance and an obstruction to the highway. The surveyor of highways for the parish within which T.'s residence was situate, took up and removed the drain and the brickwork, and in so doing damaged them. The surveyor having been charged upon an information before justices with committing damage, injury and spoil upon T.'s property, against the provisions of 24 & 25 Vict. c. 97, s. 52, they found that the surveyor had acted bonâ fide, but that he did not do the act complained of under a fair and reasonable supposition that he had a right to do it, and they convicted him of the offence charged:—Held, that the conviction was wrong, and that the information ought to have been dismissed; for he was not a private individual, but the surveyor of highways having a control over, and an interest in, the drains laid for carrying off the water, and that in dealing bonâ fide with the drains he was not guilty of wilful or malicious damage. *Denny* v. *Thwaites*, 46 L. J., M. C. 141; 2 Ex. D. 21; 35 L. T. 628.

Semble, that as he, according to the finding of the justices, acted bonâ fide, they ought, upon the facts stated, also to have found that he acted under a fair and reasonable supposition that he had a right to do what was complained of in the information. *Ib.*

Trespass—Compensation for Injury.]—Under 5 & 6 Will. 4, c. 50, s. 54, a surveyor of highways may enter on adjoining lands, and cut drains therein, without tendering amends for the damage caused thereby; and an action will not lie against him for so doing, the tendering of amends not being a condition precedent or concurrent; and the surveyor is not bound to have the amount of damages and compensation ascertained within twenty-one days after the injury is committed. *Peters* v. *Clarkson*, 1 New Sess. Cas. 519; 8 Scott (N.R.) 384; 7 Man. & G. 548; 13 L. J., M. C. 153; 8 Jur. 648.

The amount of compensation to be paid can be settled only by the justices at a special session for the highways. *Ib.*

—— **In obtaining Materials for Repairs.**]—*See* post, cols. 102 et seq.

—— **Wrongful Distress for Rate.**]—Where a highway rate was made, payment of which was refused by a person, and application thereupon made for a distress warrant to justices, who declined to act until a rule of the court was made absolute, calling upon them to do so:—Held, that although no action would lie against the justices it might well lie against the surveyor who levied the distress. *Freeman* v. *Read*, 4 B. & S. 174; 32 L. J., M. C. 226; 10 Jur. (N.S.) 149.

Replevin by A. against B. for taking the goods of A. Plea, that after the passing of the 5 & 6 Will. 4, c. 50, two justices made their warrant in writing directed to the surveyors of the highway (waywardens) of the parish, and to the constable of that parish, reciting that by a rate A., occupier of lands in the parish, was duly assessed to the repair of the highways of the parish in a sum which had been demanded, but that A. had refused to pay, and that he had been summoned and had not appeared, whereupon the waywardens were commanded to levy the amount by distress and sale of his goods. The plea then stated that B. was constable, and that C. and D. were surveyors (waywardens), and that the warrant being delivered to C. and D. and to B., the latter, in aid of C. and D., seized the goods of A.:—Held, that the plea was neither in form nor in substance a plea under the statute; and that it was not a good plea at common law, inasmuch as it did not allege that the justices had jurisdiction over the subject matter in respect of which the warrant was granted. *Morrell* v. *Martin*, 3 Man. & G. 581; 4 Scott (N.R.) 300; 11 L. J., M. C. 22.

—— **Obedience to Orders.**]—At a meeting of the members of a highway board it was resolved that a path running through land in the occupation of the plaintiff was a highway, and that the plaintiff be directed to remove a lock from a gate placed across it. The surveyor of the board was afterwards ordered by them to remove the lock, and did so. On the trial of an action of trespass brought by the plaintiff against the members of the board in their personal capacity and the surveyor, in which they justified, Kelly, C.B., nonsuited the plaintiff on the ground that neither the members of the board nor the surveyor were liable individually. No evidence was, therefore, given in support of the plea of justification. The court of exchequer having set aside the nonsuit and ordered a new trial on the ground, first, that assuming that the resolution was illegal the members of the board who concurred in it were personally responsible; secondly, that the fact that the surveyor was, by 25 & 26 Vict. c. 61, s. 16, bound to obey the orders of the board, did not excuse him if in obeying their orders he did an unlawful act:—Held, on appeal (the court expressing no opinion as to the liability of the members of the board), that the surveyor was liable, and that the judgment setting aside the nonsuit must therefore be affirmed. *Mill* v. *Hawker*, 44 L. J., Ex. 49; L. R. 10 Ex. 92; 33 L. T. 177; 23 W. R. 348—Ex. Ch. Affirming (as to surveyor) 43 L. J., Ex. 129; L. R. 9 Ex. 309; 30 L. T. 894; 23 W. R. 26.

Non-Repair.]—An action for a personal and pecuniary damage resulting from the non-repair of a county bridge will not lie against the county surveyor, either at common law or under 43 Geo. 3, c. 59. *M'Kinnon* v. *Penson*, 9 Ex. 609; 23 L. J., M. C. 97; 18 Jur. 513; 2 W. R. 262—Ex. Ch.

No action lies against a surveyor for damage resulting from an accident caused by his neglect to repair the highway. *Young* v. *Davis*, 7 H. & N. 760; 31 L. J., Ex. 250; 8 Jur. (N.S.) 286; 6 L. T. 363; 10 W. R. 524. Affirmed, 2 H. & C. 177; 10 Jur. (N.S.) 79; 9 L. T. 145; 11 W. R. 735—Ex. Ch.

Negligence — Third Party contracting to supply Labour—No Interference.]—When a surveyor of highways has been ordered by a vestry to do certain works on a highway, and during the performance of those works an accident occurs in consequence of the road being left in a dangerous condition, the surveyor is guilty of neglect of a statutory duty under 5 & 6 Will. 4, c. 50, s. 56, and will be liable in an action for damage notwithstanding that he has contracted with a third party for supplying the necessary labour, and has not personally interfered with the work. *Taylor* v. *Greenhalgh*, 24 W. R. 311—C. A. Reversing 43 L. J., Q. B. 168; L. R. 9 Q. B. 487; 31 L. T. 184.

A vestry resolved that part of a highway should be raised, and ordered the surveyor of highways to employ men to do it. He contracted with G. to do the work. G. employed and paid his own men, and proceeded with the work. The surveyor employed men to cart materials to the ground, and determined the levels; but beyond exercising a general superintendence on behalf of the vestry did not personally interfere with the work. G. left the road in such a state that the plaintiff in driving along the road by night was overturned and injured. The surveyor did not give any direction that the road should be left in such a state:—Held, that he was liable. *Pendlebury* v. *Greenhalgh*, 45 L. J., Q. B. 3; 1 Q. B. D. 36; 33 L. T. 472; 24 W. R. 98—C. A.

H., the appellant, was surveyor of highways to a local board. S. was his foreman, and R. was a carter, acting under directions of S. A highway was being repaired, and R. laid two loads of stone upon it so as to cause an obstruction, and left them there in unprotected heaps at night. Damage to a horse and cart occurred. H. was summoned under s. 56 of the Highway Act, 1835, and, at petty sessions, convicted in a penalty. S., on cross-examination before the justices, said, "H. had not given instructions to place the stone. . . . I gave instructions. H. knew nothing about it":—Held, upon a case stated (without expressing any definite opinion upon the abstract proposition as to the appellant's responsibility under any circumstances without personal knowledge of the proceedings of his subordinates), that on the findings of fact in the case there was nothing to shew personal knowledge or negligence on the part of the appellant, and the conviction must be quashed. *Hardcastle* v. *Bielby*, 61 L. J., M. C. 101; [1892] 1 Q. B. 709; 66 L. T. 343; 56 J. P. 549.

Hire of Labourers.]—A surveyor of turnpike roads is not personally liable to answer the labourers; but they must look to the commissioners, or their treasurer. *Pechin* v. *Pawley*, 1 W. Bl. 670.

Right to Notice of Action—In what Cases.]—Where surveyors had been appointed, but in an informal manner, and bonâ fide believing themselves to be such surveyors, and to have been duly appointed, cut down a tree which overhung the highway and was a nuisance to it:—Held, that they were entitled to notice of action, as for a thing done in pursuance of the act. *Huggins* v. *Wayday*, 15 M. & W. 357; 16 L. J., Ex. 136.

The members of a board for the repair of the highways in a parish, having resolved that the surveyor should be directed to open the locus in quo to the public on the suggestion that there was an ancient right of footway over it, the surveyor did, in pursuance of such resolution, remove a gate obstructing such supposed right of footway; and an action being brought against the members of the board and the surveyor:—Held, that they were entitled to notice of action, it being admitted that the act was done bonâ fide. *Smith* v. *Hopper*, 9 Q. B. 1005; 16 L. J., Q. B. 93; 11 Jur. 302.

An action was brought against a surveyor for allowing and causing a heap of gravel, which had been placed for the purpose of repair of the highway, to remain upon it, without taking any care or precaution to guard against damage to persons passing along it, contrary to his duty in that behalf:—Held, that the action was brought for a "thing done in pursuance of, or under the authority of," the statute, and therefore that he was entitled to notice of action. *Davis* v. *Curling*, 8 Q. B. 287; 15 L. J., Q. B. 56; 10 Jur. 69.

In pursuance of a resolution at a parish vestry, that it would be advantageous if a weighing machine was erected to check the weight of materials purchased for the highways, the surveyors caused a machine to be placed on the highway:—Held, that although the 5 & 6 Will. 4, c. 50, gave no express power to erect weighing machines, the surveyors were acting in pursuance of the act, so as to entitle them to notice of an action brought for injuries sustained by a person in driving over a heap of earth excavated for the weighing machine. *Hardwick* v. *Moss*, 7 H. & N. 136; 31 L. J., Ex. 205; 7 Jur. (N.S.) 804; 4 L. T. 802.

—— **Action to recover Money paid for Rate.**]—The surveyors of highways of a parish made a rate which was entered in the rate-book as a composition of 1*s.* in the pound, agreed to be taken by the surveyors, &c., in lieu of statute work to be performed and done by several inhabitants and occupiers of land, hereditaments, &c. The rate was not signed by the surveyors, nor allowed by justices of the peace, nor published as required by 5 & 6 Will. 4, c. 50. An inhabitant paid the amount at which he was assessed, and afterwards discovering that the rate was bad, commenced an action to recover the money paid:—Held, that although the rate was bad, the surveyors were entitled to the protection afforded by 5 & 6 Will. 4, c. 50, s. 109, and that the action was not maintainable, inasmuch as the plaintiff had not given to them any notice of action. *Judge* v. *Selmes*, 40 L. J., Q. B. 287; L. R. 6 Q. B. 724; 24 L. T. 905; 19 W. R. 1110.

Period of Limitation.]—A reversioner of land declared against a surveyor for digging his close, separating a portion of it from the residue, and keeping it so separated, and adding such portion to the public road. The separation was by a wall which was begun more than three calendar months before the action. It was at that time very low, but formed a complete division between the parcels of land. After the commencement of the three months the wall was raised and finished:—Held, that, as there was a complete separation before that period, the raising of the wall was not such an act of severance as would take the case out of the limitation in 13 Geo. 3, c. 78, s. 81, which required all actions for things done in pursuance of that statute to be commenced within three calendar months after the fact committed. *Wordsworth* v. *Harley*, 1 B. & Ad. 391; 9 L. J. (O.S.) M. C. 50.

By s. 109 of the Highway Act (5 & 6 Will. 4, c. 50), no action is to be brought against any person for anything done under that act after three months after the fact committed for which such action was brought. The Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 117, constitutes the local board of health surveyor of highways, and by s. 139 of that act every action against any inspector or any person acting under the general board of health, or the officer of health, clerk, surveyor of nuisances, or officer acting under a local board for anything done under the provisions of the act, is to be commenced within six

months after the accrual of the cause of action:—Held, that an action of trespass against a local board of health for an act done as surveyor of highways which was commenced less than six months though more than three months after the alleged trespass, was not too late. *Taylor* v. *Meltham Local Board*, 47 L. J., C. P. 12.

By a local act passed in 1862, the corporation of Salford were constituted surveyors of highways within the borough, having and being subject to all such powers and liabilities as any surveyors of highways had or were subject to by virtue of the law for the time being in force. Sect. 109 of 5 & 6 Will. 4, c. 50 (the Highway Act of 1835), limits the period within which any action may be brought for anything done under the authority of that act to three months after the fact committed for which the action is brought. Sect. 5 of 5 & 6 Vict. c. 97, limits the period within which any action may be brought for anything done under the authority of local acts to two years after the cause of action. By the Public Health Act, 1875, s. 144, urban authorities (including by s. 6 corporations of boroughs) are constituted surveyors of highways within their district, having and being subject to all the powers, duties and liabilities (so far as the same are not inconsistent with the provisions of that act) of surveyors of highways under the law for the time being in force. Sect. 264 limits the period within which actions may be brought for anything done under that act to six months after the cause of action accrued; and by s. 341, all powers given by that act shall be deemed to be in addition to and not in derogation of any other powers conferred by statute, and such other powers may be exercised in the same manner as if that act had not passed. In an action against the corporation for negligence, as surveyors of highways, commenced more than three, but less than six months after the cause of action accrued:—Held, that the defendants were entitled to rely on the limitation of three months provided by 5 & 6 Will. 4, c. 50, and therefore that the action could not be maintained. *Taylor* v. *Meltham Local Board* (supra) distinguished. *Burton* v. *Salford Corporation*, 52 L. J., Q. B. 668; 11 Q. B. D. 286; 49 L. T. 43; 31 W. R. 815; 47 J. P. 614.

An urban authority constituted the surveyor of highways by s. 144 of the Public Health Act, 1865, is not liable to be sued for negligence in the management of highways, unless the action be commenced within three months; the limitation under s. 109 of the Highways Act, 1875, and not that under s. 264 of the Public Health Act, 1875, being applicable. *Taylor* v. *Meltham Local Board* (47 L. J., C. P. 12) and *Kay* v. *Atherton Local Board* (42 J. P. 792) overruled. *Burton* v. *Salford Corporation* (11 Q. B. D. 286) followed. *Graham* v. *Newcastle-upon-Tyne Corporation*, 62 L. J., Q. B. 315; [1893] 1 Q. B. 643; 4 R. 358; 69 L. T. 6; 41 W. R. 424; 57 J. P. 596—C. A.

b. Penalty for Neglect of Duties.

Non-Repair.]—By the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 20, if a surveyor shall neglect his duty in anything required of him by that act, for which no particular penalty is imposed, he shall forfeit for every such offence any sum not exceeding 5*l*. By s. 94, if any highway is out of repair, justices may order a view, and if satisfied thereof upon the view, may convict the surveyor who is liable for the repair in any penalty not exceeding 5*l*., and shall make an order appointing a time for the necessary repair. Justices convicted a surveyor, under s. 20, upon evidence in the ordinary way, of neglecting his duty by neglecting to repair a footpath for which he was liable:—Held, that the justices could convict for non-repair only upon adopting the course provided by s. 94; and that this conviction was therefore bad. *Robinson* v. *Stevenitt*, 38 L. T. 611.

—— **Denial of Obligation, Effect of.**]—Where, on the hearing of a summons against the district surveyor for the non-repair of a highway in South Wales, he denies on behalf of the inhabitants of the parish the obligation to repair, justices may direct an indictment to be preferred against the parish. *Reg.* v. *James*, 3 B. & S. 901; 32 L. J., M. C. 211; 9 Jur. (N.S.) 1126.

Securing Causeways with Posts.]—The 5 & 6 Will. 4, c. 50, s. 24, requiring parish surveyors to secure horse causeways and foot causeways by posts, from being passed over by waggons, applies to the protection of causeways lying side by side with public roads, and being parts of such roads, from the wheels of carriages passing along those roads; therefore surveyors are not bound to secure the ends of those causeways with posts. *Ellis* v. *Woodbridge*, 29 L. J., M. C. 183; 6 Jur. (N.S.) 1017; 2 L. T. 237; 8 W. R. 437.

Neglect of Specific Orders.]—Where magistrates directed a surveyor of highways to remove a nuisance from the highway, and to fence a pit that was dangerous, and on his neglecting to do so, convicted him in a penalty for having "wilfully neglected his duty in not removing, or causing to be removed, nuisances in and upon a highway in the parish, &c., and not duly guarding a dangerous pit lying on the highway":—Held, that the conviction was not warranted by 5 & 6 Will. 4, c. 50, s. 20, or s. 73, and that it could not be supported. *Morgan* v. *Leach*, 10 M. & W. 558; 12 L. J., M. C. 4.

Proceedings—Viewer's Report.]—Where an information is laid under 5 & 6 Will. 4, c. 50, s. 94, that a highway is out of repair, and the magistrates, pursuant to that section, appoint a viewer, who reports it out of repair, the magistrates, at the special sessions, are not bound by that report, but may exercise their discretion, whether they will convict the surveyor or not. *Reg.* v. *Wilts JJ.*, 8 D. P. C. 717.

c. Collection of Rates.

It is the duty of outgoing surveyors of a parish to collect an outstanding highway rate, when, during their term of office, the parish is incorporated into a new highway district under 25 & 26 Vict. c. 61, and a highway board and district surveyor are appointed. *Reg.* v. *Bluffield*, 11 L. T. 337.

The words "and then remaining unpaid," in s. 43, mean remaining unpaid at the end of seven days from the appointment of the district surveyor. *Ib.*

d. Accounts.

Time for—Mandamus.]—Where a surveyor of the highway has improperly allowed the time for

producing and passing his accounts to elapse, the court will compel him to produce them by mandamus. *Rex* v. *Lewis*, 1 D. P. C. 530.

Action against Predecessors.]—A surveyor of highways could not maintain an action against the late surveyor for the balance remaining in his hands, until his accounts had been settled and allowed, or disallowed in the manner pointed out by 13 Geo. 3, c. 78, s. 48. *Heudebourck* v. *Langton*, 10 B. & C. 546; 3 Car. & P. 566; 8 L. J. (O.S.) M. C. 134.

Action against co-Surveyor.]—A. and B. being co-surveyors of the highways of a parish, it was agreed between them that A. should deliver up the rate-book to B., and that B. should pay A. out of the moneys he should collect under the rate, 15*l.* which A. had advanced beyond the amount collected by the previous rate. The book was accordingly delivered to B., who collected more than 15*l.*, but expended the whole in the repair of the roads, and did not pay A. the 15*l.*:—Held, that A. might maintain an action to recover it. *Luckhard* or *Liddard* v. *Holmes*, 2 C. M. & R. 586; 1 Tyr. & G. 9.

Right to recover Account Books.]—Churchwardens and overseers had not such a property in the account-books of a late surveyor of the highways as to enable them to maintain trover for them; and their remedy was under 13 Geo. 3, c. 78, s. 48. *Addison* v. *Round*, 7 Car. & P. 285.

Allowance of Expenses.]—Under 5 & 6 Will. 4, c. 50, s. 111, it is not necessary for a surveyor of highways, at the expiration of his year of office, to obtain the sanction of the inhabitants in vestry to expenses reasonably incurred in defending indictments, or prosecuting appeals, and the allowance thereof by two justices, previously to laying his accounts before justices at a special sessions for the highways. It is sufficient that such expenses have either been agreed to at a vestry or allowed by two justices. *Townsend* v. *Read*, 10 C. B. (N.S.) 317; 30 L. J., M. C. 245; 8 Jur. (N.S.) 39; 5 L. T. 180; 9 W. R. 940.

—— **Power of Justices.**]—Justices, sitting at a special sessions for highways, have no power, under 5 & 6 Will. 4, c. 50, s. 44, to allow charges in the surveyor's accounts which are illegal by reason of the provisions of s. 46. *Barton* v. *Piggott*, 44 L. J., M. C. 5; L. R. 10 Q. B. 86; 31 L. T. 404; 23 W. R. 233.

A surveyor of highways having charged in his accounts certain items for work and materials and team hire, which were illegal under s. 46, the justices in special sessions, on complaint made to them, after examining the surveyor on oath, made an order, under s. 44, allowing the accounts:—Held, that the charges were made illegal by s. 46; and the justices had therefore no discretion under s. 44, and the order allowing the accounts was bad. *Ib.*

—— **Under 13 Geo. 3, c. 78.**]—An allowance of a surveyor's account at special sessions is irregular, as they have not first been carried before a single justice, though the vestry did not desire it, and though no notice was taken of the omission, on the accounts being discussed at the special sessions. *Rex* v. *Goodenough*, 2 Ad. & E. 463.

The special sessions under 13 Geo. 3, c. 78, have no authority to examine a surveyor's accounts, unless those accounts have been first examined by a single magistrate, and by him referred to the sessions for judgment. *Rex* v. *Yorkshire, North Riding, JJ.*, 6 B. & C. 152; 5 L. J. (O.S.) M. C. 63.

—— **Rights of outgoing Surveyor.**]—A.'s year of office as surveyor of highways in a township expired on the 25th of March, 1863, when B. was appointed his successor, pursuant to 5 & 6 Will. 4, c. 50, and at the next special sessions (on the 1st of April), A. verified and passed his accounts, which shewed a balance of 24*l.* 6*s.* 5*d.* in his hands due to the township. At this time there were debts owing by A. as such surveyor. On the 10th of April, a highway board was formed under 25 & 26 Vict. c. 61, for a district, which included the township; and on the 4th of May the board appointed a district surveyor. B. never acted as surveyor at all:—Held, that A. was an outgoing surveyor, and as such liable to account to the board; but that he was entitled to the same allowances for disbursements from the board as he would have been entitled to if he had paid over the balance to his immediate successor in office, B. *Wrexham Highway Board* v. *Hardcastle*, 19 C. B. (N.S.) 177.

Recovery of Disbursements.]—A surveyor of trustees of a turnpike trust having for several years suppressed, in his accounts, liabilities incurred by him on their behalf, which he actually paid, the trustees passed and settled each account successively, except the last:—Held, that he could not recover the sums so paid for any year but the last. *Cave* v. *Mills*, 7 H. & N. 913; 31 L. J., Ex. 265; 8 Jur. (N.S.) 363; 6 L. T. 650; 10 W. R. 471.

Surveyors of highways' accounts for 1856 shewed a balance due to them of 211*l.* 14*s.* 10½*d.*, and their accounts for 1857 shewed a balance due to them of 205*l.* 5*s.* 1¼*d.* For the next three years, ending March, 1860, new surveyors were appointed, and the balance of 205*l.* 5*s.* 1¼*d.* was omitted in the accounts for those three years, and undischarged. The surveyors for the year commencing March, 1860, paid the balance out of moneys received by them, and entered such payment in their accounts:—Held, that they were not justified in doing so, and that the justices were right in disallowing that payment in their accounts. *Taylor* v. *Stansfield*, 6 L. T. 26.

—— **Method of recovering Balance.**]—The defendant, as surveyor of highways, had incurred legal expenses in defending appeals against orders for stopping up highways without the previous sanction of the parish. At a meeting of the vestry, where his accounts were gone into, the items for these expenses were objected to, and opposition was threatened to be made to his accounts before the justices. The defendant ultimately offered to pay 50*l.* in discharge of the attorney's bill for costs, if no opposition were offered to the passing of his accounts before the justices; the vestry accepted the offer, and the plaintiff and other vestrymen signed a minute to this effect. They also entered and signed a minute at the foot of the defendant's account, that the 50*l.* was to be paid to his successor in office, who happened to be the plaintiff. The

accounts were passed without opposition; but the defendant did not pay the 50*l.* The plaintiff consequently sued him for it in a county court:—Held, that there was no evidence of any contract with the plaintiff alone to entitle him to maintain an action alone for the 50*l.*; and that, if the 50*l.* was to be treated as part of the balance of the public money in the hands of the outgoing surveyor, the method of recovering it was not by action, but by summary application under 5 & 6 Will. 4, c. 50, s. 103. *Kilham* v. *Collier*, 21 L. J., Q. B. 65; 15 Jur. 1175.

Penalty for Neglect—Assistant Surveyor.]—An assistant surveyor to a highway board, appointed in pursuance of 5 & 6 Will. 4, c. 50, s. 18, is not liable to a penalty for not making out his accounts and laying them before the justices at the special highway sessions; s. 44 applying only to an ordinary surveyor of highways, where no board and assistant surveyor to the board have been appointed. *Adams* v. *Lakeman*, El. Bl. & El. 615; 27 L. J., M. C. 307; 4 Jur. (N.S.) 854; 6 W. R. 650.

Proceedings—Appeal against Order of Justices.]—Under 5 & 6 Will. 4, c. 50, ss. 44 and 105, no appeal lies, on the part of the surveyor of the highways, against an order of justices, a highway sessions allowing part of his accounts, and disallowing the rest, and ordering him to pay over to his successor the amount disallowed. *Reg.* v. *Leicestershire JJ.*, 8 El. & Bl. 557; 4 Jur. (N.S.) 280; 6 W. R. 62.

An inhabitant of a parish gave notice of appeal to the quarter sessions against the allowance of the surveyor's accounts. At the sessions the court dismissed the appeal for want of jurisdiction, under 5 & 6 Will. 4, c. 50, and ordered the appellant to pay the costs:—Held, that the sessions had, under 12 & 13 Vict. c. 45, s. 5, jurisdiction to order the payment of costs. *Reg.* v. *Paduick*, 8 El. & Bl. 704; 27 L. J., M. C. 113; 4 Jur. (N.S.) 360; 6 W. R. 224.

A complaint made by an inhabitant of a parish against the accounts of the surveyor of highways at the special sessions for highways, is the subject of an appeal to one of the superior courts under 20 & 21 Vict. c. 43, even though the sessions make no order on such complaint otherwise than by allowing the surveyor's accounts. *Townsend* v. *Read*, 10 C. B. (N.S.) 308; 30 L. J., M. C. 223; 4 L. T. 447; 9 W. R. 659.

There is no appeal to the quarter sessions, under 5 & 6 Will. 4, c. 50, s. 44, against the allowance at special sessions of the accounts of a surveyor of highways. *Reg.* v. *Yorkshire (W. R.) JJ.*, 1 G. & D. 198; 1 Q. B. 624; 10 L. J., M. C. 137; 5 Jur. 824.

5. Repair of.

a. Obligation to Repair.

i. *County Authority.*

Maintenance of Main Roads under 41 & 42 Vict. c. 77.]—The Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), by s. 13 enacts that any road which has "between the 31st of December, 1870, and the date of this act ceased to be a turnpike road, and any road which, being at the time of the passing of this act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one-half of the expenses incurred from and after the 29th of September, 1878, by the highway authority in the maintenance of such road shall as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate." The corporation of the borough of Rochdale was the highway authority of the Rochdale highway area. Under ss. 47—50 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), the obligation to repair all public highways within the area of the "town" was imposed upon the corporation, and the turnpike trustees were forbidden to collect any toll or lay out any money on any road within that area. By a local act in 1872 the boundaries of the borough were enlarged and all the provisions of the acts relating to the "town" were made applicable to the enlarged area of the borough. The effect was that further portions of turnpike roads were for the first time brought within the area of the borough and within the operation of the Towns Improvement Clauses Act, 1847:—Held, that these further portions being only parts of turnpike roads, had not ceased to be "turnpike roads" and were not to be deemed to be "main roads," within s. 13 of the Highways and Locomotives (Amendment) Act, 1878; and that the county authority were not liable to pay half the expenses of their maintenance. *Lancaster JJ.* v. *Rochdale Corporation*, 53 L. J., M. C. 5; 8 App. Cas. 494; 49 L. T. 368; 32 W. R. 65; 48 J. P. 20—H. L. (E.)

The Highways and Locomotives (Amendment) Act, 1878, s. 13, provides for the maintenance of roads which have since the 31st of December, 1870, ceased to be turnpike roads. A provision in turnpike acts coming into operation before the 31st of December, 1870, that turnpike trustees shall not spend money or levy toll upon certain portions of turnpike roads does not prevent such portions of the roads from being still turnpike roads on the 31st of December, 1870, within the meaning of s. 13 of the Highways and Locomotives (Amendment) Act, 1878. An agreement under the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 41, made before the 31st of December, 1870, between turnpike trustees and a corporation, under which the turnpikes upon certain portions of turnpike roads were removed, and the repair of such portions was undertaken by the corporation, does not operate to make such portions cease to be part of a turnpike road, and therefore these portions also come under the operation of the Highways and Locomotives (Amendment) Act, 1878, s. 13. *West Riding JJ.* v. *Reg.*, 53 L. J., M. C. 41; 8 App. Cas. 781; 49 L. T. 786; 32 W. R. 253—H. L. (E.)

In 1855 a portion of a turnpike road was included in an improvement district under a local act incorporating the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34). Thereupon, by virtue of ss. 47—51 of the latter act, the maintenance of this portion of the road became vested in the improvement commissioners, and the turnpike trustees ceased to have power to collect tolls or lay out money upon it. In 1877 the turnpike trust expired. The commissioners were the "highway authority" for the district, and the district was a "highway area" within the meaning of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77),

s. 13 :—Held, that notwithstanding the operation of ss. 47—51 of the Towns Improvement Clauses Act, 1847, the road only "ceased to be a turnpike road" and became a "main road" within the meaning of s. 13 of the Highways and Locomotives (Amendment) Act, 1878, upon the expiration of the turnpike trust; and that since that event happened after 1870, the county authority was liable to pay to the commissioners one half of the expenses incurred by them in the maintenance of the portion of the road within their district, as provided by s. 13. *Lancaster JJ.* v. *Newton Improvement Commissioners*, 56 L. J., M. C. 17; 11 App. Cas. 416; 55 L. T. 615; 35 W. R. 185; 51 J. P. 68—H. L. (E.)

—— **Converting macadamised into paved Road.**]—Converting a macadamised road into a paved road does not come within the term "maintenance" of the road as used in s. 13 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77); and therefore a highway authority cannot recover half the expenses thereby incurred from the county authority under that section. *Leek Improvement Commissioners* v. *Staffordshire JJ.*, 57 L. J., M. C. 102; 20 Q. B. D. 794; 36 W. R. 654; 52 J. P. 403—C. A.

—— **Scavenging.**]—By s. 13 of the Highways and Locomotives (Amendment) Act, 1878, disturnpiked roads are to become main roads, and half of the expense of maintenance is to be contributed out of the county rate. Certain main roads passed through the borough of Burnley :—Held that the expense of so much of the scavenging (i.e. watering, removing refuse and scraping) as was necessary for the maintenance of the roads came within the above section. *Burnley Corporation* v. *Lancaster County Council*, 54 J. P 279.

—— **Removing Snow.**]—The main roads within the district of a highway authority became impassable from snow, which the highway authority removed, and they claimed one half the expense of doing so from the county authority under the Highways and Locomotives (Amendment) Act, 1878, s. 13 :—Held, that this was an "expense incurred in the maintenance" of such roads within that section, and that the county authority were liable. *Amesbury Union* v. *Wilts JJ.*, 52 L. J., M. C. 64; 10 Q. B. D. 480; 31 W. R. 521; 47 J. P. 184.

—— **Tramways — Agreement with Local Authority.**]—By a local tramways act it was provided that in case steam power should be used on the tramway, the tramway company should repair the whole extent of that part of a main road over which their lines passed, but that the company might make such contracts and agreements for the repair of the road with the local authority of the borough as might be approved by the board of trade. It was also provided that no contract or agreement to be entered into under the act should operate to lessen the liability of the company under s. 28 of the Tramways Acts, 1870. The road authority of the borough entered into a contract with the company, by which the expenses of maintenance and repair of the road were divided between them. In an action by the borough road authority against the county authority for contribution under s. 13 of the Highways and Locomotives Act, 1878 :—Held, that the county authority were liable to pay out of the county rate one half of the expenses incurred by the borough authority under the contract. *Over Darwen Corporation* v. *Lancashire JJ.*, 58 L. T. 51; 36 W. R. 140.

—— **"County Authority" — Highway in Borough.**]—By the Highways and Locomotives (Amendment) Act, 1878, s. 13, half the cost of maintenance of a road that has ceased to be a turnpike road is to be paid "by the county authority of the county in which such road is situate"; and by s. 38 the word "county" in that act is to have the same meaning as it has in the Highway Act, 1862 (25 & 26 Vict. c. 61), s. 2, which provides that, for the purposes of that act, "all liberties and franchises except boroughs shall be considered as forming part of that county by which they are surrounded." The highway authority of the borough of Over Darwen in Lancashire claimed contribution in respect of the maintenance of part of a road in the borough that had ceased to be a turnpike road from the county authority of the county of Lancaster :—Held, that the word "county" in s. 13 of the act of 1878 is a geographical term; and that the county authority of Lancaster, by which county the road in question is surrounded, is liable to contribute as "the county authority of the county in which such road is situate." *Over Darwen Corporation* v. *Lancashire JJ.*, 54 L. J., M. C. 51; 15 Q. B. D. 20; 51 L. T. 739—C. A.

Under 51 & 52 Vict. c. 41—Footpaths by the side of Main Roads in Urban Districts.]—Upon a case stated for the opinion of the court raising the questions whether under ss. 13 and 15 of the Highways (Amendment) Act, 1878, and s. 11 of the Local Government Act, 1888, the county council were liable for payment of the costs of the repairs, maintenance and improvement of the footways by the sides of main roads in urban as well as in rural districts, and for the lighting of streets and roads which are "main roads" :—Held (the lighting question being abandoned), that by the old highway acts the words "main road" included footpaths, and there was no section in the amending act of 1878 expressing that it did not apply to footpaths within urban districts. Sect. 11 of the Local Government Act, 1888, meant what it purported to say, namely, that every "main road" should be maintained entirely by the county council, and therefore they were, under those acts, liable for the maintenance and repairs of the footpaths. *Warminster Local Board, In re, Wiltshire County Council, In re*, 59 L. J., Q. B. 434; 25 Q. B. D. 450; 62 L. T. 902; 38 W. R. 670; 54 J. P. 375.

Where under s. 11 of the Local Government Act, 1888, an urban authority undertake the maintenance and repair of the main roads within their district, the liability of the county council of the county to contribute to the costs of such maintenance and repair includes the costs of the maintenance and repair of paved footways at the side of disturnpiked roads, which were constituted main roads by s. 13 of the Highways and Locomotives (Amendment) Act, 1878. *Warminster Local Board and Wilts County Council, In re* (59 L. J., Q. B. 434; 25 Q. B. D. 450), approved. *Burslem Corporation and Staffordshire County Council, In re*, 65 L. J., Q. B. 1; [1896] 1 Q. B.

24 ; 73 L. T. 651 ; 44 W. R. 356 ; 59 J. P. 772—C. A.

Sect. 11 of the Local Government Act, 1888, by which every road in a county which is constituted a "main road" under s. 13 of the Highways Act, 1878, is, if repairable by the highway authority, to be wholly maintained and repaired by the county council, imposes upon the county the duty of maintaining and repairing, in an urban sanitary district, the footways at the side of such main roads. *Warminster Local Board and Wilts County Council, In re* (59 L. J., Q. B. 434 ; 25 Q. B. D. 450), approved. *Derby County Council* v. *Matlock Bath Urban District Council*, 65 L. J., Q. B. 419 ; [1896] A. C. 315 ; 74 L. T. 595 ; 60 J. P. 676—H. L. (E.)

—— **Annual Payment by County Council—How determined.**]—In default of agreement, the annual sum payable by a county council to a borough in respect of the maintenance and repair and reasonable improvement connected with the maintenance and repair of the main roads within and under the control of such borough must be determined by arbitration of the local government board, as provided by s. 11, sub-s. 3, of the Local Government Act, 1888. The court has no jurisdiction to determine the principle upon which such annual sum is payable. *Bedford Urban Sanitary Authority, In re*, 64 L. J., Q. B. 26 ; [1894] 2 Q. B. 786 ; 10 R. 485 ; 71 L. T. 433 ; 58 J. P. 786.

—— **Trust Funds for Maintenance—Parts of Roads repairable by different District Councils—"District."**]—Funds were left in trust to be applied for the maintenance, repair, lighting, watching and watering of certain roads which were claimed to be retained as main roads under the provision of s. 11, sub-s. 2, of the Local Government Act, 1888, by certain district councils. The roads in question had been divided up in places into lengths which were locally situate in two adjoining districts, though for purposes of repair certain parts of the roads were divided transversely and not longitudinally, the effect of which was that different district councils repaired parts of the roads not within their districts, and were, on the other hand, relieved of the duty of repairing parts of the roads within their districts. In a dispute between the district councils and the county council as to the control of such roads :—Held, that the district councils were entitled to retain as main roads those portions which they repaired ; that in arriving at the amount to be paid by the county council in respect of these roads, the existence of the trust funds ought to be taken into consideration so far as they were applied for the maintenance and repair of the roads, but not so far as they were applicable to lighting, watching and watering ; and that the word "district" in s. 11, sub-s. 2, of the Local Government Act, 1888, ought, in dealing with these main roads, to be treated as denoting a district of jurisdiction or administration, and not merely as denoting a geographical area. *Middlesex County Council* v. *Willesden and Hendon District Councils*, 60 J. P. 630.

Vesting in County Council—Agreement to repair—Tramways Act.]—An agreement between a county council and a highway board under s. 11 of the Local Government Act of 1888, by which the highway board became bound to repair roads, does not take away from the county council their rights and liabilities as the "road authority." *Stockport Highway Board* v. *Cheshire County Council*, 61 L. J., Q. B. 22 ; 65 L. T. 85 ; 39 W. R. 606 ; 55 J. P. 808.

—— **Adoption of s. 20 of 41 & 42 Vict. c. 77.**]—The maintenance of main roads throughout a county remains a "general county purpose" within s. 11, sub-s. 1, and s. 68 of the Local Government Act, 1888, and chargeable on the exchequer contribution fund appropriated under that act for "general county purposes," although the county council may by resolution adopt the provisions of s. 20 of the Highways Act, 1878, and throw the expense of maintaining main roads on the hundreds. *Reg.* v. *Dolby*, 61 L. J., Q. B. 826 ; [1892] 2 Q. B. 736 ; 67 L. T. 619.

Sea Wall for Protection of Main Road—Repair by Highway Authority—Recovery of Expense from County Council.]—As a highway authority is under no legal obligation to protect a highway adjoining the sea by the erection of a sea wall, the expense of maintaining such a wall cannot be recovered, in the case of such highway being a main road, from the county council. *Kent County Council* v. *Sandgate Urban Council*, 61 J. P. 517—C.A.

ii. *Parish or District.*

Generally.]—The inhabitants of a parish are primâ facie bound to repair a highway of common right. *Rex* v. *Great Broughton*, 5 Burr. 2700.

Unless by prescription they can throw the onus on particular persons by reason of their tenure. *Rex* v. *Sheffield*, 2 Term Rep. 106 ; 1 R. R. 442.

When Repairs undertaken by Mistake.]—The inhabitants of a parish are not bound to repair a way used by the public, and repaired by the parish for more than twenty years, if there is no owner who could dedicate the way to the public, and the repairs by the parish are shewn to have been begun and continued under a mistaken notion of the liability of the inhabitants to repair. *Rex* v. *Edmonton*, 1 M. & Rob. 24.

The inhabitants are bound by such repairs, if made with a full knowledge of the facts, and with the intention of taking upon themselves the public duty. *Ib.*

Road not adopted by Parish.]—A road dedicated to and used by the public becomes a highway which the parish must repair, although neither such dedication nor such user has been adopted or acquiesced in by the parish. *Rex* v. *Leake*, 2 N. & M. 583 ; 5 B. & Ad. 469. See also *Reg.* v. *Dukinfield*, 4 B. & S. 158, ante, col. 20.

Extent of Repairs.]—A parish bound to repair a road, must make it reasonably passable at all times of the year. *Reg.* v. *High Halden*, 1 F. & F. 678.

—— **Highway across a River.**]—Where a public way crosses the bed of a river which washes over it at every high tide, and leaves a deposit of mud, semble, that the parish is not bound to make it good. *Rex* v. *Landulph*, 1 M. & Rob. 393.

Destruction of Road—Effect of.]—An indictment charged that a part of a highway was out

of repair. Part of the road had, at the time when the indictment was preferred, been destroyed by the encroachments of the sea, and the surface of the existing road was in good repair up to where the same had been so destroyed, at which part the road was terminated by a perpendicular cliff, caused by successive encroachments:—Held, that there was no obligation on the parish to provide an available carriage road down to the beach, the encroachments of the sea having destroyed the road, so that the subject of repair was not in existence. *Reg.* v. *Hornsea*, Dears. C. C. 291; 2 C. L. R. 596; 23 L. J., M. C. 59; 18 Jur. 315; 2 W. R. 274; 6 Cox, C. C. 299.

A highway ran along the slope of a hill, beneath which was a valley, the slope being at right angles to the valley, and very precipitous. A landslip of considerable magnitude occurred on the slope, and about 252 yards of the highway was carried off into the valley below, and its place being filled up with stones and other débris, no trace of the old metalled road remained, but the line of it was known and admitted. An engineer, who had inspected the locus in quo, reported that it was practicable to form a permanent and passable road along the whole tract, and of a similar character, at a moderate outlay:—Held, that there was no such total destruction of the road as would relieve the parish from liability to repair. *Reg.* v. *Greenhow*, 45 L. J., M. C. 141; 1 Q. B. D. 703; 35 L. T. 363.

New Road substituted for Old.]—Where a new road was made pursuant to a writ of ad quod damnum, and the parish could be at no further expense with regard to the old one, it was held that the inhabitants ought in future to repair the new; but that where the new road lay in another parish, the person who sued out the writ, and his heir, ought not only to make it, but keep it in repair. *Vennor, Ex parte*, 3 Atk. 766.

Road situate in different Counties.]—If a parish is situate, part in one county and the rest in another, and a highway lying in one part is out of repair, an indictment against the inhabitants of that part only is bad; the indictment must be against the whole parish. *Rex* v. *Clifton*, 5 Term Rep. 498; 2 R. R. 657.

If a parish lies in two distinct counties, an indictment for not repairing the highway may be brought against that part of the parish in which the ruinous road lies. *Rex* v. *Weston*, 4 Burr. 2507. *And see* 5 Burr. 2700.

Liability of One Parish for Another—Prescription.]—Semble, there is no sufficient authority for holding that one parish can be liable by prescription to repair a highway in another parish. But at all events there must be shewn to have been a sufficient consideration, which existed contemporaneously with such liability. *Reg.* v. *Ashby Folville*, 35 L. J., M. C. 154; L. R. 1 Q. B. 213; 12 Jur. (N.S.) 520.

Extra-parochial Places or Hamlets.]—The 25 & 26 Vict. c. 61, s. 2, does not subject places formerly extra-parochial parishes to the common-law liability to indictment for nonrepair of highways. It only subjects them to the operation of that act as highway parishes liable to be put into a highway district. *Reg.* v. *Central Wingland*, 46 L. J., M. C. 282; 2 Q. B. D. 349; 36 L. T. 798; 25 W. R. 876.

Though the inhabitants of a parish are liable, as of common right, to repair all highways therein, yet, where an indictment stated, that a way was an ancient common highway, and that a certain part, situated in an extra-parochial hamlet, was out of repair, and that the inhabitants of such hamlet ought to repair it:—Held, that such indictment was bad, as it did not allege that the inhabitants of the hamlet were immemorially bound to repair, nor that the hamlet did not form part of a larger district, the inhabitants of which were bound to repair; and it is doubtful whether the inhabitants of the hamlet would be liable to repair at common law, even if the indictment had contained the latter allegation. *Rex* v. *Kingsmoor*, 3 D. & R. 398; 2 B. & C. 190; 26 R. R. 307.

A parish contained four townships, each of which had been accustomed from time immemorial to maintain its own highways. There was, from time immemorial, in one of the townships a hamlet, the owners and occupiers in which had never in the memory of man paid highway rates, nor done team work, nor paid any composition in lieu thereof. There were now no public roads in the hamlet which could be repaired by it:—Held, that these circumstances were insufficient by themselves to establish a custom exempting the occupiers in the hamlet from contribution to the repair of highways without its limits. *Reg.* v. *Rollitt*, 44 L. J., M. C. 190; L. R. 10 Q. B. 469; 24 W. R. 26. *S. C.*, nom. *Rollett* v. *Corringham Overseers*, 32 L. T. 769.

Townships and other Districts.]—The primâ facie liability to repair roads attaches to a parish only, and not to any township, or other district, although it is no part of any parish. *Reg.* v. *Midville*, 3 G. & D. 522; 4 Q. B. 240.

—— **Exemption by Statute—New Roads.**]—If the inhabitants of a township bound by prescription to repair are expressly exempted by an act of parliament from repairing new roads to be made within the township, the duty falls on the rest of the parish. *Rex* v. *Sheffield*, 2 Term Rep. 106; 1 R. R. 442.

—— **Of Public Highways.**]—By an act for more effectually cleansing, lighting and watching, &c., the township of Little Bolton, it was enacted, by s. 63, "That the trustees or commissioners of such of the several roads as pass within the township of Little Bolton should be exonerated and discharged from the repairs of such parts of the said roads respectively as lie within the township of Little Bolton, and the same should from thenceforth cease to belong to the said turnpike roads, or to be under the control of the trustees thereof, and should thereafter be repaired and maintained by the trustees for executing that act: Provided, that such portions of the turnpike roads leading from, &c., to, &c., as pass and lie within the said township of Little Bolton, should, until such portion of such last-named turnpike road, by the erection of houses and buildings on each side thereof, be made to form a street communicating with the present public street called Chorley Street, in Little Bolton aforesaid, belong to such last-mentioned turnpike road, and be under the management of the trustees, and should be kept in repair and

maintained by the trustees, in the same manner as they would have been liable to maintain the same in case that act had not been passed." It was further enacted by s. 64, "That every person who should be rated or assessed for the purposes of that act, in respect of any messuage, building, land, tenement or hereditament, within the said township of Little Bolton, should be in respect of the same messuage, &c., exonerated, released and discharged from the payment of all rates and assessments whatsoever, and performance of statute duty, or composition for the same, for or in respect of the repair and amendment of all or any of the public highways in the said township of Little Bolton, or any costs, charges, or burthens in respect thereof." Upon the trial of an indictment against the inhabitants of the township of Little Bolton, for the nonrepair of a highway (authorised to be made under a former act and the recited act), within the township, the jury found specially, that the highway was out of repair; that the township of Little Bolton, until the passing of the act above set out, had been used to repair such of the highways within it as would otherwise be repairable by the inhabitants of the parish at large; and that the portion of the road indicted, at the time of making the presentment, was not, by the erection of houses and buildings on each side thereof, made to form a street communicating with a certain public street called Chorley Street:—Held, that the inhabitants of the township were liable to the repair of this highway, notwithstanding the provisions of s. 64. *Little Bolton* v. *Reg.*, 12 L. J., M. C. 104.

—— **When other Persons specially Liable.**]—By a navigation act the proprietors of the navigation were required to keep a road in repair, and were declared to be liable to indictment if it was out of repair:—Held, that this enactment did not relieve the township from their common-law liability to repair the road. *Reg.* v. *Brightside Bierlow*, 13 Q. B. 933; 4 New Sess. Cas. 47; 19 L. J., M. C. 50; 14 Jur. 174.

Highways created by Statute—Within a Town.]—The 1 & 2 Vict. c. ii., for better paving the town of M., by s. 23 required the commissioners to repair all or any streets which had hitherto been dealt with under the act. The limits of the act were not defined. In pursuance of 25 & 26 Vict. c. 61, s. 7, the county was divided into highway districts, one of which included that part of the parish of M. "not within the town of M." Since 1862, certain highways in the parish of M. had been lighted by the commissioners; before they were so lighted they were not within the town. Upon complaint against the highway district board:—Held, that the highway was within the town if there was a continuous row of houses so as to form a congregation of human habitations, and that the fact of lighting the highways was not conclusive as to their being in the town. *Milton-next-Sittingbourne Commissioners* v. *Faversham Highway Board*, 10 B. & S. 548.

—— **Street not a Highway—Wrong Decision of Commissioners—Lapse of Time.**]—The commissioners appointed in pursuance of the South Wales Turnpike Act, 1844 (by which act, also, the roads of the county of Glamorganshire were vested in the defendant board), directed that a certain road, situated within the borough of S., should be continued as a turnpike road, and in 1845 a toll-gate was erected on it, at which tolls have been collected up to the present time. In the year 1850 a provisional order was made, by which the Public Health Act, 1848, was applied to the borough of S., and a local board of health for the borough was appointed. By the 68th section of that act it is provided that all present and future streets, being highways without any district, shall vest in and be under the management of the local board of health, and that board is directed to repair these roads. By 15 & 16 Vict. c. 42, s. 13, it is declared that the word "highway" in the above section shall mean "any highway repairable by the inhabitants at large":—Held, that though the road in question was in fact a street, it was not a "highway repairable by the inhabitants at large," and therefore had not become vested in the local board of health, but had remained vested in and subject to the powers of the defendant board. *Nutter* v. *Accrington Local Board* (4 Q. B. D. 375) distinguished. The commissioners having done certain acts more than thirty years before, which had ever since been acted on, the court refused to review their decision, though it appeared wrong. *Swansea Improvement Co.* v. *Glamorganshire Roads Board*, 41 L. T. 583.

—— **Non-compliance with Regulations—Effect of.**]—By a local act, passed in 1823, which was to be in force for twenty-one years, and the preamble of which stated that making and maintaining a turnpike road would be of advantage to the public, trustees were appointed, who were enabled to make the turnpike road, and required to erect sufficient fences where it passed through private lands. The act did not expressly declare that the road should be a highway, but it enabled all persons to use it on payment of toll. Part of the turnpike road was formed upon an existing road, which had been made under an inclosure act, but which had never been declared to be completed, as provided by 41 Geo. 3, c. 109, s. 9. The turnpike road was completed and opened to the public in 1833, and had for fourteen or fifteen years since that time been used by the public. A coach had at one time travelled over it. Part of the road passed through a parish, and was out of repair; no repairs had ever been done upon it by the parish. While the turnpike act continued in force, an indictment was preferred and found against the parish for nonrepair:—Held, that at all events, during that time, the road was a common Queen's highway; and that the want of compliance with the provisions of 41 Geo. 3, c. 109, s. 9, did not prevent it from having all the incidents of a common highway, when adopted and used as such by the turnpike trustees. *Reg.* v. *Lordsmere*, 15 Q. B. 689; 4 New Sess. Cas. 205; 19 L. J., M. C. 215; 15 Jur. 82.

—— **Expiration of Local Act.**]—Under a local act, passed in 1827, and which was to be in force for twenty-one years, enabling commissioners to make and maintain a public highway from W. to N., the road was made only from N. to L., where it joined a private road. The local act was repealed in 1844. During the existence of the act, the part so made was treated as a highway repairable by the parish; and after the repeal of the act, the public continued

to use it as before; and although portions of it were not kept in sufficient repair, rates for the repair of it had been made by the parish:—Held, that there was evidence from which the sessions might find, that after the expiration of the local act the road became a highway compulsorily repairable by the parish. *Reg.* v. *Thomas*, 7 El. & Bl. 399; 3 Jur. (N.S.) 713; 5 W. R. 321.

—— **Contribution to Repair out of Highway Rate.**]—An act of parliament authorised trustees to establish a ferry and make certain highways in connection therewith. The trustees were also empowered to take tolls, out of the proceeds of which the ferry and roads were to be maintained. No limit of time was specified by the act for the expiration of the trust. The act also provided that, in case the works thereby authorised should not be executed within the space of ten years all the powers and authorities thereby given should cease and determine, save only as to so much of the work as should have been completed within that time. The trustees established the ferry and made all the roads specified in the act but one. The funds arising from the tolls becoming insufficient for the repair and maintenance of the roads so made, an application was made by the trustees to justices for an order for contribution to the repair of one of the roads so made, out of the highway rate under 4 & 5 Vict. c. 59, s. 1:—Held, that the trust created by the act was a turnpike trust within the meaning of 4 & 5 Vict. c. 59; and, secondly, that, inasmuch as the act merely authorised and did not compel the making of the roads thereby specified, and contemplated that all the works might not be executed, the construction of the whole system of roads authorised to be made was not a condition precedent to the roads that were made becoming highways, and consequently that an order of contribution to the repair of the road in question might be made under 4 & 5 Vict. c. 59, s. 1. *Rex* v. *Cumberworth* (infra) overruled. *Reg.* v. *French*, 48 L. J., M. C. 175; 4 Q. B. D. 507; 41 L. T. 63—C. A. Affirming 26 W. R. 437.

—— **Necessity of completing whole Road.**]—Where, by an act, trustees were authorised to make a road from one point to another, the making of the entire road is a condition precedent to any part becoming a highway repairable by the public; trustees empowered by act to make a road from A. to B. (being in length twelve miles) had completed eleven miles and a half of such road to a point where it intersected a public highway:—Held, that the district in which the part so completely lay was not bound to repair it. *Rex* v. *Cumberworth*, 3 B. & Ad. 108; 1 L. J., M. C. 86.

So, where trustees under a turnpike act are empowered to make a road from A. to B., and a branch from that road to C., the public are not compellable to repair the main road, though complete in its whole extent, till the branch is finished. *Rex* v. *Cumberworth*, 4 A. & E. 731; 1 N. & P. 197; 2 H. & W. 439; 6 L. J., M. C. 21.

Where, by an act, trustees are authorised to make a main line of road from one point to another, and a portion only of the road is completed, the district through which the part completed is situate is not bound to repair it, although made by the trustees, and used by the public and repaired by the district for upwards of thirty years, and although it is of great utility to the public. *Rex* v. *Edge Lane*, 6 N. & M. 81; 4 A. & E. 723; 1 H. & W. 737; 5 L. J., M. C. 91.

A new road had been made by virtue of an act of parliament, and traversed the highway; by the act it was enacted, that the new road should be completed, and that the lands constituting the former road (unless leading over some moor or waste ground, or to some village, town or place to which the new road did not lead) should be vested in trustees and sold:—Held, that the trustees could not make a partial destruction of the road, and that, if the old road led to a single house, the same remained subject to the public right. *Wilkinson* v. *Bagshaw*, Peake, Ad. C. 165.

—— **Private Ways.**]—A power in an act to continue private ways does not alter the liability of parties to repair them. *Anon.*, Lofft, 465.

Alteration of Highway District—Subtraction of Parish.]—The provisions in 25 & 26 Vict. c. 61, s. 39, for altering a highway district by subtracting from it any parish by order of the county authority are not repealed by 41 & 42 Vict. c. 77, s. 3, providing for the formation of highway districts coincident in area with rural sanitary districts, and, by s. 4, for the exercise by the rural sanitary authority of the powers of a highway board within their district, and for the dissolution of the existing highway board. Therefore, although by an order made under 41 & 42 Vict. c. 77, the area of a highway district may have become coincident with the area of a rural sanitary district, and the rural sanitary authority have been duly authorised to exercise the powers of a highway board, they cannot enforce contribution to the expenses of the board from a parish which has been duly subtracted from the district by an order under 25 & 26 Vict. c. 61, s. 39. *Sheppy Union* v. *Elmley Overseers*, 55 L. J., M. C. 176; 17 Q. B. D. 364; 35 W. R. 15; 50 J. P. 343.

Local Road and Drainage Commissioners—Transfer of Local Powers to District Councils.]—Sect. 25 of the Local Government Act, 1894, by which all the powers, duties and liabilities of any highway authority in the district and highway boards are transferred to the rural district councils, is applicable to local highway commissioners, such as the Marshland Smeeth and Fen district commissioners, who had been constituted both highway and drainage commissioners under local inclosure acts dating from 1796; and the expenses raised by an acre rate under the said local acts are not to be deemed "highway expenses in whole or in part defrayed in any parish or other area out of any property or funds other than rates" mentioned in s. 29 (d) of the Local Government Act, 1894, but are to be defrayed in manner directed by the Public Health Act, 1875, as made applicable by the said s. 29. *Marshland Smeeth District Commissioners and Marshland Rural Council, In re*, 65 L. J., Q. B. 185; 73 L. T. 563; 59 J. P. 824.

Sea Wall for Protection of Main Road—Obligation of Highway Authority to Maintain.]—See *Kent County Council* v. *Sandgate Urban Council*, ante, col. 88.

iii. *On Inclosure.*

Owners Adjoining New Road.]—Where the commissioners of a turnpike road directed a public road across open common fields, inclosed

and divided by a private act, to be made, and then allotted the land:—Held, that one, whose lot adjoined to this open road, and who had inclosed it, was not bound to repair it. *Rex* v. *Flecknow*, 1 Burr. 461; 2 Ld. Ken. 261.

Liability of Occupier—Ratione Clausuræ.]—The liability to repair a highway ratione clausuræ is in the occupier of the lands inclosed, not in the owner as owner. *Reg.* v. *Ramsden*, El. Bl. & El. 949; 27 L. J., M. C. 296; 5 Jur. (N.S.) 169.

Such liability, however, does not accrue where either the highway is not immemorial, or where the adjoining land inclosed has not, before the inclosure, been used for passage. *Ib.*

Private Road.]—If the commissioners, under an inclosure act, set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, no indictment can be supported against the latter for not repairing, it not concerning the public. *Rex* v. *Richards*, 8 Term Rep. 634; 5 R. R. 489.

A private road, set out under an inclosure award, may upon proof of sufficient user by the public before the passing of the Highway Act (5 & 6 Will. 4, c. 50), be deemed to be a highway which the parish or township is compellable to repair, though the award provides that such road is for ever thereafter to be kept in repair by the owners or occupiers of the adjoining land. *Reg.* v. *Bradfield*, 43 L. J., M. C. 155; L. R. 9 Q. B. 552; 30 L. T. 700; 22 W. R. 693.

Dedication to Public.]—An award under an inclosure act in 1816, set out certain public roads and private occupation roads. One of the occupation roads was a soft road, it had no gate at either end, and the public used it without any interference. On two occasions the inhabitants had repaired it by subscription:—Held, that there had been sufficient dedication and user to render the parish liable to repair, although they had never adopted the road. *Reg.* v. *Horley*, 8 L. T. 382; 11 W. R. 433.

In 1771 commissioners, under an inclosure act, were empowered to set out public and private roads, the former to be repaired by the township, the latter by such persons as the commissioners should direct. The public roads were to be sixty feet wide between the fences. The commissioners in their award described a road as private and eight yards wide; but in setting it out they left a space of sixty feet between the fences; and they directed both the public and private roads to be repaired by the township. The centre only of the sixty feet was ordinarily used as a carriage road, and the township repaired it. The space said to be encroached upon was at the side of this road; and there was a diversity of evidence as to the use made of this space by the public, and its condition since the time of the award:—Held, that the commissioners had exceeded their authority in awarding that private roads should be repaired by the township; but that on the whole of this evidence it was a proper question for the jury whether or not the road in question, though originally intended to be private, had been dedicated to and adopted by the public. *Rex* v. *Wright*, 3 B. & Ad. 681; 1 L. J., M. C. 74.

Declaration by Justices.]—Under 41 Geo. 3, c. 109, s. 9, a road continued, as well as a road newly made, under the award of commissioners of inclosure, must be declared by justices in special sessions to be fully completed and repaired, before the inhabitants of the district are liable to repair. *Rex* v. *Hatfield*, 4 A. & E. 156.

Transfer of Liability to adjoining Township.]—Where commissioners under an inclosure act for township A. set out an old road belonging to township B. of an increased width, and directed it to be repaired in future by A., without any dispute as to boundary, so as to give them jurisdiction to alter or settle it:—Held, that their award was of no avail to shift the liability to repair the road from B. to A. *Reg.* v. *Nether Hallam*, 3 C. L. R. 94; 6 Cox, C. C. 435.

Alteration of Old Road.]—By an inclosure act, incorporating 41 Geo. 3, c. 109, the commissioners for inclosing certain common lands were authorised to stop up, divert or alter any public ways over the waste, with the concurrence of two justices. They were also empowered to set out new ways, which, when certified by two justices to be complete, were to be repaired by the parish. Before the inclosure acts, a private bridle-way led across a common. There was no definite track where the land lay open. The commissioners ordered the common to be closed, and set out a road thirty feet wide, with the same termini and in the same line as the old bridle-way, and in their award directed that it should be a public bridle-way, and a private carriage road for certain persons, who should keep it in repair. The road was set out accordingly. On the trial of an indictment against the parish for not keeping it in repair, no order or certificate of justices was proved:—Held, that the old public way was never effectually stopped; that the defined road set out was, in effect, the same way; and that the parish was still liable to repair it as a bridle-road, and was not exonerated by the fact that it was now set out as a private carriage road also. *Reg.* v. *Cricklade, St. Sampson*, 14 Q. B. 735; 19 L. J., M. C. 169; 14 Jur. 690.

On trial of an indictment for nonrepair of a public carriage-way, it appeared that inclosure commissioners, by their award made in 1840, set out a public highway which ran in the same track as and included, but straightened and widened, an ancient highway. The indicated road passed through allotable land on both sides of it, except that on one side, in one part, there was an old inclosure. The parish had repaired the road both before and after the award. No steps had been taken by the commissioners for putting the road into complete repair pursuant to 41 Geo. 3, c. 109, s. 9, and there never had been any declaration by justices at their special sessions that the road had been fully and sufficiently formed, completed and repaired:—Held, that the parish was not liable in respect of the nonrepair of the road. *Reg.* v. *East Hagbourne*, 1 Bell, C. C. 135; 28 L. J., M. C. 71; 5 Jur. (N.S.) 346.

Reservation of Mines to Lord of Manor—Effect upon Assignees.]—Commissioners, acting under the powers conferred on them by a local inclosure act for inclosing commons, set out public highways over the land, and directed that they should be maintained by the inhabitants and occupiers of the township in which they were situated, and that it should be lawful for all

persons to use the same. The act reserved to the lord of the manor, his successors and assigns, in the widest terms, all rights belonging to the manor, and all mines, minerals and quarries under the commons, with power to do every act necessary for the draining, winning and working such mines, minerals and quarries, as fully and freely as he or they could have had, held, used or enjoyed the same in case the act had not been made, without paying any damages or making any satisfaction for so doing. The assignees of the lord of the manor worked the mine so as to injure one of the roads set out by the commissioners. In an action against them by the local board, on whom the duty of repairing the road fell, to recover the expense of doing so:—Held, that the reservation to the lord of the manor must be taken to be subject to the public right created by the statute, and did not protect the assignees from liability. *Benfieldside Local Board* v. *Consett Iron Co.*, 47 L. J., Ex. 491; 3 Ex. D. 54; 38 L. T. 530; 26 W. R. 114.

iv. *Persons Liable Ratione Tenuræ.*

Statute.]—*By the Local Government Act*, 1894, *s.* 25, *sub-s.* 2, *where a highway repairable ratione tenuræ appears on the report of a competent surveyor not to be in proper repair, and the person liable to repair the same fails, when requested so to do by the district council, to place it in proper repair, the district council may place the highway in proper repair, and recover from the person liable to repair the highway the necessary expenses of so doing.*

Immemorial Usage.]—An indictment for non-repair of a road on a liability ratione tenuræ cannot be sustained, where the tenement on which the liability is charged originated within time of legal memory. *Rex* v. *Hayman*, M. & M. 401; 31 R. R. 742.

Whether a liability to repair a highway ratione tenuræ must be immemorial, quære. Per Denman, C.J. *Reg.* v. *Beeby*, 8 L. J., M. C. 38.

Covenant by Former Owner.]—On an indictment charging a party with a liability to repair a highway ratione tenuræ, the defendant gave in evidence an ancient deed between certain inhabitants of the parish and the former owner of his land, whereby the former gave to the latter that land, in consideration of his repairing an existing highway; the grantee covenanted to repair it, and it was stipulated that if, through his neglect to repair, the parish were indicted, there should be a right of re-entry, and the agreement should be void:—Held, that this deed did not constitute a liability ratione tenuræ, if any could be created after the time of legal memory. *Ib.*

Evidence of Prescription.]—Indictment for not repairing a highway, alleging the defendant's liability ratione tenuræ. A special verdict found that the defendant's land adjoined the sea; that anciently a highway went over this land, and that his predecessors had repaired it; that within living memory the sea encroached, and that the ancient highway was covered by the sea; that his predecessors had, from time to time, gradually removed the ancient highway as the sea encroached, and appropriated other parts of the estate for the site of a highway, so as to keep a highway along the sea-coast, and that they had always repaired such highway; that the highway mentioned in the indictment passed over a different part of the estate from that formerly occupied by any part of the ancient road; that the sea had, shortly before the finding of the indictment, made an encroachment on and washed away part of the highway alleged to be out of repair, and washed away the earth, so that the residue of the road was too narrow for passage, and was made to stand at the edge of a precipitous bank:—Held, that the defendant was entitled to judgment. *Reg.* v. *Bamber*, D. & M. 367; 5 Q. B. 279; 13 L. J., M. C. 13; 8 Jur. 309.

Upon the trial of an indictment for not repairing a highway, which it is alleged the defendant is bound to repair ratione tenuræ, an award, made under a submission by a former tenant for years of the premises, can neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, being post litem motam. *Rex* v. *Cotton*, 3 Camp. 444; 14 R. R. 780.

Evidence of reputation is inadmissible to shew a liability in the occupiers of land to repair a road ratione tenuræ. *Reg.* v. *Wavertree*, 2 M. & Rob. 353.

A defendant was indicted for non-repair of a highway, which it was alleged he was liable to repair ratione tenuræ. Evidence was given of the conviction of a former owner and occupier of the lands in respect of which the liability was said to arise, for the non-repair of the same highway, shewing that he had pleaded guilty to a presentment against him alleging his liability to repair the highway. Repairs by occupiers of the same lands subsequently to this conviction were also proved; and evidence was given that the defendant purchased these lands after public notice of the liability to repair the highway, and that he was the owner and occupier of the same:—Held, that there was evidence to go to the jury of immemorial usage and liability ratione tenuræ. *Reg.* v. *Blakemore*, 2 Den. C. C. 410; 21 L. J., M. C. 60; 16 Jur. 154.

Owner indicted—Character of Road altered.]—An owner of lands, which were alleged to be chargeable with the repair of an ancient highway, was indicted for non-repair ratione tenuræ. In 1854 a turnpike act was passed, when the trustees took up the paving-stones with which the road was formed to the width of nine feet, and laid down a macadamised road fifteen feet wide, more costly to maintain. They also made certain deviations in its course. Upon the expiration of the act the road fell into decay, and the indictment was preferred:—Held, first, that the ancient character of the road having been destroyed, the liability to repair ratione tenuræ was at an end; secondly, that the occupiers of the lands were the persons liable to be indicted, not the owner. *Reg.* v. *Barker*, 59 L. J., M. C. 105; 25 Q. B. D. 213; 62 L. T. 578; 17 Cox, C. C. 26; 54 J. P. 615—C. C. R.

v. *Owners or Occupiers Generally.*

Liability to Indictment.]—See *Reg.* v. *Barker*, supra.

Public or Owner of Soil.]—Public highways are generally repairable by the public; an owner of land in the suburb of a town who allows the public to pass over his land, but who does not

make a road at his own expense, nor propose to dedicate a highway to the public by notice under 5 & 6 Will. 4, c. 50, nor undertake to keep the road in repair for twelve months with a view of throwing the future care and expense of the highway on the surveyor and the general rate under the same act, is not liable to be compelled to sewer and pave the road as a street under the 69th section of the Public Health Act, 1848. *Healey* v. *Batley Corporation*, 44 L. J., Ch. 642; L. R. 19 Eq. 375.

Lessor of Tithes.]—Quære, whether a person is liable to be rated to the repair of the highways where he lets his tithes from year to year to the several occupiers of the land from which they issue. *Rex* v. *Buckinghamshire JJ.*, 2 D. & R. 689; 1 B. & C. 485.

Adjoining Owner—Expense of Paving Street.]—In 1798, by a local act, trustees were appointed to repair, &c., the streets of a township, and to levy rates on the inhabitants, who on paying them were to be exempt from all other charges for paving, &c., the streets. In 1816 A. laid out a street on his land, which in 1819 became dedicated to the public by user. In 1823, by another local act, the former act was repealed, and trustees were appointed for similar purposes, as it was provided that all persons should be exonerated from statute duty and compositions and all liability for highway repairs, that surveyors should be appointed who were to be in the position of surveyors of highways, all costs to be paid by the trustees out of rates to be levied by them, and the trustees authorised to pave, &c., present and future streets, and when any new streets already or thereafter laid out and made were properly paved, &c., an application by the owners of adjoining houses to declare them public, whereupon they were to be public and repaired by the trustees, and where any streets then or thereafter set out on private property had been opened and used for three years, to cause them to be paved, &c., whereupon they should be deemed public. In 1851 the Public Health Act, 1848, was applied to the township, and the local acts repealed as far as the liability of the surveyors, the powers of the trustees to pave, and liability of owners to reimburse them; and the local board having duly paved the street before mentioned, called on A. to contribute as an adjoining owner, under s. 69 of the last-mentioned act, which excepts highways defined by 15 & 16 Vict. c. 42, s. 13, to be highways repairable by the inhabitants at large. Rates had been paid in respect of the premises under the local acts, but the street had never been paved, &c., never been dedicated under 5 & 6 Will. 4, c. 50, and no steps taken by the trustees or the local board to make it public:—Held, that the first local act did not prevent a dedication to the public, that the second only applied to streets then in course of construction or afterwards constructed, and that therefore the street was a highway within the exception in s. 69 of the Public Health Act, 1848, and A. not liable. *Hirst* v. *Halifax Local Board*, 40 L. J., M. C. 43; L. R. 6 Q. B. 181; 19 W. R. 279.

To Keep up Fences.]—Semble, that there is no general law imposing the obligation on the owner or occupier of lands abutting on a public road to keep up the fences. *Potter* v. *Parry*, 7 W. R. 182.

On Removal of Encroachments.]—If there has been an encroachment on a highway, and a person removes it, and repairs that part of the highway which was injured by the encroachment once, and then leaves it to the trustees or parish to repair in future, he will not be liable in future. *Rex* v. *Skinner*, 5 Esp. 219.

But if the proprietor of the adjoining land has for any length of time repaired, it is evidence of his liability, unless he gives positive evidence of encroachment. *Ib.*

Under Special Agreement.]—A highway board agreed with a gas company that if the highway board would give the gas company a licence to open a highway in their jurisdiction, the gas company should make good the surface of the road, and would pay to the highway board 1*s.* per yard of the highways so broken up:—Held, that the contract was valid; for that the agreement of the highway board to allow the gas company to interfere with the surface of the road was a good consideration, and the contract was not illegal and did not necessarily contemplate the creation of a nuisance by the gas company. *Edgware Highway Board* v. *Harrow District Gas Co.*, 44 L. J., Q. B. 1; L. R. 10 Q. B. 92; 31 L. T. 402; 23 W. R. 90.

Under Particular Statutes — Transfer of Liability.]—Where the burden of repairing a highway is transferred, by a public act of parliament, from the parish to other persons, if the parish is indicted for not repairing this highway, there is no occasion for a special plea stating who are bound to repair it, but the exemption may be taken advantage of under the general issue of not guilty. *Rex* v. *St. George, Hanover Square*, 3 Camp. 222; 13 R. R. 792.

—— **When Township still Liable.**]—By a navigation act, the proprietors of the navigation were required to keep a road in repair, and were declared to be liable to indictment if it was out of repair:—Held, that this enactment did not relieve the township from their common-law liability to repair the road. *Reg.* v. *Brightside Bierlow*, 13 Q. B. 933; 4 New Sess. Cas. 47; 19 L. J., M. C. 50; 14 Jur. 174.

—— **Proceedings to Enforce—Validity.**]—A navigation company, holding lands partly occupied as a wharf, were directed by statute to uphold and repair a road between certain points of the navigation; it was enacted, that they should be liable to indictment for any default in so doing; and they were empowered to take tolls for goods carried along the line of navigation (over and above lock dues which were payable to them), and were required to apply such tolls to the making and repairing of the road. By a subsequent act, a canal company (whose works would interfere with the revenue of the navigation company) was required to purchase the navigation, and the navigation company's lands, and all rights thereto belonging (including the right to the tolls to be applied towards the repair of the road), and it was enacted, that the canal company should for ever after repair the road, and should be liable to indictment for non-repair, and should indemnify the navigation company from the maintenance of the road, and from indictment for non-repair; the conveyance of the premises to be subject to such condition, with power of re-entry by the navigation

company in default of compliance. The canal company purchased the lands and navigation, and took a conveyance according to the statute:—Held, first, that a count, stating these facts, and that the canal company, by reason of the premises, and by force of the statute, became liable to repair (averring non-repair), was sufficient to charge the company. *Reg.* v. *Sheffield Canal Co.*, 13 Q. B. 913; 4 New Sess. Cas. 25; 19 L. J., M. C. 44; 14 Jur. 170.

Held, secondly, that the company was properly charged by such count with breach of an obligation to repair, and that it was not requisite to charge them specifically with disobedience. *Ib.*

Held, thirdly, that a count, stating the road to have been made under the first-mentioned act, and alleging that the company, under and by virtue of the last-mentioned act, ought to have repaired, was not too general, both statutes being public. *Ib.*

But that a count merely stating the existence and non-repair of the road, and that the company, by reason of the then tenure of certain lands and tenements in the parishes, ought to have repaired, was not maintainable. *Ib.*

Held, fourthly, that the company was rightly charged with liability to repair generally, and not merely to the extent of the tolls, though in fact the tolls received were inadequate to the cost of repair; and this whether the company had or had not other adequate sources of revenue. *Ib.*

In the Case of Railway Companies.]—See RAILWAY.

vi. *Jurisdiction to Determine.*

Order of Justices — Conclusiveness of.] — Justices have jurisdiction under 25 & 26 Vict. c. 61, s. 18, to order a highway board to repair a highway if the waywarden of the parish denies the fact that such road is a highway; and although the denial, if not made bonâ fide, will not oust their jurisdiction if they are satisfied that the road is really a highway, yet their decision that the denial is not made bonâ fide is not conclusive, and may be reviewed by the court. *Reg.* v. *Odell*, 21 L. T. 556.

An order of magistrates under 34 Geo. 3, c. 64, for dividing a road lying partly in one parish and partly in another by a transverse line, for the purpose of repair, such order pursuing the form given by that statute, is conclusive as to the liability of each parish to repair the portions of road allotted to them; and it is not open to either parish, on an indictment for the non-repair of the portion so allotted, to impeach the jurisdiction of the magistrates by producing evidence to prove that no part of the road ever was within such parish. *Reg.* v. *Hickling*, 7 Q. B. 880; 2 New Sess. Cas. 117; 14 L. J., M. C. 177; 9 Jur. 1075.

Where there was no evidence that the boundary of two hamlets passed through the middle of two public roads, the road cannot be divided by a transverse line by order of justices, under 5 & 6 Will. 4, c. 50, s. 58. *Reg.* v. *Perkins*, 14 Q. B. 229; 19 L. J., M. C. 105; 14 Jur. 362.

The proviso of s. 58 does not apply to cases in which there is a divided common-law liability to repair, but to cases of a liability ratione tenuræ or clausuræ. *Ib.*

—— **Appeals against Orders.**]—A complaint having been made to justices that certain roads alleged to be highways under the jurisdiction of a highway board were out of repair, a summons was issued against such board. Upon the hearing, a land surveyor was appointed to view and report on the state of the roads in question. The report was duly made, and the justices, upon the evidence and admissions before them, ordered the highway board to do the repairs. The highway board neglected to obey this order; and the justices appointed such land surveyor to put the highway in repair, and ordered the board to pay the expenses. At several hearings before the justices, the highway board never denied that they were liable to repair the roads in question. The board appealed to quarter sessions against the order upon them for the expenses of repairing the roads. The following were the grounds of appeal:—"1. That the said justices had no jurisdiction to make the said order. 2. That the said order is contrary to law. 3. That the said order is contrary to the evidence. 4. That the justices wrongfully admitted evidence of witnesses other than the persons appointed by them under s. 18 of 25 & 26 Vict. c. 61. 5. That at the time of the making of the said order the said highways had been put into a state of complete and effectual repair. 6. That the sum mentioned in the said order to be spent in putting the said roads into repair is excessive. 7. That the said highway board was and is not liable to repair the said highways, and that the liability to repair the said highways was at all the hearings before the said justices recited in the said order, and also at the time of the hearing when the said order was made, and at the time of the making thereof, disputed." Upon the appeal it was contended on behalf of the board that the roads in question were not highways, and the order was quashed on that ground:—Held, that the highway board were entitled to appeal to quarter sessions against the order, but were not entitled on the appeal to raise the question whether the roads were highways—(1) because they were stopped by their admissions before the justices; (2) because their grounds of appeal gave no notice that the point would be taken; and (3) because the question was not open to them when the order appealed against was made. *Illingworth* v. *Bulmer East Highway Board*, 52 L. J., Q. B. 680; 48 J. P. 37.

Held, also, that the quarter sessions, by deciding the question, did not thereby necessarily decide that it was open to the highway board to raise it. *Ib.*

b. Obtaining of Materials.

Right of Inhabitants to Take.]—The right for the inhabitants of a township to take stones from the land of another person for the purpose of repairing the highways, is profit à prendre, and cannot therefore be claimed by custom; neither can it be claimed by prescription, as inhabitants are incapable by that description of taking such an easement, unless under a grant which would incorporate them. *Constable* v. *Nicholson*, 14 C. B. (N.S.) 230; 32 L. J., C. P. 240; 11 W. R. 698.

Trespass by Surveyor.]—A surveyor cannot justify a trespass under a prescriptive right, or a custom, to take stones from the waste, whether adjoining the sea-shore between high and low water mark, or otherwise, for the purpose of

repairing the highways of a parish. *Padwick* v. *Knight*, 7 Ex. 854 ; 22 L. J., Ex. 198.

Licence from Magistrates.]—A licence may be granted to get materials for the repair of the highways under 5 & 6 Will. 4, c. 50, s. 54, although the materials when got must be carried away by an "avenue to a house," the exception of such an avenue (inter alia) in the section referring only to the digging or getting of the materials, not to the carrying of them away when got. *Ramsden* v. *Yeates*, 50 L. J., M. C. 135 ; 6 Q. B. D. 583 ; 44 L. T. 612 ; 29 W. R. 628 ; 45 J. P. 538.

The licence granted by justices to the surveyor to get materials from inclosed lands for the repair of the highways, in accordance with s. 54 of 5 & 6 Will. 4, c. 50, is limited to the necessities of that particular occasion in respect of which the application for the licence is made. *Manvers (Earl)* v. *Bartholomew*, 48 L. J., M. C. 3 ; 4 Q. B. D. 5 ; 39 L. T. 327 ; 27 W. R. 167.

Justices in special sessions, under 5 & 6 Will. 4, c. 50, s. 54, granted in 1866 to the surveyor of highways a licence to take materials for the repairs of the highways from lands in the parish of which plaintiffs were the owner and occupier respectively. Materials had been got under that licence down to 1877, when the plaintiffs gave notice to the present surveyor not to get any more. The defendant continued to do so nevertheless, and the plaintiffs brought an action of trespass against him :—Held, that the defendant had no right to enter upon the land, inasmuch as the licence granted by the justices only extended to the necessities of the particular occasion in respect of which it was granted *Ib.*

—— **Place should be Specified.**]—A highway surveyor applied under 5 & 6 Will. 4, c. 50, s. 54, for an order to take materials for highway repairs out of a wood of H. The wood consisted of thirteen acres, and was part of a larger wood of a hundred acres :—Held, that the order was bad for not specifying the part of the wood where the materials were to be taken. *Hooper* v. *Hawkins*, 51 J. P. 246.

—— **Right to Compensation.**] — Under the Highway Act (5 & 6 Will. 4, c. 50), s. 51, justices are entitled to grant the surveyor of highways a licence to gather stones upon inclosed land within the parish for the repair of its highways, without making any compensation to the owner for the value of such stones. *Alresford Rural Sanitary Authority* v. *Scott*, 50 L. J., M. C. 103 ; 7 Q. B. D. 210 ; 45 L. T. 73 ; 29 W. R. 741 ; 45 J. P. 619.

Sufficiency of Amends.]— Surveyors having broken a new way over the plaintiff's land, in order to carry such materials for repair, in a case where an old, but circuitous road existed before, and having, after the damage done, and after an action brought against them, paid money into court by way of amends :—Held, under 13 Geo. 3, c. 78, s. 27, that the sufficiency of such amends could not be questioned at nisi prius, the statute having referred the quantum of amends, if not agreed upon, to the decision of justices of the peace. *Boyfield* v. *Porter*, 13 East, 200 ; 12 R. R. 324.

The amount of satisfaction can only be ascertained by the justices at a special session. *Peters* v. *Clarkson*, 7 Man. & G. 548 ; 8 Scott (N.R.) 384 ; 1 New Sess. Cas. 519 ; 13 L. J., M. C. 153 ; 8 Jur. 648.

—— **Contract for Materials.**] — A highway board contracted with the plaintiff for the supply of materials to repair, during 1866, the roads in one of the parishes in their district. On 24th of March, 1866, the parishioners passed a resolution adopting the Local Government Act, 1858. The board continued to repair the roads up to the 26th July with materials supplied by the plaintiff, who brought an action to recover their value :—Held, that he was, under 25 & 26 Vict. c. 61, s. 41, entitled to recover. *Driver* v. *Kingston Highway Board*, 24 L. T. 480 ; 20 W. R. 20.

Purchase of Materials by Surveyor — Non-liability of Successor.]—A surveyor of highways who, in accordance with the provisions of the Highway Act, 1835, contracts for the purchase of materials to be used in the repair of the parish roads, and raises the necessary sum by the levy of the highway rate, is personally and solely liable for payment ; and his successor in office is not liable therefor, although such materials were in fact used in repairing the roads. *Frodingham Iron and Steel Co.* v. *Bowser*, 64 L. J., Q. B. 12 ; [1894] 2 Q. B. 791 ; 10 R. 498 ; 71 L. T. 433 ; 59 J. P. 54.

Removal of Shingle.]—A highway board is not entitled under 5 & 6 Will. 4, c. 50, ss. 51, 52, to remove shingle for the repair of the highways from below high-water mark, so as to cause increased danger of encroachment by the sea. *Pitts* v. *Kingsbridge Highway Board*, 25 L. T. 195 ; 19 W. R. 884.

A special custom to take shingle from the beach above high-water mark for the repairing of the highways of the parish, is bad as to such portion of the beach as is private property, being a custom of a profit à prendre in another man's land. *Ib.*

—— **Injunction.**]—The plaintiff, by virtue of a grant from the crown, made 36 Hen. 8, claimed, as lord of the manor of C., to be entitled to the beach or shore of the sea between high and low water mark. The defendants, the surveyors of highways, took the stones to mend the highway of the parish. Upon a bill filed by the plaintiff against them, the defendants put in their answer, denying the right claimed by the plaintiff, and insisting upon their right to take the stones by custom, and also by prescription, and also under the Highways Act, 5 & 6 Will. 4, c. 50 ; and upon a motion to dissolve the injunction obtained by the plaintiff :—Held, that the rights claimed by the plaintiff were legal, and must be decided by an action ; that the court must consider which of the two parties were likely to sustain most injury ; that, notwithstanding the want of distinct evidence respecting injury, the court, to prevent a possible mischief, would grant an injunction, and give the plaintiff leave to bring an action, but it refused to say that he must do so. *Clowes* v. *Beck*, 20 L. J., Ch. 505.

Working of Gravel Pits.]—By a private act passed in 1764 for the purpose of extinguishing the right of common over the commonable lands in a manor and parish, of which lands S. was then in possession as lessee of the lord of the

manor, it was enacted that the surveyors of highways of the parish might at all times thereafter cut, dig and carry away any quantity of gravel for the repair of roads within the parish from any pit or pits then in the possession of S., without payment, and the surveyors were thereby required to fence in the pits, and to repair the fences as occasion should require. These lands included a field of nine acres, in which one of the pits was situated. The field having become vested in the plaintiff, he sought to restrain the surveyors from extending the pit laterally so as to destroy the surface:—Held, that the right conferred by the act was to work the gravel in the ordinary manner of working a gravel pit, and that consequently the surveyors were entitled to extend the area of the pits, although the surface was thereby destroyed. *Ellis* v. *Bromley Local Board*, 45 L. J., Ch. 763; 35 L. T. 182; 24 W. R. 716—C. A.

Where gravel pits had been opened on rectory land, and gravel taken therefrom by the surveyors of the highways, for the purpose of their repair, without sloping down the ground as required by 13 Geo. 3, c. 78, s. 31:—Held, that neither the taking such gravel, and omitting to slope down, nor neglecting to compel the surveyors to slope down, could be considered waste on the part of the rector. *Huntley* v. *Russell*, 13 Q. B. 572; 18 L. J., Q. B. 239; 13 Jur. 837.

—— **Extinguishment of Surveyor's Title.**]—A gravel pit and a road to it were allotted to surveyors of highways under a local act. The surveyors continued to take gravel from the pit till 1837, but from that year till 1863 they took no steps whatever to assert their rights over either the road or the pit. In 1837, the tenant of the plaintiff's predecessor in title filled up part of the pit with rubbish, and from that year till 1863 took the surface of it into regular cultivation. In 1839, another such tenant ploughed up the remaining portion of the pit, and from that time till 1863 this portion of the pit and the whole of the road were taken into cultivation by the plaintiff's tenants. In 1844, one of the plaintiff's tenants, who was in the occupation of the greater portion of the surface of the pit, was elected surveyor of highways, and held the office for one year:—Held, first, that the plaintiff had by his tenants been in actual possession of the gravel pit and road from 1837 to 1863, so that the title of the surveyors to the soil and their right to dig gravel had become extinguished by twenty years' adverse possession. *Smith* v. *Stocks*, 10 B. & S. 701; 38 L. J., Q. B. 306; 20 L. T. 740; 17 W. R. 1135.

Held, secondly, that the fact that the tenant occupying a portion of the pit had been elected surveyor after possession had been taken made no difference, as the character of the previous possession was not altered during the tenant's year of office. *Ib.*

—— **Transfer of Right to County Council—Main Road.**]—A highway was duly declared a main road. Before that time the highway surveyor was entitled to take gravel from a pit for repairs. The county council, under s. 11 of the Local Government Act, 1888, claimed the same right:—Held, that the right to do so passed to the council with the duty to repair the highway. *Norfolk County Council* v. *Bittering Highway Surveyor*, 58 J. P. 497.

Sale of Exhausted Gravel Pits—Pre-emption of Adjoining Owners.]—Where, under the Highway Act (5 & 6 Will. 4, c. 50), s. 48, an exhausted gravel pit is offered for sale to the owner of adjoining lands to whom the statute gives the right of pre-emption, it is the duty of the justices at the special sessions, in fixing the price to be paid by him, to consider his interests as well as those of the parish. They are, therefore, while in the interests of the parish fixing a minimum below which the land shall not be sold, yet in his interests to fix a price fair for him to pay, and not to take as a standard of value a price which might be obtained on a sale by auction, or to some person who for some private or personal reasons would give an extraordinary price. *Reg.* v. *Drayton-in-Hales Highway Board*, 45 L. J., M. C. 126; 1 Q. B. D. 608; 35 L. T. 251; 24 W. R. 756.

—— **Appeal to Sessions—When it Lies.**]—An appeal to the quarter sessions, under s. 105, lies against the consent or determination of justices under s. 48. *Ib.*

c. Fines for Nonrepair.

Application of.]—The fine, which the court, under 5 & 6 Will. 4, c. 50, s. 96, may order to be imposed on defendants convicted on an indictment for the non-repair of a highway, to be applied pursuant to the directions of the statute, can only be applied towards the repair and amendment of such highway; and if, after conviction and order, and before payment of the fine, the defendants effectually repair the road, they are entitled to a stay of further proceedings on the order; and the prosecutors cannot claim the fine on behalf of third parties for repairs done previously to the conviction. *Reg.* v. *Barnard Castle*, 1 Q. B. 246; 10 L. J., M. C. 53; 5 Jur. 799.

—— **Apportionment.**]—If a parish, consisting of two districts which are bound to repair separately, is convicted for not repairing the road in one of the districts, the other district having no notice of the indictment, the court will consider it as being substantially the conviction of the one district; and, if the fine is levied on all the inhabitants of the other, will grant a special mandamus for the rate to be levied on the district bound to repair the indicted part of the road. *Rex* v. *Townshend*, 2 Dougl. 421.

To whom Payable.]—Fines for not repairing roads ratione tenuræ were formerly payable to the surveyor of the parish highways. *Rex* v. *Wingfield*, 1 W. Bl. 602.

Verdict of Guilty—Mode of Repair.]—A verdict of guilty had been found against a parish upon an indictment for nonrepair of a highway, and the parish afterwards neglected to repair with hard materials. An application was then made for the imposition of a fine for such neglect, when it appeared that the road never had been repaired with hard materials, probably not at all; that it was continued into an adjoining parish, which denied that it was a highway; and further, that it was so little used that the repair required would be a useless expense:—Held, that these facts were no answer to the application, and did not excuse the parish from the consequences of the verdict. *Reg.* v. *Claxby*, 3

C. L. R. 986 ; 24 L. J., Q. B. 223 ; 1 Jur. (N.S.) 710 ; 3 W. R. 451.

The court will not prescribe the particular mode of repair, but when it appears a certain amount is necessary to put the highway in a substantial state of repair, a fine of that amount will be imposed. *Ib.*

Winter Months.]—The court will not make a rule for a fine for nonrepair of a road absolute in the winter months ; but will enlarge the rule till Easter term. *Reg.* v. *Walton*, 4 Jur. 195.

Wrongful Levy—Application to Reimburse.]—An application under 13 Geo. 3, c. 78, s. 47, for a rate to reimburse two inhabitants of a parish on whom a fine for the nonrepair of a highway had been levied, after a conviction upon an indictment against the parish for nonrepair, ought to have been made within a reasonable time after such levy, before any material change of inhabitants. *Rex* v. *Lancashire JJ.*, 12 East, 366.

In the Case of Surveyor.]—*See ante*, cols. 79, 80.

d. Liability for Damages.

Parish.]—No action for the nonrepair of a highway lies against a vestry appointed under the Metropolitan Local Management Act, 1855. *Parsons* v. *St. Matthew's, Bethnal Green, Vestry*, 37 L. J., C. P. 62 ; L. R. 3 C. P. 56 ; 17 L. T. 211 ; 16 W. R. 81.

Surveyors.]—An action for a personal and pecuniary damage resulting from the nonrepair of a county bridge will not lie against the county surveyor either at common law or under 43 Geo. 3, c. 59. *McKinnon* v. *Penson*, 9 Ex. 609 ; 23 L. J., M. C. 97 ; 18 Jur. 513 ; 2 W. R. 262—Ex. Ch.

No action lies against a surveyor for damage resulting from an accident caused by his neglect to repair the highway. *Young* v. *Davis*, 7 H. & N. 760 ; 31 L. J., Ex. 250 ; 8 Jur. (N.S.) 286 ; 6 L. T. 363 ; 10 W. R. 524. Affirmed on appeal, 2 H. & C. 177 ; 10 Jur. (N.S.) 79 ; 9 L. T. 145 ; 11 W. R. 735—Ex. Ch.

Improvement Commissioners.]—The commissioners under 10 & 11 Vict. c. 34, Towns Improvement Clauses Act, 1847, are liable to an action, in their corporate capacity, at the suit of a person who has suffered damage from a highway, within the limits of their special act, being allowed by them to remain in a dangerous condition. *Hartnall* v. *Ryde Commissioners*, 4 B. & S. 361 ; 33 L. J., Q. B. 39 ; 10 Jur. (N.S.) 257 ; 8 L. T. 754 ; 11 W. R. 963.

Local Boards.]—An action for personal injuries sustained by one of the public owing to the nonrepair of a highway, does not lie against a local board of health. *Gibson* v. *Preston Corporation*, 10 B. & S. 942 ; 39 L. J., Q. B. 131 ; L. R. 5 Q. B. 218 ; 22 L. T. 293 ; 18 W. R. 689.

By 15 & 16 Vict. c. 42, s. 13, the term "highway" in the Public Health Act (11 & 12 Vict. c. 63), s. 68, by which highways are vested in the local board, shall mean "any highway repairable by the inhabitants at large" :—Held, that the words "repairable by the inhabitants at large" are used in contradistinction to repairable by individuals ratione tenuræ. *Ib.*

A local board, being the highway authority of the district, are not liable for damages caused to a person in consequence of the highway being out of repair, where such nonrepair is a mere nonfeasance. *Gibson* v. *Preston Corporation* (L. R. 5 Q. B. 218) followed and approved. *Cowley* v. *Newmarket Local Board*, 62 L. J., Q. B. 65 ; [1892] A. C. 345 ; 1 R. 45 ; 67 L. T. 486 ; 56 J. P. 805—H. L. (E.)

—— **Where Obligation to Repair.**]—Where a statute empowers the corporation of a town to maintain and repair the highways of the town, and the corporation allows one of the highways to fall into disrepair, in consequence of which a member of the public is injured, such failure to repair being a nonfeasance and not a misfeasance, the injured party cannot maintain an action against the corporation, but the remedy (if any) is by indictment. *Bathurst Borough* v. *Macpherson* (4 App. Cas. 256) distinguished : *Cowley* v. *Newmarket Local Board* ([1892] A. C. 345) followed. *Sydney Municipal Council* v. *Bourke*, 64 L. J., P. C. 140 ; [1895] A. C. 433 ; 11 R. 482 ; 72 L. T. 605 ; 59 J. P. 659—P. C.

The effect of a contract made in pursuance of s. 29 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), by a tramway company with the road authority for the maintenance by the latter of the roadway and lines, is to transfer to the road authority the liability primâ facie imposed by s. 28 upon the company for drainage occasioned by the roadway being out of repair. *Howitt* v. *Nottingham Tramways Co.* (12 Q. B. D. 16) approved. *Alldred* v. *West Metropolitan Tramways*, 60 L. J., Q. B. 631 ; [1891] 2 Q. B. 398 ; 65 L. T. 138 ; 39 W. R. 609 ; 55 J. P. 824.

The transfer of an obligation to repair a highway to a public corporation does not of itself render such corporation liable to an action in respect of mere nonfeasance. To establish such a liability the legislature must have used language indicating an intention that this liability should be imposed. *Bathurst Borough* v. *Macpherson* (4 App. Cas. 256) distinguished. *Pictou Municipality* v. *Geldert*, 63 L. J., P. C. 37 ; [1893] A. C. 524 ; 1 R. 447 ; 69 L. T. 510 ; 42 W. R. 114—P. C.

—— **Where also Sewer Authority.**]—C., who was the owner of certain cottages in a public highway, received a notice from the defendants under the Public Health Act, 1875, requiring him to connect the drains of his cottages with the main sewer, and in compliance therewith he dug a trench in the road and made the connection to the satisfaction of the defendants' surveyor, and he then filled up the trench. The soil afterwards subsided, and the subsidence was the cause of an accident to the plaintiff while driving in a pony cart. The defendants were the sewer authority and the highway authority of the district. In an action for damages for personal injuries :—Held, that the defendants were not liable as the sewer authority, on the ground that the notice did not constitute C. their agent ; nor as the highway authority, on the ground that no action would lie against a local board for personal injuries arising from the nonrepair of a highway. *Steel* v. *Dartford Local Board*, 60 L. J., Q. B. 256—C. A.

A local authority which, under the Public Health Act, 1875, has vested in it both the high-

ways and the sewers of the district, and the control and management of the same, is not civilly liable for an injury caused by a sewer grating that projects beyond the road surface if the grating is in proper repair and condition, and the accident is attributable solely to the non-repair of the highway. The fact that the local authority has the control of the sewers as well as of the highways does not render the local authority liable. *Kent* v. *Worthing Local Board* (10 Q. B. D. 118) overruled; *Moore* v. *Lambeth Waterworks* (17 Q. B. D. 462) discussed; *Cowley* v. *Newmarket Local Board* (1 R. 45) followed. *Oliver* v. *Horsham Local Board*, 63 L. J., Q. B. 181; [1894] 1 Q. B. 332; 9 R. 111; 70 L. T. 206; 42 W. R. 161; 58 J. P. 297—C. A.

The municipality of B., incorporated under New South Wales Acts No. 13 of 1858 and No. 12 of 1867, and having thereunder the care, construction, and management of the roads and streets within their municipality, constructed therein a barrel drain into which ran an open drain, the brickwork of which having broken away, and not having been repaired, a hole was caused, into which the plaintiff's horse fell. In an action claiming damages against the municipality (a) for negligence in constructing the street, (b) for negligence in keeping and maintaining the street, and not repairing the drain, gutter, or sewer in the said street (plea, the general issue), the chief justice directed the jury that the defendants under their act of incorporation were not liable for the result of any mere nonfeasance; that if they thought fit to construct a sewer, and they did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance: but if they constructed the sewer properly in the first instance and it became defective afterwards they were not bound to repair it; and further, that if the defective state in which the drain was arose from the operation of the weather, or wear and tear, it having been properly constructed originally, they were not liable. Verdict for defendants:—Held, on motion for a new trial, that as regards (b) there was misdirection. The barrel drain was not only made by the defendants, but the sole control and management of it were by the statute vested in them. By reason of their construction of that drain and their neglect to repair it, whereby, as an indirect but natural consequence, the dangerous hole was formed, which was left open and unfenced, they caused a nuisance in the highway for which, whatever their statutory obligation to repair may have been, they were liable to an indictment, and also to an action by the plaintiff who sustained direct and particular damage from their breach of duty. *Bathurst Borough* v. *Macpherson*, 48 L. J., P. C. 61; 4 App. Cas. 256—P. C.

A local board had vested in them, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 43, a sewer which ran under a highway, of which, by virtue of the act, they were surveyors. A grid or grating in the highway, used for the purpose of carrying the surface water from the road into the sewer, was allowed by the board to get out of repair, by reason of which a horse of the plaintiff was injured:—Held, that, whether the local board was liable or not, as surveyors of the highway, the grid must be taken to be part of the sewer, and they were liable, as owners of the sewer and grid, for their negligence in not keeping the latter in repair. *White* v. *Hindley Local Board*, 44 L. J., Q. B. 114; L. R. 10 Q. B. 219; 32 L. T. 460; 23 W. R. 651.

—— **Liability for Negligent Workmanship.**]—A local board of health, which was both the highway authority and the sewer authority of the district, employed a contractor to construct a pipe-sewer under a highway within the district. The contractor in the laying the pipes dug a trench, which he afterwards filled in with earth, and the roadway was apparently made good. The work was done under the directions and to the satisfaction of the surveyor of the local board. Some months after it was finished, a subsidence of the soil in the trench took place without any assignable cause, leaving the road apparently sound. The plaintiff's horse, in consequence of the surface giving way, fell into the trench, and was injured:—Held, that there was evidence that the work of filling in the trench had been negligently and improperly done, and that the local board, either as the sewer or the highway authority, or as both, was responsible. *Smith* v. *West Derby Local Board*, 47 L. J., C. P. 607; 3 C. P. D. 423; 38 L. T. 716; 27 W. R. 137—C. A.

Occupier of House—Coal Shoot.]—A. was injured by the giving way of a grating in a public footway, which was used for a coal shoot and for letting light into the lower part of the premises adjoining. These premises were at the time of the accident under lease to B., who covenanted to repair and keep in repair all except the roofs, main walls and main timbers. At the time of the demise the grating was unsafe; but there was no evidence that the landlady had any knowledge of its unsafe state; and the jury found that no blame was attributable to her for not knowing it:—Held, that no action was maintainable against the landlady. *Gwinnel* v. *Eamer*, L. R. 10 C. P. 658; 32 L. T. 835.

At the time of the accident A. was not passing along the way, but was standing on the grating to talk with a person at the window above it:—Held, that he was not making an improper use of the grating. *Ib.*

—— **Structure Part of Highway.**]—A row of houses stood a few feet from a raised causeway, the centre of which was a carriage road, the sides being foot pavement. The ground-floor of the houses was on a lower level than the causeway. There was a continuous structure, consisting of flagstones and gratings, from the row of houses to the foot pavement, with which it was on a level; an outer door of each house opened upon this structure; it had been dedicated to the public, and used by them as part of the highway for foot passengers. The carriage and foot roads on the causeway were repaired by the parish. The structure became in a bad state of repair, and, owing to this, R. fell through one of the gratings forming part of it, and was killed:—Held, in an action by his administrator against the lessee of the houses, that the structure was part of the highway, and that the parish was bound to repair it, and that, therefore, the action against the lessee was not maintainable. *Robbins* v. *Jones*, 15 C. B. (N.S.) 221; 33 L. J., C. P. 1; 10 Jur. (N.S.) 239; 9 L. T. 523; 12 W. R. 248.

—— **Defective Lamp.**]—The occupier of premises adjoining a highway is bound to keep them

in such a state of repair that they shall not endanger passers by. The occupier does not discharge himself of this duty by employing a competent person to repair the premises. *Tarry* v. *Ashton*, 45 L. J., Q. B. 260; 1 Q. B. D. 314; 34 L. T. 97; 24 W. R. 581.

Therefore, where the defendant had a lamp and lamp iron projecting from his premises over the street, and had given orders to a competent contractor to repair it, but the contractor had done the work badly, by reason of which the lamp fell and injured the plaintiff:—Held, that the defendant was liable. *Ib.*

e. Indictment for Nonrepair.

i. *Generally.*

Exclusiveness of Remedy.]—The court will not entertain an application for a mandamus to repair a road, because the remedy is by indictment. *Reg.* v. *Oxford and Witney Turnpike Roads Trustees*, 12 A. & E. 427; 4 P. & D. 154; 6 Jur. 216, n.

Nature of Offence—Wall supporting Highway out of Repair.]—Where a highway is supported by a wall, and such wall becomes dangerous by reason of nonrepair, the inhabitants of the place in which such highway is situate, if liable to repair the highway, can be convicted upon an indictment for nonrepair, it being a question for the jury whether the wall forms part of the highway or not. *Reg.* v. *Lordsmere* (*Inhabitants*), 54 L. T. 766; 16 Cox, C. C. 65; 51 J. P. 86—C. C. R.

On an indictment for the nonrepair of a highway in the ordinary form, a parish cannot be convicted for not rebuilding a sea-wall, washed away by the sea, over the top of which the alleged way used to pass. *Reg.* v. *Paul* (*Inhabitants*), 2 M. & Rob. 307.

Form of—Sufficiency of Allegations.]—It must be affirmatively stated that the road is within the district which is bound to repair it. *Rex* v. *Upton*, 6 Car. & P. 133.

Stating a road to be out of repair, "from and through" a place, excludes the terminus. *Ib.*

An indictment charged that the defendants removed a culvert in the parish of S. opposite to a mill there, in a highway there, leading from S. to H.:—Held, on motion in arrest of judgment, that it sufficiently appeared that the culvert removed was in the parish of S. *Rex* v. *Knight*, 7 B. & C. 413; 1 M. & Ry. 217; 6 L. J. (o.s.) M. C. 19.

An indictment for not repairing one side of a road should state a liability to repair it to the middle. *Rex* v. *St. Pancras*, Peake, 286. And see *Rex* v. *Eardisland*, 2 Camp. 494.

An indictment against the parish of B. for not repairing a road leading from A. to B., is exclusive of B. and therefore bad; and it is not aided by a subsequent allegation that a certain part of the same highway, situate in B., is in decay. *Rex* v. *Gamlingay*, 3 Term Rep. 513; 1 Leach, C. C. 528.

An indictment charged that the inhabitants of the township of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland, in the parish of St. Andrew, Auckland, were immemorially liable to repair a highway in the town of Bishop Auckland, in the parish of St. Andrew, Auckland, and no consideration was laid:—Held bad, in arrest of judgment, as not shewing that the highway was in the defendant's district. *Rex* v. *Bishop Auckland*, 1 A. & E. 744; 1 M. & Rob. 286.

Held to be no objection that the inhabitants of the three townships were charged conjointly. *Ib.*

If a parish is indicted for the nonrepair of a pack and prime way, and it is proved that the way is a carriage-way, this is a misdescription of the way. *Rex* v. *St. Weonard*, 6 Car. & P. 582.

It is not necessary to state the termini; but if they are stated, they must be proved. *Ib.*

A road had been repaired by a parish, and persons on horseback had used it; but there was no evidence that any carriage had ever gone along the whole length of it:—Held, that the parish could not be convicted of nonrepair of it on an indictment stating it to be a way for carriages; and that there should have been a count charging it to be a way for horses. *Rex* v. *St. Weonard*, 5 Car. & P. 572.

An indictment stated, that there was a queen's highway for carriages, "leading from the town of A. in the county of B. towards and unto the village of E. in the same county," a part of which was out of repair. The part of the road charged to be out of repair was a portion of a lane called F. lane, and it was proved that, to go from the town of A. to the village of E. with a carriage, a person must go four miles along the C. turnpike road, then all along F. lane, and then across the W. turnpike road, and for a short distance go along a road which goes from the W. turnpike road to the village of E.:—Held, that the road was not misdescribed. *Reg.* v. *Steventon*, 1 Car. & K. 55.

Indictment for nonrepair of a highway within certain limits, charging a corporation with a prescriptive liability to repair all common highways, within such limits, "excepting such as ought to be repaired according to the form of the several statutes in such case made," is bad, for want of shewing that the highway was not within any of the exceptions. *Rex* v. *Liverpool Corporation*, 3 East, 86; 6 R. R. 546.

A count, stating the defendant's liability to arise by virtue of an agreement with the owners of houses alongside of it, is also bad; for the parish, who are primâ facie bound to the repair of all highways within their boundaries, cannot be discharged from such liability by an agreement with others. *Ib.*

Indictment stated that, from time whereof the memory of man is not to the contrary, there was a queen's common highway leading from T. to E.; that part of the same common highway was and yet is out of repair; and that the inhabitants of the parish ought to repair the same. On the trial, it appeared that the highway had been made within living memory:—Held, no variance; for that, in an indictment against a parish, it was not material whether the way was immemorial or not; and the antiquity of the road was not so averred in the indictment as to become an essential part of the description. *Reg.* v. *Turweston*, 16 Q. B. 109; 20 L. J., M. C. 46; 15 Jur. 650; 4 Cox, C. C. 349.

It appeared also that the way from T. to E. referred to in the indictment led from T. into the turnpike road from Buckingham to Brackley; then lay, for a short distance, along that road, and then branched off to E. This was the direct way between T. and E.:—Held, that the way was properly described as from T. to E. *Ib.*

Upon the trial of an indictment against the inhabitants of the township of H. for the non-

repair of a highway, a prior judgment of quarter sessions upon a presentment by a justice under 13 Geo. 3, c. 78, for non-repair of the same highway by H. was put in. The presentment alleged that the highway was in H., and that H. was liable to repair it. It also appeared by the judgment that two of the inhabitants of H. had appeared, and pleaded guilty, and that a fine was imposed. The presentment did not state how the township was liable to repair:—Held, that although it might be bad for this reason on demurrer or error, yet that, having been submitted to by the defendants, they were exclusively bound by it. *Reg.* v. *Haughton*, 1 El. & Bl. 501; 22 L. J., M. C. 89; 17 Jur. 455; 1 W. R. 164; 6 Cox, C. C. 101.

Where a magistrate presented a road in the township of F. upon information upon oath of the surveyor for the township of C., it was held that the presentment was bad, as the surveyor of one township had no power under 13 Geo. 3, c. 78, s. 24, to give information as to a road in another township. *Rex* v. *Flyingdales*, 7 B. & C. 438; 1 M. & Ry. 176; 6 L. J. (O.S.) M. C. 27.

An indictment against a township for the non-repair of a highway must aver that the road in question was a road which, but for the custom, would have been repaired by the parish. *Reg.* v. *Colling*, 2 Cox, C. C. 184.

Where, between the finding of an indictment for non-repair of a road and plea pleaded, the statute, upon which alone the indictment could be supported, was repealed, and afterwards the indictment was proceeded with and a conviction obtained, the court arrested the judgment. *Reg.* v. *Denton*, 16 Q. B. 832; 1 Dears. C. C. 3; 21 L. J., M. C. 207; 17 Jur. 453.

Indictment stated that a part of the highway, from W. to M., at a place called A., and extending thence to L. highway, was out of repair. The evidence was that the place mentioned as A. was in fact a place called B.:—Held, no material variance; the erroneous description relating to a terminus not of the road, but only of the part out of repair. *Reg.* v. *Warerton*, 2 Den. C. C. 340; 17 Q. B. 562; 21 L. J., M. C. 7; 16 Jur. 6.

Variances and misdescriptions in the indictment are the subject of amendment under 14 & 15 Vict. c. 100, s. 1. *Reg.* v. *Sturge*, 3 El. & Bl. 734; 23 L. J., M. C. 172; 18 Jur. 1052; 2 W. R. 477.

Pleas—Sufficiency of.]—To an indictment against a parish for non-repair of a highway lying within it, a plea that the inhabitants of another parish have repaired, and been used and accustomed to repair, and of right ought to have repaired, is ill, as it does not shew any consideration. *Rex* v. *St. Giles, Cambridge*, 5 M. & S. 260; 17 R. R. 320.

On an indictment against a parish for non-repair of a highway, it is not essential, in support of a plea, that the several townships in it have been accustomed from time immemorial to repair their own highways, to shew by direct affirmative evidence that there have been ancient highways in each of the townships. The existence and several repair of ancient highways in one township may be inferred from their existence and several repair in the other township. *Reg.* v. *Barnoldswick*, 3 G. & D. 545; 4 Q. B. 499; 12 L. J., M. C. 44.

But in a plea by the inhabitants of a county, that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge, situate within the township, it is not necessary to state any consideration for such prescription. *Rex* v. *Yorkshire (W. R.). JJ.*, 4 B. & Ald. 623; 23 R. R. 421.

So on indictment against the inhabitants of a parish for not repairing a road, a plea, that the inhabitants of a particular district within the parish have immemorially repaired all the roads within that district, of which the road indicted was one, is a good plea, although it does not state any consideration for the liability of the inhabitants of the district. *Rex* v. *Ecclesfield*, 1 B. & Ald. 348; 1 Stark. 393; 19 R. R. 335.

To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea, stating that the parish was immemorially divided into seven townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that part of the highway indicted was within the township of G. B., and that the residue, &c., was within the township of L. B., and that the respective parts ought to be repaired by the inhabitants of the respective townships, is bad; without specifying what part of the highway lay within one township, and what part within the other. *Rex* v. *Bridekirk*, 11 East, 304; 10 R. R. 514. And see *Rex* v. *Taunton*, 3 M. & S. 465.

In a plea by a parish to an indictment for the non-repair of a highway, they must shew, not merely that they are not liable, but who is liable to repair it. *Rex* v. *Eastington*, 1 N. & P. 193; 5 A. & E. 765; 2 H. & W. 373; 6 L. J., M. C. 17.

Indictment against a parish for non-repair of a highway. Pleas (1) except as to part, not guilty. (2) As to such part that one H. (an inhabitant) was liable ratione tenuræ to repair what had been a part of such highway until stopped up and enclosed by E., whilst owner of the farm, now in the possession of H., without legal authority, and who then, in lieu thereof, set out a new road, part of the highway alleged to be out of repair, by reason of which such part so set out ought to be repaired by the said H.:—Held, bad on demurrer. *Reg.* v. *Largarshall*, 2 W. R. 411.

Where to an indictment against a parish for not repairing a road the defendants pleaded that there was a township within the parish, that the road lay within that township, and that, by immemorial custom, that township was bound to repair all roads which, but for the custom, would be repairable by the parish; but the plea omitted to aver that the road in question was one "which, but for the custom, the parish would be liable to repair," and the jury finding the existence of the custom, gave a verdict for defendants:—Held, that the court could not give judgment non obstante. Held, however, that the want of the above averment in the plea made it bad in arrest of judgment. *Rex* v. *Eastrington*, 5 Ad. & E. 765; 1 N. & P. 193; 6 L. J., M. C. 17.

Replication.]—To an indictment for non-repair of a highway in parish A., it was pleaded that the parish of G. was bound from time immemorial to repair such highway, in consideration of levying and receiving rates in respect of certain lands of parish A., adjoining to such highway. Replication, that the agreement referred to in the plea was put an end to by notice:—Held, that the replication was a good answer to the plea. *Reg.* v. *Ashby Folville*, 35 L. J., M. C. 154; L. R. 1 Q. B. 213; 12 Jur. (N.S.) 520.

ii. *Against what Parties.*

Urban Sanitary Authority.]—An indictment for non-repair of a highway will lie against an urban sanitary authority under s. 10 of the Highways and Locomotives Act, 1878. *Reg.* v. *Wakefield Corporation*, 57 L. J., M. C. 52; 20 Q. B. D. 810; 36 W. R. 911; 16 Cox, C. C. 439; 52 J. P. 422.

Parish Council.]—A parish council cannot be indicted for the non-repair of a highway. *Reg.* v. *Shipley Parish Council*, 18 Cox, C. C. 531; 61 J. P. 488.

iii. *Evidence of Liability.*

Agreement to execute Repairs.]—Where township A. was liable by custom to repair the highways within it, and was indicted for non-repair, the defence set up was, that township B. was liable; and an agreement was produced, made between the owners of the soil of the two townships, in 1591, by which the owner of township B. agreed to repair the roads in township A.; and it was agreed that a lawyer should be elected to carry the agreement into effect; it was proved also, that township B. had repaired the road up to within a short time of the trial:—Held, that on such evidence it was not incumbent on the judge to leave it to the jury to presume that legal instruments had been executed, casting the liability on township B. *Rex* v. *Scarisbrook*, 1 N. & P. 582; 6 A. & E. 509; 1 W., W. & D. 246; 6 L. J., M. C. 103.

Repairs by Adjoining Owners.]—Evidence of repairs to a highway by the owners of the adjoining lands is inadmissible upon an indictment against the inhabitants of the place in which such highway is situate, unless liability on the part of such owners to repair the highway, ratione tenuræ, has been specially pleaded. *Reg.* v. *Lordsmere* (*Inhabitants*), 54 L. T. 766; 16 Cox, C. C. 65; 51 J. P. 86—C. C. R.

Immemorial User.]—An indictment, describing the way as immemorial, is not supported by proof of a highway extinguished as such sixty years before by an inclosure act, but since used by the public, and repaired by the district charged. *Reg.* v. *Westmark* (*Tithing*), 2 M. & Rob. 305.

On an indictment against a township for non-repair of a common and ancient highway, it was proved that the lane had always been used as a common highway, but it was admitted that the township had never repaired this particular highway, and that it had been repaired by private persons occasionally:—Held, that the highway being in use previously to 5 & 6 Will. 4, c. 50, s. 23, proof of repair by the township was not necessary to support a conviction. *Reg.* v. *Newbold*, 19 L. T. 656; 17 W. R. 295.

Where, in an indictment against a township for the non-repair of a road, the prescription stated and proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which, but for such usage, would be repairable by the parish at large:—Held, that this placed the township in the situation of a parish, and that it was necessary for the defendants to prove with certainty that some other persons were liable, in order to exonerate themselves from their liability to repair. *Rex* v. *Hatfield*, 4 B. & Ald. 75; 22 R. R. 631.

Evidence of a previous conviction of the inhabitants of a particular district in a parish for the non-repair of one of the highways in such district is admissible to prove that the district is liable by immemorial custom to repair all the highways within its limits, for the repair of which the inhabitants of the whole common law parish would otherwise be primâ facie liable. *Reg.* v. *Lordsmere* (*Inhabitants*), 54 L. T. 766; 16 Cox, C. C. 65; 51 J. P. 86—C. C. R.

Custom.]—To charge a township with liability by custom to repair a highway within it which would otherwise be repairable by the parish comprising such township, it is not necessary to prove that such highway has been hitherto repaired by such township. *Reg.* v. *Ardsley* (*Township*), 47 L. J., M. C. 65; 3 Q. B. D. 255; 38 L. T. 71; 26 W. R. 405.

Without such proof a jury may infer the custom from other evidence; such as that the parish at large has never done any repairs, nor appointed surveyors, nor levied highway rates. *Ib.*

An indictment against a township, for non-repair of a road, charged the township with a liability, by custom, to repair all common and public highways within it:—Held, that the custom so laid might exist; and that it need not be confined to highways which, but for such custom, would be repairable by the parish. *Reg.* v. *Heage*, 1 G. & D. 548; 2 Q. B. 128; 10 L. J., M. C. 145; 6 Jur. 367.

Repair by Third District, whether for Parish or Township.]—Indictment of a parish for non-repair of a highway; plea that the parish was divided into townships, in two of which existed a custom for the township to repair all the highways within it, which, but for the custom, would be repairable by the parish. Replication, traversing the custom. Proof that the parish had no surveyor of highways; that the township had; that repairs had been done of the highways within the township, under the direction of the township surveyor; but on cross-examination it appeared that the particular road had been repaired by a third district, N.:—Held, that it ought to have been left to the jury to say what was the character of the repairs done by N., whether for the parish or for the township. *Rex* v. *Crosthwaite*, 6 L. J., M. C. 18.

Plea of Guilty to former Indictment.]—On an indictment against a parish for non-repair of a highway, a plea of guilty to a former indictment against the same parish for non-repair of the same highway is conclusive evidence that it is a public way. *Rex* v. *Whitney*, 7 Car. & P. 208.

—— **As to Part of Highway.**]—Indictment against a township for not repairing an ancient highway. On the trial a record of an indictment against an adjoining township for non-repair of a part of the same line of road, and to which that township had submitted, was received:—Held, that it was properly received as evidence that the whole highway was ancient. *Reg.* v. *Brightside Bierlow*, 13 Q. B. 933; 4 New Sess. Cas. 47; 19 L. J., M. C. 50; 14 Jur. 174.

—— **Prior Judgment.**]—Upon the trial of an indictment against the inhabitants of the township of H., for the non-repair of a highway, a prior judgment of quarter sessions, upon a presentment by a justice under 13 Geo. 3, c. 78, for

non-repair of the same highway by H., was put in. The presentment alleged that the highway was in H., and that H. was liable to repair it. It also appeared by the judgment that two of the inhabitants of H. had appeared and pleaded guilty, and that a fine was imposed:—Held, conclusive evidence that the highway was in H., and that H. was liable to repair it. *Reg.* v. *Haughton*, 1 El. & Bl. 501; 22 L. J., M. C. 89; 17 Jur. 455; 1 W. R. 164; 6 Cox, C. C. 101.

The fact of the fine imposed by the sessions not being shewn to have been paid, did not prevent the judgment from acting as an estoppel, no fraud being imputed. *Ib.*

A recital in a private act (since repealed), that the road was in D., is at most only evidence, and that fact is not admissible against the estoppel. *Ib.*

Admissibility limited by Indictment.]—Evidence that a parish did not put guard fences at the side of a road, is not receivable on an indictment which charges that the king's subjects could not pass as "they were wont to do," if no such fences existed before. *Rex* v. *Whitney*, 7 Car. & P. 208.

Disputing Order of Justices.]—An order of justices, determining the liability of certain parishes for the repair of a common highway, cannot be disputed on the indictment for non-repair by production of evidence to prove that no part of the road was within one of such parishes. *Reg.* v. *Hickling*, 7 Q. B. 88; 2 New Sess. Cas. 117; 14 L. J., M. C. 177; 9 Jur. 1075.

iv. *Orders of Justices.*

Directing an Indictment—Ministerial Duty.]—The 5 & 6 Will. 4, c. 50, s. 95, imposes a ministerial, and not a judicial, duty upon justices to direct an indictment to be preferred for non-repair of a highway, where the liability to repair is simply denied by the party summoned before them. *Reg.* v. *Surrey JJ.*, 1 B. C. C. 70; 21 L. J., M. C. 195; 16 Jur. 641.

—— **Validity of.**]—An order made by such justices is good, although it subsequently appears that one of them is interested in the subject-matter of the order. *Ib.*

Where justices at special sessions make an order, directing an indictment to be preferred for non-repair of a highway, the order must state that the special sessions were held within the "division in which the highway was situate." *Reg.* v. *Martin*, D. & M. 386; 2 Q. B. 1037; 13 L. J., M. C. 45; 8 Jur. 36. S. P., *Reg.* v. *Hickling*, 7 Q. B. 890; 15 L. J., M. C. 23.

Jurisdiction—Where Liability denied.]—Under 5 & 6 Will. 4, c. 50, s. 95, if, on the hearing of a summons respecting the repair of a highway, the duty, liability, or obligation to repair is denied by the surveyor, the justices are bound to order an indictment to be preferred against the parish, and have no jurisdiction to inquire whether the highway is one which the parish is liable to repair. *Reg.* v. *Arnould*, 8 El. & Bl. 550; 27 L. J., M. C. 92; 4 Jur. (N.S.) 162; 6 W. R. 61.

Where the liability of a parish to repair a road has been denied, and an indictment preferred under 5 & 6 Will. 4, c. 50, s. 95, and a verdict of not guilty found, and a fresh information laid before justices, upon which they declined to order another indictment:—Held, that they were justified in refusing to order another indictment. *Bartlett, Ex parte*, 3 El. & El. 253; 30 L. J., M. C. 65; 6 Jur. (N.S.) 1196; 3 L. T. 316; 9 W. R. 54.

Where upon information and summons, under 5 & 6 Will. 4, c. 50, s. 94, a parish denies its liability to repair a road, upon the ground that it is not a highway, the justices, before directing an indictment, should hear evidence upon the question of highway or no highway, upon which question their jurisdiction depends. *Reg.* v. *Johnson*, 34 L. J., M. C. 85; 11 Jur. (N.S.) 467; 11 L. T. 706; 13 W. R. 309.

Under 25 & 26 Vict. c. 61, s. 19, which enacts, that when on the hearing of a summons under s. 18, respecting the repair of any highway, the liability to repair is denied by the waywarden on behalf of his parish, the justices shall direct a bill of indictment to be preferred, at the next assizes or quarter sessions, against the inhabitants of the parish for the non-repair, the power to direct an indictment to be preferred does not arise where the liability to repair is denied on the ground alone, that the road is not a highway, and the liability is admitted, if the road is in fact a highway, and the denial of the road being a highway is made bonâ fide. *Reg.* v. *Farrer*, 35 L. J., M. C. 210; L. R. 1 Q. B. 558; 14 L. T. 515; 14 W. R. 777; 10 Cox, C. C. 261.

In order to give the justices such a power, the liability must be denied on some ground other than that the road is not a highway, such as that some one else is bound to repair. *Ib.*

The expression in s. 19, when the liability to repair is denied, is to bear the same construction as the expression if the duty or obligation of such repairs is denied in 5 & 6 Will. 4, c. 50, s. 95. *Ib.*

When on the hearing of a summons under 23 & 24 Vict. c. 68, South Wales Highway Act, s. 40, against the district surveyor for the non-repair of a highway in a parish, the liability to repair is disputed on behalf of the parish, the justices have power to direct an indictment to be preferred under 5 & 6 Will. 4, c. 50, s. 95. *Reg.* v. *James*, 3 B. & S. 901; 32 L. J., M. C. 211.

Complaint having been made under s. 10 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), to a county authority that the highway authority of a highway area within their jurisdiction had made default in repairing certain highways within their jurisdiction, the county authority were, after due inquiry and report by their surveyor, of opinion that it was bonâ fide denied by the highway authority that the ways were highways, and thereupon held that they had no jurisdiction to make an order:—Held, that by the terms of the above section it was the duty of the justices to make an order, and that a mandamus must issue ordering them so to do. *Reg.* v. *Farrer* (supra) discussed. *Reg.* v. *Cheshire JJ.*, 50 L. T. 483; 48 J. P. 262.

Where proceedings are taken before justices for the non-repair of a highway in a parish forming part of a highway district under 25 & 26 Vict. c. 61, a bonâ fide admission by the waywarden of the parish that the road is a highway which the parish is bound to repair, is binding on the highway board, and it is not competent for them after such an admission to deny these

facts so as to oust the jurisdiction of the justices. *Loughborough Highway Board* v. *Curzon*, 55 L. J., M. C. 122; 17 Q. B. D. 344; 55 L. T. 50; 34 W. R. 621; 50 J. P. 788—C. A.

Appeal to Quarter Sessions.]—See *Illingworth* v. *Bulmer East Highway Board*, 52 L. J., Q. B. 280; 48 J. P. 37.

Appeal to Court of Appeal—Special Case stated by Quarter Sessions.]—See *S. C.*, 53 L. J., M. C. 60; 32 W. R. 450—C. A.

—— **Removal of Indictment by Certiorari.**]—An indictment for non-repair of a highway preferred and found at the assizes by an order of justices, made under 5 & 6 Will. 4, c. 50, s. 95, may be removed by certiorari. *Reg.* v. *Sandon*, 3 El. & Bl. 547; 2 C. L. R. 1699; 23 L. J., M. C. 129; 18 Jur. 401; 2 W. R. 374.

v. *Trial.*

Practice.]—On the trial of an indictment for non-repair of a highway, counsel for the defendants not allowed to sum up. *Reg.* v. *Field*, 2 F. & F. 498.

Practice as to pleading by inhabitants of a township. *Reg.* v. *Stamhall*, 1 F. & F. 363.

—— **Appearance.**]—Where inhabitants of a parish are indicted for non-repair of a highway, and appear and plead not guilty by two surveyors, it is not competent to one only to appear and retract the plea of not guilty, and plead guilty; the other appearing and pleading by a clerk of his attorney. *Reg.* v. *Langley*, 2 F. & F. 170; 8 Cox, C. C. 366.

vi. *Costs.*

Jurisdiction to Order and Award.]—Where justices have directed an indictment against a parish, under 5 & 6 Will. 4, c. 50, s. 95, for non-repair of a highway, and the judge of assize directs payment of the costs out of the parish highway rate, he must ascertain the amount of costs, and order payment of the sum so ascertained. *Reg.* v. *Clark*, 5 Q. B. 887; D. & M. 687; 1 New Sess. Cas. 143; 13 L. J., M. C. 91; 8 Jur. 489.

Where the judge's order is only to pay the costs generally, the court cannot enforce such an order by mandamus. *Ib.*

An order for the costs can only be made when the road is proved affirmatively to be a highway, and the court will not go into that question on affidavit. *Reg.* v. *Down Holland* (*Township*), 2 New Sess. Cas. 177; 15 L. J., M. C. 25; 9 Jur. 1077.

Where a parish are acquitted on an indictment on the ground of there being no highway, the court is not bound to award costs under 5 & 6 Will. 4, c. 50, s. 95. *Reg.* v. *Paul* (*Inhabitants*), 2 M. & Rob. 307.

—— **Out of what Funds.**]—A judge's order for costs of the prosecution of an indictment for non-repair of a highway, should state on the face of it out of what funds the costs are to be paid; and where it did not do so, the court set the order aside. *Reg.* v. *Watford*, 4 D. & L. 593; 1 B. C. Rep. 336; 11 Jur. 332.

A judge has no power to direct the costs of an indictment for non-repair of a road, preferred by the direction of justices, to be paid out of the highway rate, except where there is a highway, and the liability to repair it is in dispute. *Reg.* v. *Heanor*, 6 Q. B. 745; 1 New Sess. Cas. 460; 14 L. J., M. C. 38; 9 Jur. 105.

Where Order directing Indictment Void.]—An order directing an indictment for non-repair of a road under 5 & 6 Will. 4, c. 50, ss. 94, 95, must shew on the face of it that it was made at a special session for the highways held within the division in which the road is situate. If it does not it is void, and an order for costs made under s. 95, by the judge who tried the cause, will be set aside. *Reg.* v. *Hickling*, 7 Q. B. 890; 2 New Sess. Cas. 117; 15 L. J., M. C. 23. S. P., *Reg.* v. *Heytesbury*, 8 L. T. 315.

Where Indictment not Tried.]—If an indictment is preferred, and the defendants plead guilty, the judge will not direct the prosecutor's costs to be paid, as the indictment was not tried before him. *Reg.* v. *Vowchurch*, 2 Car. & K. 393.

Upon an indictment for non-repair of a highway, preferred under 5 & 6 Will. 4, c. 50, s. 95, by an order of justices against the inhabitants of a parish, a judge of assize has power to make an order for the costs of the prosecution, although the defendants pleaded guilty, and there is no actual trial of the indictment. *Reg.* v. *Haslemere*, 3 B. & S. 313; 32 L. J., M. C. 30; 9 Jur. (N.S.) 573; 7 L. T. 382; 11 W. R. 115.

When Jury disagrees.]—An indictment for non-repair of a highway came on to be tried at the assizes, when the jury was discharged without a verdict, they being unable to agree:—Held, that the judge could not direct the costs of such trial to be paid out of the highway rate. *Reg.* v. *Heytesbury*, 8 L. T. 315.

When Indictment defective.]—An order was made by justices for an indictment to be preferred for the non-repair of a highway called Quaker Lane. Before the justices, it was sought to fix the defendants with liability to repair the highway as a cart and carriage-way. The indictment contained counts for a cart and carriage-way, and also for a pack and prime way. At the trial the jury found that it was not a cart and carriage-way, and the defendants admitted that it was a pack and prime way, and contended that it was not out of repair, and the jury found that as a pack and prime way it was not out of repair:—Held, that the prosecutor was not entitled to his costs under 4 & 5 Will. 4, c. 50, s. 95. *Reg.* v. *Cleckheaton*, 11 L. T. 305.

If, upon the trial of an indictment for the non-repair of a highway ordered by justices, it appears that the road indicted is not the road set out in the order of justices, and the prosecution fails in consequence, the judge has no jurisdiction to certify for the costs. *Reg.* v. *Fifehead*, 3 Cox, C. C. 59.

Discretion of Judge.]—A prosecutor obtained a summons under 5 & 6 Will. 4, c. 50, s. 94, calling upon the parish surveyors to shew cause why a highway should not be repaired. The surveyors denied the liability of the parish to repair, and the magistrates ordered an indictment against the inhabitants of the parish, which was preferred, and was tried as a traverse on the crown side of the assizes, and the defendants found guilty:—Held, that the prosecutor was entitled to an order to have his costs paid out of the highway rate, and that the statute as to this was imperative, and left no discretion

whatever in the judge. *Reg.* v. *Yorkhill*, 9 Car. & P. 218.

Justices must have had Jurisdiction.] — To enable a judge before whom an indictment preferred by order of justices under 5 & 6 Will. 4, c. 50, s. 95, for non-repair of a highway, is tried, to make an order for the costs of "such prosecution" to be paid out of the rate under that section, it is necessary that the prosecution be one which the justices had jurisdiction to order, and be the one which they did order. *Reg.* v. *Lee*, 45 L. J., M. C. 54; 1 Q. B. D. 198; 34 L. T. 445; 24 W. R. 550.

Therefore, where an indictment, charging the inhabitants of a township with the nonrepair of a general highway, was amended at the trial so as to charge them in respect only of a limited highway:—Held, that the judge had no power to order the costs to be paid out of the rate levied in the township, the prosecution of the amended indictment not being "such prosecution" within s. 95. *Ib.*

Under Highway Act of 1862—Verdict of Not Guilty.]—Under 25 & 26 Vict. c. 61, s. 19, the court has no power to direct the costs of an indictment for nonrepair of a road, preferred by the direction of justices against the inhabitants of a parish, to be paid by them where the jury has found a verdict of not guilty on the ground that the road was a private road, and not a highway. *Reg.* v. *Buckland*, 6 B. & S. 397; 34 L. J., M. C. 178; 11 Jur. (N.S.) 821; 12 L. T. 380; 13 W. R. 715; 10 Cox, C. C. 116.

When Prosecution Vexatious—New Trial.]—Where defendants were convicted on an indictment for nonrepair of a highway, and obtained a rule for a new trial upon terms as to the prosecutor's costs, and upon the second trial they were acquitted:—Held, that they were not entitled to costs, although the judge certified under the Highway Act, 13 Geo. 3, c. 78, s. 64, that the prosecution was vexatious. *Rex* v. *Salwick* (*Inhabitants*), 2 B. & Ad. 136; 1 L. J., M. C. 14.

By the General Highway Act, 13 Geo. 3, c. 78, s. 64, the court before which any indictment for nonrepair of a road is tried, may award costs to the prosecutor if the defence appears to have been frivolous, or to the defendant if it appears that the prosecution was vexatious. This section applies only to cases tried in the ordinary course; and where on an indictment removed by the defendant by certiorari, the court above had ordered a new trial, and the prosecutor's costs of both trials to abide the event, it was held, that this special rule took away the authority of the judge to certify in favour of the defendant. *Rex* v. *Salwick* (*Inhabitants*), 2 B. & Ad. 136.

When Defence Frivolous.]—Upon an indictment for not repairing a highway, removed by the prosecutor, if the judge at nisi prius certifies that the defence was frivolous, the prosecutor will have his costs notwithstanding the defendants have obtained a rule nisi to arrest the judgment. *Rex* v. *St. John, Margate*, 6 M. & S. 130.

By 5 & 6 Will. 4, c. 50, s. 98, it shall be lawful for the court before whom any indictment shall be preferred for not repairing highways, to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the court that the defence made to such indictment was frivolous or vexatious:—Held, that a plea of not guilty to an indictment for nonrepair of a highway, is not a defence within the meaning of the section, and that no order for costs can be thereupon made. *Reg.* v. *Denton*, 5 B. & S. 821; 34 L. J., M. C. 13; 11 Jur. (N.S.) 172; 11 L. T. 371; 13 W. R. 143.

Where an indictment for not repairing a turnpike road has been preferred at the quarter sessions, and removed by certiorari into the queen's bench, that court has power, under 5 & 6 Will. 4, c. 50, s. 98, to award to the prosecutor costs incurred previously to the removal of the indictment, if the defence has been frivolous or vexatious in the opinion of the judge trying the cause. *Reg.* v. *Preston*, 7 D. P. C. 593. Overruling 2 M. & Rob. 137.

—— **Enforced by Attachment.**] — Where a certificate has been granted under 5 & 6 Will. 4, c. 50, s. 98, that the defence to a road indictment, removed by certiorari into the queen's bench, is frivolous, and costs have been awarded against the defendants, the payment of such costs may be enforced by attachment. *Reg.* v. *Pembridge*, 3 G. & D. 603; 3 Q. B. 901; 12 L. J., Q. B. 47; 6 Jur. 1037.

In such case the judge may certify for the costs of a special jury. *Ib.*

On Removal by Certiorari.]—Where an indictment ordered by justices to be preferred at the next assizes against the inhabitants of a township, is removed by them by certiorari into the queen's bench, and is tried at nisi prius, and a verdict is found for the defendants, the judge has no power, under 5 & 6 Will. 4, c. 50, s. 95, to order the payment of the costs of the prosecution out of the highway rate; the section giving the power only to the judge of assize, that is, the judge sitting under the commission of oyer and terminer. *Reg.* v. *Ipstones*, 9 B. & S. 106; 37 L. J., M. C. 37; L. R. 3 Q. B. 216; 17 L. T. 497; 16 W. R. 538.

5 & 6 Will. 4, c. 50, s. 95, points out three tribunals for the trial of indictments for nonrepair of a highway—the quarter sessions, the judge of assize sitting under a commission of oyer and terminer, and the judge sitting at nisi prius, when the indictment is removed into this court by certiorari; and the judge trying an indictment so removed has power to make an order for the costs of the prosecution, to be taxed by the officer of this court, without specifying the amount. *Reg.* v. *Erdisland*, 2 W. R. 553.

A judge who tries at nisi prius an indictment for non-repair removed by certiorari, has no power under the above section to award costs. *Reg.* v *Paul* (*Inhabitants*), 2 M. & Rob. 307.

A complaint was made to magistrates under 5 & 6 Will. 4, c. 50, s. 94, that a way alleged to be a highway was out of repair; and the magistrates ordered an indictment against the inhabitants of the parish, which was found and removed by certiorari, and, on the trial, defendants were acquitted on the ground that it was not a highway. The prosecutor applied for costs to be paid out of the highway rate under s. 95. It was objected that this provision as to costs only applied where the existence of a highway was not disputed, and also that it did not apply when the indictment was removed by certiorari. The judge refused the order. *Reg.* v. *Chedworth* (*Inhabitants*), 9 Car. & P. 285.

Semble, that ss. 95 and 98 of the act are distinct in their operation and not to be connected. *Ib.*

Semble, that the magistrates are not bound to make their order in terms exactly following those of the information. *Reg.* v. *Chedworth (Inhabitants)*, 9 Car. & P. 285.

—— **Effect of Recognizance.**]—A prosecutor removing an indictment for nonrepair of a highway by certiorari is only liable for costs by virtue of the recognizance required by 16 & 17 Vict. c. 30, s. 5, and if he has not entered into such a recognizance, costs cannot be recovered against him. *Reg.* v. *East Stoke*, 6 B. & S. 536; 34 L. J., M. C. 190; 11 Jur. (N.S.) 809; 13 W. R. 737.

The proper remedy for such a default is that given by s. 7, which provides that in that case the certiorari may be disregarded. *Ib.*

—— **Who Entitled.**]—Several persons were held entitled to costs under 5 Will. & M. c. 11, as prosecutors of an indictment, removed by certiorari, for not repairing a highway, one as constable of the manor within which the highway lay, the others as parties grieved, they having used the way for many years in passing and repassing from their homes to the next market town, and being obliged, by reason of the want of repair, to take a more circuitous route. *Rex* v. *Taunton, St. Mary*, 3 M. & S. 465. And see *Rex* v. *Bird*, 2 B. & Ald. 522.

—— **By one Inhabitant—Effect of.**]—Where one inhabitant of a parish has removed an indictment against it for the nonrepair of a road, and has entered into the usual recognizance for costs, in case a verdict of guilty should pass, the other inhabitants of the parish will not be permitted to plead guilty to the indictment. *Rex* v. *Laxborough*, 1 D. P. C. 527.

Taxation.]—An order of sessions for payment of costs of a prosecution for non-repair of a highway is bad, unless the amount of costs is ascertained and ordered by the same sessions. The sessions cannot refer the costs to be taxed by their officer after the sessions. *Reg.* v. *Lambeth (Surveyors)*, 3 C. L. R. 35; 3 W. R. 74.

Mode of Recovery.]—The costs of an indictment against a parish for non-repair of a highway ordered to be paid to the prosecutor by the quarter sessions, under 5 & 6 Will. 4, c. 50, s. 95, are not recoverable by distress against the surveyor, but are to be paid out of the rate made and levied in pursuance of the act. *Tryddyn, In re*, 23 L. J., M. C. 45. *S. C.*, nom. *Reg.* v. *Eyton*, 3 El. & Bl. 390; 18 Jur. 399.

—— **Duty of Surveyor.**]—It is the duty of the surveyors who are in office when such an order for costs is made, or of their immediate successors in office, to pay the costs out of any funds then in their hands, or, if they have none, to make a rate for the purpose of putting themselves in funds. *Ib.*

Treble Costs under 13 Geo. 3, c. 78, s. 81.]—The Highway Act, 13 Geo. 3, c. 78, s. 81, did not entitle a surveyor of highways to treble costs after verdict, but only in cases of nonsuit, discontinuance, or judgment on demurrer. *Ward* v. *Bateman*, 1 C. & M. 485; 3 Tyr. 221; 2 L. J., Ex. 16.

vii. *Other Matters.*

Discharge from an Indictment.]—In order to be discharged from an indictment for not repairing a highway, the parties must produce an affidavit that the road is actually repaired since the conviction, and is likely to continue so. *Rex* v. *Loughton*, 3 Smith, 575.

The inhabitants of a parish cannot be discharged from an indictment for the non-repair of a highway, until it is ascertained whether the repairs effected will stand during the winter. *Rex* v. *Witney*, 5 D. P. C. 728; 1 W. W. & D. 381.

Quashing an Indictment.]—An indictment against a parish for not repairing a highway cannot be quashed on an affidavit that the way was then in repair; but the defendant must plead guilty, and pay a nominal fine. *Rex* v. *Lincombe*, 2 Chit. 214.

Setting aside an Award.]—The court will not entertain an application for setting aside an award founded on an indictment at the assizes for not repairing a road, though the question in dispute is of a civil nature. *Rex* v. *Cotesbatch*, 2 D. & R. 265.

New Trial—On what Grounds.]—Where the defendant has been acquitted on an indictment for not repairing a road, the court will not grant a new trial; yet they will, in very special circumstances, suspend the entry of judgment, so as to enable the parties to have the question reconsidered upon another indictment, without the prejudice of the former judgment. *Rex* v. *Wandsworth*, 1 B. & Ald. 63; 18 R. R. 434.

After a verdict for the defendant upon an indictment for the non-repair of a highway, the court refused an application for a new trial, on the ground of the improper rejection of evidence, but suspended the judgment in order that another indictment might be preferred. *Rex* v. *Sutton*, 2 N. & M. 57; 5 B. & Ad. 52; 2 L. J., M. C. 75.

After a verdict of not guilty, upon an indictment for obstructing a highway, the court will not grant a new trial upon the ground that the verdict was against the weight of evidence, although the judge who tried the case reports that he is dissatisfied with the verdict. *Reg.* v. *Johnson*, 2 El. & El. 613; 29 L. J., M. C. 133; 6 Jur. (N.S.) 553; 8 W. R. 236.

Or on the ground of the misdirection of the judge. *Reg.* v. *Russell*, 3 El. & Bl. 942; 23 L. J., M. C. 173; 18 Jur. 1822; 2 W. R. 555.

Where a verdict of not guilty has been returned upon an indictment for non-repair, a new trial will not be granted; but under very special circumstances the court may order all proceedings upon the judgment to be suspended, so as to give an opportunity for the question to be again raised upon a fresh indictment. *Rex* v. *Wandsworth* (1 B. & Ald. 63) approved. *Reg.* v. *Southampton County*, 56 L. J., M. C. 112; 19 Q. B. D. 590; 57 L. T. 261; 16 Cox, C. C. 271; 52 J. P. 52.

See further, CRIMINAL LAW (NEW TRIAL).

Removal by Rule Nisi.]—The rule for removing an indictment for non-repair of a road, from an inferior jurisdiction, is nisi in the first instance. *Rex* v. *Leeds (Inhabitants)*, 5 D. P. C. 123.

Agreement by Parishioner to stay Proceedings on Presentment—Action for Breach.]—A part of the inhabitants of a parish entered into an agreement with a parishioner who had presented a road in it for want of repair, that he should stay proceedings on that presentment;

that the inhabitants should allow him a sum of money towards the expenses of repairing the road; and that the statute duty of himself and certain inhabitants should be done therein:—Held, that a declaration in which it was averred that part of the inhabitants had performed the agreement, but that the parishioner had not repaired the road or withdrawn the presentment, was bad. *Jefferies* v. *Greenman*, 4 L. J. (O.S.) K. B. 13.

6. RATES.

a. Validity of.

Concurrent Rates.]—Concurrent rates for repairs of highways are invalid if made for the same period of time; but a second rate may be made where a former rate for the same purpose has not been wholly collected. *Reg.* v. *Best*, or *Reg.* v. *Surrey JJ.*, 2 New Sess. Cas. 655; 5 D. & L. 40; 16 L. J., M. C. 102; 11 Jur. 489.

—— **Under General and Local Acts—Right to alter Ambit of Township.**]—Commissioners under a local act had power from time to time to ascertain and fix the limits of a township for the purposes of the act, and were authorised to levy rates not exceeding a certain amount for, among other objects, paving and repairing the roads and streets within such limits:—Held, that the commissioners could from time to time diminish as well as enlarge the ambit of the township for the purposes of the act; and that their powers of rating within the ambit so fixed were not exclusive of those of the highway surveyors under 5 & 6 Will. 4, c. 50. *Villers* v. *Hargreaves*, 5 W. R. 595.

Additional Rate—Title of.]—A single rate exceeding 10*d.* in the pound, made under s. 111 of 5 & 6 Will. 4, c. 50, as an additional rate to defray the expenses of defending an indictment, need not shew by its title that it is such additional rate. *Reg.* v. *Uttermere*, 4 W. R. 205.

Signature of Surveyor and Allowance.]—The signature of the surveyor, and allowance by justices, were by inadvertence inserted in the middle of a highway rate, instead of at the end:—Held, that this was no allowance of the rate in respect of matters which followed such signature and allowance, and therefore that the justices had no jurisdiction to enforce the rate by issuing a distress warrant for the amount of an assessment which appeared in a part of the rate subsequent to the signature and allowance. *North Staffordshire JJ., In re, Skelton (Surveyor), Ex parte*, 1 B. C. C. 211; 2 C. L. R. 130; 23 L. J., M. C. 17; 17 Jur. 1165; 2 W. R. 80.

Where a highway rate, made by a waywarden of a highway district under 27 & 28 Vict. c. 101, s. 33, has been published like a poor rate, it is not necessary that it should also have been signed and allowed by justices like a poor rate. *Worthington* v. *Gill*, 49 J. P. 629.

Publication—No Church in Highway Parish.]—The hamlet of H. was a highway parish within the meaning of the Highway Act, 1835, but for ecclesiastical and poor law purposes it formed part of the parish of K. Notices of a highway rate for H. were published by posting them in public and conspicuous places in H. Notice was not posted on the door of the parish church of K.:—Held, that this was a good publication. *Reg.* v. *Wolferstan*, 62 L. J., M. C. 148; [1893] 2 Q. B. 451; 5 R. 561; 69 L. T. 429; 42 W. R. 176; 58 J. P. 133.

—— **Proof of.**]—The production of the rate book is not sufficient evidence of the due publication of a highway rate, although it is primâ facie evidence in the case of a poor rate. *Bird* v. *Adcock*, 47 L. J., M. C. 123; 26 W. R. 634.

General Highway Rate—Exempted District.]—A local act exempted a district from all rates towards paving and lighting the rest of the parish:—Held, that a general highway rate on the whole parish was not void, though part of the money thus raised might be applied to paving the rest of the parish. If that should be a misapplication, it might be ground of appeal, but would not make the rate void. *Richardson* v. *Tubbs*, 4 C. B. 304; 16 L. J., C. P. 171.

—— **Public Works of Paving.**]—By s. 216, sub-s. 3, of the Public Health Act, 1875, it is provided that "where no public works of paving, water supply and sewerage are established in the district, the cost of repair of highways in the district shall be defrayed out of a highway rate to be levied throughout the whole district by the urban authority as surveyor of highways." The appellants, a local district board, made a general district rate, and a highway rate, and demanded the same from the respondents, who had constructed two compensation reservoirs in connection with the supply of water for the town of B. The respondents contended that the local board had no power to levy a highway rate because in 1880 they laid down in their district a curbstone (about 300 yards long) as a coping to a cinder pathway of a carriage road:—Held, that putting down the curbstone did not constitute the establishment of public works of paving within the meaning of s. 216, sub-s. 3, of the Public Health Act, 1875, and therefore the appellants were entitled to levy a highway rate. *Oxenhope District Local Board* v. *Bradford Corporation*, 47 L. T. 344; 31 W. R. 322; 47 J. P. 21.

Urban District—Part of Parish excluded—Amount.]—By s. 29 of the Highway Act, 1835, no highway rate to be levied or assessed shall exceed at any one time the sum of 10*d.* in the pound, or 2*s.* 6*d.* in the pound in the whole in any one year, without the consent of four-fifths of the inhabitants assembled at a specially called meeting. By s. 216 of the Public Health Act, 1875, where parts of a district are not rated for works of paving, water supply and sewerage, or for some of them, the cost of repair of highways in those parts shall be defrayed out of a highway rate to be separately assessed and levied in those parts by the urban authority as surveyor of highways; provided that where part of a parish is included within an urban district, and the excluded part was, before the constitution of that district, liable to contribute to the highway rates for such parish, such excluded part shall, for all highway purposes, be treated as forming part of such district. The hamlet of G. was formerly a "parish" maintaining its own highways. Prior to 1875 part of the hamlet was formed into a local government district, called the inner district, with a local board, and became an urban

district under the Public Health Act, 1875. Part of the hamlet, called the outer district, was excluded from it. The local board of the inner district repaired the highways in the outer district, and separately assessed a rate of 3*s*. 4*d*. in the pound on the inhabitants of the outer district, without first obtaining the consent of four-fifths of them. The appellants objected to the validity of the rate:—Held, that the consent of four-fifths of the inhabitants of the outer district was rendered unnecessary by s. 216 of the Public Health Act, 1875, and that the rate was valid. *Dyson* v. *Greetland Local Board*, 53 L. J., M. C. 106; 13 Q. B. D. 946; 48 J. P. 596—C. A. Affirming 48 L. T. 636.

Before the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, the borough of A. was divided into a town and country district, each maintaining its own highways. That act was incorporated in a local act for the improvement of the borough of A. except so far as anything in the former act was varied or otherwise provided for by this. By the latter act the mayor, aldermen and burgesses of A. were empowered to cause any street in the borough to be sewered and paved at the expense of the adjoining landowners, and certify the same when completed to be a public highway, and that it should be lawful for them from time to time to make a rate for the maintenance of such highways upon the occupiers of all houses and lands within the borough. By 10 & 11 Vict. c. 34, s. 48, commissioners (that is, the persons or body corporate intrusted to execute any local improvement act incorporated with this) shall be the surveyors of all highways within the limits of such local act, and shall have within those limits all the powers of surveyors, and the inhabitants of the district within those limits shall not be liable to highway rates in respect of roads within other parts of the parish in which the district is situated. By s. 49 the commissioners are to be indictable for non-repair of any public highway within the limits of such local act in the same manner as the inhabitants thereof, or of any parish or other district therein, were liable before the passing of such act:—Held, that the mayor, aldermen and burgesses of A. were bound as commissioners under 10 & 11 Vict. c. 34, to rate the whole borough for the repair of highways, paved and certified under the local act, and likewise to rate the whole for repair of the public highway not so paved and certified, and that a rate upon the country district alone, for repair of the highways within it (not proved or certified), was bad. *Slater* v. *Ashton-under-Lyne Corporation*, 18 Q. B. 398; 21 L. J., M. C. 185; 16 Jur. 992.

Exercise of Statutory Powers—Construction.]—By a local act for improving a town, and repairing the highways, commissioners were invested with the powers, provisions and authorities contained in 13 Geo. 3, c. 78, and by a subsequent section were enabled to make a rate of not more than 8*d*. in the pound in any one year. A subsequent local act, amending and altering the former, recited the rate of 8*d*., and empowered the commissioners to raise it to 1*s*. and 1*s*. 6*d*.:—Held, that, under the words "powers, provisions and authorities," the justices of the peace for the borough had no authority to order and allow a rate under 13 Geo. 3, c. 78, s. 45. *Higgins* v. *Green*, 10 M. & W. 703; 12 L. J., M. C. 27.

According to Amount.]—In a cognizance for a highway rate, made for the purposes mentioned in 13 Geo. 3, c. 78, ss. 30 and 45, such rate must have been expressly alleged to be an equal assessment of 9*d*. in the pound on the yearly value of the lands, &c. The statement of its being an equal assessment of 9*d*. in the pound upon all occupiers of lands within the parish was not sufficient. *Morrell* v. *Harvey*, 6 N. & M. 35; 4 A. & E. 684; 1 H. & W. 728; 5 L. J., M. C. 69.

b. Liability to.

Property or Premises "Usually rated."]—The words "usually rated," in 5 & 6 Will. 4, c. 50, s. 27, refer not to legal ratability, but to rating in point of fact, and to the practice of rating in the particular parish, not in the country generally. *Reg.* v. *Rose*, 6 Q. B. 153; D. & M. 300; 13 L. J., M. C. 155; 8 Jur. 777.

On appeal against a surveyor's rate on timber woods, the sessions found for the appellant, subject to a case, which stated that the woods were not liable to poor rate, that from 1809 down to the passing of the 5 & 6 Will. 4, c. 50, they had not been rated to the highways; and that timber woods of a like description had always been rated to the highways in the majority of parishes in the country and neighbourhood, but in some they had not been so rated since 1809:—Held, that the woods were not shewn to be chargeable under s. 27. *Ib.*

—— **Mines.**]—Mines not ratable to the relief of the poor opened into a parish since the passing of that act are ratable to the highway rate, if mines of a similar description were before the act usually rated to the highways in that parish. *Reg.* v. *Randall*, or *Saunders*, 4 El. & Bl. 564; 24 L. J., M. C. 57; 1 Jur. (N.S.) 255; 3 C. L. R. 822; 3 W. R. 177.

Tithes and Commutation Rents.]—An owner of tithes, which are retained by the occupier of the land under prospective compositions from year to year, is ratable to the repair of the highways as an occupier of tithes. *Chanter* v. *Glubb*, 4 M. & Ry. 334; 9 B. & C. 479; 7 L. J. (O.S.) M. C. 114.

Where an inclosure act directed that all great tithes, payable to the rector of a parish, should be extinguished, and that the commissioners should ascertain the nett value of such tithes, and affix a fair, clear, annual rent or sum of money per acre in lieu of such tithes, and as an adequate compensation for the same to the rector:—Held, that the rector was, in respect of such rents, ratable to the repair of the highways. *Rex* v. *Lacy*, 5 B. & C. 702; 8 D. & R. 457; 5 L. J. (O.S.) M. C. 6.

Exemptions—Hamlet repairing its own Highways—Sufficiency of Evidence.]—The parish of A. contained several hamlets all included in the poor rate for the parish, with one set of overseers. M., one of these hamlets adjoining the parish of B., had, so far as living memory extended, been assessed to the property and income tax, land tax and assessed taxes, as part of B. The occupiers of land in M. had at various times held the offices of guardian of the poor, overseer, churchwarden and dike reeve for A., and had never held similar offices in B. M. had time out of mind paid poor rates, church rates, sewer rates and tithes to A. So far as living memory and evidence of reputation went, the occupiers of

lands in M. had always been assessed, and had contributed to the highway rates of B., and the highways in M. had always been repaired by B. until 1841, when, by private arrangement with the surveyors of the highways of B., the lands in M. ceased to be assessed in that parish; and the highways in M. had still been repaired by the occupiers of lands in M. without any rate, the surveyors of the highways of B. expressly reserving to themselves the right of assessing the lands in M. to the highway rates at any future time:—Held, that M. was assessable to the highway rates for A., there not being sufficient evidence to warrant the conclusion, that M. was a hamlet repairing its highways separately. *Dawson* v. *Willoughby Highways (Surveyor)*, 5 B. & S. 920; 34 L. J., M. C. 37; 11 Jur. (N.S.) 240; 11 L. T. 597; 13 W. R. 287.

H. and others, the owners and occupiers of lands in the hamlet of G., in the township of W., had been immemorially exempt from the repair of the highways, by reason of their repairing a particular road in the hamlet, but had always been rated to the relief of the poor. W. was included in a highway district under 25 & 26 Vict. c. 61, and a precept to the overseers of W. was duly made, and they made a uniform rate of 1*s.* on all the lands in W., being 8*d.* for poor rate and 4*d.* for highway rate, and H. was rated like others:—Held, that H., by reason of his former exemption, continued exempt from the highway rate, and that he ought to have been rated at 8*d.* only in the pound. *Heath, In re*, 35 L. J., M. C. 113; L. R. 1 Q. B. 218; 12 Jur. (N.S.) 355; 13 L. T. 669; 14 W. R. 388.

—— **Of a Tithing.**]—A tithing, consisting of two farms, had from time immemorial repaired its own highways, and had never contributed to the repairs of highways in other parts of the parish in which it was situate, although rated to the poor rate:—Held, that these facts afforded sufficient evidence of exemption from the primâ facie liability to the repairs of the highways in the parish at large. *Freeman* v. *Read*, 4 B. & S. 174; 32 L. J., M. C. 226; 10 Jur. (N.S.) 149. *S. C.*, previous judgment of court on case stated, 7 W. R. 556.

—— **Trial of Validity.**]—A rule under 11 & 12 Vict. c. 44, s. 5, is not the proper remedy to try the validity of an exemption from a highway rate. *Reg.* v. *Shropshire JJ.*, 3 New Sess. Cas. 641.

—— **Under Particular Statutes.**] — By a paving act, commissioners were authorised to impose a paving rate for paving and repairing the streets, squares, &c., within a city, and certain suburban parishes, upon the occupiers of houses, buildings, lands, &c., "except all arable, meadow, and pasture land without the walls of the city, and also except all that messuage, &c., together with the barns, stables, &c., and grounds thereunto belonging, situate, &c., and now in the tenure of possession of S. T., called or known by the name of B. farm." A part of the grounds so exempted was afterwards occupied by a company for the purposes of their railway:—Held, that such part was still exempt from the rate. *Todd* v. *L. & S. W. Ry.*, 7 Man. & G. 336; 8 Scott (N.R.) 56.

By an act for improving a particular portion of a parish, it was provided that every inhabitant or owner who should be assessed to the rates made under that act, for any lands or tenements within the limits of the act, should be released and free from all rates and assessments towards the paving and lighting any other street, road or place within the parish in respect of such lands or tenements:—Held, that this did not exempt an occupier of premises assessed within the local district from being assessed in a general highway rate imposed upon the whole parish, although a portion of such rate might be expended in paving parts of the parish out of the district. *Richardson* v. *Tubbs*, 4 C. B. 304; 16 L. J., C. P. 171.

Exemption by reason of Liability to Repair ratione tenuræ — Extinction of Liability and Exemption.]—An exemption from time immemorial of the owner or occupier of property from the payment of general highway rates by reason of his liability, ratione tenuræ, to repair a particular road, ceases with his liability to repair that road. *Heath* v. *Weaverham Overseers*, 63 L. J., M. C. 187; [1894] 2 Q. B. 108; 10 R. 274; 70 L. T. 729; 42 W. R. 478; 58 J. P. 557.

County Rate — Borough Extended.]—By a local act passed in 1874, the limits of the borough of Middlesborough were extended. By s. 20 of that act it was enacted that the extended area "shall be exempt from all county rates save only in respect of the purposes for which any county rates are now leviable within the existing borough." At the time of the passing of that act general county rates were leviable within the existing borough for all purposes for which general county rates could be levied in any part of the riding. By s. 13 of the Highways and Locomotives (Amendment) Act, 1878, any road which has ceased to be a turnpike road in manner described by the act shall be deemed to be a main road, and one-half of the expense incurred by the highway authority in the maintenance of such road shall be contributed out of the county rate:— Held, that as within the borough existing at the time of the passing of the local act general county rates were leviable for all purposes, the saving of such liability rendered the exemption in s. 20 inoperative; and therefore the inhabitants of the extended area of the borough were not exempt from liability to pay county rates for the maintenance of a road under s. 13 of the Highways and Locomotives (Amendment) Act, 1878. *Middlesborough Overseers* v. *Yorkshire, (N. R.) JJ.*, 12 Q. B. D. 239; 32 W. R. 671—C. A.

Apportionment between Adjoining Parishes—Jurisdiction of Justices.]—The 5 & 6 Will. 4, c. 50, s. 58, enacts that where the boundaries of parishes pass across or through the middle of a highway, justices in special sessions may, on complaint, summons and hearing, apportion the future liability to repair between the parishes; proviso, that in the case of such highway the repairs of any part of which belong to any body politic or corporate, or to any person by the reason of tenure of any lands, or otherwise howsoever, the same proceedings may be adopted. Two justices made an order of apportionment in the form given in the schedule, which form does not contain any express finding as to boundary. On appeal against this order, evidence was heard on the question whether or not the highway was upon a parochial boundary; the appellants denied the jurisdiction of the justices, because,

as they contended, the highway did not appear to be on such boundary; the respondents argued that, even if it were not so, the justices had jurisdiction under the proviso. The sessions confirmed the order, but stated a case setting forth the facts on the question of boundary, and the objection taken to the jurisdiction, and adding, that if the court should be of opinion that under the circumstances stated the road could not be divided by order of justices under the statute, the order of sessions was to be confirmed; if not, both orders to be quashed:—Held, that the court, though the order of justices was made in the statutory form, and confirmed at sessions, might go into the whole question raised by the case; namely, whether there was evidence of a boundary intersecting the highway, or if not, whether upon the evidence the two justices appeared to have had jurisdiction under the proviso. *Reg.* v. *Perkins*, 14 Q. B. 229; 19 L. J., M. C. 105.

Held, also, that the case did not come within s. 58, as the evidence did not show a boundary intersecting the highway, and that the proviso did not apply. *Ib.*

c. Recovery.

By one of two Surveyors.]—By 5 & 6 Will. 4, c. 50, s. 34, for levying and recovering highway rates, the surveyor shall have the same powers, remedies, and privileges, as the overseers of the poor in the parish have by law for the recovery of any rate made for the relief of the poor; and s. 6 empowers parishes to appoint "one or more persons to serve the office of surveyor." Two persons were appointed under the act:—Held, that a demand of a rate and application for a warrant of distress were sufficient, though made by only one of the persons so appointed, in his own name. *Morrell* v. *Martin*, 8 Scott, 688; 6 Bing. (N.C.) 373; 4 Jur. 891.

See also SURVEYORS, ante, cols. 72 et seq.

Warrant of Commitment — Validity.] — The 3 Geo. 4, c. 23, s. 2, enacts, that after examination and adjudication of a complaint by any two justices all subsequent proceedings to enforce obedience thereto may be enforced by either of the justices, or any other justice for the same county, in like manner as if done by the same two justices who had heard and adjudged the complaint:—Held, that a warrant of commitment, which recited that a party had been summoned before two justices to show cause why he should not pay rates (not stating that they were the same justices who granted the warrant), was bad for not showing that the same justices who issued the summons also adjudicated upon the case. *Ramsden, In re*, 2 New Sess. Cas. 427; 1 B. C. Rep. 133; 15 L. J., M. C. 113; 10 Jur. 879.

Mandamus to Issue Distress Warrant—When Liability Doubtful.]—On an application to justices for a distress warrant to levy a highway rate upon A. as occupier of premises, he claimed to be exempt, by reason of having never contributed to the repair of the highways or been rated, but having always repaired so much of a highway as was within his premises, and half a bridge at the extremity of the highway. He showed no origin for the exemption, but insisted that he was protected by 5 & 6 Will. 4, c. 50, s. 33. The justices refused a warrant. On an application to the court for an order on the justices to issue the warrant, held, too doubtful a question to justify the court in acting under 11 & 12 Vict. c. 44, s. 5, and left the applicants to move for a mandamus, or to try the question by having another rate made, and against which A. might appeal (the objection that he ought to have appealed having been waived by consent). *Reg.* v. *Browne*, 13 Q. B. 654.

The court would not compel a magistrate by mandamus to issue a warrant for a parish highway rate, under 13 Geo. 3, c. 78, ss. 45, 67, made upon the occupier of lands within his district, if it appeared that, in the magistrate's belief, and in fact, there was a legal doubt as to the occupier being liable to contribute to the repairs of the parish highways. *Rex* v. *Greame*, 2 A. & E. 615.

The court refused to award a mandamus commanding justices to enforce, by issuing a warrant of distress, a highway rate assessed upon land which had never been rated before, and the liability of which to be rated was denied. *Rex* v. *Somersetshire JJ.*, 4 N. & M. 394; 2 A. & E. 632.

—— **Neglect to Appeal.**]—After a highway rate has been regularly made and assessed, and an occupier of premises included in such rate has neglected to appeal within the time allowed by 5 & 6 Will. 4, c. 50, for that purpose, he cannot afterwards successfully set up a claim to exemption from that particular rate; and the court will grant a rule to compel the issuing of a distress warrant for the amount where the justices applied to for that purpose refused to issue their warrant, after hearing the grounds of such exemption, even though the claim of exemption appears to be a substantial one. *Reg.* v. *Oxfordshire JJ.*, 6 D. & L. 288; 3 New Sess. Cas. 640; 18 L. J., M. C. 222; 14 Jur. 575.

Of a Paving Rate—County Court Proceedings.]—A paving rate, imposed under authority of an act of parliament, is not an incorporeal hereditament, and may, therefore, be sued for in a county court. *Baddeley, In re, Baddeley* v. *Denton*, 4 Ex. 504; 19 L. J., Ex. 44.

—— **Reimbursement of Expenses—Previous Notice.**]—An act for paving and improving a town appointed commissioners, and authorised them to pave new streets, and provided that the expenses of such new pavements should be paid and reimbursed to the commissioners by the owners or occupiers of the land adjoining the streets, and empowered the commissioners to recover such expenses by action. A subsequent section commencing, "Provided always, and be it enacted," directed that, before the commissioners should cause the streets to be paved, they should in the first place give notice to the owner or occupier of every house, land, &c., adjoining the street, requiring him to pave the same as the commissioners should direct; and if he should for six months neglect to pave pursuant to the notice, then it should be lawful for the commissioners, and they were required, to cause the same to be done, and to recover the expenses from such owner or occupier:—Held, that the giving of this notice was a condition precedent to the commissioners executing the paving themselves and charging the expenses on the owner or occupier, and that it must be averred in the declaration in an action brought for the recovery of such expenses. *Salford Corporation* v. *Achers*, 16 M. & W. 85; 16 L. J., Ex. 6.

—— **Refusal to pay—Offence under 7 Will. 4 & 1 Vict. c. 78.**]—Commissioners under an act for lighting and paving the parish of Bathwick were empowered to levy rates, and power was given to justices for the county of Somerset to enforce payment of them by distress. A charter of incorporation was granted by Queen Elizabeth to the city and borough of Bath. Before 5 & 6 Will. 4, c. 76, passed, the parish of Bathwick was situate partly in Somerset and partly in the city of Bath; but, by s. 7, the whole parish was included within the city of Bath. An inhabitant of the parish of Bathwick was duly assessed under the local act, and the amount not being paid, a magistrate for the city and borough of Bath refused to grant a warrant of distress:—Held, that the refusal to pay these rates was an offence against the provisions of the local act within the meaning of the 7 Will. 4 & 1 Vict. c. 78, s. 31, and that the justices for the city and borough of Bath had jurisdiction to enforce the payment of them. *Reg.* v. *Sutcliffe, Bathwick, In re*, 3 New Sess. Cas. 634; 18 L. J., Q. B. 301; 13 Jur. 840.

Liability of Collector for Balance in Hand—Sufficiency of Demand.]—A collector of highway rates had in his hands a balance arising from the sale of goods of A., distrained for non-payment of rates, after satisfying the rates and the costs of distress and sale. A person came and demanded the balance, and on being asked if he had authority from A. to demand it, said he had a written authority in his pocket, but refused to produce it, saying there was no need for him to show it:—Held, that this was not a sufficient demand within 27 Geo. 2, c. 20, s. 2, to entitle A. to sue the collector for such balance. *Charrington* v. *Johnson*, 13 M. & W. 856; 14 L. J., Ex. 299.

See also LOCAL GOVERNMENT *and* METROPOLIS.

d. Appeal against Distress.

Notice of.]—The notice of appeal required by 13 Geo. 3, c. 78, s. 80, against a distress for non-payment of a highway rate, might be within six days after the levy, and need not be within six days after the granting the warrant of distress. *Rex* v. *Devon JJ.*, 1 M. & S. 411.

The notice of appeal need not disclose the grounds upon which the appellant objects to the regularity of the distress. *Ib.*

B. TURNPIKE ROADS.

1. GENERALLY.

Meaning of.]—The legal meaning of the words "turnpike road" is a road on which parties have by law a right to erect gates and bars for the purpose of taking toll, and of refusing the permission to pass to all persons who refuse to pay. *Northam Bridge and Roads Co.* v. *London and Southampton Ry.*, 6 M. & W. 428; 1 Railw. Cas. 665; 9 L. J., Ex. 165; 4 Jur. 892.

The words "turnpike road" in the Railways Clauses Act (8 & 9 Vict. c. 20), s. 50, mean a road which is repaired by tolls payable by passengers for the use of the road. *Reg.* v. *East and West India Docks and Birmingham Junction Ry.*, 1 C. L. R. 496; 2 El. & Bl. 466; 22 L. J., Q. B. 380; 17 Jur. 1181; 1 W. R. 409.

Within 4 & 5 Vict. c. 59.]—A turnpike road is within 4 & 5 Vict. c. 59 although made and maintained under a local act comprising the making and maintaining sea-defences and other objects. *Reg.* v. *Worthing and Lancing Turnpike Roads (Trustees)*, 3 El. & Bl. 989; 2 C. L. R. 1678; 23 L. J., M. C. 187; 18 Jur. 907; 2 W. R. 478.

Completion of—Certificate of Justice.]—The 4 Geo. 4, c. 95, s. 87, gives an appeal to any person who shall think himself aggrieved by anything done by any two justices in pursuance of that act or any local turnpike act; and declares that the determination of the sessions shall be final and conclusive, and that no proceeding to be had in pursuance of that act shall be removed by certiorari. The sessions, on appeal against a certificate of two justices, that a turnpike road made under a local act had been completed, and was fit to be travelled upon, having decided that the certificate was void in point of law, and having refused to go into the merits of the appeal in point of fact, the court refused to grant a mandamus to them to hear the ground that their decision was contrary to the local act. *Rex* v. *Yorkshire, (W. R.) JJ.*, 5 B. & Ad. 1003.

Extent of 26 Geo. 2, c. 64.]—Where a turnpike act described "the roads from A. to the town of B., and from thence to C.":—Held, that the road through B. was excluded. *Hammond* v. *Brewer*, 2 Ken. 33; 1 Burr. 376.

Conversion into Main Roads.]—*See* infra, 8, col. 175.

2. TRUSTEES AND COMMISSIONERS.

a. General Powers and Duties.

Statute.]—56 & 57 Vict. c. 73, s. 25, confers on rural district councils the power of highway authorities, &c.

Transfer of Powers to District Councils—District Commissioners incorporated under Local Acts.]—By certain local acts district commissioners were, before 1875, incorporated for the enclosure, drainage, and making and repair of certain roads extending into several rural parishes and one urban parish, and by these acts the highway expenses were to be defrayed by an acre-rate. Upon a case stated:—Held, that the powers, &c., of the district commissioners as the highway authority within their district had been transferred, as regards the rural parishes, to the rural district council of the district including such parishes, and that the highway expenses of that council as to such parishes ought to be defrayed as general expenses and not by acre-rate; and that the urban district council for the district comprising the urban parish within the district of the commissioners were entitled, exclusively of the commissioners, to exercise within such parish the powers, &c., of surveyors of highways. *Marshland, Smeeth, and Fen District Commissioners and Marshland Rural District Council*, 73 L. T. 563; 59 J. P. 824.

—— **Highway Commissioners for Isle of Wight.**]—By virtue of s. 25 of the Local Government Act, 1894, the Isle of Wight highway commissioners have ceased to exist, and their powers, duties, and liabilities are now vested in the district council of the rural districts of the island. Although the district council has become

the actual highway authority, the expenses still have to be defrayed by the county council. *Isle of Wight Highway Commissioners, In re*, 72 L. T. 569; 59 J. P. 438.

Necessary Oath.]—If a person is named in a turnpike act as one of the trustees of a turnpike road, and has acted as such, and been recognised as a trustee by the plaintiff in an action for the balance of his salary against one of the trustees, the judge will take him to be a good trustee, and will not allow evidence to be given on the part of the plaintiff to show that such person has not taken the oath prescribed to be taken by trustees of roads before they act as such. *Pritchard* v. *Walker*, 3 Car. & P. 212.

Power to Divert Roads.]—Under a turnpike act, the trustees had power to turn roads through private grounds, making satisfaction to the owners; and if they could not agree, they were enabled, on giving notice to the owners, to summon a jury to ascertain the damage, and to order such sum, so ascertained, to be paid to the owners; the court quashed an inquisition of the jury and an order of the trustees because it did not appear on the face of the proceedings that any notice had been given to the owners of the land. *Rex* v. *Bagshaw*, 7 Term Rep. 363.

Power to Stop Roads.]—The exception in the General Turnpike Act, 3 Geo. 4, c. 126. s. 86, does not take away from the trustees of a road the power of stopping up the roads therein mentioned, but leaves them at their discretion to do so or not:—Held, therefore, that the trustees were justified in stopping up and giving to the owner of the adjoining land an old road leading to a church, &c., to which the new road was a longer way. *De Beauvoir* v. *Welch*, 7 B. & C. 266; 1 M. & Ry. 81; 6 L. J. (o.s.) K. B. 78.

—— **Necessary Conveyance of Land.**]—An order for stopping up a road under 3 Geo. 4, c. 126, where the site of the old road was taken in exchange for that of the new, was valid, although no conveyance to the trustees was executed. *Allnut* v. *Pott*, 3 M. & Ry. 439, n.; 1 B. & Ad. 302.

The clause in s. 84, directing a conveyance to the trustees where lands are purchased by them, does not apply where the vendors were sui juris, and acting in their own right. *Ib.*

Reservation of Private Right over Abandoned Highway—Liability to repair.]—Where turnpike trustees, on the construction of a new turnpike road, stopped up part of an ancient highway, along which it was originally intended that the turnpike road should be carried, but from which they had diverted it and resolved that the remaining portion of the old road "should be kept open as a private way only for the use of A. to join the private way leading to his house and lands":—Held, that the part of it so kept open was no longer a highway, and that the parish was not indictable for its non-repair *Reg.* v. *Ifield*, 4 W. R. 458.

Taking of Buildings—Compensation.]—By a turnpike act trustees were authorised to enter upon and take lands, and to pull down certain houses, buildings, &c., "making or tendering satisfaction to the owners or proprietors of all private lands, houses, buildings, &c., so taken, for any loss or damage they may sustain thereby"; and it was also provided. that they should not be authorised to take other buildings without the consent "of the owners or proprietors thereof, or other persons interested therein":—Held, first, that compensation was to be made in the case of premises taken under the former clause, not only to the owners of the fee-simple in the lands and buildings, but also the lessees of the same for terms of years. *Lister* v. *Lobley*, 7 A. & E. 124; 6 N. & M. 340; 2 H. & W. 12; 6 L. J., K. B. 200.

Held, secondly, that the trustees were not bound by the above clause to make or tender compensation before or at the time of entering upon or taking the lands, or pulling down the houses. *Ib.*

Contracts—Intra Vires—Sinking of Well.]—Where any five or more trustees under a turnpike act were authorised to make turnpikes, with such suitable outbuildings and conveniences as they should think necessary on the intended line of road, and the owner of the soil next adjoining a toll-house (erected in pursuance of the act) contracted with one of the trustees, on behalf of the rest, to sink a well for the convenience of the toll-house, the expense to be borne by each party equally:—Held, that the sinking the well was within the authority of the trustees; that the contract entered into by one of them on behalf of the rest was valid; that the action to recover a moiety of the expense of the well was rightly brought in the name of the clerk of the trustees; and that the consent of the trustees, through the medium of one, that the well should be sunk, was a good consideration to support the action. *Newman* v. *Fletcher*, 1 D. & R. 202.

—— **When Interested in — Penalty.**] — A trustee who holds the office of treasurer, which may be made an office of profit, is within the penalty of the act, though he makes no profit of it in his own person. *Delane* v. *Hillcoat*, 4 M. & Ry. 175; 9 B. & C. 310; 8 L. J. (o.s.) K. B. 4.

A. having contracted with the trustees of a turnpike road to repair the road for a specific sum, B., one of the trustees, let out to A. his horse and cart for 5*s.* a day, and they were used in the repair of the road. In an action against B. for the penalties:—Held, first, that B. was liable to the penalty imposed by 3 Geo. 4, c. 126, s. 65. *Towsey* v. *White*, 7 D. & R. 810; 5 B. & C. 125; 4 L. J. (o.s.) K. B. 61.

Held, secondly, that the notice of action, not stating that B., when he let out his horse and cart, was acting as a trustee, was bad. *Ib.*

Held, thirdly, that, the notice being bad, the plaintiff was barred, not only of his right to costs, but of his right to sue. *Ib.*

The proviso in s. 143 of the 3 Geo. 4, c. 126, is not confined to that part of the section which immediately precedes it, but extends to the whole matter in the section; and, therefore, if a party seeking to recover the penalties imposed by that act omits to give the requisite notice, or to commence his action within the prescribed time, he is not merely barred of his right to costs, but of his right of action altogether. *Cobbett* v. *Warner*, 1 H. & N. 388; 26 L. J., Ex. 11—Ex. Ch.

Removal of Clerks.]—The 4 Geo. 4, c. 95, s. 42, empowering commissioners of turnpike roads to remove their clerks, &c., must be taken in conjunction with s. 39, which requires certain

notices to be given when it is intended to revoke any order of the commissioners. And, therefore, where commissioners had discharged a clerk by a resolution made without such notice, a mandamus was granted to restore him, although at a former meeting the commissioners had ordered proper notices to be given of a meeting for the purpose of such discharge, and the notices had not been given, nor the meeting held, owing to the misconduct, as was alleged, of the clerk himself. *Rex* v. *Wrexham and Denbigh Roads (Trustees)*, 5 A. & E. 581.

Accounts—Power to Inspect.]—A turnpike act directed that the trustees should keep books, in which they should enter their accounts, and also their orders and proceedings, and that all persons should have access to such entries. By a subsequent local act it was directed, that the trustees should keep a book, in which they should enter their accounts, which book should be open to the inspection of the trustees, or of any creditor on the tolls. The 3 Geo. 4, c. 126, s. 73, re-enacted the latter provision as to all turnpike road accounts; and s. 72 directed, that all trustees of turnpike roads should keep a book of their orders and proceedings, which should be open to the inspection of any of the trustees, and should be read as evidence in courts as there directed. The act also provided, that the enactments therein contained should extend to all other turnpike acts, except where by that act it was otherwise ordered:—Held, that these clauses of the general and of the second local act superseded the provisions of the original act, and limited the power of inspection at first given to the whole public, confining it to trustees, and to trustees and creditors in the respective cases of orders and accounts. *Rex* v. *Northleach and Witney Roads (Trustees)*, 5 B. & Ad. 978.

—— **Signature of—Admissibility.**]—Printed copies of the annual accounts of a turnpike trust, made up from the original statements, signed by the chairman of the trustees, and returned pursuant to 3 Geo. 4, c. 126, s. 78, were produced from the office of the clerk of the peace and tendered in evidence. They were not signed by the chairman:—Held, inadmissible, either as primary or secondary evidence. *Pardoe* v. *Price*, 13 M. & W. 267; 14 L. J., Ex. 212.

Resolution not Signed till Subsequent Meeting—Validity.]—A resolution of the trustees of a turnpike road, although entered in the book kept by them, was not signed by the chairman of the meeting at which it was passed; but at a subsequent meeting the resolution was referred to and confirmed, and the entry of such confirmation was signed by the then chairman:—Held, sufficient evidence, under 3 Geo. 4, c. 126, s. 72, that such resolution had been passed. *Reg.* v. *Ifield*, 4 W. R. 458.

In respect of Repairs.]—*See* infra, col. 140.

b. Proceedings by and against.

Parties—Liability of Treasurer.]—Where a turnpike act directed that if any person had a cause of action against the trustees, he should sue the treasurer:—Held, that the action against the treasurer was substituted only for such action as might be maintained against the whole body of trustees, and that an action would not lie against him for the act of five trustees, though they formed a quorum. *Everett* v. *Cooch*, 7 Taunt. 1.

Where the trustees under a road act are sued in the name of their clerk, in pursuance of 3 Geo. 4, c. 126, s. 74, the property of the clerk is not liable to be taken in execution to satisfy the judgment. *Wormwell* v. *Hailstone*, 4 M. & P. 512; 6 Bing. 668; 8 L. J. (o.s.) C. P. 264.

A clerk to turnpike trustees is not personally liable under a clause, by which they may sue and be sued in his name. *Emery* v. *Day*, 4 Tyr. 695; 1 C. M. & R. 245; 3 L. J., Ex. 307.

Recovery of Costs in Actions.]—The 4 Jac. 1, c. 3, enacts, that in any action of trespass, or ejectione firmæ, or any action whatsoever, wherein the plaintiff might have costs in case judgment should be given for him, if the plaintiff be nonsuited, the defendant shall have judgment to recover his costs. A mortgagee of turnpike tolls brought ejectment to recover the tollgates, &c., and one of the trustees of the road was admitted to defend as landlord. The plaintiff having been nonsuited, the defendant signed judgment for costs:—Held, that the judgment was right, for that, assuming the statute to make it a condition to the defendant's right to costs that the plaintiff would have had his costs if he had succeeded in the particular action, still the case was within the statute, inasmuch as the plaintiff might have had his costs, even if the defendant, as a trustee of the road, was protected from personal liability by 3 Geo. 4, c. 126, s. 74. *Cobbett* v. *Wheeler*, 3 El. & El. 358; 30 L. J., Q. B. 64; 7 Jur. (N.S.) 260; 3 L. T. 554; 9 W. R. 140.

Action by Trustees—Claim for Calls—Validity of Agreement.]—In order to proceed for calls under 9 Geo. 4, c. 77, against parties who have agreed to subscribe money for the making or repairing a highway, the agreement must be in writing, and must be substantially the same as the form given in the schedule of 3 Geo. 4, c. 126. *Meigh* v. *Clinton*, 3 P. & D. 211; 11 A. & E. 418; 9 L. J., Q. B. 92.

The 3 Geo. 4, c. 126, s. 82, is only repealed by 9 Geo. 4, c. 77, ss. 6, 7, as to so much as relates to the payment and recovery of the sum subscribed for the making of a turnpike road. *Ib.*

Evidence of being a Trustee.]—By 3 Geo. 4, c. 126, s. 134, where any action shall be brought by or against any trustee of a road, evidence of the trustee having acted as such, together with the act of parliament by which he was appointed, or the order, or a copy of the order for his appointment or election, in case he was appointed or elected by the trustees, shall be sufficient proof of his being a trustee:—Held, that the words, "in case he was appointed or elected by the trustees," applied to cases where there was an appointment or election de facto by the trustees, in contradistinction to an appointment by the road act; and, therefore, proof of a party having acted as trustee, and of an order made by the trustees for his appointment or election, was sufficient, even under a local act, whereby the appointment of new trustees, on death or removal, was required to be under the hands and seals of five of the old trustees, and although it was shown that the order for such appointment was not so made. *Doe* d. *Baggaley* v. *Hares*, 4 B. & Ad. 435; 1 N. & M. 237; 2 L. J., K. B. 88.

Action against Trustees—Liability for Negligence.]—The trustees appointed under a public road act are not responsible for an injury occasioned by the negligence of the men employed in making or repairing the road. *Duncan* v. *Findlater*, 6 Cl. & F. 894 ; 1 Rob. 911.

The funds raised by such act cannot be charged with compensation for such an injury, the persons employed on the road being in the situation of servants to the trustees. *Ib.*

The trustees of a turnpike road converted an open ditch, which used to carry off the water from the road, into a covered drain, placing catchpits, with gratings thereon, to enable the water to enter the drain. Owing to the insufficiency of such gratings and catchpits, the water, in very wet seasons, instead of running down the ditch as it formerly did before the alterations by the trustees, overflowed the road and made its way into the adjoining land and injured a colliery :—Held, that the trustees were liable for such injury, if they were guilty of negligence in respect of such gratings and catchpits. *Whitehouse* v. *Fellowes*, 10 C. B. (N.S.) 765 ; 30 L. J., C. P. 305 ; 4 L. T. 177 ; 9 W. R. 557.

Held, also, that a fresh damage to the owner's colliery, occasioned by the trustees continuing such insufficient gratings and catchpits, was a distinct cause of action. *Ib.*

—— **Time for bringing Action.**]—Therefore, an action brought in respect of it within three months from the time of such fresh damage, although more than three months from the first damage, was not defeated by 3 Geo. 4, c. 126, s. 147, which limits the action against such trustees to "three months after the fact committed." *Ib.*

—— **Delay.**]—A road was altered in 1855 in a manner which the plaintiff considered likely to retard the escape of water in time of flood, and thus to aggravate the mischief done by floods to his property, and especially to do him serious damage on the occurrence of great floods, such as might be expected every twenty or thirty years. While the works were in progress in February, 1855, he threatened proceedings to stop them. After their completion slight floods occurred, in 1855 and 1856, without doing serious mischief ; and in 1857 a great flood occurred, shortly after which, in December, 1857, he filed a bill to have the road restored to its condition before 1855, and to have compensation for the damages done by the flood of 1857 :—Held, that the fact of no serious damage being done in the interval did not excuse the delay, and that he was not entitled to have the bill retained pending a trial. The bill accordingly dismissed with costs, without prejudice to any proceedings at law. *Wicks* v. *Hunt*, 1 Johns. 372.

—— **Specific Performance — Right of Pre-emption in Adjoining Owner.**]—It is no defence to a suit for specific performance against trustees of a turnpike road, that the land they have contracted to sell is liable to pre-emption by the owner of the adjoining land under the General Turnpike Act (3 Geo. 4), c. 126, s. 39, even where the offer required has not, through inadvertence, been made to such owner, and it is in evidence that the owner insists on his right, the purchaser making no objection to the title, and being content to take such estate as the trustees could convey. *Barrett* v. *Ring*, 2 Sm. & G. 43.

—— **Injunction—Proposed Deviation.**]—Commissioners proposed turning an inclined road or ship-way, leading from a town to the seashore, from the north-east to the north-west. This, so far from producing any injury, would make a more convenient landing-place : — Held, that whether they were authorised or not, the court would not interfere in the matter. *Ryde Commissioners* v. *Isle of Wight Ferry Co.*, 30 Beav. 616.

Liability to Information.]—Commissioners of roads, by exceeding their authority, render themselves liable to an information. *Rex* v. *Rogers*, 2 Ken. 373.

3. Repair of Roads.

Mandamus to Compel.]—A mandamus does not lie to compel the repair of a turnpike road. *Reg.* v. *Oxford and Witney Roads* (*Trustees*), 4 P. & D. 154 ; 12 A. & E. 427.

Liability of Treasurer or Surveyor.]—When a turnpike road is out of repair, the proper person to be summoned and proceeded against, in the first instance before justices at special sessions, under 5 & 6 Will. 4, c. 50, s. 94, is the treasurer or surveyor, or other officer of the turnpike road. *Reg.* v. *Trafford*, *Gorton* (*Surveyors*), *In re*, 5 El. & Bl. 967 ; 25 L. J., M. C. 70 ; 2 Jur. (N.S.) 399 ; 4 W. R. 260 ; 7 Cox, C. C. 76.

—— **Jurisdiction to Summon.**]—A single justice has no authority, under 5 & 6 Will. 4, c. 50, s. 94, to summon the surveyor of turnpike roads for non-repair. *George* v. *Chambers*. 11 M. & W. 149 ; 2 D. (N.S.) 783 ; 12 L. J., M. C. 94 ; 7 Jur. 836. S. P., *Reg.* v. *St. Albans JJ.*, 1 C. L. R. 536 ; 22 L. J., M. C. 142 ; 17 Jur. 531.

Liability of Trustees.]—If trustees under a road act turn a road through an inclosure, and make the fences at their own expense, and repair them for several years, they cannot be compelled to continue such repairs unless there is a special provision in the act to that effect. *Rex* v. *Llandillo Commissioners*, 2 Term Rep. 232 ; 1 R. R. 466.

Where the trustees of a turnpike road have formed a new road through private grounds, but have neglected to make proper fences, as required by 4 Geo. 4, c. 95, s. 66, the want of the necessary funds for that purpose is not a sufficient answer to a mandamus commanding them to make the fences. *Reg.* v. *Luton Roads* (*Trustees*), 1 G. & D. 428 ; 1 Q. B. 860 ; 10 L. J., Q. B. 263.

—— **Cleansing of Ditches and Drains.**]—Under 3 Geo. 4, c. 126, s. 113, the obligation to make, scour, cleanse and keep open the ditches, drains and watercourses for keeping turnpike roads dry, and conveying the water from them, is on the trustees, and not on the occupiers of adjoining lands. *Merivale* v. *Exeter Turnpike Road* (*Trustees*), 9 B. & S. 70 ; 37 L. J., M. C. 40 ; L. R. 3 Q. B. 149 ; 18 L. T. 83 ; 16 W. R. 702.

—— **Agreement for—Liability of Successors.**]—The respective trustees of two different turnpike roads agreed, that the main street of a borough through which street the two roads passed, and which had been treated as common to the two trusts, should in future be repaired by

one trust alone, and that the other trust should contribute, annually, a certain sum towards those repairs, as long as the said portion of road should remain common to both trusts, and be repaired as aforesaid. In an action by the repairing trustees to recover from the contributing trustees their share due under the agreement in respect of the repairs :—Held, that the trustees had power to make such an agreement, under 4 Geo. 4, c. 95, s. 78 ; and that the succeeding trustees were bound by the agreement until it was determined by notice from either side. *Swinburne* v. *Robinson*, 1 El. & El. 80 ; 28 L. J., Q. B. 4 ; 5 Jur. (N.S.) 462 ; 7 W. R. 10.

—— **Effect of Local Act.**]—A local act for repairing a road under the trust of the contributing trustees, passed after the making of the agreement, provided that it should not be lawful for the trustees to apply the tolls or moneys coming to their hands under the act "in repairing or amending any part of the turnpike roads in any town or place which is or shall be paved or repaired by any commissioners or trustees for executing any local act of parliament" :—Held, that the fact that the borough had been brought within the provisions of the 11 & 12 Vict. c. 63, Public Health Act, did not render the agreement void under the local act. *Ib.*

Liability of Parish—Tolls an Auxiliary Fund.]—Where a turnpike act, after empowering the trustees under it to take tolls, directed that the roads should from time to time be repaired by the trustees out of the money arising by virtue of the act :—Held, that this only made the tolls an auxiliary fund in the hands of the trustees, and that the inhabitants of the township where the road was situate, who by prescription were bound to repair all roads within it, were nevertheless liable to be indicted for non-repair of the road. *Rex* v. *Netherthong*, 2 B. & Ald. 179.

Held, also, that such inhabitants might, after conviction, apply by motion for relief against the trustees under 13 Geo. 3, c. 84, s. 33. *Ib.*

If a turnpike road is out of repair, the inhabitants are liable to be indicted, although the tolls are appropriated by act of parliament to the repairs thereof. In such case they must seek relief from the trustees under 3 Geo. 4, c. 126. *Reg.* v. *Preston*, 2 Lewin, C. C. 193.

The 4 Geo. 4, c. 95, s. 68, which recites, that doubts have arisen whether any body politic or corporate, or any particular person or persons liable to repair, by tenure or otherwise, any old turnpike road, ought to repair any new road set out in lieu of the old road, and then enacts, that every body politic or corporate, and person or persons liable to repair any old turnpike road, shall be liable to repair any new road set out in lieu thereof, includes parishes. *Reg.* v. *Barton*, 3 P. & D. 190 ; 11 A. & E. 343 ; 9 L. J., M. C. 23.

Obtaining Materials for—"Inclosed Lands."]—The words "inclosed lands," in 3 Geo. 4, c. 126, ss. 97 and 98, meant lands which were actually inclosed and surrounded with fences ; and, therefore, where (before 4 & 5 Vict. c. 51) lands on downs were not fenced off, although private property, a surveyor might take materials for the repairs of a turnpike road, without the order of the justices mentioned in s. 98. But it was otherwise where the land was surrounded by a fence, though out of repair. *Tapsell* v. *Crosskey*, 7 M. & W. 441 ; 10 L. J., Ex. 188.

—— **Gardens.**]—Where there was a power for trustees of a turnpike road to dig for gravel, except in gardens :—Held, that the exception extended to fields planted with garden stuff. *Hughes* v. *Brand*, Amb. 105.

—— **Order of Sessions—Validity of.**]—An order of sessions for digging materials in private soil, by virtue of 29 Geo. 2, c. 67, quashed, because it showed no notice to the occupier, nor what kind of material for repair was wanted, nor in what fields it was intended to search, and did not award a satisfaction to the owner and occupier. *Rex* v. *Manning*, 1 Burr. 377 ; 2 Ld. Ken. 561.

Expenses of.]—*See* infra, cols. 167, 169.

When becoming Main Roads.]—*See* supra, A. 5, *a*, i. (ante, cols. 83 et seq.).

4. Tolls.

a. Toll Bars and Houses.

Power to Erect.]—The 9 Geo. 4, c. 77, s. 5, authorises turnpike trustees to build toll-houses, and inclose gardens for them on the sides of the turnpike roads :—Held, that this power is limited to the inclosure of land on the side of the road over which the public has an easement for passage, and does not extend to land adjacent to the road over which the public has no easement, though the land is uninclosed. *Beckett* v. *Upton*, 5 El. & Bl. 629 ; 25 L. J., Q. B. 70 ; 1 Jur. (N.S.) 1136 ; 4 W. R. 52.

—— **Under a Local Act—Construction.**]—By a local act, which was to continue in force for thirty-one years, it was enacted, that it shall not be lawful for the trustees of the turnpike roads to continue or erect any turnpike or toll-gate across the roads, in the towns of T. and W., or in any other town through or into which the roads might pass or be made in pursuance of the act, within the thirty-one years :—Held, that the act was prospective, so as to prohibit as well the continuance of any turnpike gate in the town of T., as it might be at any time during the thirty-one years for which the act was to be in force, as the erection of one in the town, as it was when the act passed. *Reg.* v. *Cottle*, 16 Q. B. 412 ; 20 L. J., M. C. 162 ; 15 Jur. 721.

Within a Town—Right to Demand Tolls—Jurisdiction of Magistrates.]—A turnpike act, passed in 1815, forbade the demanding or taking toll from any of the inhabitants of S. at any toll-gate "to be erected in the said town." In 1838 a toll-gate, which had stood in the town since 1815, was moved (about 1,200 yards) to a site outside the town. For several years there was no house between the new site of the gate and the town, but subsequently several houses were built on both sides of the road, though not forming a continuous street. Between 1838 and 1878 no toll was demanded from any inhabitant of S., but in the latter year A., an inhabitant of the town, was called upon to pay toll on driving through the gate. He then summoned the toll-collector for unlawfully demanding toll. The magistrates found as a fact that the toll-gate did not, either when erected or at the date of the complaint

stand within the town, and they dismissed the summons:—Held, (1) that the question whether the toll-gate was within the town was a question of fact for the magistrates, and the court could not go behind their finding; (2) that the finding was right in point of fact; and (3) that the omission to demand toll for forty years gave the public no right to exemption. *Deards* v. *Goldsmith*, 40 L. T. 328.

Near a Bridge—Rules for.]—By a local act a person was empowered to make a bridge over a river, and to set up gates and take tolls upon or near to the bridge, or at or upon any of its approaches or communications belonging to him, and from time to time to remove such gates to any part of the bridge or approaches. He moved a toll-gate from near the bridge to a point in a private road (which was his property, and led to the bridge) half a mile distant from the bridge:—Held, that, as the toll to be taken was pontage and not toll traverse, the gate must be so approximate to the bridge that the gate-keeper could see if a person passing through it was really going over the bridge, and that therefore toll could not be legally payable at the gate half a mile from the bridge. *Royal* v. *Yaxley*, 20 W. R. 903.

Compelling Trustees to Pull Down.]—A toll-house erected by turnpike trustees on a highway was for some years used for the collection of tolls. The toll-bar attached to the house was then taken down, and for twelve years subsequently no toll had been collected at the house, which had been in the occupation of a man employed by the road surveyors for the repair of the road. It was stated by the trustees that they might at some future period again require to use the house on the collection of tolls:—Held, that the owner of the land adjoining was entitled to a mandamus to compel the trustees to pull down the toll-house and remove the materials, for it must be taken to have become useless and no longer required for the purposes of the road within the meaning of 4 Geo. 4, c. 95, s. 57. *Reg.* v. *Greenlaw Turnpike (Trustees)*, 48 L. J., Q. B. 409; 4 Q. B. D. 447; 40 L. T. 555; 27 W. R. 800.

Sale of Toll-Houses by Trustees.]—A person was indicted for obstructing a highway, having purchased and kept standing a toll-house, not required for the purposes of the road, from the trustees of the turnpike, under 29 & 30 Vict. c. 105, s. 2. This toll-house was situated in the middle of a wide part of the road at the junction with another road. The addition of the site would have been a slight improvement to the road for the purpose of persons driving a particular way, but it would have been of no material benefit or advantage for the chief part of the traffic; and the price paid for the house was 120*l.*:—Held, that assuming the court to have jurisdiction to review the propriety of the sale, the trustees must have a practical discretion under the 29 & 30 Vict. c. 105, s. 2; and that, the price of the house being far beyond the value of the improvement, the trustees were justified in selling the house instead of adding the site to the road. *Reg.* v. *Fox*, 35 L. T. 249.

b. Nature and Amount of Tolls.

i. *On what Payable.*

Generally.]—Toll is not payable for passengers' luggage in an omnibus, or for a sheep and lamb in a basket on the omnibus, or for a man riding a horse, under an act imposing toll separately on carriages, on portmanteaus, trunks, &c., on passengers and travellers, or sheep, lambs, &c., and on horses ridden or not ridden. *Portsmouth Floating Bridge Co.* v. *Nance*, 6 Man. & G. 222; 6 Scott (N.R.) 823.

Taxed Cart.]—A local act provided that upon a turnpike road certain tolls should be chargeable "for every horse or other beast drawing any other chaise, chair or caleche, or any taxed cart, a sum not exceeding 3*d.*":—Held, that a cart upon which a tax had been imposed and paid in the previous year was within the enactment, and that no larger toll than 3*d.* could be charged for passing through the toll-gate. *Purdy* v. *Smith*, 1 El. & El. 511; 28 L. J., M. C. 150; 5 Jur. (N.S.) 912; 7 W. R. 306.

By a local act of 1852 the trustees of a turnpike road were empowered to take a certain toll "for every horse or other beast drawing any car or chair or other such like carriage with double seats (except a dog cart), or any phaeton, caravan, or taxed cart, or any four-wheeled light carriage, if drawn by one horse or other beast only":—Held, that the words "taxed cart" mean such a cart as comes within the designation of taxed cart in 43 Geo. 3, c. 161, and do not apply to any cart, simply because it is a cart in respect of which a tax is paid. *Williams* v. *Lear*, 41 L. J., M. C. 76; L. R. 7 Q. B. 285; 25 L. T. 906.

Locomotive Steam Ploughs.]—A steam engine which, in being taken along a turnpike road for the purpose of working a plough for hire, and on its way to take up a plough to be driven on a farm not occupied by the owner of the engine, having on it the necessary plough-gear, passes through a turnpike gate more than three miles distant from where the plough was, is liable to toll under 24 & 25 Vict. c. 7, s. 1, and is not within the exemption arising from 24 & 25 Vict. c. 70, s. 12, and 3 Geo. 4, c. 126, s. 32, inasmuch as it is not a horse or a carriage conveying a plough, or a plough itself. *Skinner* v. *Visger*, 43 L. J., M. C. 49; L. R. 9 Q. B. 199.

Bicycle.]—A local turnpike act, 3 Will. 4, c. 4, imposed the following tolls:—For every horse, mule, or other beast drawing any coach, sociable, chariot, berlin, landau, vis-à-vis, phaeton, curricle, &c., 6*d.* For every carriage of whatever description, and for whatever purpose, which shall be drawn or impelled, or set or kept in motion by steam or other power or agency than being drawn by any horse or horses, or other beast or beasts of draught, 5*s.*:—Held, that a bicycle was not a carriage liable to toll under the act. *Williams* v. *Ellis*, 49 L. J., M. C. 47; 5 Q. B. D. 175; 42 L. T. 249; 28 W. R. 416; 44 J. P. 394.

According to Size of Wheels.]—Amount of tolls payable on breadth of fellies of wheels. *Beerling* v. *Terry*, 6 L. T. 186.

A turnpike act of 1861 comprised within the trusts eighteen several roads. It empowered the trustees to demand and take "at the several and respective toll-gates which shall be upon or on the sides of the roads, such tolls as the trustees shall direct, not exceeding for every horse drawing any cart, waggon, &c., with wheels of a less breadth than four and a half inches, 6*d.*," and "for every horse or mule, laden or unladen, and not drawing, 1½*d.*":—Held, that the local act

specifically providing for progressive charges in respect of the diminished breadth of waggon wheels, virtually repeals 3 Geo. 4, c. 126, s. 7, and, consequently, that the toll was limited to the sums mentioned in the local act. *James* v. *Dickenson*, 14 C. B. (N.S.) 416.

The additional toll to be paid by waggons which are overweight must be according to the progressive proportions named in 12 Geo. 3, c. 82, s. 2; not a gross charge of the highest additional toll incurred upon the gross overweight. *Chamberlain* v. *Longhurst*, Cowp. 365.

Where a turnpike act imposed a toll of 1*s.* 6*d.* on every four-wheeled waggon with wheels of a less breadth than six inches, and drawn by four horses; 1*s.* on every such waggon drawn by three horses; 9*d.* by two; and 4½*d.* by one; and so in like proportion on waggons with two wheels drawn by four, three, two, or one horse or horses: —Held, that only those respective sums could be demanded for toll, and that the 13 Geo. 3, c. 84, s. 23, by which one-half more than the tolls payable for waggons with wheels of a less breadth than six inches might be taken, was virtually repealed by the other act. *Ridge* v. *Garlick*, 2 Moore, 481.

By a local act, a scale of tolls was prescribed, by which a toll of 4½*d.* was imposed for each horse drawing any waggon drawn by four horses, whether the fellies of the wheels were of the breadth of six inches and upwards, or less. The trustees under this act had, previously to the passing of the 3 Geo. 4, c. 126, taken and collected the additional toll directed to be taken by 13 Geo. 3, c. 84:—Held, that such increased toll (6¾*d.*) was properly demanded; the case not falling within the exemption contained in 4 Geo. 4, c. 95, ss. 5, 6. *Pickford* v. *Davis*, 4 M. & Scott, 683; 1 Bing. (N.C.) 141; 3 L. J., C. P. 263.

Where a turnpike act authorised the trustees to take at each and every toll-bar on the whole line of road a certain scale of tolls; and by another section they were authorised at a meeting, upon notice thereof to be affixed on all the gates, to reduce or advance all or any of the tolls granted by the act:—Held, that the trustees had no authority to reduce or advance the tolls at some gates and not at others. *Rex* v. *Bury and Stratton Roads*, 6 D. & R. 369; 4 B. & C. 361.

ii. *Exemptions.*

The Sovereign.]—A carriage and horses belonging to the queen, driven by her coachman, and used by a member of her household, or his family, with the queen's permission, though not upon her service, are exempt from turnpike tolls. *Westover* v. *Perkins*, 2 El. & El. 57; 28 L. J., M. C. 227; 5 Jur. (N.S.) 1352; 7 W. R. 582.

Commissariat Stores.]—The exemption from toll in 3 Geo. 4, c. 126, s. 32, in favour of carts conveying stores for the use of her majesty's forces, applies, although the cart conveying such stores is the cart of a common carrier hired for that purpose by the contractor for such stores, and although the contract contains a power to the officer in command at the depôt to which they are being conveyed of rejecting them, if they should not be of a certain quality. *L. & S. W. Ry.* v. *Reeves*, 1 H. & R. 845; 35 L. J., M. C. 239; L. R. 1 C. P. 580; 12 Jur. (N.S.) 786; 14 L. T. 662; 14 W. R. 967.

By 3 Geo. 4, c. 126, s. 32, any waggon conveying commissariat stores for the use of her majesty's forces is exempt from toll. A contractor for the supply of forage for the use of her majesty's forces at A. was bound by his agreement to keep at A. a supply of forage sufficient for at least fourteen days' consumption. The deputy commissary-general had a right to inspect the forage at the store, and reject all that was of inferior quality. A waggon belonging to the contractor was conveying forage to the store at A., bonâ fide intended to be there delivered in performance of the agreement, and for the use of her majesty's forces:—Held, that the waggon was exempt from toll. *Toomer* v. *Reeves*, 37 L. J., M. C. 49; L. R. 3 C. P. 62; 17 L. T. 149; 16 W. R. 83.

Officers and Soldiers on Duty.]—By 27 & 28 Vict. c. 3 (Mutiny Act, 1864), s. 72, her majesty's officers and soldiers on duty are exempt from payment of any duties and tolls in passing along or over any turnpike or other roads or bridges: —Held, that this exemption did not apply to a floating bridge propelled from one side of a river to the other by steam power, and kept in its course by parallel chains laid across the bed of the river. *Ward* v. *Gray*, 6 B. & S. 345; 34 L. J., M. C. 146; 11 Jur. (N.S.) 738; 12 L. T. 305; 13 W. R. 653.

Sect. 86 of the Mutiny Act (39 & 40 Vict. c. 8) only exempts from toll carriages employed under and by virtue of s. 68. *Hinds* v. *Thring*, 36 L. T. 216.

Volunteers.]—A captain of volunteer infantry dressed in his uniform, and having his arms and accoutrements, according to the regulations of his corps, passing through a turnpike gate in a carriage hired for the purpose of returning from drill, is exempt from toll by 3 Geo. 4, c. 126, s. 32. *Stephenson* v. *Taylor*, 1 B. & S. 95; 30 L. J., M. C. 145; 7 Jur. (N.S.) 602; 4 L. T. 243; 9 W. R. 600.

An omnibus hired by volunteers especially to carry them to a place of exercise is exempt from toll by 3 Geo. 4, c. 126, s. 32, though some of them are not in uniform, or though a person not a volunteer is allowed to sit in it, not paying for his seat. *Ib.*

Volunteers in uniform, going to attend a voluntary rifle match, at a duly appointed place of rifle practice, but open to all the world, were not entitled to exemption from toll, under 24 & 25 Vict. c. 126. *Teather* v. *Turner*, 7 L. T. 785; 11 W. R. 425.

The exemption of volunteers from toll contained in 26 & 27 Vict. c. 65, s. 45, does not extend to members of the yeomanry cavalry, and therefore such members are not exempt if they drive instead of ride to the place of meeting of their corps. *Humphrey* v. *Bethel*, 1 H. & R. 221; 35 L. J., M. C. 150; L. R. 1 C. P. 215; 12 Jur. (N.S.) 212; 13 L. T. 797; 14 W. R. 457.

Clergymen.]—By 3 Geo. 4, c. 126, s. 32, no toll shall be taken from any rector, vicar or curate going to or returning from visiting any sick parishioner or on other his parochial duty within his parish:—Held, that a clergyman acting as curate of a parish with the permission of the bishop, though without his licence, was within the exemption, and that the exemption extended to a turnpike not in the parish to which he was going on parochial duty. *Temple* v. *Dickinson*,

1 El. & El. 34 ; 28 L. J., M. C. 10 ; 5 Jur. (N.S.) 363 ; 7 W. R. 13.

The curate of a parish was engaged by the rector of a neighbouring parish to discharge his clerical duties during his temporary absence from illness. There was no licence from the bishop or other authority by which the curate was empowered to perform the duties. He rode through a turnpike-gate on his way to the parish church to perform the ceremony of marriage :—Held, that he was not entitled to the exemption from toll given by 3 Geo. 4, c. 126, s. 32, to the curate of a parish on parochial duty within his parish. *Brunskill* v. *Watson*, 37 L. J., M. C. 103 ; L. R. 3 Q. B. 418 ; 18 L. T. 432 ; 16 W. R. 1009.

A clergyman driving out to visit a sick parishioner is exempted from paying toll in respect of his carriage and horse, although accompanied by his wife and family. *Layard* v. *Ovry*, 37 L. J., M. C. 148 ; L. R. 3 Q. B. 415 ; 18 L. T. 123 ; 16 W. R. 896.

Minister of Primitive Methodists.]—A minister of the Primitive Methodists had assigned to him, by persons having authority amongst the Primitive Methodists, the Sunday and other services in a district comprising thirteen parishes, of which the parish of F. was one. The days on which and the places at which he was to attend were fixed at regular quarterly meetings of the Primitive Methodists, and were printed on a "plan." The minister, according to this plan, had to preach at F. on three Sundays in one quarter of the year, and on the other Sundays during the quarter at some of the other parishes in his district :—Held, that in going to F. on the Sundays indicated in the plan to conduct the services there, the minister was going to "his usual place of religious worship," within 3 Geo. 4, c. 126, s. 32, and was therefore exempt from liability to pay tolls. *Smith* v. *Barnett*, 40 L. J., M. C. 15 ; L. R. 6 Q. B. 34 ; 23 L. T. 746.

Persons attending Places of Worship — "Parochial."]—A turnpike act exempted persons from toll "in going to and returning from their proper parochial church, chapel or other place of religious worship on Sundays" :—Held, that the word "parochial" extended over the whole clause ; and, therefore, that a dissenter was not within the exemption in going to and returning from his proper place of religious worship, situate out of the parish in which he resided. *Lewis* v. *Hammond*, 2 B. & Ald. 206.

Police Constables.]—The exemption from toll granted by 3 & 4 Vict. c. 88, s. 1, to police constables passing with horses along any turnpike road or bridge, extends to a road or bridge made and erected by a company under an act of parliament. *Longland* v. *Andrews*, 3 H. & C. 564 ; 34 L. J., Ex. 90 ; 11 Jur. (N.S.) 412 ; 12 L. T. 233 ; 13 W. R. 784.

Seafaring Persons.]—By a local act, passed in 1834, the company of proprietors of the Southampton and Itchen Floating Bridge and Roads was incorporated, and tolls were payable for passing over such bridge, there being an exemption from toll in favour of any fisherman or seafaring person being an inhabitant of the parish of St. Mary Extra. By a section in a subsequent act it is enacted that the words "fishermen, seafaring men, and seafaring persons" in the recited acts, or any of them, shall not be deemed or construed to extend to or include any person who shall not be bonâ fide a fisherman, seaman, mariner, sailor or pilot. A. had for many years been engaged upon one of the Peninsular and Oriental Company's steamships trading between Southampton and Alexandria, and was an inhabitant of the parish of St. Mary Extra. He signed articles like all other seamen employed on board, and was bed-cabin steward. He was liable to do what the captain ordered him to do either above or below deck, but, without special orders, his duties were confined to the bed-cabins. He had occasionally lent a hand in making and shortening sail, and in heaving the capstan when weighing anchor ; but he never kept watch on board and never steered :—Held, that he was a seafaring person within the statute, and so entitled to exemption from toll. *Sharp* v. *Fields*, 10 L. T. 338.

"Fodder for Cattle."]—Barley grown on a farm, which was being conveyed to a mill to be ground into meal for feeding pigs upon the farm, and barley meal ground at the mill from barley grown on the farm, which was being conveyed back to be consumed by pigs on the farm, are within the exemption as "fodder for cattle" in 3 Geo. 4, c. 126, s. 32. *Clements* v. *Smith*, 3 El. & El. 238 ; 30 L. J., M. C. 16 ; 6 Jur. (N.S.) 1149 ; 3 L. T. 295 ; 9 W. R. 53.

Milk.]—Milk does not come within the meaning of the words "or other agricultural produce" in 3 Geo. 4, c. 126, s. 32, so as to be exempt from toll. *Oran* v. *Gait*, 1 L. T. 326.

Cattle going to or returning from Pasture.]—In a turnpike act, imposing tolls on horses, &c., "cattle going to or returning from pasture," and "horses attending cattle returning from pasture," were exempted :—Held, that a horse ridden by the owner of the cattle at pasture, in order to fetch them from pasture, did not come within either of the exemptions. *Harrison* v. *Brough*, 6 Term Rep. 706.

Sheep or Cattle going to Pasture.]—The exemption from toll on a turnpike road, contained in 1 & 2 Will. 4, c. 25, s. 1, in respect of sheep or cattle going to pasture, is not confined to farmers occupying farms in the locality of a toll-gate. *Warmby* v. *Deakin*, 14 C. B. (N.S.) 124 ; 32 L. J., M. C. 201 ; 10 Jur. (N.S.) 98 ; 8 L. T. 319 ; 11 W. R. 669.

A., who carried on the business of a farmer and cattle dealer, had two pasture fields, one on each side of a toll-bar. Having purchased beasts and sheep at a market, he drove them to the one pasture, and, after keeping them there a day, drove them through the toll-bar to the other pasture, intending the next day to send them to another market on that side of the bar, for sale. The distance between the two pastures along the turnpike road was less than two miles :—Held, that the animals were exempt. *Ib.*

Manure.]—The provision of 3 Geo. 4, c. 126 ss. 28, 32, which exempts from toll on turnpike roads carriages employed only in carrying manure, and exacts that toll shall not be demanded for them "by reason only of any basket or baskets, empty sack or sacks, or spade, shovel or fork, necessary for loading or unloading such manure, being in or upon any such carriage," is not

repealed by 5 & 6 Will. 4, c. 18, s. 1. *Richens* v. *Wiggins*, 3 B. & S. 953 ; 32 L. J., M. C. 144 ; 9 Jur. (N.S.) 1055 ; 8 L. T. 384 ; 11 W. R. 617.

A person drove through a turnpike gate a cart laden with garden produce, packed in baskets, paying the toll, and returned the next morning with the cart laden with manure for land, on the top of which were the baskets empty :—Held, that no toll was demandable on account of these baskets being on the cart. *Ib.*

A turnpike act for repairing roads exempted carts employed in carrying "mould, dung, soil, marl, manure, or compost employed in husbandry for manuring or improving land" :—Held, that this exemption included soil carried by the owner to be deposited in a place belonging to himself, and there sold for the purpose of its being employed as manure by others. *Reg.* v. *Freke*, 5 El. & Bl. 944 ; 25 L. J., M. C. 64 ; 2 Jur. (N.S.) 162 ; 4 W. R. 264 ; 7 Cox, C. C. 32.

The same construction is applicable to a similar exemption contained in 5 & 6 Will. 4, c. 18, s. 1. *Ib.*

Under 5 & 6 Will. 4, c. 18, s. 1, which provides that no turnpike toll shall be demanded in respect of any horse or carriage conveying manure for land, artificial manure carried by the dealer to the farmer in the dealer's cart is exempt from toll. *Foster* v. *Tucker*, 39 L. J., M. C. 72 ; L. R. 5 Q. B. 224 ; 22 L. T. 124.

A cart drawn by horses laden with manure for the manuring of land is exempt from toll. *Rex* v. *Adams*, 6 M. & S. 52.

An act exempting carts and waggons, loaded with manure, from toll, exempts them from toll if they are going empty to fetch manure. *Harrison* v. *James*, 2 Chit. 547. *But see* 52 Geo. 3, c. 145.

Uncrushed bones, which are taken through a turnpike to be there crushed and part of them used as manure, and the residue to be afterwards sold and to be used as manure at other places, are exempt from toll under 3 Geo. 4, c. 126, s. 32, and 5 & 6 Will. 4, c. 18, s. 1. *Pratt* v. *Brown*, 8 Car. & P. 244.

—— **Lime.**]—Under an exemption from toll, in an act of parliament, for carts carrying compost, or any thing whatever used in the manuring of land, the carriage of lime is not exempt ; the words, "or any thing whatsoever used in the manuring of land," being considered as only applying to the carriage of ploughs, harrows and such like instruments. *King* v. *Gough*, 2 Chit. 655.

A clause in a turnpike act exempted from toll all carriages employed in the conveyance of materials for repairing the road, or any of the highways, in the parishes in which any part of the road lay ; and in a subsequent part exempted generally carriages employed in conveying implements of husbandry or manure. In the following clause, the trustees were empowered to compound with persons who resided in one parish, and occupied lands in an adjoining parish. A waggon was passing on the road, laden with lime, from one parish to another, for the purpose of the cultivation of owner's farm, situate in the latter, neither of which was situate in any of those parishes through which the road passed :—Held, that this, being an exemption in the former clause in favour of husbandry, was to be beneficially construed, and that it was not restrained by the subsequent one ; and that, consequently, the owner of the waggon was not liable to the payment of toll. *Higginbotham* v. *Perkins*, 3 Moore, 185 ; 21 R. R. 561.

Implements of Husbandry — Engines.] — A steam-engine used exclusively for working a threshing-machine belonging to the same owner, and passing a turnpike-gate at the same time with the threshing-machine, but in a separate cart, is exempted from toll as an implement of husbandry, although the steam-engine is capable of being applied to other purposes. *Reg.* v. *Matty*, 8 El. & Bl. 712 ; 27 L. J., M. C. 59 ; 4 Jur. (N.S.) 238 ; 6 W. R. 213.

—— **Threshing-Machines.**] — Where a local act engrafted on the exemption of agricultural machines contained in 3 Geo. 4, c. 126, s. 32, an exception of machines, "let to hire, or travelling for the purpose of being used by any person other than the owner thereof" :—Held, that a threshing-machine, owned by a person who was taking it along the road for the purpose of threshing for hire the corn of a farmer, was within the exception. *Rapley* v. *Richards*, 12 W. R. 864.

A turnpike act imposed certain tolls on waggons and carts, and by the interpretation clause included in these words threshing-machines. By 3 Geo. 4, c. 126, s. 4, all the enactments, provisions, matters and things contained in the act are to extend to existing and future turnpike acts, unless expressly referred to and varied, altered or repealed ; and by s. 32, implements of husbandry are exempted from toll. By 9 Geo. 4, c. 77, s. 19, the powers, &c., in the former act are to extend to every local turnpike act as if repeated in it. By 14 & 15 Vict. c. 38, s. 4, and 16 & 17 Vict. c. 135, s. 6, implements of husbandry in 3 Geo. 4, c. 126, are to include threshing-machines :—Held, that within the area of the local act, the provisions of the general acts as to threshing-machines were superseded, and that such machines within such area were liable to pay toll. *Ablert* v. *Pritchard*, 1 H. & R. 274 ; 35 L. J., M. C. 101 ; L. R. 1 C. P. 210 ; 12 Jur. (N.S.) 211 ; 14 L. T. 16 ; 14 W. R. 331.

Road Materials.]—A bridge was not a highway within 13 Geo. 3, c. 84, s. 60, by which carriages employed in carrying materials for the repair of any turnpike road or public highway were exempted from toll ; and, therefore, toll was payable for a carriage employed in carrying materials for the repair of a bridge along a turnpike road. *Osmond* v. *Widdicombe*, 2 B. & Ald. 49.

—— **Public Footpath is a Highway.**]—Where a road has been found to have been used for a length of time as a footway to the adjoining lands :—Held, that it is a public highway, and that under the General Turnpike Act, 3 Geo. 4, c. 126, s. 32, materials for the repair of the same are exempt from tolls. *Reg.* v. *Lord*, 4 W. R. 83.

Where, under a local act, companies have power to convert streets within their districts into public highways, and to pave, flag and maintain the same, and are entitled to bring materials for that purpose free of tolls :—Held, that they are entitled to bring materials to repair such streets before these are declared public highways, if they have previously been used as highways either for foot-passengers only, or for carriage traffic generally. *Ib.*

Merely Crossing the Road.]—The act of 4 & 5 Vict. c. 33, is merely a declaratory act, and does

not create any new exemption from toll. *Harris* v. *Morrice*, 10 M. & W. 260; 12 L. J., Ex. 42.

Passing for Less Distance than One Hundred Yards.]—The 13 Geo. 3, c. 84, s. 34, exempted from toll carriages passing on a turnpike road for a less distance than one hundred yards, whether they quitted the road on the same side on which they entered it, or on the opposite side. *Major* v. *Oxenham*, 5 Taunt. 340.

Under 3 Geo. 4, c. 126, s. 32, a carriage is not exempt from toll which passes along one hundred yards of a road from A. to B., for repairing which trustees have been appointed under a local act, although a part of the one hundred yards be a street which, by a subsequent act, the trustees are forbidden to repair. *Pope* v. *Langworthy*, 1 N. & M. 647, n.; 5 B. & Ad. 464; 2 L. J., K. B. 170.

Where a turnpike act imposes toll on carriages passing one hundred yards upon a turnpike road, from A. to B., but throws upon the county the repairs of the bridges and approaches to bridges on that line of road, such toll is incurred by a carriage passing one hundred yards along the road, although part of that distance be made up of the approaches to one of the bridges repaired by the county. *Bussey* v. *Storey*, 1 N. & M. 639; 4 B. & Ad. 98; 2 L. J., K. B. 166.

By 3 Geo. 4, c. 126, s. 32, no toll shall be taken on any turnpike road for any horses or carriages which shall not pass above one hundred yards thereon:—Held, that a person who, after crossing a turnpike road from P. to W. at a toll-bar, travelled along a parish road into a turnpike road from P. to C., which was under the same trust, and passed more than one hundred yards thereon, was exempt from toll, inasmuch as the road from P. to C. was not identical with the road from P. to W. *Reg.* v. *Gerrard*, 26 L. J., M. C. 148; 3 Jur. (N.S.) 741; 5 W. R. 502. *S. C.*, nom. *Gerrard* v. *Parker*, 7 El. & Bl. 498.

The user at different times of portions of the turnpike road, each less than one hundred yards, but, taken together, more than one hundred yards, does not deprive a party of the benefit of the exemption in 3 Geo. 4, c. 126, s. 32. *Veitch* v. *Exeter Turnpike Roads (Trustees)*, 8 El. & Bl. 986; 27 L. J., M. C. 116; 4 Jur. (N.S.) 584; 6 W. R. 290.

An act empowered trustees of a turnpike road leading into a town to collect tolls from persons passing more than a hundred yards along it, and to borrow money on the credit of the tolls. By an act for improving the town, the road trustees were prohibited from repairing a certain portion of it nearest the town, and the town commissioners were to maintain it in future:—Held, that the road trustees might still take the same tolls for passing over that part, and that it still continued part of the same turnpike road for all purposes but that of repair. *Phipson* v. *Harrett*, 1 C., M. & R. 473; 5 Tyr. 54; 4 L. J., Ex. 36.

A person is liable to pay toll at a toll-gate on a turnpike road, though he has not travelled one hundred yards on the road before coming to the gate, if, after passing through the gate, he uses the road for a space which, together with that he has passed over previously, exceeds in all the distance of one hundred yards. *Horwood* v. *Powell*, 30 L. J., M. C. 203; 4 L. T. 372; 9 W. R. 659.

—— **Nature of Exemption.**]—The exemption in 13 Geo. 3, c. 84, from payment of toll by a passenger crossing a road, and not going one hundred yards thereon, was confined to carriages, &c., merely crossing the road. *Phillips* v. *Harper*, 2 Chit. 412.

"Pass" and "Repass."]—By a turnpike act tolls were authorised to be taken for horses, carts, &c., with a proviso that if the tolls shall have been paid for the passing of any horse, &c., through a toll-gate, such horse, &c., should be permitted to repass during the same day toll free:—Held, that this proviso did not extend to exempt from toll a horse, &c., which had once passed and repassed—the words "pass" and "repass" meaning "going" and "returning." *Hill* v. *Browning*, 22 L. T. 712.

Passing Several Times in One Day—Exemption from Second Toll—In what Cases.]—Where a turnpike act imposed a scale of tolls upon horses only, drawing or not drawing carriages, respectively, as the case might be, and by a clause of exemption it was provided that no person should be liable to pay toll more than once for passing and repassing the gates on the same trust at any time in any one day, with the same horses and carriages, through the same toll-gate; but that every person having paid toll once should afterwards pass and repass with the same horses and carriages toll-free during the same day, through the same gate where such toll was paid; and a stage-coach drawn by four horses having passed through a gate on trust, and paid the toll in the morning, and in the evening of the same day the same horses drawing a different coach of the same name, belonging to the same proprietors, driven by the same coachman, but carrying different passengers and parcels for hire, attempted to repass through the gate, and a second toll being demanded and refused, the collector seized one of the horses until it was paid:—Held, in an action for seizing and detaining the horse, that the action could not be sustained, the carriage and horses not being exempted from a second toll. *Loaring* v. *Stone*, 3 D. & R. 797; 2 B. & C. 515; 2 L. J. (O.S.) K. B. 66. *See next case.*

By a turnpike act, a toll of sixpence should be demanded and taken for every horse drawing any stage-coach, from the person or persons attending the same. A subsequent clause provided that if any person or persons should have paid the toll for any cattle or carriage passing through the gate, the same person or persons on producing a ticket should be permitted to pass and repass through the same gate with the same cattle or carriage, toll free at any time during the same day. A stage-coach, drawn by four horses, passed through and paid the toll; in the evening of the same day, a different coach, called by the same name, belonging to the same proprietors, and drawn by the same four horses, but driven by a different coachman, and carrying different passengers and parcels for hire, passed through the same gate:—Held, that a second toll was not payable in respect thereof. *Norris* v. *Peate*, 10 Moore, 293; 3 Bing. 41; 3 L. J. (O.S.) C. P. 134. *See preceding case.*

A turnpike act imposed a toll, first, upon every carriage drawn by horses; then upon every horse not drawing; and then upon every drove of oxen or cattle: with a proviso "that no more than one toll shall be taken from any person repassing on the same day with the same horses, cattle, beasts and carriages." Where a stage-coach, drawn by four horses, paid the toll in the morning, and in the evening of the same day

repassed with the same driver, but with different horses and passengers :—Held, that a second toll was not payable. *Waterhouse* v. *Keen*, 6 D. & R. 257 ; 4 B. & C. 200.

A turnpike act imposed tolls, first, upon carriages drawn by horses ; second, upon horses not drawing ; third, upon oxen, &c. ; provided, that all persons having paid once for their carriages, horses, and cattle, returning the same day with the same carriages, horses, and cattle, should pass toll-free. A subsequent act recited, that it was expedient to increase the existing tolls, and re-enacted the provisions of the former act, subject to some alterations, one of which was, that the former tolls should cease, and that instead there should be paid a certain toll for every horse drawing a carriage. Four horses passed a toll-gate in the morning, drawing a carriage, and repassed the same gate in the evening, drawing a different carriage :—Held, that, being the same horses, they were not liable to a second toll. *Fearnley* v. *Morley*, 7 D. & R. 832 ; 5 B. & C. 25 ; 4 L. J. (o.s.) K. B. 225.

A turnpike act imposed tolls for every horse drawing any coach, and other tolls upon every horse not drawing ; it provided, generally, that if the tolls had in any one day been paid for the passing of any horse, such horse should on that day be permitted to repass once toll-free ; but enacted, that the toll for horses drawing any stage-coach should be payable every time of passing. The trustees let the tolls, with power to collect them according to the act, and subject to such rules and restrictions as should be made by the trustees ; and the lessee covenanted with the trustees to permit the owners of stage-coaches, waggons, &c., to pass in the following manner, viz. horses drawing any such carriage as therein-before mentioned to be respectively allowed to pass along the road on payment of full toll going and quarter-toll returning at any time during the same day. Horses passed through a gate, drawing a stage-coach, and full toll was paid for them ; they returned the same day, drawing another stage-coach, and the lessee exacted full toll :—Held, that the lessee ought, by his covenant, to have demanded quarter-toll only. *Fenton* v. *Swallow*, 1 A. & E. 723.

A turnpike act imposed toll, first, upon every horse, &c., drawing any carriage ; second, upon every horse, &c., not drawing ; and third, upon every score of oxen, &c. : provided that no collector should take from any person more than one toll for the same carriage, horses, beasts, or cattle, passing once, and repassing once in the same day, through the same or any of the gates on the roads, such person producing a ticket denoting that such toll had been paid on that day for such horses, beasts, or cattle. Where the same horses passed and repassed once in the same day, drawing different carriages belonging to the same person :—Held, that only one toll was payable. *Jackson* v. *Curwen*, 7 D. & R. 838 ; 5 B. & C. 31 ; 4 L. J. (o.s.) K. B. 227.

Where, by a turnpike act, a certain toll was imposed on carriages, and not on the horses drawing them, with a provision that no person having paid such tolls and producing a ticket should be again liable on the same day ; and by a subsequent act, reciting the former one, the old tolls were repealed, and others imposed in respect of the horses drawing, and not on the carriages ; but all the provisions of the former act were to be continued as fully as if they had been re-enacted :—Held, that, toll having been paid on horses passing with a carriage, no new toll was demandable on the same horses returning the same day, although drawing a different carriage. *Gray* v. *Shilling*, 4 Moore, 371 ; 2 Br. & B. 30.

A turnpike act imposed tolls, first, on horses drawing carriages ; second, on carriages fixed to waggons ; third, on horses not drawing ; and fourth, on oxen ; provided that every person having paid the toll on producing a ticket denoting such payment should be permitted to pass and repass once, in the same day, the gates mentioned in such ticket, with the same horses, or other beasts, coach, or other carriages, without being liable to any additional toll. Where the same horses passed and repassed once in the same day, drawing different carriages belonging to the same person :—Held, that only one toll was payable. *Chambers* v. *Williams*, 7 D. & R. 842 ; 4 L. J. (o.s.) K. B. 229.

A turnpike act imposing a toll on every carriage and on every horse passing through the gate, and exempting any person from paying more than once in a day for passing or repassing with the same carriage or horse, exempts the traveller from paying a second time in the day for the passage of the same carriage, though drawn by different horses, being the same in number ; and another clause providing, that, in all cases of carriages travelling for hire, the traveller or passenger therein shall be considered as the person paying the toll, and that such payment shall not exempt such carriages repassing with a different traveller or passenger, does not extend to stage-coaches, the carriage itself not being there hired by the respective passengers, but only a conveyance by it ; and therefore such stage-coaches are freed from toll under the former clause by one payment in the day, although returning with different passengers and different horses, the horses being the same in number. *Williams* v. *Sanger*, 10 East, 66.

By a turnpike act a certain toll was to be taken at every turnpike on the road from W. to O. for four horses drawing any carriage. A subsequent section provided, that no person should pay toll more than once on the same day for passing or repassing with the same horses or carriages through any of the turnpikes, but that every person, after having paid toll once, and producing a ticket, should pass with the same horses and carriages toll-free during such day : —Held, that a second toll was payable for passing on the same day two toll-gates on the road with the same carriage, but drawn by different horses, for that the clause imposing the toll was clear, and the exempting clause either meant that the horses should be the same, or was too ambiguous to control the previous enactment. *Hopkins* v. *Thorogood*, 2 B. & Ad. 916 ; 1 L. J., K. B. 56.

By a local act a toll was imposed on horses drawing carriages ; for default of payment the collector was authorised to distrain any horse or carriage upon which toll was imposed by that act. No person was to pay more than once a day in respect of any carriage or any horse, and no toll was to be taken in respect of any carriage, horse, or beast conveying materials for the road :—Held, that the toll was imposed on the horse only, and not on the combination of horse and carriage ; and that the same horse passing a second time the same day, with a different carriage and passengers, was exempt from toll. *Niblett* v. *Pottow*, 1 Bing. (N.C.) 81 ; 4 M. & Scott, 595 ; 3 L. J., C. P. 251.

By a turnpike act, tolls were made payable on horses. By s. 11, it was provided, "except as hereinafter provided to the contrary," only one full toll shall be payable for horses passing and repassing once in the same day. By s. 12, all horses except horses or cattle drawing any stage-coach, waggon, or other stage-carriage, returning the same day, shall, on the production of a ticket denoting payment, pass toll-free. By s. 13, no horse which shall have paid the toll once shall be permitted to return toll-free when drawing "another or different waggon, wain, cart, or other such carriage." By s. 14, horses drawing any postchaise or other carriage travelling for hire shall pay as often as a new hiring takes place. Sect. 15 provided that no additional toll shall be payable in respect of any stage-coach which shall be freed by such ticket on account only of their conveying other passengers or of the horses or cattle drawing the same having been changed:—Held, that, in respect of the same horses passing through the toll-gate with a stage-coach, and returning the same day with a different stage-coach and passengers, only a single toll for each horse was payable, the horses and both coaches belonging to the same proprietor. *Skin* v. *Flay*, 1 New Sess. Cas. 561.

By a local act, the trustees of a road were authorised to take tolls at the toll-gates. It was enacted, that if any person should have paid the toll authorised to be taken for the passing of any horse through any of the turnpikes, the same horse should, upon a ticket denoting the payment on that day being produced, be permitted to pass and repass toll-free through the same toll-gate, and also through such other gates, if any, as a ticket for such payment should free, at any time during the same day. It also enacted, that no more than one full toll should be taken in respect of the same horse for passing on the same day through all or any of the toll-gates along the whole line of the road:—Held, that, after payment of one maximum toll, no toll was payable for passing once on the same day with the same horse through any other toll-gate on the whole line of the road. *Johnson* v. *Cocksedge*, 5 C. B. (N.S.) 286; 27 L. J., M. C. 314.

A turnpike act of 1861 comprised within the trusts eighteen several roads. It empowered the trustees to demand and take "at the several and respective toll-gates which shall be upon or on the sides of the roads such tolls as the trustees shall direct, not exceeding, for every horse drawing any cart, waggon, &c., with wheels of a less breadth than four and a half inches, 6*d.*"; and "for every horse or mule, laden or unladen, and not drawing, 1½*d.*" "For passing and repassing any number of times on the same day with the same horses, beasts, or carriages liable to toll through any of the toll-gates to be continued or erected by virtue of this act upon any road hereinafter particularly mentioned," it enacted that no "more than the number of tolls hereinafter limited with reference to such road shall be taken—that is to say, two full tolls, and no more, upon the road from A. to B.; two full tolls, and no more, upon the road from C. to D.; two full tolls, and no more, upon the road from E. to F.; one full toll, and no more, upon all the other roads comprised in this act." "And all horses, beasts, and cattle in respect whereof the tolls hereby authorised to be taken shall have been paid at any toll-gate on the roads or on the sides thereof shall, upon a ticket being produced denoting such payment, be permitted, in returning through the same toll-gate, and in going and returning through such other toll-gate (if any) as the ticket for such payment shall free, to pass toll-free at all times on the same day":—Held, that the act did not authorise the trustees to demand two full tolls from a traveller passing through only one gate on a line of road upon which two full tolls were chargeable. *James* v. *Dickenson*, 14 C. B. (N.S.) 416.

Held, also, that where a party had paid one full toll on passing a gate, he was not chargeable with two full tolls on passing on the same day through another gate on another of the roads on which two full tolls were demandable; but that he was liable to a second single toll, there being nothing on the ticket to indicate that it freed any other gate. *Ib.*

Held, also, that a traveller who had paid one full toll on passing through a gate on one of the roads on which one full toll was payable was not entitled to pass toll-free on the same day through a gate on another of the roads upon which one full toll was payable, the one full toll being payable upon "each" of the roads comprised in the act. *Ib.*

——**Waggons—Wharfingers.**]—Where a turnpike act imposed a toll on every horse, &c., drawing a carriage of any description, but contained an exception for every person who had paid toll on any carriage, &c., once on that day; and the act contained a further proviso that every stage-coach, diligence, van, caravan, or stage-waggon, or other stage-carriage, conveying passengers or goods for pay or reward, should pay toll every time of passing:—Held, that the waggons of a wharfinger, carrying out the goods brought by a canal to the different consignees, and collecting the goods from persons in the neighbourhood to carry to his wharf, were not stage-waggons within the meaning of the act. *Reg.* v. *Ruscoe*, 8 A. & E. 386; 3 N. & P. 428; 1 W., W. & H. 435; 7 L. J., M. C. 94; 2 Jur. 888.

—— **Carriage Let to Hire.**]—By 10 Geo. 4, c. 59, s. 28, the tolls hereby made payable shall be paid in each of the districts for every horse or beast drawing any stage-coach, van, caravan, waggon, or other carriage conveying passengers or goods for pay, hire, or reward for each time of passing along any of the roads in that district:—Held, that this section only applies where a carriage conveys passengers or goods, and a charge is made in respect of the passengers or goods, and not where the carriage itself is let to hire; and that, therefore, where a van was hired to fetch furniture from H. to L., and toll was paid as the van went out, a second toll was not payable as the van returned loaded. *Short* v. *Hudson*, 5 H. & N. 559; 29 L. J., M. C. 208; 2 L. T. 245; 8 W. R. 439.

—— **Common Carriers.**]—An act, after imposing tolls, exempted any horse, cart, &c., from toll on repassing a gate on the same day if the toll had been once paid, with the proviso, "that the tolls by the act made payable for or in respect of horses or beasts drawing any stage-coach, diligence, van, caravan, or stage-waggon or other stage-carriage, conveying passengers or goods for pay or reward, should be payable and paid every time of passing or repassing along the road." C.

travelled with a caravan, sometimes conveying goods and sometimes passengers; he was not licensed under 16 & 17 Vict. c. 90, but paid the duty on a carriage used by a common carrier:—Held, that he was liable to toll every time of passing and repassing the toll-gate. *Comley* v. *Carpenter*, 18 C. B. (N.S.) 378; 11 Jur. (N.S.) 712; 12 L. T. 453; 13 W. R. 812.

A turnpike act provided that no person should be liable to pay toll more than once in a day for passing through the same turnpike with the same horses, but that the tolls should be payable "for or in respect of all stage-coaches and other such public carriages, licensed or not licensed, for every time of passing." A common carrier was travelling from A. to B. and back three times a week, with a light tilted van on four wheels drawn by one horse, and which was chiefly and bonâ fide used in the carriage of goods, but was also occasionally used to carry passengers for hire. He did not travel more than four miles an hour, and paid a duty of 2*l.* 6*s.* 8*d.*, under 16 & 17 Vict. c. 90, but had no stage-coach licence:—Held, that his van, being principally used in the conveyance of goods, was not "such" a public carriage as a stage-coach, and therefore that he was not liable to pay toll for it for every time of passing the same turnpike. *Pearson* v. *Tazewell*, 19 C. B. (N.S.) 384; 13 L. T. 158; 14 W. R. 39.

A carrier was the owner of a four-wheeled van in which he journeyed on certain days and at stated times between Bath and Chippenham, carrying goods occasionally, and passengers, and sometimes both, for payment. He paid the annual duty of 2*l.* 6*s.* 8*d.* imposed by 16 & 17 Vict. c. 90:—Held, that he was not chargeable with return toll, as the proprietor of a stage-carriage, under a local act which provided that for or in respect of the horses drawing any stage-coach, stage-waggon, van, caravan, cart, or other stage-carriage for the conveyance of passengers, for payment, hire, or reward, for which toll should have been paid, and which should return on the same day, through the same turnpike-gate or bar, the tolls thereby made payable should be paid every time of passing and repassing through every such gate or bar in like manner as if no toll had been before paid thereat. *Eatwell* v. *Richmond*, 18 C. B. (N.S.) 364; 12 L. T. 52; 13 W. R. 429.

c. Evading Payment.

By Misrepresentation—Action for Tolls.]—An action for turnpike tolls lies where a party has frequently passed through the gate misrepresenting facts which led the collector to believe he was not entitled to receive toll, and consequently demanded no toll at the times he passed through. *Maurice* v. *Marsden*, 19 L. J., C. P. 152.

Forfeiture for—When done bonâ fide.]—Quære, whether 3 Geo. 4, c. 126, s. 139, which imposes a forfeiture not exceeding 10*l.* upon any person who "shall pass through any turnpike gate" "without paying the toll appointed to be paid at such gate," is applicable to a party passing without violence through a gate and not paying the toll, though demanded, under an erroneous impression that he is exempt from toll. Per Lord Denman, C.J., and Erle, J., it is not; per Patteson and Coleridge, JJ., it is. *Reg.* v. *Irving*, 11 Q. B. 429.

Successful Arrangement to avoid Liability.]—A person going in a carriage from his own house to a town drove along a parish road; he then used a private road, without any express licence from the owner, and by that way entered the turnpike road; he then used the turnpike road for eighty-six yards, and then by parish roads reached the town, and returned the same route. He could not, by any other route, have gone to the town without becoming liable to pay turnpike tolls:—Held, that, assuming that he used this route because, by using any other, he would become liable to pay toll, this was not an evasion of payment of toll, but a successful arrangement to avoid becoming liable to payment. *Veitch* v. *Exeter Turnpike Roads (Trustees)*, 8 El. & Bl. 986; 27 L. J., M. C. 116; 4 Jur. (N.S.) 584.

Leaving Carriage on Road.]—By 3 Geo. 4, c. 126, s. 41, if any person shall leave upon a turnpike road any horse, cattle, beast, or carriage whatsoever, by reason whereof the payment of any toll or duties shall be avoided or lessened, he shall forfeit any sum not exceeding 5*l.* A gentleman was driven by his coachman from his house along a turnpike road up to but not through a turnpike gate. He then got out and walked through the gate to a railway station beyond it, and went away by a train, and his coachman drove the carriage back to his house:—Held, that he had not left his carriage upon the road within the meaning of the act, and had not therefore incurred the penalty imposed. *Stanley* v. *Mortlock*, 39 L. J., M. C. 150; L. R. 5 C. P. 497; 22 L. T. 758; 18 W. R. 1139.

Connecting Two Openings in Fence by a Road.]—The occupier of land adjoining a turnpike road made an opening through the fence which separated his land from the turnpike road, and another opening through the same fence at a few yards' distance. He also made a road over the land in his occupation, connecting the two openings in the fence, between which was a toll-gate, at which the trustees of the turnpike road were authorised to take tolls. By means of the two openings in the fence, and the road connecting them, he was able to use the turnpike road without passing through the gate:—Held, that in doing so with intent to evade the payment of toll he did not incur any liability to the penalty imposed by 3 Geo. 4, c. 126, s. 41. *Harding* v. *Headington*, 43 L. J., M. C. 59; L. R. 9 Q. B. 157; 29 L. T. 833; 22 W. R. 262.

Evidence of Evasion.]—Two one-horsed carts went through a turnpike-gate and returned. The horses were then unyoked and put to another vehicle of the same owner, from which the horses that had drawn it some distance on the turnpike road were removed before reaching the gate. The driver on passing the gate with the second vehicle paid only a smaller toll, contending that he was not liable to pay in respect of the two horses so yoked to the second vehicle, as they had paid toll and were allowed to pass through the gate four times per day on the payment of one toll, under a local turnpike act:—Held, that there was evidence on which a justice might find that this was done to evade the payment of toll, and on which he might convict under 3 Geo. 4, c. 126, s. 41. *Hartley* v. *Bowlzer*, 11 L. T. 767.

—— **Admissibility of.**] — A person having been convicted of forcibly passing a turnpike-gate without paying toll:—Held, that the sessions properly rejected evidence that the gate had been unlawfully erected, the admissibility of such evidence being a question expressly within the discretion of the justices at sessions. *Rex* v. *Cambridge JJ.*, 1 D. & R. 325.

Conviction for — Warrant of Distress.] — A local act gave power "to take toll at each and every of the several turnpikes or toll-gates (before mentioned), or turnpike, or toll-gate, or toll-house which shall be erected in, upon, across, or on the sides of the roads, or any of them, by virtue of the act." A warrant of distress issuing upon a conviction under this statute and 3 Geo. 4, c. 126, s. 41, stated, that "J. B., at the parish of C., in the Isle of Wight, &c., with a carriage, did unlawfully, &c., pass through a toll-gate then and there situate, by means whereof a payment of a toll, to wit, &c., then and there legally due and payable by J. B. in respect of carriage, was avoided, contrary to the statute in such case made and provided":—Held, that the warrant sufficiently described the offence. *Barnes* v. *White*, 1 New Sess. Cas. 504; 1 C. B. 192; 9 Jur. 182; 14 L. J., M. C. 65.

The warrant went on to state, "that by reason thereof J. B. should forfeit 2*l.* 2*s.*" The warrant then went on to order a distress to be made, and directed that one-half of the fine should be paid to the informer, and the other moiety to the treasurer of the commissioners for amending the roads and highways: — Held, first, that a demand of the fine was not necessary to be made upon J. B. to authorise the issuing of the warrant. *Ib.*

Held, secondly, that the appropriation of the second moiety of the fine was rightly made. *Ib.*

Appeal against Convictions — Time for.] — Under 4 Geo. 4, c. 95, s. 87, notice of appeal is to be served within six days after the cause of complaint. A conviction having taken place on Monday, the 2nd May, a notice of appeal served on the following Monday, the 9th May, held too late. *Reg.* v. *Middlesex JJ.*, 2 D. (N.S.) 719; 12 L. J., M. C. 59; 7 Jur. 396.

d. Composition for Tolls.

Legality of Agreement.]—A lessee of turnpike tolls compounded with a person using the road for tolls for three years:—Held, that such an agreement was not prohibited by 3 Geo 4, c. 126, s. 55. *Stott* v. *Clegg*, 13 C. B. (N.S.) 619; 32 L. J., C. P. 102; 9 Jur. (N.S.) 945; 7 L. T. 714; 11 W. R. 366.

e. Toll Collectors.

Action against — Notice of.]—A notice of action under an act against a toll-gate keeper "for demanding and taking of the plaintiff toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll, in and by a certain act of parliament entitled," &c., is uncertain and bad. *Freeman* v. *Line*, 2 Chit. 673.

If a turnpike-keeper levy an extra toll, and upon adjudication by two magistrates (under the Bath act) it is determined that the toll was not due, the money may be recovered back in an action for money had and received, and notice of action need not be given; for where a power is given to justices to determine, it is final, unless an appeal is expressly given. *Parsons* v. *Blandy*, Wightw. 22.

—— **Venue.**]—A turnpike act enacted, that no action should be commenced against any person for anything done in pursuance of the act until twenty-one days' notice should be given to the clerks of the trustees, or after sufficient satisfaction or tender thereof made to the party aggrieved, or after six calendar months next after the fact committed; and that every such action should be brought in the county or place where the matter should arise, and not elsewhere; and the defendant should and might at his election plead specially, on the general issue, not guilty, and give evidence that the same was done in pursuance and by the authority of that act. In an action against a toll collector to recover the amount of tolls improperly collected by him:—Held, that the venue should have been laid in the county where the tolls were collected, and that he was entitled to twenty-one days' notice of action. *Waterhouse* v. *Keen*, 6 D. & R. 257; 4 B. & C. 200.

Taking Tolls Unlawfully — Indictment — Evidence of Exemption.]—Before 4 Geo. 4, c. 95, s. 50, which abolishes the proceedings by indictment, the question of exemption from toll could not be tried on an indictment against the turnpike-keeper for extortion in taking the toll, unless the ground of exemption was specified to him at the time when the toll was taken. *Rex* v. *Hamlyn*, 4 Camp. 379.

—— **Conviction, Sufficiency of.**]—A conviction stated, that "a collector did demand and take from J. L., at a gate on a turnpike road, a toll, to wit, the toll or sum of 4*d.*, as and for a toll payable by J. L. at such gate, for a horse drawing a cart upon two wheels only, and which cart was drawn by such one horse only, and driven by him in, along, and over the turnpike road, and for which horse drawing such cart a certain toll, to wit, the sum of 6*d.*, was payable by J. L., the toll or sum of 4*d.*, so demanded and taken by the collector, being a less toll than he was authorised to take for the cause aforesaid by virtue of the powers of any act, or of the orders and resolutions of the trustees or commissioners of the turnpike road, made in pursuance thereof, contrary to the form of the statute":—Held, a sufficient conviction, though no provisions of any particular turnpike act, or orders or resolutions of trustees or commissioners, were set forth or referred to. *Stamp* v. *Sweetland*, 2 New Sess. Cas. 90; 8 Q. B. 13; 14 L. J., M. C. 184; 9 Jur. 939.

—— **Summons for—Jurisdiction of Justices.**]—The Highway Archway Turnpike Act (50 Geo. 3, c. 88) did not create a highway within the operation of the 3 Geo. 4, c. 126. Where, therefore, a toll was demanded from a horseman passing along the highway, which he contended he was not liable to pay, and thereupon he paid the toll, and summoned the toll collector under 3 Geo. 4, c. 126, s. 53, for demanding and taking a toll which he was not authorised to take, and the justices dismissed the summons upon the ground that they had no jurisdiction:—Held, that they were right in so doing. *Potter, Ex parte*, 16 L. T. 350.

Appeal.]—A party convicted under 4 Geo. 4, c. 96, s. 87, of having taken too large a toll, and adjudged to pay a penalty of 41*s.*, may appeal to the quarter sessions. *Rex* v. *Hants JJ.*, 1 B. & Ad. 654.

—— **Costs Payable by Informer.**]—On appeal by a party convicted under this section, the informer is the party appealed against, within the meaning of the statute; and the justices having ordered him to pay 10*l.* for costs, the court granted a mandamus to them to issue a warrant for levying the same on the goods of the informer. *Ib.*

Right of Action—Illegally Appointed.]—A collector or a renter of turnpike tolls, though illegally appointed without the forms prescribed by the act of parliament, may still recover, upon a count for an account stated, the amount of the tolls for which he has credited the defendant passing through the gate; no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent 5*l.* inclosed in a letter to the plaintiff, in which he stated that she should have the remainder next week, is evidence of such an account stated, and a recognition of the intestate's title to be accounted with for the tolls. *Peacock* v. *Harris*, 10 East, 104; 10 R. R. 231.

Prosecution by—For Burglary.]—If a person employed by the trustees of turnpike tolls to collect them, lives in the toll-house rent free, the property in the house in an indictment for burglary may be laid in the person so employed. *Rex* v. *Camfield*, 1 M. C. C. 42.

f. Letting Tolls.

Mode of—To Highest Bidder.]—By 3 Geo. 4, c. 126, s. 55, the trustees are empowered to let the tolls by auction; but to prevent undue preference, a minute-glass is to be turned thrice after each bidding; and it declares, that, if no other person bids, the last bidder is to be the farmer or renter. Trustees put up tolls subject to other conditions, one of which was, that unless there should be three biddings there should be no letting, unless the trustees thought proper to take less than three biddings; and that the trustees should have a reserved bidding. There was one bidding only, which was made by the plaintiff; whereupon the trustees declared that if there was no advance, they should be obliged to make a reserved bidding. The minute-glass was turned thrice, and there was no further bidding. The plaintiff insisted that, under the express terms of the act, he was the purchaser, and he filed a bill for a specific performance:—Held, that he was not entitled to relief, and the bill was dismissed, but without costs. *Levy* v. *Pendergrass*, 2 Beav. 415.

—— **Notice of Amount Realised.**]—Trustees of a turnpike road were authorised to let the tolls, upon giving notice of their intention to do so, and the notice was to state the amount which the tolls produced during the preceding year, clear of the expenses of collecting:—Held, that this direction was sufficiently complied with, where the notice merely stated the amount received by the trustees during the preceding year, although during part of that time the tolls were let for a greater sum than they had actually produced, and no expenses were allowed for collecting during that part of the year. *Newman* v. *Ring*, 15 L. J., Ch. 365.

Agreements for—By whom made—Validity.]—An agreement for the letting of tolls, signed by the clerk of the trustees, and by the lessee or farmer of the tolls, is valid under 3 Geo. 4, c. 126, s. 57, and therefore can be enforced by the trustees notwithstanding it has not been signed by the sureties; their execution of the agreement being a formality for the benefit of the trustees, which they may waive without prejudice to their rights against the lessee or farmer of the tolls. *Markham* v. *Stanford*, 14 C. B. (N.S.) 376; 8 L. T. 277.

A. agreed in writing to pay the rent of tolls which he had hired "to the treasurer of the commissioners":—Held, that no action for rent could be maintained in the name of the treasurer. *Pigott* v. *Thompson*, 3 Bos. & P. 147.

By 3 Geo. 4. c. 126, s. 57, all contracts signed by the trustees for letting of tolls, or by their clerk or treasurer, shall be valid, although not by deed or under seal, and, by s. 74, the trustees may sue and be sued in the name of their clerk or clerks for the time being. The trustees of a turnpike road having appointed two persons to act as their clerks:—Held, that a contract for letting tolls signed by one was not sufficient, as both filled the office jointly. *Bell* v. *Nixon*, 2 M. & Scott, 534; 9 Bing. 393; 2 L. J., M. C. 44.

In an action by the clerk of the trustees of a turnpike road against a surety for a lessee of the tolls, the declaration stated, that, at a public meeting of the trustees for letting the tolls, the lessee was the best bidder, and that the trustees declared that he should become tenant of the tolls on the terms and conditions mentioned in an agreement; and that, by an agreement made by and between the trustees and the lessee and his sureties, which agreement was in writing, and was duly signed by D., treasurer to the trustees, and by the lessee and his sureties, the lessee and his sureties severally and jointly agreed with D., that they or one of them should and would pay to D., his successors and executors, or to whom any five of the trustees should direct, the instalments of money therein mentioned; and that, on failure of payment, the trustees might enter into the toll-houses and take the tolls. The declaration stated that the lessee entered into the receipt of the tolls, and paid certain instalments; but that the residue was not paid to D. and the trustees:—Held, that the agreement, as stated, was an agreement by the lessee with D. in his individual capacity, on which the trustees could not sue. *Hellings* v. *Pratt*, 6 Jur. 914.

By an agreement, reciting that at a meeting of the trustees for letting by auction the tolls of a turnpike road, N. was the highest bidder, the clerk, on behalf of the trustees, agreed to let, and N. agreed to take, the tolls. The agreement was signed by the clerk to the trustees:—Held, first, that the agreement, though made by the clerk, and not by the trustees, was a sufficient compliance with 3 Geo. 4, c. 126, ss. 55, 57. *Shepherd* v. *Hodsman*, 18 Q. B. 316; 21 L. J., Q. B. 263; 16 Jur. 948.

Held, secondly, that s. 57 of the 3 Geo. 4, c. 126, was not affected by 8 & 9 Vict. c. 106, s. 3, by which a lease, required by law to be in writing, of any tenements or hereditaments, shall be void, unless made by deed. *Ib.*

—— **Contract with Sureties—Joint or Several.**]—By a memorandum of an agreement between the trustees of a turnpike road and N., the trustees agreed to let and he to take the tolls for a year at a certain rent; and N., as renter of the tolls, and D. as his surety, severally promised the trustees that N. should pay the rent at the appointed times, and perform the conditions annexed to the agreement:—Held, that the contract was several and not joint, and that the trustees could not sue the parties jointly for arrears of the rent. *Lee* v. *Nixon*, 1 A. & E. 201; 3 N. & M. 441; 3 L. J., K. B. 160.

—— **Actions upon—Pleadings.**]—In an action for rent payable under an agreement with the trustees of turnpike roads, demising tolls and toll-houses, the declaration need not shew that the forms required by 3 Geo. 4, c. 126, s. 55, were observed in the letting. *Willington* v. *Browne*, 8 Q. B. 169; 15 L. J., Q. B. 23; 9 Jur. 271.

A declaration against the sureties of a farmer of tolls under 3 Geo. 4, c. 126, need not set forth a compliance with all the requisites contained in s. 55 as to the letting of such tolls. It is sufficient to state that they were duly let under the act. *Oldroyd* v. *Crampton*, 5 Scott, 256; 4 Bing. (N.C.) 24; 3 Hodges, 261; 7 L. J., C. P. 57.

In an action by a trustee of a turnpike road against a lessee of tolls for rent, he pleaded, that, after the demise to him, and before any rent became due, the 4 & 5 Vict. c. 33, passed, which took away certain of the tolls, and therefore the lease was void:—Held, bad, on general demurrer. *Harris* v. *Morrice*, 10 M. & W. 260; 12 L. J., Ex. 42.

Plea, to an action on a covenant for rent due for turnpike tolls, that, before it became due, the trustees entered into and upon a part of the tolls, and ejected, expelled, put out and removed the defendant from the possession thereof, and kept and continued him so ejected. Replication, that the trustees did not enter into or upon the said part of the tolls, or eject the defendant from the possession thereof, as alleged:—Held, that this replication was good on special demurrer, although it put in issue not only the expulsion but also the entry, the latter being immaterial and impossible; and that the defendant having mixed up the entry and expulsion as constituting the eviction, the plaintiff had a right to follow him, and to accept the issue as tendered. *Palmer* v. *Gooden* or *Goden*, 8 M. & W. 890; 1 D. (N.S.) 673; 11 L. J., Ex. 424.

Right of Trustees to vary Tolls let—Notice to Mortgagees.]—The trustees of a turnpike road acting under a general and special act, lease the tolls of a particular district, upon which tolls there is a mortgage, it being stated when the tolls are let that a certain gate would be moved and the tolls taken in future under the then new (special) act. Lists are affixed to the toll gates, and the gate in question is moved. Up to the time of the gate being so moved, the lessee takes the tolls under the general acts, and since that time according to the scale put up by the trustees, and likewise takes a full toll at two gates, including that which had been moved, where before the gate was moved full toll was not taken, and only half toll could be taken at one gate under the affixed scale. The trustees then give notice of a meeting to consider the propriety of reducing so much of the tolls as were in excess of those previously taken at the gates in question; the lessee attends the meeting, and objects to such proposition; the meeting is adjourned, and the lessee files a bill, and moves for an injunction to restrain the trustees from making any order reducing or altering the tolls, on the ground that the trustees are bound by the lease not to prejudice the plaintiff's rights, and that the mortgagees must have notice under the acts of parliament regulating turnpike roads:—Held, first, that trustees of a turnpike road, being public officers, are not debarred from varying the tolls, because they lease them. Next, that what was intended to be done was only to restore the previously existing state of the tolls, and was, although a detriment to the plaintiff, damnum sine injuriâ. It could not be assumed that the trustees were neglecting their duty, and therefore not giving notice to the mortgagees rather showed that no reduction was intended. Motion refused with costs. *North* v. *Thompson*, 5 W. R. 176.

g. Mortgage of Tolls.

By Trustees—Validity of.]—A mortgage executed by A., B., C., D. and E., as trustees of a turnpike road, is not invalidated by shewing that A., who had acted as a trustee for many years, had not been appointed under seal, as required by the local act. *Doe* d. *Baggaley* v. *Hares*, 1 N. & M. 237; 4 B. & Ad. 435; 2 L. J., K. B. 88.

—— **Statutory Authority to make—Construction.**]—Trustees of a turnpike road being desirous of obtaining an act authorising the making a new road connected with the former, the plaintiff agreed to advance 2,000*l.* for the purpose of making the new road, upon having the payment secured by a mortgage of the tolls of both roads. The trustees obtained an act which authorised the making of the new road, repealed the act under which the old was made, and placed both roads under one system of management, treating them for most purposes as one road. By this act it was provided, that the tolls of the old road should be applied, first, in paying the expenses of obtaining the act; secondly, in paying the interest on mortgages of the tolls receivable under the old act; thirdly, in repairing the old road; and, fourthly, in paying the principal of the old mortgages. And that the tolls of the new road should be applied, first, in paying the expenses of obtaining the act; secondly, in making and repairing the new road; thirdly, in paying the interest of money borrowed on the tolls of the new road; and, fourthly, in paying the principal of moneys borrowed under the repealed act, or borrowed on the tolls of the new road. A party advanced 2,000*l.*, and a mortgage was made to him of the tolls, toll-houses, &c., in such a form that it was doubtful whether it extended to the tolls of the new road:—Held, in the context of the act, that it did not take away the power of mortgaging given by 3 Geo. 4, c. 126, s. 81; that the trustees, therefore, had power to mortgage the tolls of the old road as well as the new road, for moneys borrowed for the purposes of the new road, and that the party, having advanced his money on the faith of having a security on both roads, was entitled in equity, if not at law, to a security on the tolls of the old road as well as of

the new. *Crewe (Lord)* v. *Edleston*, 1 De G. & J. 93; 3 Jur. (N.S.) 1061.

—— **Of Toll-houses.**]—The trustees of a public turnpike act, which empowers them to erect toll-houses, and mortgage the tolls, and which declares that there shall be no priority among the creditors, have no power to mortgage the toll-houses or gates. *Fairtitle* d. *Mytton* v. *Gilbert*, 2 Term Rep. 169; 1 R. R. 455.

If in fact they have made such a mortgage, and an ejectment is brought against them by the mortgagee, they are not estopped by their deed from insisting that the act gives them no such power. *Ib.*

—— **Money "Borrowed and taken up at Interest."**]—The trustees of a turnpike being indebted to their clerk in 81*l.*, for business done as a solicitor, gave him a mortgage for 80*l.*, which recited the consideration to be money advanced by him to them:—Held, that the mortgage was valid under 3 Geo. 4, c. 126, s. 81, the transaction being equivalent to money "borrowed and taken up at interest" by the trustees. *Doe* d. *Jones* v. *Jones*, 5 Ex. 16; 19 L. J., Ex. 284.

Secured Creditor—Priority.]—Trustees under a turnpike act having demised to one of several mortgagees such proportion of the tolls arising from the road and of the toll-houses and toll-gates for collecting the same, as the sum advanced by him bore to the whole sum raised on the credit of the tolls, the mortgagee brought ejectment for the toll-houses and toll-gates, in order to repay himself the interest due to him:—Held, that he might well maintain his action, notwithstanding a clause in the act that all the mortgagees should be creditors upon the tolls in equal degree. *Doe* d. *Banks* v. *Booth*, 2 Bos. & P. 219; 5 R. R. 575.

"Priority of Charge."]—By a turnpike act the tolls were subject to the payment of moneys borrowed and to be borrowed thereupon. The trustees granted mortgages of such tolls, in the form given by 3 Geo. 4, c. 126, s. 81, conveying to each creditor such proportion of the tolls, and the toll-gates and toll-houses, as the money advanced by him bore, or should bear, to the whole sum due or to become due on that security. By a subsequent act for making a new branch road, the former act was continued, and tolls were granted in respect of the new branch, to be applied like the former, and to be subject to the debts incurred on the credit of the former tolls; and it was enacted that all moneys due on such credit should be entitled to "a preference and priority of charge and payment" before any moneys advanced under this act for making the new branch:—Held, that the words "priority of charge" did not prevent this mortgagee from acquiring a legal estate in the subjects mortgaged, and that he might recover the toll-houses and gates in ejectment, only remaining accountable to the other mortgagees for such portion of the tolls as they were entitled to in respect of their advances. *Doe* d. *Thompson* v. *Lediard*, 4 B. & Ad. 137; 1 N. & M. 683; 2 L. J., K. B. 12.

Rights of Mortgagees.]—The 3 Geo. 4, c. 126, s. 49, enables a mortgagee whose mortgage is under s. 81 to recover on his own demise only, the toll-gates and toll-houses in ejectment, although there are prior unsatisfied mortgages at the same time upon the tolls, toll-gates, and toll-houses. The first mortgagee under this statute is in a different situation from an ordinary mortgagee, as he does not take the whole legal estate; and, therefore, the objection that at law a subsequent mortgagee has no estate cannot prevail. *Doe* d. *Watton* v. *Penfold*, 3 Q. B. 757; 3 G. & D. 235; 12 L. J., Q. B. 70; 6 Jur. 948. See *Doe* d. *Levi* v. *Horn*, 3 Q. B. 757; 3 G. & D. 239; 12 L. J., Q. B. 72; 7 Jur. 38.

Ejectment by a mortgagee to recover possession of the toll-gates. After the commencement of the ejectment, another ejectment on the demise (laid earlier than in the first action) of another mortgagee was commenced. Judgment went by default, in the second ejectment; and before trial the sheriff gave the plaintiff in the second ejectment possession under a habere facias possessionem:—Held, that the plaintiff who had commenced his ejectment first was entitled to the verdict. *Doe* d. *Butt* v. *Rous*, 1 El. & Bl. 419; 22 L. J., Q. B. 111; 17 Jur. 502.

—— **Claims on Toll Fund.**] — *See* infra, APPLICATION OF FUNDS.

Assignment of Validity.]—An assignment of a mortgage of tolls according to the form prescribed by 3 Geo. 4, c. 126, s. 81, has no validity unless produced and notified to the proper clerk or treasurer, and by him entered in the book kept for that purpose within two months from its date. *Doe* d. *Jones* v. *Jones*, 5 Ex. 16; 19 L. J., Ex. 284.

The fact of the clerk having prepared or attested the execution of the transfer is evidence from which a jury may infer a notification to him. *Ib.*

Where the trustees held meetings, and had separate clerks at several places within their district:—Held, that the clerk of the place in which the mortgage was made and entered was the proper clerk to receive the notification, although the mortgage included the tolls of the whole district and the clerk was himself the mortgagee. *Ib.*

A. made a voluntary assignment of turnpike bonds to B., in trust for himself for life, and after his death for his nephew. He delivered the bonds to B. but did not observe the formalities required by 3 Geo. 4, c. 126, s. 81, to make the assignment effectual:—Held, on his death, that no interest in the bonds passed by the assignment, and that B. ought to deliver them to his executors. *Searle* v. *Law*, 15 Sim. 95.

—— **Secondary Evidence of—When Allowed.**]—Where an assignment of turnpike tolls had been executed by way of mortgage to A.:—Held, in an action by his personal representative after his death against the trustees for arrears of interest, that a search for the security in the office of A.'s solicitor, where his papers had been deposited, except some deposited in a suit against A.'s representative in the office of one of the masters in chancery and also in the latter office, without finding the security among any of such papers, was sufficient evidence of its loss to let in secondary evidence, and that entries in a book of the trustees, indorsed "Mortgage Book," containing an abstract of the names of the creditors, the amounts of their securities and the interest due upon them, was good secondary evidence of such security. *Pardoe* v. *Price*, 13 M. & W. 267; 14 L. J., Ex. 212.

Nature of Security — Mortmain Act.] — A mortgage of turnpike tolls is an interest in land within the Mortmain Act (9 Geo. 2, c. 36). *Ashton* v. *Langdale* (*Lord*), 4 De G. & S. 402; 20 L. J., Ch. 234; 15 Jur. 868.

—— **Statute of Limitations.**]—Turnpike tolls are within the Statute of Limitations (3 & 4 Will. 4, c. 27), and consequently more than six years' arrears of interest are recoverable on a mortgage of them. *Mellish* v. *Brooks*, 3 Beav. 22.

—— **Bonum notabile.**]—By 3 Geo. 4, c. 126, s. 81, the trustees of a turnpike may borrow money upon mortgage. The form of mortgage, given in the act, assigns the tolls, toll-gates and toll-houses to the mortgagee, to hold for the residue of the term for which the tolls are granted, unless the mortgage money with interest be sooner repaid:—Held, first, that such a mortgage is bonum notabile where the road and toll-houses are, and not where the deed is at the time of the mortgagee's death. *Reg.* v. *Balby and Worksop* (*Trustees*), 1 B. C. C. 134; 22 L. J., Q. B. 164; 17 Jur. 734; 1 W. R. 150.

Held, secondly, that the deed conferred no legal right on the mortgagee to the payment of the principal or interest; and consequently that a mandamus to pay the money did not lie against the trustees. *Ib.*

Personal Liability of Trustees.]—The chairman of the trustees of a turnpike road applied to the treasurer of the road to advance to the trust 2,000*l.* as a temporary loan; the treasurer placed the sum required to the credit of the trustees, but he received no such security as is provided by 3 Geo. 4, c. 126, s. 81:—Held, that the chairman was not exempted from personal liability by 7 & 8 Geo. 4, c. 24, s. 3, the money not having been borrowed on the credit of the tolls in the manner prescribed by the statutes. *Parrott* v. *Eyre*, 3 M. & Scott, 857; 10 Bing. 283; 3 L. J., C. P. 3.

5. Application of Funds.

Arrears of Interest—Order on Parish—Priority of Repairs.]—By a local act the moneys received under the act were to be applied in repairing the roads, and then in paying the interest of the moneys advanced on the credit of the act. After 4 & 5 Vict. c. 59, the trustees applied a sum towards payment of former arrears of interest, and the trust funds became thereby insufficient for the repair of the roads:—Held, first, that 4 & 5 Vict. c. 59, did not give the trustees a right to apply their funds otherwise than as directed by the local act, and therefore the payment of arrears of interest by the trustees was improper. *Reg.* v. *South Shields Turnpike Roads* (*Trustees*), 3 El. & Bl. 599; 2 C. L. R. 1506; 23 L. J., M. C. 134; 18 Jur. 1115.

Held, secondly, that the justices had power to make the order on the parish notwithstanding the improper application of the funds; but the court concurred with the quarter sessions that it was not necessary nor expedient to cast on the present occupiers in the parish the burden of payment of former arrears of interest, and therefore affirmed their order. *Ib.*

The trustees of a turnpike road have no power to apply their funds in payment of arrears of interest upon moneys secured upon the tolls in priority to the necessary repair of the roads. *Ib.*

Trustees of a turnpike road who, by their local act, are to apply the tolls in keeping down the interest of the principal sum borrowed on the credit of the act, and then in keeping the road in repair, are not justified in paying off old arrears of interest when the road is out of repair, before defraying the expense of the repairs, but only the interest periodically falling due. *Reg.* v. *Hutchinson*, 4 El. & Bl. 200; 3 C. L. R. 104; 24 L. J., M. C. 25; 18 Jur. 1116; 3 W. R. 70.

By a turnpike act the trustees were to apply all moneys received by them by virtue of the act upon the roads included in the act; first, in paying the expenses of and incident to the obtaining of the act; secondly, in paying and discharging any interest which might from time to time be owing in respect of money which might have been borrowed on credit of the tolls authorised to be taken by former acts thereby repealed; thirdly, in keeping the roads in repair; fourthly, in paying and discharging any interest on money which might be borrowed on the credit of the tolls; fifthly, in reducing and discharging the principal moneys borrowed on the credit of the tolls authorised to be taken by former acts; and, lastly, in reducing and discharging the principal moneys which should thereafter be borrowed:—Held, that a mortgagee of the tolls authorised to be taken by the former acts had no right of action against the trustees whatever for the arrears of interest due to him, whether the expenses of obtaining the act had been paid or not, or whether the trustees had or had not in their hands sufficient money for the payment of such arrears of interest. *Pardoe* v. *Price*, 16 M. & W. 451; 16 L. J., Ex. 192.

—— **When Priority Allowed — Special Provisions.**]—By a turnpike act the tolls were to be applied, in the first place, in payment of the costs of the act; in the next place, in paying and discharging all interest now due and owing, and which shall hereafter become due, upon any mortgage or securities of the tolls, and in defraying the expenses of erecting toll-houses, &c., and of widening, repairing, &c., the roads; and, lastly, in reducing, paying off and discharging the several sums of money due on any mortgage or securities, and also other debts now due or hereafter to become due:—Held, that the trustees were at liberty to apply the tolls in payment of arrears of interest in priority to the repairs of the road, and that the funds not being sufficient for both, no order could be made upon them by justices to contribute towards the repairs, under 5 & 6 Will. 4, c. 50, s. 94. *Burton Turnpike Trustees* v. *Wincanton Highway Board*, 39 L. J., M. C. 155; L. R. 5 Q. B. 437; 22 L. T. 605; 18 W. R. 1027.

A turnpike act (4 Vict. c. xxxv.), after reciting that the principal sum borrowed on the credit of the tolls under former acts still remained unpaid, together with arrears of interest thereon, and that such sums could not be paid, nor the interest thereon discharged, nor the road kept in repair, without further powers, enacted that all moneys received by the trustees should be applied in the first place in paying and discharging any interest which might from time to time be owing in respect of any money borrowed on the credit of the tolls; secondly, in maintaining and keeping the roads in repair; and thirdly, in reducing and paying off the principal sums borrowed. On an application under 4 & 5 Vict. c. 59, for an order for contribution from the highway rates:—Held,

that the act did not authorise the payment of arrears of interest before repairing the road. *Market Harborough and Bramton Turnpike Trustees* v. *Kettering Highway Board*, 42 L. J., M. C. 137; L. R. 8 Q. B. 308; 28 L. T. 446; 21 W. R. 737.

Money borrowed—Sinking Fund.]—Money borrowed by the commissioners of a turnpike road, on the security of the tolls, after 12 & 13 Vict. c. 87, to pay off a debt contracted before that act, is not money borrowed after the passing of the act, within the meaning of the act; and therefore the sinking fund, directed by that act to be set aside out of the tolls to pay off such money, comes within 13 & 14 Vict. c. 79, and will not have priority over all other payments out of the tolls. *Chatham Local Board* v. *Rochester Pavement and Road Commissioners*, 35 L. J., M. C. 81; L. R. 1 Q. B. 24; 12 Jur. (N.S.) 47; 13 L. T. 273; 14 W. R. 51.

Insufficiency of Fund — Apportionment.]—When the roads of a turnpike trust pass through several parishes, and the funds of the trusts applicable to the repairs of the roads are insufficient, the funds ought to be apportioned to the roads in each parish according to the amount of repairs in each parish, and not according to the mileage in each; and the deficiency thus left in each parish may be supplied by contribution out of the highway rates, under 4 & 5 Vict. c. 59, s. 1. *Brighton Turnpike Roads Trustees* v. *Preston Surveyors*, 39 L. J., M. C. 33; L. R. 5 Q. B. 146; 22 L. T. 92; 18 W. R. 574.

6. Application of Highway Rates to Repairs.

Under 4 & 5 Vict. c. 59.]—The 4 & 5 Vict. c. 59, which provided for the application of highway rates to the repairs of turnpike roads when the revenues of the turnpike trusts were insufficient, applies to turnpike roads not in existence at the time when it was passed. *Sunk Island Turnpike Road Trustees* v. *Patrington*, 1 B. & S. 747; 31 L. J., M. C. 18.

—— **Turnpike Trust, what is.**]—A turnpike trust is not the less a turnpike trust within 4 & 5 Vict. c. 59, because the funds of it are derived from other sources than from tolls taken on the road. *Ib.*

A turnpike trust may be within the provisions of 4 & 5 Vict. c. 59, although the road was made and the tolls are taken under a public general statute. *Ib.*

—— **Jurisdiction of Justices.**]—Justices can make an order for a portion of the highway rate to be applied to a turnpike road authorised to be made, where part only has been completed and opened to the public. *Roberts* v. *Roberts*, 3 B. & S. 183; 7 L. T. 320; 11 W. R. 35.

By a local act, subsequent to 4 & 5 Vict. c. 59, the trustees of a turnpike trust were directed to apply the trust funds (after discharging the expenses of the obtaining the act), first, in the management of the roads, salaries of officers, &c., but not exceeding in any year 300*l.*; secondly, in the maintenance and reparation of the roads, but so that the amount expended for these purposes should not exceed yearly 1,600*l.*; and, lastly, in paying off a debt due from the trust. The revenue of the trust was in excess of the expenditure, so that there was a small sum applicable to the reduction of the debt; but desirous to apply a larger sum to this purpose, the trustees obtained an order of justices under 4 & 5 Vict. c. 59, s. 1, on the grounds that the funds of the trusts, although sufficient for the repair of the roads, if applied as directed by the local act, would be insufficient if the sum proposed to be applied to the liquidation of the debt were paid:—Held, that the justices had no jurisdiction to make the order. *Weardale District Highway Board* v. *Alston Turnpike Trust Trustees*, 35 L. J., M. C. 173; L. R. 1 Q. B. 396; 12 Jur. (N.S.) 563; 14 L. T. 546; 14 W. R. 988.

Contribution Order—When Trustees entitled to.]—A private act (5 Geo. 4, c. xciv.), after authorising trustees to establish a ferry across the river Arun at Littlehampton, in Sussex, and make roads in communication therewith, provided that the roads when made, as well as the ferry, should be maintained and repaired out of the tolls thereby authorised to be taken. The act specified no limit of time for the expiration of the trust, but it was provided that if the execution of the authorised works should not be completed within the space of ten years, all the powers and authorities given should cease and determine, save only as to so much of the work as should have been completed within that time. The ferry was established, and all the roads made with one exception; but the funds derived from the tolls being insufficient to keep one of the roads so made in repair, an order was made by justices in special sessions, under the provisions of 4 & 5 Vict. c. 59, s. 1, for contribution out of the highway rates towards the repair of such road:—Held, that the road in question was a turnpike road within 4 & 5 Vict. c. 59, and that as the funds of the trust were inadequate to keep it in repair the justices had a discretion to appropriate a portion of the highway rate towards its maintenance. *Reg.* v. *French*, 48 L. J., M. C. 175; 4 Q. B. D. 507; 41 L. T. 63—C. A. Affirming 26 W. R. 437.

Held, also, that the completion by the trustees of the whole system of roads specified in 5 Geo. 4, c. xciv., was not a condition precedent to the right to call upon the parish to contribute towards the repair of the roads that had been made. *Ib.*

A turnpike act (5 Vict. c. lxix., s. 1) prohibited the trustees from taking any toll on a certain part of their roads, between a town and a bridge; but enacted, by s. 2, that in case the trustees keep and continue in good repair that part of the road, then it shall be lawful for them to take on such part of the road the tolls specified. The trustees kept this part of the road in repair and took thereon the tolls specified, which were sufficient to pay for the repairs of that part of the road. But the tolls taken throughout the trust being insufficient to meet the repairs of the road within it, the trustees, under 4 & 5 Vict. c. 59, s. 1, applied for a contribution order upon the parish in which the above part of the road was situate:—Held, that the trustees were not entitled to an order. *Market Harborough Trustees* v. *Market Harborough Highway Board*, 42 L. J., M. C. 139; L. R. 8 Q. B. 327; 28 L. T. 660; 21 W. R. 844.

The hamlet of W., within and part of a parish, was, by a local act, constituted the town of W., and placed under the management of commissioners, and the surveyor of the highways was

required to pay a proportion of the highway rates to the commissioners, W. continuing liable to contribute to the parish rates. By another local act, for maintaining a turnpike road from W. to L., and sea defences for protecting such road and the lands adjoining from the future encroachments of the sea, trustees were appointed to carry the act into effect, with power to levy and assess rates upon the owners of the land; and the powers conferred by the former local act were not to be affected, except that the commissioners were to be relieved from maintaining and protecting so much of the road as was within W. The Public Health Act (11 & 12 Vict. c. 63) was afterwards applied to W., and a local board was appointed which was to execute the office, and have all the powers of surveyors of highways, except where such powers might be inconsistent, and the inhabitants of any district were not to be liable to highway rate or other payment, not being toll, in respect of making or repairing roads or highways within any parish, township, or place, situate beyond the limits of such district. Portions of the turnpike road being out of repair, and the revenues accruing to the trustees under the local act being insufficient to keep it in repair, and preserve the embankments, an order was made upon the surveyor of the highways of the parish for payment of a portion of the highway rates to the trustees, to be laid out in the repair of the portion of the turnpike road within the parish, and this order being appealed against:—Held, first, that the road in question was a turnpike road within 4 & 5 Vict. c. 59. *Reg.* v. *Worthing and Lancing Turnpike Road*, 3 El. & Bl. 989; 2 C. L. R. 1678; 23 L. J., M. C. 187; 18 Jur. 907; 2 W. R. 478.

Held, secondly, that by the local act, the management of the road was transferred from the commissioners to the turnpike trustees, the latter having the ordinary right to seek relief from the parish in case of the deficiency of the funds, and the parish being liable to an indictment for non-repair of the road. *Ib.*

Held, also, that the local board of health was made the surveyors of the highways within the district, and empowered to make a highway rate for the purpose of contributing towards the deficiency of the turnpike funds, and that the order appealed against was therefore invalid. *Ib.*

A turnpike act provided for the application of the tolls to payment of the expenses of the act, salaries, interest of debt, repairs of road not exceeding 800*l.*, reduction of principal debt, and further repairs of road. The estimated revenue of the trust was 1,087*l.*, and expenditure 1,017*l.*: and after allowing for salaries, interest and 800*l.* towards repairs, the surplus, 83*l.*, was applied towards reduction of principal debt. That left a deficiency of 217*l.* to be raised by parochial contributions, and the sum of 22*l.* 3*s.* 11*d.* was the contribution claimed from a parish:—Held, that the justices might make an order for payment of such contribution from the parish. *Mawby* v. *Hopkinson*, 10 L. T. 27.

An order for the payment of a portion of the parish highway rate, to cover the repairs of a turnpike road, and including expenses which had been already, and before information, incurred, is bad. *Brown* v. *Evans*, 34 L. J., M. C. 101; 11 Jur. (N.S.) 541; 13 W. R. 680.

—— **When Fund misapplied.**]—Trustees of turnpike roads have no right to pay off arrears of interest of money borrowed on security of the tolls before providing for the repair of the road, contrary to their local act; and where they had done so:—Held, that an order of special sessions for payment of a contribution out of the highway rate was properly quashed by the quarter sessions. *Reg.* v. *South Shields Turnpike Roads Trustees*, 3 El. & Bl. 599; 2 C. L. R. 1506; 23 L. J., M. C. 134; 18 Jur. 1115.

Repairs of Disturnpiked Roads—Main Roads—Liability of County Authority for Half Cost.]—The Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), by s. 13, enacts that any road which has "between the 31st of December, 1870, and the date of this act ceased to be a turnpike road" . . . "shall be deemed to be a main road, and one half of the expenses incurred from and after the 29th of September, 1878, by the highway authority in the maintenance of such road, shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate." The corporation of the town and borough of R. was the highway authority of the R. highway area. Under ss. 47—50 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), such portions of the turnpike roads entering R. as came within the area of the "town" were taken out of the turnpike trusts, and the obligation to repair the same was imposed upon the corporation. By a local act in 1872, the boundaries of the borough were enlarged and all the provisions of the acts relating to the "town" were made applicable to the enlarged area of the borough. The effect was that the further portions of the turnpike roads, thus for the first time brought within the area of the borough, were taken out of the turnpike trusts by the operation of the Towns Improvement Clauses Act, 1847, and ceased to be turnpike roads:—Held, that these portions, being only parts of turnpike roads, had not ceased to be "turnpike roads," and were not to be deemed to be main roads within s. 13 of the Highways and Locomotives (Amendment) Act, 1878, and that consequently the county authority was not liable to pay half the expenses of their maintenance. *Lancaster JJ.* v. *Rochdale Corporation*, 53 L. J., M. C. 5; 8 App. Cas. 494; 49 L. T. 368; 32 W. R. 65; 48 J. P. 20—H. L. (E.) *And see further* supra, A, 5, *a.* i. (cols. 83 et seq.).

Notice of Application for an Order.]—The notice of an intended information before a special sessions to obtain an order for payment of a portion of a highway rate to the trustees of a turnpike road under 4 & 5 Vict. c. 59, s. 1, need not state what portion of the road is out of repair, or to what purpose the money is to be applied, or that the road is within the division for which the sessions are held. *Reg.* v. *Preston*, 3 New Sess. Cas. 333; 12 Q. B. 816; 18 L. J., M. C. 4; 12 Jur. 1068.

Order for Payment of Rate.]—An order of special sessions, directing the payment of a portion of the highway rate to the surveyor, for the purpose of repair of a turnpike road, under 4 & 5 Vict. c. 59, s. 1, must appear on the face of it to be made at a special sessions holden in and for the division of the county in which the turnpike

is situate. *Reg.* v. *Hertfordshire JJ.* or *Reg.* v. *Morice* or *Morrice*, 2 D. & L. 952; 1 New Sess. Cas. 585; 14 L. J., M. C. 75; 9 Jur. 731.

An order directed the payment of 9*l.* 5*s.* to the surveyor for the purpose of repairs, being a portion of the rate or assessment levied or to be levied by virtue of 5 & 6 Will. 4, c. 50:—Held, that it was not essential to specify in the order what proportion of the rate was to be paid. *Ib.*

An order made in pursuance of an information need not adjudicate that the information is true, or that notice was, in fact, given; it is sufficient if it shews that an information has been exhibited, and that the justices proceeded to act upon it. *Reg.* v. *Preston*, supra.

Where the order recited an application to the justices to order a portion of the rates "to be levied by virtue of the statutes in that case made and provided, for the repair of the highways within," &c., to be paid, &c.; and the order directed a sum to be paid "out of the rate which shall next be made for the repair of the highways within," &c.:—Held, that the order must be taken to refer to the application, and was therefore warranted by the statute. *Ib.*

When such order is made on the surveyor of the highways of a hamlet, it is to be considered as stated by reasonable intendment that the hamlet is one maintaining its own highways. *Ib.*

The order need not set out the state of the revenues of the trust, the length of the roads, or the other particulars into which justices are to inquire by the statute. *Ib.*

Where an order recited that the surveyors appeared, in pursuance of a notice from the clerk of the turnpike trust, given pursuant to the statute, and there was an affidavit, stating that though such notice was, in fact, given, the surveyors did not appear, but purposely absented themselves, there being no reason to suppose that the order was intentionally false, and the variance being immaterial to the validity of the proceedings:—Held, no objection to the order. *Ib.*

An order on the parish surveyor, for the repairs of a turnpike road, can only be made under 4 & 5 Vict. c. 59, s. 1, upon its appearing to the justices that the turnpike trust funds are insufficient. *Reg.* v. *Trafford, Gorton Surveyors, In re*, 5 El. & Bl. 967; 25 L. J., M. C. 70; 2 Jur. (N.S.) 399; 4 W. R. 260; 7 Cox, C. C. 76.

Order on Officer of Turnpike—Authority of Justices.]—Justices at special sessions have no authority to make an order on the treasurer or other officer of a turnpike road to repair the road, or to pay money to be applied to the repairs of it, without having first examined the sufficiency of the funds, nor without giving such officer an opportunity of shewing the condition of the funds. *Reg.* v. *St. Albans JJ.*, 1 C. L. R. 536; 22 L. J., M. C. 142; 17 Jur. 531.

Where the clerk of the trustees of a turnpike road which was out of repair had been summoned by a single justice, and two justices at a special sessions for the highways, without allowing the clerk to shew cause that the turnpike funds were insufficient, made an order convicting him in a penalty, and ordering him to repair the road:—Held, that though the certiorari was taken away, the order was so entirely without jurisdiction that a certiorari might issue to bring up the order to quash it. *Ib.*

—— **Under 2 & 3 Vict. c. 81.**]—Under 2 & 3 Vict. c. 81 (which act has expired), justices might make an order that the parish surveyor shall pay a portion of the rate levied under 5 & 6 Will. 4, c. 50, to the trustees of a turnpike road for its repair, when it appeared that the income arising from the tolls was insufficient to defray both the expenses of repair and the interest on money advanced on mortgage of the tolls, although, under the local act constituting the trust, the income arising from the tolls was directed to be expended first in repairs, and afterwards in payment of interest; and although it appeared to them that the income would be sufficient for the purpose of repairs alone. *Reg.* v. *White*, 3 G. & D. 284; 4 Q. B. 101; 12 L. J., M. C. 31; 7 Jur. 106.

—— **Jurisdiction of Special Sessions.**]—Under 2 & 3 Vict. c. 81, s. 1, a special sessions had jurisdiction to make an order on the parish surveyor of the highway to pay a certain sum to the trustees of a turnpike road, although the funds of the turnpike trustees were not exhausted. *Reg.* v. *Berks JJ.*, 8 D. P. C. 727.

Appeal against Order—Notice.]—By 4 & 5 Vict. c. 59, s. 3, a right of appeal is given against an order of justices made at special sessions for highways in pursuance of that act, the appellant first giving to the justices ten days' notice "within six days after such order, judgment, or determination shall be so made or given":—Held, that notice of appeal must be given within six days after the decision of the justices at special sessions, and not within six days after the service of the order upon the surveyors of highways. *Reg.* v. *Derbyshire JJ.*, 1 New Sess. Cas. 645; 7 Q. B. 193; 14 L. J., M. C. 84; 9 Jur. 551.

——**Interested Justices.**]—Where, upon a trial of an appeal to quarter sessions against an order of two justices, directing a sum of money to be paid by the surveyor of highways to the commissioners of a turnpike trust, two justices were present, one of whom was a respondent in the appeal, being one of the justices making the order, and the other was a creditor of the turnpike trust, and one of them voted, the court quashed the order, upon the ground that the justices were interested. *Reg.* v. *Hertfordshire JJ.*, 1 New Sess. Cas. 490; 6 Q. B. 753; 14 L. J., M. C. 73; 9 Jur. 424.

7. Offences upon.

Permitting Cattle to Wander.]—Horses grazing on the side of a turnpike road, with a man in charge of them, they being under his control, are not liable to be impounded, under 4 Geo. 4, c. 95, s. 75, as "wandering, straying, or lying" about the road. *Morris* v. *Jeffries*, 35 L. J., M. C. 143; L. R. 1 Q. B. 261; 13 L. T. 629; 14 W. R. 310.

Drawing Timber otherwise than upon wheeled Carriages.]—A vehicle composed of a rough skeleton of woodwork, fifteen feet long, having two wheels placed behind the centre, the forepart being shod with iron, which in going down hill comes in contact with the ground, retarding its descent, is not a wheeled carriage within 3 Geo. 4, c. 126, s. 121. *Radnorshire County*

Roads Board v. *Evans*, 3 B. & S. 400; 32 L. J., M. C. 100; 9 Jur. (N.S.) 890; 7 L. T. 677.

A person using such a vehicle for the carriage of straw, cannot be convicted under that portion of the section which imposes a penalty for "hauling or drawing upon any part of a turnpike road any timber, stone or other thing, otherwise than upon a wheeled carriage"; straw not being of ejusdem generis with timber or stone. *Ib.*

Encroachment—Limitation of Time for Conviction.]—By 9 Geo. 4, c. 77, s. 18, no person may be convicted of an offence against 3 Geo. 4, c. 126, s. 118 (which enacts that any person causing an encroachment within a certain distance of the centre of a turnpike road shall be subject to a penalty), after the expiration of six months from the time when such offence shall have been committed. The period of six months mentioned in the section begins to run from the time that a substantial encroachment of the highway has been caused, and not from the final completion of the encroaching building or other encroachment. *Hyde* v. *Entwistle*, 52 L. T. 760; 49 J. P. 517.

Making Tunnel under — Injunction.] — The trustees of a turnpike road which passed over a hill were empowered to lower it when necessary. They applied to restrain an adjoining freeholder from making a tunnel under the road, on the ground that it would obstruct the future improvement of the road. The court, however, held that it had no authority to interfere, and refused the application. *Cunliffe* v. *Whalley*, 13 Beav. 411.

8. Conversion into Main Roads.

Application for—District Commissioners under Local Act.]—The commissioners of a district in the fens of Norfolk appointed and incorporated under various local acts for draining and enclosing lands and providing roads, applied to the county council, as the county authority, for an order, under s. 15 of the act of 1878, declaring a certain road in their district to be a main road: —Held, that the act was so framed as to include only the three highway areas mentioned in s. 14, and the highway authority within those areas, and did not extend to include an exceptional area and an exceptional authority. Both the commissioners and their district fell within this category, and the county authority was not bound to make the order sought. *Reg.* v. *Norfolk County Council*, 60 L. J., Q. B. 379; 65 L. T. 222; 56 J. P. 7.

Liberties merged in Counties—County Authority—Recorder.]—Liberties merged into counties by the Highways Act, 1862, are revived by the Highways Act, 1878, and so far as that act applies are to be deemed separate "counties." The "county authority" for such liberties are the justices of those liberties in quarter sessions assembled. A recorder of a borough to which such liberties belong, when holding his quarter sessions, represents the justices of such counties in quarter sessions assembled, and he must be deemed to be the "county authority" under the Highways Act of 1878, and be required to exercise the jurisdiction of such "county authority." The plea that there is no machinery for exercising such authority is not sufficient to excuse the authority having such jurisdiction from acting when properly applied to for such purpose. *Reg.* v. *Dover Recorder*, 32 W. R. 876; 49 J. P. 86.

Repair of Main Roads.]—*See* ante, A, 5, *a.* i.

Conversion of Main Road into ordinary Highway—Application for Provisional Order.]—The 16th section of the Highways and Locomotives (Amendment) Act, 1878, provides as follows: "If it appears to a county authority that any road within their county which, within the period between the 31st of December, 1870, and the date of the passing of this act, ceased to be a turnpike road, ought not to become a main road in pursuance of this act, such authority shall, before the 1st of February, 1879, make an application to the local government board for a provisional order declaring that such road ought not to become a main road." The section further provides that, "subject as aforesaid, where it appears to a county authority that any road within their county, which has become a main road in pursuance of this act, ought to cease to be a main road and become an ordinary highway, such authority may apply to the local government board for a provisional order declaring that such road has ceased to be a main road and become an ordinary highway":—Held, that a road which had ceased to be a turnpike road within the period specified by the first of the above-mentioned provisions, and had become a main road, there being no application for a provisional order before the 1st of February, 1879, was not excluded from the operation of the second of the above-mentioned provisions, and that the local government board had, therefore, jurisdiction to make a provisional order declaring such road an ordinary highway upon an application made subsequently to the 1st of February, 1879. *Reg.* v. *Local Government Board*, 54 L. J., M. C. 104; 15 Q. B. D. 70; 53 L. T. 194; 49 J. P. 580—C. A.

C. BRIDGES.

1. Liability to Repair.

a. Public User.

Who Liable.]—Bridges must be repaired by the county when it does not appear who else ought to repair them. *Rex* v. *Yorkshire* (*W. R.*), 5 Burr. 2594; 2 W. Bl. 685; Lofft, 238; 2 East, 342; 6 R. R. 439.

If no one be bound by tenure or prescription to repair a bridge, it shall be repaired by the inhabitants of the county wherein it is situate. *Rex* v. *Oxfordshire*, 5 L. J. (O.S.) M. C. 127.

Built by Private Person.]—The county is bound to repair a bridge built by a private person, if it is of public utility. *Rex* v. *Yorkshire* (*W. R.*), supra.

But, if he has the benefit of it, he must repair. *Ib.*

Where an individual builds a bridge which he dedicates to the public, by whom it is used, the county is bound to repair it. *Ib.*

As a general rule, the county is liable to repair bridges built by private individuals before 43 Geo. 3, c. 59, if the public use such bridges. *Reg.* v. *Ely*, 4 New Sess. Cas. 222; 15 Q. B. 827; 19 L. J., M. C. 223; 14 Jur. 956.

The county may be compelled to repair a bridge built in the highway, and used by the

public above forty years, though originally erected by a private individual for his own convenience. *Rex* v. *Glamorgan*, 2 East, 356, n.; 6 R. R. 450, n.

Where a person, about forty-five years back, erected a mill and a dam thereto for his own profit, per quod he deepened the water of a ford through which there was a public highway, but the passage through which was before the deepening very inconvenient at times to the public, and the miller afterwards built a bridge over it, which the public had ever since used:—Held, that the county and not the miller was chargeable with the reparation. *Rex* v. *Kent*, 2 M. & S. 513; 15 R. R. 330.

—— **Bridge not built in existing Highways—Acquiescence by County.**]—Upon the trial of an indictment against the inhabitants of a county for the non-repair of a bridge built by private owners, but not built in an existing highway, the true effect of the evidence as to the dedication to and the adoption of the bridge by the county is always a question for the jury. The fact that such a bridge is of public utility and is used by the public is not necessarily conclusive against the county on the question of liability, user and utility being only elements for consideration in determining that question; but there need not, in addition to evidence of public user and public utility, be proof of an overt act amounting to a formal adoption by a body capable of representing and binding the county. *Reg.* v. *Southampton County* (17 Q. B. D. 424) in part dissented from. *Reg.* v. *Southampton County*, 56 L. J., M. C. 112; 19 Q. B. D. 590; 57 L. T. 261; 16 Cox, C. C. 271; 52 J. P. 52.

The owners of land on one side of a river made a road across such land, and built a bridge connecting such road with an existing highway on the other side of the river. They then dedicated both bridge and road simultaneously to the public, who afterwards used the same:—Held, that the bridge not having been erected in an existing highway, the county was not liable for its repair, inasmuch as there was no evidence of acquiescence by the county in the building and dedication of the bridge. The effect of the 21st section of the Highway Act, 1835, is, in the case of county bridges built subsequently to that act, to throw the liability in respect of surface repairs to the roadway of the bridge and approaches upon the highway authority. Where a county of a town has been created by charter and declared to be a separate county, the county in which it was originally situated is not liable for the repair of bridges within its boundaries. *Reg.* v. *Southampton County*, 55 L. J., M. C. 158; 17 Q. B. D. 424; 55 L. T. 322; 35 W. R. 10; 16 Cox, C. C. 117; 50 J. P. 773.

In Time of Floods.]—A bridge may be a public bridge which is used by the public at all such times as are dangerous to pass through the river. *Rex* v. *Northampton*, 2 M. & S. 262; 15 R. R. 241.

A bridge used only on occasion of floods, and lying out of and alongside the road commonly used, is a public bridge, and the county is liable to repair it. *Rex* v. *Devon*, R. & M. 144.

A bar across a public bridge kept locked, except in times of flood, is conclusive evidence that the public has only a limited right to use the bridge at such times. *Rex* v. *Buckingham* (*Marquis*), 4 Camp. 189.

b. Description of Bridge.

Flumen vel cursus aquæ.]—The inhabitants of a county are bound by common law to repair bridges erected over such water only as answers the description of flumen vel cursus aquæ; that is, water flowing in a channel between banks more or less defined, although such channel may be occasionally dry. *Rex* v. *Oxfordshire*, 1 B. & Ad. 289; 8 L. J. (O.S.) K. B. 354.

Though there cannot be a bridge which the county is bound to repair, where there is no cursus aquæ, yet it is a question of fact in each case, whether an arch thrown over a cursus aquæ is such a bridge or not. *Rex* v. *Whitney*, 4 N. & M. 594; 3 A. & E. 69; 7 C. & P. 208; 1 H. & W. 147; 4 L. J., M. C. 86.

The fact of the arch or bridge having no parapets does not of itself prevent its being a county bridge. *Ib.*

It is not essential to a bridge, in the legal sense of the word, that it should be a structure over water which flows at all times. *Reg.* v. *Derbyshire*, 2 G. & D. 97; 2 Q. B. 745; 11 L. J., M. C. 51; 6 Jur. 483.

Semble, that arches ought to pass over some branch or channel of a river in order to come within the legal definition of bridge, and to render the county liable. *Rex* v. *Oxfordshire*, 5 L. J. (O.S.) M. C. 127.

But arches which have been erected and serve for the purpose of draining lands on each side of a public road at times of inundation, and are not absolutely essential to the passage along the road, will not be considered as bridges, or as forming part of a bridge, unless it shall appear that they have always been repaired by the county. *Ib.*

And see *Rex* v. *Gloucester*, post, col. 185.

Culvert only Necessary.]—Trustees under a turnpike act having built a bridge across a stream where a culvert would have been sufficient, but a bridge was better for the public, the county cannot refuse to repair such bridge on the ground that it was not absolutely necessary. *Rex* v. *Lancashire*, 2 B. & Ad. 813; 1 L. J., M. C. 1.

Street.]—A bridge may be so situate as to be a street within the meaning of a statute. *Beaver* v. *Manchester Corporation*, 8 El. & Bl. 44; 26 L. J., Q. B. 311; 4 Jur. (N.S.) 23.

Foot-bridge.]—A foot-bridge, formed of three planks, nine or ten feet long, and a hand-rail, and which carried a public footpath across a small stream, was held not to be repairable as a county bridge; that it had been repaired by the commissioners under the local act of parliament. *Reg.* v. *Southampton*, 18 Q. B. 841; 21 L. J., M. C. 201; 17 Jur. 254.

New Bridge on Site of Old.]—*See cases*, post, col. 185.

c. Ratione tenuræ.

Owner or Occupier.]—At common law, the liability to repair bridges, ratione tenuræ, is thrown ultimately on the owner of the land, as between him and the occupier, though primarily, as far as the public are concerned, the occupier may be chargeable. *Baker* v. *Greenhill*, 3 Q. B.

148; 2 G. & D. 435; 11 L. J., Q. B. 161; 6 Jur. 710.

Infant.]—An infant seised of lands in the actual possession of his guardian in socage, is not indictable for the non-repair of a bridge ratione tenuræ. *Rex* v. *Sutton*, 5 N. & M. 353; 3 A. & E. 597; 1 H. & W. 428; 4 L. J., K. B. 215.

Guardian in Socage.]—The guardian in socage, if in possession of the lands charged with the repairs, is indictable. *Ib.*

So, any occupier of the lands charged. *Ib.*

Indictment.]—An indictment, charging an individual with the repair of a bridge by reason of his being owner and proprietor of a certain navigation, is not equivalent to charging him ratione tenuræ, but is erroneous; and, if judgment is given thereon, upon error, it will be reversed. *Rex* v. *Kerrison*, 1 M. & S. 435; 14 R. R. 491.

An indictment for not repairing an ancient bridge, describing it as being situate within the parish of P. and M., and averred that the inhabitants of P., and those of the township of M. aforesaid, were liable to repair such bridge, without proceeding to state what part of it was situate in the township of M., and that the inhabitants thereof were liable to repair it:—Held, bad, as no special or sufficient consideration was shewn to render the inhabitants of the township liable to repair, as they could not hold land, and consequently could not be liable ratione tenuræ. *Rex* v. *Penegoes and Machynlleth*, 3 D. & R. 388; 2 B. & C. 166; 26 R. R. 294.

Evidence.]—To an indictment against the inhabitants of a county for the non-repair of a foot-bridge, they pleaded that it was parcel of a carriage-bridge, which A. was bound to repair ratione tenuræ. Replication admitted the liability of A. to repair the carriage-bridge, but denied that the foot-bridge was parcel of the same, whereupon issue was joined. The evidence was, that the carriage-bridge mentioned in the pleadings had been built before 1119, and that certain abbey lands had been ordained for the repairs of the same, and the proprietors of those lands (of which those mentioned to be held by A. formed part) had always repaired the bridge so built. In 1736 the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden foot-bridge along the outside of the parapet of the carriage-bridge, partly connected with it by brickwork and iron pins, and partly resting on the stonework of the bridge:—Held, that this (being the bridge mentioned in the indictment) was not parcel of the carriage-bridge which A. was bound by tenure to repair; and, consequently, that the county was liable to repair the foot-bridge. *Rex* v. *Middlesex*, 3 B. & Ad. 201; 1 L. J., M. C. 16.

Indictment against a county for not repairing a bridge: plea, that S. was liable ratione tenuræ. The plea is not sustained by evidence that the estate of S. was part of a larger estate, which part he purchased of the former owner, who retained the rest in his own hands, and as well before the purchase as since had repaired the bridge: but where in such case the county was found guilty, the court gave leave to stay the judgment upon payment of costs until another indictment was preferred, in order to try the liability. *Rex* v. *Oxfordshire*, 16 East, 223.

An indictment for non-repair of a bridge on a liability ratione tenuræ cannot be sustained where it appears that the tenement on which the liability is charged originated within time of legal memory. *Rex* v. *Hayman*, M. & M. 401; 31 R. R. 742.

On an indictment for the non-repair of a bridge ratione tenuræ:—Held, that a record of Edw. 3, setting out a presentment of the Bishop of Lincoln for non-repair of the bridge, and his acquittal by the jury, which was shortly afterwards followed by a grant of pontage from the crown, on the ground that it had been found by inquest that no one was liable to repair the bridge, is admissible to negative any immemorial liability ratione tenuræ. *Reg.* v. *Sutton*, 3 N. & P. 569; 8 A. & E. 516; 7 L. J., Q. B. 205.

d. By Prescription.

Corporation.]—As to the liability of a corporation by prescription to repair a bridge, see *Rex* v. *Stratford-upon-Avon Corporation*, 14 East, 348.

Hundred.]—A hundred may be charged by prescription with the reparation of a bridge, and this, although it appears that by a statute within the time of legal memory, one of the townships, parcel of the hundred, was then annexed to it. *Rex* v. *Oswestry*, 6 M. & S. 361; 18 R. R. 398. See also *Reg.* v. *Chart and Longbridge*, infra.

Parish.]—A parish may be indicted for non-repair of a bridge without stating any other ground of liability than immemorial usage. *Rex* v. *Hendon*, 4 B. & Ad. 628; 2 L. J., M. C. 55.

A public bridge, repairable by immemorial custom by the inhabitants of a hundred, is not a highway within the meaning of that term in 5 & 6 Will. 4, c. 50, s. 5, and is not repairable under that act by the parish in which it is situated. *Reg.* v. *Chart and Longbridge*, 39 L. J., M. C. 107; L. R. 1 C. C. 237; 22 L. T. 416; 18 W. R. 791; 11 Cox, C. C. 502.

By 5 & 6 Will. 4, c. 50, s. 5, it is enacted, that the word "highways" shall be understood to mean all roads, bridges (not being county bridges), carriage ways, &c.:—Held, that a bridge of the above description was a county bridge, and repairable by the hundred, within the exception of county bridges. *Ib.*

County Bridge — When within Municipal Boundary.]—Where a toll-bridge has been built, and a turnpike road made in connection with it under a local act, on the termination of the period of the trust, though the bridge is within the boundaries of a municipal borough, it becomes such a county bridge under 33 & 34 Vict. c. 73, s. 12, as to make it repairable by the inhabitants of the county, unless there is some immemorial usage imposing a liability on the inhabitants of the borough to repair all bridges within its boundaries. A toll-bridge was made over the B. river at W. for the purpose of connecting the back streets of W. with the county districts on the other side of the river. A turnpike road was made in connection with the bridge; both the road and the bridge were constructed under one act. There were separate trusts of the bridge and the road, but the trustees of the one were

trustees of the other. This bridge was within the municipal boundaries of the borough of W. On the expiration of the trust the county repaired the road, but the bridge was allowed to fall into disrepair. The county of D., in which the bridge was situated, was thereupon indicted for its non-repair, and was found guilty:—Held, upon the argument for a new trial, that the county was rightly convicted; and that as there was nothing shewn in the case to cast the liability to repair on the borough in which the bridge was situated, on the expiration of the period of the trust affecting the bridge, it became a county bridge repairable by the inhabitants of the county under 33 & 34 Vict. c. 73, s. 12. *Reg.* v. *Dorset* (*Inhabitants*), 45 L. T. 308.

e. When built under Special Authority.

Canal Act—Deepening a Ford.]—A canal company, authorised by an act of parliament to make a river navigable, and to make and enlarge certain navigable cuts, and build bridges and other works connected with the navigation, having for their own benefit made a navigable cut and deepened a ford which crossed the highway, and thereby rendered a bridge necessary for the passage of the public, which was accordingly built at the expense of the company in the first instance:—Held, that the company was bound to maintain it, and that the burden of repair was not to be thrown upon the inhabitants of the county. *Rex* v. *Lindsey*, 14 East, 317; 12 R. R. 529.

Act for making River Navigable.]—A company being empowered under a local act to make a river navigable, and to take tolls, and to amend or alter such bridges or highways as might hinder the passage or navigation, leaving them or others as convenient in their room, and they having forty years ago destroyed a ford across the river in the common highway by deepening its bed, and built a bridge over the same place, are bound to keep such bridge in repair, as under a continuing condition to preserve the new passage in lieu of the old one, which they destroyed for their own benefit. *Rex* v. *Kent*, 13 East, 220; 12 R. R. 330.

Where certain persons and their successors were authorised by act of parliament to make a river navigable, and to cut the soil of any persons for making any new channel, by virtue of which they cut through a highway, and rendered it impassable, and a bridge was built over the cut, over which the public passed, and which had been repaired by the proprietors of the navigation:—Held, that the proprietors, and not the county, were liable to repair. *Rex* v. *Kerrison*, 3 M. & S. 526; 16 R. R. 342.

Alteration of Bridge.]—By 43 Geo. 3, c. 59, s. 5, the inhabitants of a county were compelled to repair no bridge thereafter erected or built by a private person or body corporate, unless under the direction or to the satisfaction of the county surveyor or some person appointed by the justices. By a local act of 1827 a road passing over a bridge was made repairable by trustees; but at no time was the bridge or its approaches actually repaired by them. The road became an ordinary highway. By another local act of the same year a canal company was empowered to make, maintain, and support bridges across their navigation, providing no existing liability to repair a bridge not erected or altered by the company should be affected. The company raised the surface of this bridge, without altering the structure, in order to give the approach to another bridge over their navigation the incline required by their act. They did this without reference to the county surveyor or justices. By 33 & 34 Vict. c. 73, s. 12, where a turnpike road shall have become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road shall become county bridges, and shall be kept in repair accordingly:—Held, that by this alteration this bridge had not become repairable by the canal company, and that this general provision of the last act was not limited to those bridges erected by private expense, which alone were repairable by a county under 43 Geo. 3, c. 59, s. 5; nor to bridges which had been actually repaired by trustees. *Reg.* v. *Somerset*, 38 L. T. 452.

Indictment—Division of County.]—Indictment against the inhabitants of the Isle of Ely, for non-repair of a public bridge in the Isle of Ely and county of Cambridge, averring that they were liable, but stating no specific reason. Plea, that the bridge was in a public highway, over an artificial cut made in the highway by the adventurers for draining the Bedford Level; that the bridge was rendered necessary by the cut for the purpose of the highway; that the cut was made for the benefit of the lands of the adventurers, and was maintained by the adventurers until a statute, when the property in the cut and its banks, and in the bridge, and in the lands benefited by the cut, which lands had been previously vested in the adventurers, became vested in the corporation of the conservators of the fens, and the cut was from that time maintained by the corporation for their own benefit; and they have repaired and been liable to repair the bridge:—Held, first, that the count was good, as the court must take judicial notice that the Isle of Ely was a division of a county in the nature of a riding, and, as such, primâ facie liable to repair bridges within it. *Reg.* v. *Ely*, 4 New Sess. Cas. 222; 15 Q. B. 827; 19 L. J., M. C. 223; 14 Jur. 956.

Held, secondly, that the plea was good, as it sufficiently shewed that the corporation was bound to repair the bridge rendered necessary by the cut maintained for their benefit. *Ib.*

Turnpike Act—County primarily Liable.]—Where turnpike trustees erected a bridge in pursuance of the power given them by the act, upon a road where there had been no bridge before:—Held, that the county was primarily liable to keep it in repair, even assuming that the trustees had funds in hand applicable to that purpose. *Rex* v. *Oxfordshire*, 6 D. & R. 231; 4 B. & C. 194; 3 L. J. (o.s.) K. B. 198.

The county or riding is liable to the repair of a bridge built by trustees under a turnpike act; there being no special provision for exonerating them from the common-law liability, or transferring it to others, though the trustees were enabled to raise tolls for the support of the roads. *Rex* v. *Yorkshire* (*W. R.*), 2 East, 342; 6 R. R. 439.

Railways Clauses Act.]—A special act of a railway company (incorporated by the Railways Clauses Act, 1845, so far as it was not expressly

varied or excepted) provided, that if after notice the company did, with reasonable expedition, repair a bridge over a turnpike road to the satisfaction of the surveyor of the trustees, the latter might repair and recover the costs; the Turnpike Act, however, was suffered to expire:—Held, that though the Railways Clauses Act, 1845, s. 65, was expressly varied by the special act, yet it revived on the cessation of the turnpike trust, and an order to repair the bridge might be made under it. *L. C. & D. Ry.* v. *Wandsworth Board of Works*, 42 L. J., M. C. 70; L. R. 8 C. P. 8.

Where a railway crosses a highway, and the road is carried over the railway by means of a bridge, in accordance with the provisions of s. 46 of the Railway Clauses Consolidation Act, 1845, the railway company are bound to keep in repair the roadway upon the bridge, such roadway being part of the bridge which by the section the company are to maintain. *Lancashire and Yorkshire Ry.* v. *Bury Corporation*, 59 L. J., Q. B. 85; 14 App. Cas. 417; 61 L. T. 417; 54 J. P. 197—H. L. (E.)

During Erection.] — The 49 Geo. 3, c. 84, appointed trustees for taking down the old and building a new bridge over a river, and empowered them to take tolls, and that it should be lawful for them, out of the moneys received, to build a new bridge, and vested the property in the old and new bridge during the continuance of the act, in the trustees; and that as soon as the purposes of the act should be executed, then and from thenceforth the tolls should cease, and the bridge should be repaired by such persons as were by law liable to repair the old bridge:—Held, that during the time the trustees were engaged in executing the powers of the act, and before they had completed them, the county was not liable to repair the bridge. *Rex* v. *Somerset*, 16 East, 305.

Proprietor taking Tolls.] — Defendant was proprietor of a bridge and received tolls; the bridge being out of repair and impassable, he established a ferry and took tolls under the acts which authorised the building of the bridge. An action was brought against him by the plaintiff for a mandamus commanding defendant to repair the bridge, and on a case stated the question was, whether the defendant was liable to reinstate the bridge under the acts, and, if so, that judgment might be entered for plaintiff for 40*s.* damages and costs, and that the mandamus might issue:—Held, that under the acts, the defendant having received toll was liable to reinstate the bridge; but the judgment of the court below in so far as it ordered a mandamus to issue should be reversed. *Nicholl* v. *Allen*, 1 B. & S. 934; 31 L. J., Q. B. 283; 6 L. T. 699; 10 W. R. 741.

Isle of Wight.]—The Isle of Wight is a division of the county of Southampton, but has no separate commission of the peace. Before 1842, all public bridges in the island, not repairable by tenure, were repaired either by the tithings, parishes or townships in which they were situate, or from rates levied on all the parishes in the island under the following circumstances. The island having been assessed to the general county rate, and appeals against such assessment having been entered, an arrangement was made, in 1774, by consent, under an order of quarter sessions, fixing certain proportions to be paid by the parishes towards the general county rate, but leaving the expense of bridges and the house of correction to be raised by a local rate, the island being adjudged and declared not to be liable to pay to the county rate or county house of correction, and the inhabitants agreeing to erect and maintain houses of correction and bridges within the island at their sole expense. After this arrangement, the practice was for the county quarter sessions, on application of the justices for the Isle of Wight division, to lay a rate, in the nature of a county rate, on every parish in the island, for the repair of the island bridges and bridewell. Till 1842, there had been no instance of the general county rate being applied to the repair of the island bridges. In 1813, a local act appointed commissioners for the repair of the highways in the island, with power to make assessments, and enacted that all bridges previously repaired by any parishes, tithings, divisions, or townships should, for the future, be repaired "in such and the same manner, and by such and the same ways and means," as other bridges usually called county bridges within the island had been accustomed to be repaired. In 1842, and since, the island was assessed generally with the county, and no separate island rate made. Application for the repair of bridges and bridewells in the island had been since that time made to the county quarter sessions:—Held, that all bridges which, at the time of the passing of the act, were repairable by the tithings, parishes or townships in which they were situate, were for the future repairable by the county generally, and that the arrangement of 1774 did not affect the legal liability of the county, and was no answer to an indictment against it for non-repair of such bridges. *Reg.* v. *Southampton*, 18 Q. B. 841; 21 L. J., M. C. 201; 17 Jur. 254.

Destruction of Bridge.]—By a local act commissioners were constituted to protect the banks of the Ouse, and by another act commissioners were constituted, under the title of the Middle Level Commissioners, with powers over a large district of land, and who under such powers had built a sluice bridge from bank to bank over the Ouse. The tide having broken in and washed away such sluice bridge and 110 feet of the embankment adjoining, a local act was passed, enacting that the Middle Level Commissioners "shall, with all convenient dispatch after the passing of this act, at their own cost, erect a new bridge, or otherwise provide and make and for ever maintain a good and sufficient continuous road or haling path over and along or near to that part of the west bank of the River Ouse, where recently stood the sluice bridge and roadway made by the commissioners." These commissioners were ready to build a sluice bridge of the dimensions of the old one, if there were any embankments to which to attach it, but declined to make one to connect itself with the embankment in its present unrestored condition:—Held, that the words of the statute limited the duty of the commissioners to the making of a bridge of the limits of the former bridge. *Reg.* v. *Middle Level Commissioners*, 10 L. T. 375.

On a covenant to build a bridge in a substantial manner, and to keep it in repair for a certain time, the party is bound to rebuild the bridge, though broken down by an extraordinary flood. *Brecknock Navigation* v. *Pritchard*, 6 Term Rep. 750; 3 R. R. 335.

f. Satisfaction of County Surveyor.

Persons within the Act.]—Trustees appointed by a local turnpike act are individuals or private persons within the meaning of 43 Geo. 3, c. 59, s. 5, which renders it necessary to erect county bridges under the direction or to the satisfaction of the county surveyor. *Rex* v. *Derby*, 3 B. & Ad. 147; 1 L. J., M. C. 15.

Newly-built Bridges.] — The statute applies only to bridges newly built, not to a bridge merely widened or repaired since its passing. *Rex* v. *Lancashire*, 2 B. & Ad. 813; 1 L. J., M. C. 1.

A county bridge having been washed away was, after the passing of 43 Geo. 3, c. 59, rebuilt, wider than before, and, without notice to the county surveyor, by the parish, partly with the old materials, and in the same line of passage over the river:—Held, that the county was liable to repair, and that this was not a new bridge within the meaning of that act. *Rex* v. *Devonshire*, 2 N. & M. 412; 5 B. & Ad. 383; 2 L. J., M. C. 74.

A bridge in the Isle of Wight, originally repaired by the tithing in which it was situate, was, after the passing of a local act, wholly rebuilt by order of the justices for the island division. The new bridge was longer than the old, and different in form, and stood higher up the stream. The expense of the building, and of repairs, was defrayed out of the island rate imposed under an arrangement. The conditions, by 43 Geo. 3, c. 59, were not observed in building it:—Held, that the county was liable to repair the new bridge. *Reg.* v. *Southampton*, 18 Q. B. 841; 21 L. J., M. C. 201; 17 Jur. 254.

Over Stream of Water.]—A bridge had been built before 43 Geo. 3, c. 59, over a stream of water. The stream was never known to be dry, but in the winter its depth only averaged two and a half feet. It was part of a sheet of water crossing low land, and at the place where the bridge crossed it, it was confined by embankments, to prevent it from overflowing the adjoining meadows. The judge left it to the jury, whether this structure was a bridge over a stream of water; for, if so, it was not necessary that it should be for the convenience of the public under 43 Geo. 3, c. 59, s. 5, but the county was liable to repair it. *Reg.* v. *Gloucester*, Car. & M. 506.

Alteration of Bridge.]—By 43 Geo. 3, c. 59, s. 5, the inhabitants of a county were compelled to repair no bridge thereafter erected or built by a private person or body corporate, unless under the direction or to the satisfaction of the county surveyor or some person appointed by the justices. By a local act of 1827 a road passing over a bridge was made repairable by trustees; but at no time was the bridge or its approaches actually repaired by them. The road became an ordinary highway. By another local act of the same year a canal company was empowered to make, maintain and support bridges across their navigation, provided no existing liability to repair a bridge not erected or altered by the company should be affected. The company raised the surface of this bridge, without altering the structure, in order to give the approach to another bridge over their navigation the incline required by their act. They did this without reference to the county surveyor or justices. By 33 & 34 Vict. c. 73, s, 12, where a turnpike road shall have become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road shall become county bridges, and shall be kept in repair accordingly:—Held, that by this alteration this bridge had not become repairable by the canal company, and that this general provision of the last act was not limited to those bridges erected by private expense, which alone were repairable by a county under 43 Geo. 3, c. 59, s. 5; nor to bridges which had been actually repaired by trustees. *Reg.* v. *Somerset*, 38 L. T. 452.

g. When Bridge Widened.

Obligation to Repair—Evidence.]—A particular parish was bound by prescription to repair an old wooden foot-bridge used by carriages only in times of flood; about forty years before the trustees of the turnpike road built on the same site a much wider bridge of brick, which had been constantly used ever since by all carriages passing that way:—Held, that to an indictment against the county for not repairing this bridge, a plea that the parish had immemorially repaired and still ought to repair the bridge, was not supported by the above facts, and that the burden of repairing the new bridge must be borne by the county at large. *Rex* v. *Surrey*, 2 Camp. 455.

—— **Liability pro Ratâ.**]—Where townships have so enlarged a bridge which they were before bound to repair as a foot-bridge, they will still be liable pro ratâ. *Rex* v. *Yorkshire (W. R.)*, 2 East, 353, n.; 6 R. R. 447, n.

h. Approaches to Bridges.

At Common Law.] — By the common law, declared by 22 Hen. 8, c. 5, and the subsequent bridge acts, where the inhabitants of a county are liable to the repair of a public bridge, they are liable also to the repair of the highway at the ends of such bridge to the extent of 300 feet; and if indicted for the non-repair thereof, they cannot exonerate themselves, except by pleading specially that some other is bound by prescription or tenure to repair the same. *Yorkshire (W. R.)* v. *Rex*, 2 Dow, 1; 5 Taunt. 284; 7 East, 588; 3 Smith, 437; 8 R. R. 688.

Prescriptive Liability — 300 Feet.] — Where there is a prescriptive liability to repair a bridge, it is an intendment of law, in the absence of any evidence to the contrary, that the liability extends to 300 feet of the approaches at each end of the bridge. *Reg.* v. *Lincoln Corporation*, 3 N. & P. 273; 8 A. & E. 65; 1 W. W. & H. 260; 7 L. J., Q. B. 161; 2 Jur. 615, 807.

The presumptive liability to repair the approaches to a bridge is not rebutted by proof that the party has been known only to repair the fabric of the bridge, and that the only repairs known to have been done to the highway have been performed by commissioners under a turnpike road act. *Ib.*

A new and substantive bridge of public utility, built within the limit of one county and adopted by the public, is repairable by the inhabitants of that county, although built within 300 feet of an old bridge repairable by the inhabitants of another county, who were bound of course under

22 Hen. 8, c. 5, to maintain such 300 feet of road, though lying in the other county. *Rex* v. *Devon*, 14 East, 477; 13 R. R. 285.

Under Canal Act.]—The liability imposed on a canal company by a private act of parliament of "making and perfecting" and maintaining and repairing bridges to carry highways over a canal, includes the liability to maintain and repair raised approaches which are necessary at each end of the bridges. *Nottingham County Council* v. *Manchester, Sheffield and Lincolnshire Ry.*, 15 R. 35; 71 L. T. 430.

Railway Bridge over Highway.]—When a railway is carried over a highway by means of a bridge, no liability to keep in repair the immediate approaches on each side of the bridge is cast upon the company by reason of any of the provisions in the Railway Clauses Act, 1845, even though the company has lowered the level of the old highway in making the approaches. *L. & N. W. Ry.* v. *Sherton* (*Surveyor of Highways*), 5 B. & S. 559; 33 L. J., M. C. 158; 10 L. T. 648; 12 W. R. 1102.

And see further, RAILWAYS.

i. Part of Bridge in Different Counties.

Effect of 5 & 6 Will. 4, c. 76.]—Indictment for the non-repair of a bridge. On a special verdict, it was found, that, until the passing of 2 & 3 Will. 4, c. 64, by which a borough was enlarged, the bridge was situated without the borough, in a county, and had always been repaired by that county; the metes and bounds so altered were adopted by 5 & 6 Will. 4, c. 76, for the purposes of that act:—Held, that the 5 & 6 Will. 4, c. 76, does not change the legal liability of the county; and that, though the bridge is now locally situate within the new limits of the borough, the county is still liable to repair it. *Reg.* v. *New Sarum*, 2 New Sess. Cas. 133; 7 Q. B. 241; 15 L. J., M. C. 15; 10 Jur. 176.

Indictment against the inhabitants of B. for non-repair of half of a county bridge. A special verdict found that the bridge was across the river W., in the parish of G.; that parish G. was partly on the right bank, and partly on the left bank of the river; that the whole of that part on the left bank always was in the county of R.; that until 2 & 3 Will. 4, c. 64, the boundary between the counties of B. and R. was the mid-channel of the river to a point in parish G., and thence inland to another point in the mid-channel; and that 470 acres of parish G., between the inland boundary and the river, and the part of the river from the one point to the other, always until 2 & 3 Will. 4, c. 64, were in the county of R.; that a portion of the bridge between the right bank and the centre of the river, and resting upon part of the 470 acres, was out of repair; and the doubt referred to the court was whether the defendants were guilty. By 2 & 3 Will. 4, c. 64, and 7 & 8 Vict. c. 61, the isolated portions of counties described in schedule (M.) to 2 & 3 Will. 4, c. 64, are annexed for all purposes to counties mentioned in the fourth column of the schedule. The schedule describes "part of point G." as being an isolated part of B., locally situate in B. or R., and to be annexed to B. The verdict stated that there was no part of parish G. to which this description could apply, if not to the 470 acres:—Held, first, that the description in the schedule must be understood to apply to the 470 acres, which had been part of the county of R., and that the statute made the part of the county of B. and the mid-channel the boundary between the counties. *Reg.* v. *Brecon* or *Brecknockshire*, 4 New Sess. Cas. 272; 15 Q. B. 813; 19 L. J., M. C. 203.

Held, secondly, that the liability to repair the bridge within part of G. was, as an incident to the change, transferred to the inhabitants of B. *Ib.*

Effect of Local Government Act, 1888.]—A bridge at B. was partly within the county of Stafford and partly within the county of Derby. By a local act the expenses of maintaining it were to be borne in equal moieties by the respective county rates. B. was an urban sanitary district partly within the two counties. Under s. 50 (1) (*b*) of the Local Government Act, 1888, B. became wholly included in the county of Stafford:—Held, that notwithstanding the above section the local act remained in force, and that both counties were still liable to pay equally for repairs. *Staffordshire and Derbyshire County Councils, In re*, 54 J. P. 566.

Misdescription of Liability.]—An indictment stated, that, from time immemorial, there hath been and still is an ancient bridge; that one part of it was in township A., and the other in parish B.; that the part in A. was out of repair, and that A. was under a prescriptive liability to repair. The bridge consisted of four arches, part of the principal arch and the whole of the other arches being in A., and that in 1806 the principal arch had been widened from nine to sixteen feet at the joint expense of A. and B.:—Held, that there was no misdescription of the township's liability; as, if the prescriptive liability to repair the ancient bridge was well described, it was no answer to shew that there was something else which A. was not bound to repair. *Reg.* v. *Adderbury East*, D. & M. 324; 5 Q. B. 187; 13 L. J., M. C. 9; 7 Jur. 1035.

2. PRESENTMENT FOR NON-REPAIR.

The 13 Geo. 3, c. 78, s. 24, empowers every justice of the peace, either upon his own view, or upon information upon oath, to make presentment of any highway not well and sufficiently repaired. By 43 Geo. 3, c. 59, s. 1, all matters and things in the former act contained, relating to highways, shall, so far as applicable, be extended and applied to county bridges, as fully and effectually as if the same, and every part thereof, were herein repeated and re-enacted:—Held, that the enactment, as to presentments of highways, in the former statute, was virtually re-written or re-enacted in 43 Geo. 3, c. 59, as to county bridges, and, therefore, is not repealed, as to county bridges by 5 & 6 Will. 4, c. 50, which repeals in terms 13 Geo. 3, c. 78. *Reg.* v. *Brecon*, 3 New Sess. Cas. 434; 15 Q. B. 813; 18 L. J., M. C. 123; 13 Jur. 422. *S. P.*, *Reg.* v. *Merionethshire*, 6 Q. B. 343; 13 L. J., M. C. 158.

Held, also, that 5 & 6 Will. 4, c. 50, s. 22, does not so far incorporate the provisions of s. 99, as to apply them to county bridges, and does not, therefore, shew that the legislature intended to repeal so much of the 43 Geo. 3, c. 59, as consists of clauses incorporated from 13 Geo. 3, c. 78. *Ib.*

3. Indictment and Evidence.

Liability—Immemorial Usage.]—A parish may be indicted for non-repair of a bridge, without stating any other ground of liability than immemorial usage. *Rex* v. *Hendon*, 4 B. & Ad. 628; 2 L. J., M. C. 55.

—— **Public Bridge.**]—The inhabitants of a county are bound to repair every public bridge within it, unless, when indicted for the non-repair of it, they can shew by plea, that some other person, or body politic or corporate, is liable; and every bridge in a highway is by 22 Hen. 8, c. 5, taken to be a public bridge for this purpose. *Rex* v. *Bucks*, 12 East, 192; 11 R. R. 347.

—— **Parish or County—Inspection of Parish Books.**] — An indictment had been preferred against a county for not repairing a bridge at the instance of the inhabitants of a parish, and the question intended to be tried was, whether the inhabitants of the parish or of the county were liable to repair it. The court refused to compel the inhabitants of the parish to allow the parties indicted to inspect the parish books and documents relating to the bridge. *Rex* v. *Buckingham JJ.*, 8 B. & C. 375; 2 M. & Ry. 412; 6 L. J. (o.s.) K. B. 346.

"Riding."]—The word "riding" in the Statute of Bridges (22 Hen. 8, c. 5, s. 3), is not confined to districts called by that name, but includes any division of a county which corresponds in its definition to a riding. *Reg.* v. *Isle of Ely*, 4 New Sess. Cas. 222; 15 Q. B. 827; 19 L. J., M. C. 223.

Non-repair of Approaches.] — Although the inhabitants of the county are in general liable to the repairs of the highway within 300 feet of the bridge as well as of the bridge itself, an indictment which charges merely a non-repair of the bridge is not sufficient to charge them with the not repairing of the highway within that distance. *Rex* v. *Gloucester* (*Inhabitants*), 8 L. J. (o.s.) K. B. 97; *Ib.*, M. C. 120.

Evidence.]—Upon not guilty to an indictment against the inhabitants of a county for not repairing a public bridge, it is competent to the defendants to give evidence of the bridge having been repaired by private individuals. *Rex* v. *Northampton*, 2 M. & S. 262; 15 R. R. 241.

—— **Of Reputation.**] — Indictment against the inhabitants of a county for the non-repair of a public bridge. Plea, that three persons were bound respectively to repair the three northern arches of the bridge, ratione tenuræ. On the trial a witness, who as well as his father and grandfather had been employed in doing repairs to the county parts of the bridge, was asked, "Have you heard them say who was liable to repair the three northern arches?"—Held, first, that evidence of reputation was admissible upon this issue, because, though it involved matter of private right, it also related to matters of public and general interest. *Reg.* v. *Bedfordshire*, 4 El. & Bl. 535; 3 C. L. R. 442; 24 L. J., Q. B. 81; 1 Jur. (N.S.) 208; 3 W. R. 205; 6 Cox, C. C. 505.

Held, secondly, that the answer to the question was admissible, because it was not necessarily evidence of reputation of a particular fact; but it might proceed upon a distinct reputation prevailing in the neighbourhood, or upon an admission by the owners of the lands in question that they were liable respectively to repair that part of the bridge ratione tenuræ. *Ib.*

Judgment—By Default.]—Semble, that a judgment by default, upon an indictment for non-repair of a highway, is not conclusive evidence against the parish, of a liability on their part to repair such highway. *Rex* v. *Whitney*, 4 N. & M. 594; 3 A. & E. 69; 7 Car. & P. 208; 4 L. J., M. C. 86.

—— **Stay of.**] — The court is reluctant to stay judgment on an indictment for not repairing a bridge, and will not stay it generally, but only till further order; and, if the trial of another indictment is not proceeded in with all dispatch, judgment will be given. *Rex* v. *Southampton*, 2 Chit. 215.

Costs—Where Defence Frivolous.] — The 13 Geo. 3, c. 78, s. 64, empowered the court trying an indictment for non-repair of a highway, to award costs if the defence was frivolous. The 43 Geo. 3, c. 59, s. 1, enacts, that all matters and things in the act contained relating to highways shall, so far as applicable, be extended and applied to county bridges, as fully and effectually as if the same were repeated and re-enacted:—Held, that the clause as to costs in 13 Geo. 3, c. 78, was substantively re-enacted in 43 Geo. 3, c. 59, with reference to county bridges, and, therefore, was not repealed when the 5 & 6 Will. 4, c. 50, repealed in general terms the 13 Geo. 3, c. 78. *Reg.* v. *Merionethshire*, 1 New Sess. Cas. 316; 6 Q. B. 343; 13 L. J., M. C. 158; 8 Jur. 778.

The judge who tries an indictment for non-repair of a bridge, removed by certiorari, may certify, after the assizes, that the defence was frivolous, and, by such certificate, award payment of costs to the prosecutor, which will be enforced by the court in banc. *Ib.*

4. Fines for Non-Repair.

The court cannot impose more than one fine for the non-repair of a bridge. *Rex* v. *Machynlleth*, 4 B. & Ald. 469; 23 R. R. 349.

5. Liability for Injuries or Nuisance.

Injury due to Want of Repair—Action for.]—No action will lie by an individual against the inhabitants of a county, for an injury sustained in consequence of a county bridge being out of repair. *Russell* v. *Devon*, 2 Term Rep. 667; 1 R. R. 585.

The inhabitants of a county are not liable to be sued, through their surveyor, by an individual for damages in respect of injuries to his person or property, occasioned by a bridge, repairable by the inhabitants of the county, being out of repair. *Mackinnon* v. *Penson*, 9 Ex. 609; 23 L. J., M. C. 97; 18 Jur. 513; 2 W. R. 262.

Damage by Locomotives.]—The Locomotive Act, 24 & 25 Vict. c. 70, s. 7, enacts that where any bridge on a turnpike or other road, carried across any stream, watercourse, or navigable river, canal, or railway, shall be damaged by reason of any locomotive passing over the same,

or coming into contact therewith, none of the proprietors, undertakers, directors, conservators, trustees, commissioners or other persons interested in, or having charge of, such navigable river, canal or railway, or of such bridge, shall be liable to repair the damage, &c., but the same shall be repaired to the satisfaction of such proprietors, &c., by the owners or persons having charge of the locomotive at the time of the happening of the damage :—Held, that this provision does not apply to bridges repairable by the inhabitants of a county. *Reg.* v. *Kitchener*, 43 L. J., M. C. 9 ; L. R. 2 C. C. 88 ; 29 L. T. 697 ; 22 W. R. 134 ; 12 Cox, C. C. 522.

Use of Swing Bridges—Obstruction.]—A dock company having a swing bridge on a public highway is bound, on the passing of vessels, to use all reasonable means (both as to the number of men employed, and number of ships passed at a time) to prevent unnecessary delay ; and if they do not do all which can be expected of reasonable men, and if any one is obstructed in consequence, such obstruction will render them liable for the injury sustained. *Wiggins* v. *Boddington*, 3 Car. & P. 544.

Neglect to Fence Dangerous Place.]—Where a canal company was empowered by a private act of parliament to intersect highways, and to construct bridges to connect the intercepted portions, and the canal and bridges were vested in them as proprietors, and they were enabled to take tolls from boats passing the bridges, and they erected swing bridges, which the boatmen were entitled to open for the purpose of passing, and which, when opened, left the edge of the canal unprotected, and there was not sufficient light or other means of preventing accidents, and the consequence was that while the bridge was lawfully opened at night-time a person fell into the canal and was injured, without any fault on his part :—Held, that the company was liable to an action for the injury. *Manley* v. *St. Helen's Canal and Ry.*, 2 H. & N. 840 ; 27 L. J., Ex. 159 ; 6 W. R. 297.

See also NEGLIGENCE.

Nuisance—Pulling Down Old Bridge—Prevention of.]—Justices having, under 43 Geo. 3, c. 59, contracted for the building of a new bridge in a different site, in lieu of the old one, which was ruinous ; and having directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials to be used by the contractor in finishing the new bridge ; the court refused a writ of prohibition to them to restrain them from pulling down the old before the new bridge was passable, though there were strong affidavits of the inconvenience and loss to be sustained by the neighbourhood, in being obliged to use a roundabout way in the interval, referring the complainant to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances, was a nuisance, and seeing no occasion to interfere by applying a prompt remedy of a novel kind in modern practice. *Rex* v. *Dorset JJ.*, 15 East, 594 ; 13 R. R. 443.

An injunction granted on an information and bill, upon the ground of public nuisance, to restrain the magistrates of a county from cutting the timbers supporting the roadway of a bridge, which timbers and roadway, at the place proposed to be cut, were within their jurisdiction, but of which the other extremity was within the jurisdiction of a different county. *Att.-Gen.* v. *Forbes*, 2 Myl. & C. 123.

—— **Bridge in a Public Way—Indictment.**]—A bridge built in a public way, without public utility, is indictable as a nuisance ; and so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county. *Rex* v. *Yorkshire* (*W. R.*), 2 East, 342 ; 6 R. R. 439. And see *Rex* v. *Glamorgan*, 2 East, 356, n. ; 6 R. R. 450, n.

6. RATABILITY.

Occupier of Bridge and Toll-house—Repairs under Local Act.]—Mandamus to a justice to issue his distress warrant against the occupiers of Putney Bridge for a highway rate, assessed on them under 5 & 6 Will. 4, c. 50, s. 27, in respect of their occupation of the bridge and toll-house, and the land on which the same were erected. Return, that Putney Bridge was paved, repaired, and cleansed under a local act : —Held, that the return was no answer, as s. 113 of the 5 & 6 Will. 4, c. 50, did not exempt the property from liability to the rate imposed under s. 27. *Reg.* v. *Paynter*, 13 Q. B. 399 ; 3 New Sess. Cas. 465 ; 18 L. J., M. C. 169 ; 13 Jur. 281.

Company of Proprietors.] — By a local act a company of proprietors were empowered to build a bridge for the use of the public, and to enable them to do so, to raise money, to be advanced by shares among themselves, and upon mortgage by strangers. They were to take tolls as soon as the bridge was open to the public, which were to be applied in paying the interest on the debt, and the surplus in paying the shareholders to the extent of 7½ per cent. on their shares. The excess was to be applied in paying off the shareholders, and when they were paid off, the surplus over the interest of the mortgages was to be funded until there was a sufficient accumulation to pay off the mortgage debt, and to raise a sum to meet the annual repairs : when that was done the tolls were to cease, and the company of proprietors were to become trustees for the public ; and all the money allowed by the act was raised, but a sum greater than was authorised by the act was required, and was borrowed. The tolls produced 1,500*l.* per annum, and were applied in payment of the interest of the mortgage and in reduction of the second debt, but nothing was paid to the shareholders :—Held, that the company were ratable as beneficial occupiers of this bridge. *Reg.* v. *Blackfriars Bridge, Manchester*, 9 Ad. & E. 828 ; 1 P. & D. 603 ; 8 L. J., M. C. 29.

7. OTHER MATTERS.

Duty to Construct—Canal Company.]—A canal company under their act were to make such bridges over their canals as two or more justices should "from time to time judge necessary, and appoint for the use of the owner or occupier of the lands adjoining the canal." The respondent was an adjoining owner, and obtained an order from the justices adjudging necessary and appointing one bridge to be constructed :—Held, that the canal company were bound to erect such a bridge. *Birmingham Canal* v. *Hickman*, 56 J. P. 598—C. A.

Liability to strengthen Bridge sufficient for Existing Traffic.]—A dock company being required by statute to build such good and substantial bridges for carriages, horses, and passengers over their cuts, as they should deem necessary, and for ever to keep the same in good repair, built bridges sufficient to carry the traffic of the district as it then existed. Subsequently manufactories were established on a tract of land inclosed by their cuts, in which large boilers and engines of twenty tons weight and upwards were constructed, which the bridges were insufficient to carry :—Held, on rule for mandamus, that the statute did not impose upon the company the duty of providing bridges sufficient to carry such traffic. *Reg.* v. *East and West India Dock Co.*, 60 L. T. 232 ; 53 J. P. 277.

Liability to Widen.]—The inhabitants of a county are not liable to widen a public bridge by force of their obligation to repair it. *Rex* v. *Devon*, 7 D. & R. 147 ; 4 B. & C. 670 ; 4 L. J. (O.S.) K. B. 34 ; 28 R. R. 440. Overruling *Rex* v. *Cumberland*, 6 Term Rep. 194 ; 3 Bos. & P. 354 ; 3 R. R. 149.

Order of Justices for Widening—Discretion.]—By 43 Geo. 3, c. 59, s. 2, where any county bridge shall be narrow and incommodious it shall and may be lawful to and for the justices at quarter sessions to order such bridge to be widened, improved, and made commodious for the public, provided that no money shall be applied to the amendment or alteration of any such bridge until presentment shall have been made of the insufficiency, inconvenience, or want of reparation of such bridge, in pursuance of the statutes in force concerning public bridges. On an application for a mandamus to justices to order a bridge to be widened, on the ground that it was too narrow for the traffic over it :—Held, that the enactment was discretionary. *Newport Bridge, In re*, 2 El. & El. 377 ; 29 L. J., M. C. 52 ; 6 Jur. (N.S.) 97 ; 1 L. T. 131 ; 8 W. R. 62.

Held, also, that by the proviso a presentment was a condition precedent to making such an order. *Ib.*

Property in Materials.]—If A. grants liberty, licence, power, and authority to B. and his heirs to build a bridge on his land, and B. covenants to build the bridge for public use, and to repair it, and not to demand toll, the property in the materials of the bridge when built and dedicated to the public still continues in B., subject to the right of passage by the public ; and when severed and taken away by a wrong-doer, he may maintain trespass for the asportation. *Harrison* v. *Parker*, 6 East, 154 ; 2 Smith, 262 ; 8 R. R. 434.

Fees to Clerk of the Peace.]—The sessions are not authorised to order the payment by the bridgemaster to the clerk of the peace of a percentage on all money raised for the repair of bridges in a particular district, in lieu of all his fees for indictments, presentments, &c., for bridges within it, although such percentage was claimed as an ancient fee, and had been paid without dispute for a long period of time. *Rex* v. *Houldgrave*, 1 B. & Ald. 312 ; 19 R. R. 332. And see *Rex* v. *Bird*, 2 B. & Ald. 522.

Tolls—Ferry or Bridge.]—A floating bridge, which consists of a vessel propelled by steam from one side of the river to the other, and kept in its course by chains laid down across the bed of one stream, is in substance a ferry, and is not a bridge within the meaning of s. 72 of the Mutiny Act of 1864. *Ward* v. *Gray*, 6 B. & S. 345 ; 34 L. J., M. C. 146 ; 11 Jur. (N.S.) 738 ; 12 L. T. 305 ; 13 W. R. 653.

Restraining Building of New Bridge.]—M. being entitled to lands on both sides of a river, sold and conveyed to L. a piece of land the dimensions of which were minutely given in the conveyance, and which was therein stated to contain 7,752 square yards, and to be bounded on the north by the river, and to be delineated on the plan drawn on the deed, and thereon coloured pink. The dimensions and colouring extended only up to the southern edge of the river, and if half the bed had been included the area would have been 10,031 square yards instead of 7,752. The deed contained various reservations for the benefit of M., but contained nothing express to shew whether the half of the bed was intended to pass or not. M. was at the time owner of a private bridge close by, from which he received tolls. Thirty years afterwards a bridge was projected to cross the river from L.'s land. The plaintiffs, who had succeeded to all M.'s property in the neighbourhood, brought their action to restrain the making the new bridge. If the grant to L. passed half the bed, no part of the new bridge would be over land of the plaintiffs :—Held, that the presumption that the grant included half the bed was not rebutted, and that an injunction could not be granted on the ground that the erection of the bridge would be a trespass ; held, also, that a stipulation in the grant that nothing therein contained should prejudice or affect M.'s right to take tolls over his bridge did not preclude L. taking away custom from that bridge by the erection of a new bridge. *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133 ; 55 L. T. 336 ; 51 J. P. 132—C. A.

The conveyance reserved to M., his heirs, &c., the right of entering upon the land or any part thereof for the purpose of repairing M.'s bridge :—Held, that this did not preclude L. from erecting any structures upon the land, provided he left reasonable access for the purpose of repairing the bridge. *Ib.*

D. FERRIES.

1. Rights and Obligations of Owners and Lessees.

Rights—Ownership of Land.]—The owner of a ferry need not have the property in the soil on either side of the river. *Peter* v. *Kendal*, 6 B. & C. 703 ; 5 L. J. (O.S.) K. B. 282 ; 30 R. R. 504.

A ferry is the exclusive right to carry passengers across a river or an arm of the sea from one vill to another, or to connect a continuous line of road leading from one township or vill to another, and not a servitude imposed upon a district or large area of land ; and is wholly unconnected with the ownership or occupation of land. *Newton* v. *Cubitt*, 12 C. B. (N.S.) 32 ; 31 L. J., C. P. 246 ; 6 L. T. 860. See *S. C.*, affirmed in Ex. Ch., infra, col. 196.

—— **Extent of.**]—Quære, whether the exclusive right of the owner of a ferry extends beyond the carriage of passengers by boat. *Hopkins* v. *G. N. Ry.*, 2 Q. B. D. 224.

—— **Injunction to prevent Interference.**]—A right of ferry (being in derogation of the common rights of the public) rests upon the corresponding

obligation on the part of the grantee of the right to maintain the ferry at all times for the use of the public, this obligation being enforceable by indictment and fine. But an act of parliament empowering a company to ply on Sundays from certain points on the south bank of the Thames, but imposing no obligation to provide means of transport or to maintain their plying places, does not confer an exclusive right against the rest of the world, such as the court of chancery will interfere to protect. *Letton* v. *Goodden*, 35 L. J., Ch. 427; L. R. 1 Eq. 123; 14 L. T. 296; 14 W. R. 554.

—— **Watermen's Act—Licence.**]—The 7 & 8 Geo. 4, c. lxxv. (Watermen's Act), s. 38, imposed a penalty upon owners of boats working boats within the limits of the act without a licence. By s. 99, nothing in the act contained shall extend to prejudice or affect the rights and privileges to which the owners of any ferries are entitled:—Held, that the owner of a ferry within the limits of the act might exercise the right of ferry without a licence. *Reg.* v. *Matthews*, 5 El. & Bl. 546; 25 L. J., M. C. 7; 1 Jur. (N.S.) 1204.

But where the ferry appeared to have been always exercised from a given landing-place in Middlesex to given landing-places in Kent:—Held, that the privilege did not protect the owner of such ferry in working a boat from another landing-place in Middlesex, distant 800 yards from the ancient landing-place in Middlesex. *Ib.*

Duty.]—An owner of a ferry for carriages is bound to convey carriages and their contents. *Walker* v. *Jackson*, 10 M. & W. 161; 12 L. J., Ex. 165.

Liability for Injuries.]—The lessees of a ferry provided steamboats for the conveyance of goods and cattle from A. to B., and also ships for landing and embarking, which were generally sufficient for the purpose:—Held, that they were liable for an injury sustained by the horse of a passenger in consequence of the side rail of the landing slip (of the dangerous state of which they had been forewarned) giving way, although the horse was at the time under the control and management of its owner. *Willoughby* v. *Willoughby*, 12 C. B. 742.

2. Grant and Conveyance.

Nature of Grant.]—Under a lease of a ferry describing it as a ferry across the river both ways, a ferry across the river one way only will pass. *Pim* v. *Cruel*, 6 M. & W. 234.

—— **Charter from Crown—Construction.**]—A charter from the crown granting "all our ferriages and passages" over certain rivers conveys only ferries existing at the date of the grant, and does not confer on the grantees the right to create new ferries over those rivers. *Londonderry Bridge Commissioners* v. *M'Keever*, 27 L. R., Ir. 464—C. A.

Effect of User.]—From a user of thirty-five years, the jury may presume that a ferry had a legal origin. *Trotter* v. *Harris*, 2 Y. & J. 285; 31 R. R. 593.

A variation in the amount of ferriage will not avoid the franchise. *Ib.*

Ancient Ferry—Limits Ascertained by User.]—The plaintiffs, claiming to be owners of an ancient ferry, sued the defendants for carrying passengers within the line and termini of their ancient ferry, and also for carrying near such line with the intention of evading the ferry. The termini were the Isle of Dogs and Greenwich. On this isle there had formerly been little population, and only one highway, viz. from Poplar to Potter's Ferry; but since 1800 the isle had been thickly populated, and several new roads had been made, some of them in communication with the highway. The new ferry which had been set up by the defendants, and was complained of, was situate 1,280 yards from the old ferry:—Held, that the limits of the old ferry must be ascertained by user: that by the user the old ferry was limited to the line between Potter's Ferry stairs and Greenwich, and did not extend to all parts of the coast of the Isle of Dogs; and that, therefore, the defendants had not carried in the line of the plaintiffs' ferry. *Newton* v. *Cubitt*, 13 C. B. (N.S.) 864; 9 Jur. (N.S.) 544; 11 W. R. 468—Ex. Ch.

Held, also, that the defendants had not carried so near the line of the plaintiffs' ferry as to have infringed any right of the plaintiffs. *Ib.*

Proper Mode of Grant.]—The proper mode of a grant for a ferry is to make it lie from the point where a highway comes down to the water's edge to a point on the opposite side, or to a vill. *Ib.*

Private Right — Compensation.]—C. claimed compensation against a railway company in respect of injury to land held by him in fee in a city. The injury was occasioned by the works of the company on the other side of a river, which was the boundary between the city and the county, by cutting off communication on the county side with a ferry appurtenant to the land of C. The land belonged to a corporation till 1844, when it was sold to A., who had a lease of it from the corporation. Neither the lease nor the conveyance expressly mentioned the ferry, but leased and conveyed the land with the profits and commodities thereto belonging. There was no evidence as to the original grant of the ferry by the crown, nor as to any conveyance of it by name. The lessees of the land had always, as far as living memory went, kept a boat and taken toll. The landing-place was not shewn to belong to the corporation:—Held, that the ferry, if attached to the land of C., was a private right in respect of which compensation might be awarded; and that the jury was warranted in concluding that the ferry passed to C. by the conveyance of the land, with its profits and commodities. *Cooling, In re*, or *Reg.* v. *G. N. Ry.*, 6 Railw. Cas. 246; 14 Q. B. 25; 19 L. J., Q. B. 25; 14 Jur. 128.

3. Disturbance.

Proof of Possession.]—It is sufficient for the plaintiff to prove that he was in possession of a ferry at the time the cause of action arose to entitle him to maintain an action for the disturbance of it. *Trotter* v. *Harris*, 2 Y. & J. 285; 31 R. R. 593.

In an action for disturbance of a ferry the payment of any specific sum for passage money need not be proved, although unnecessarily stated. *Peter* v. *Kendal*, 6 B. & C. 703; 5 L. J. (O.S.) K. B. 282; 30 R. R. 504.

An action for disturbing a ferry being a pos-

sessory action, evidence that the plaintiff is in possession is sufficient, and that the ferry had existed for a long time, without proving it to have a legal origin, either by grant or prescription. *Ib.*

Obstruction after Suit.] — Evidence of an obstruction after the suit, and before the declaration, is sufficient to maintain an action for obstructing a ferry. *Foster* v. *Bonner*, Cowp. 454.

Exclusive Ferry — Fraudulent Intent.] — If there is an exclusive ferry from A. to B., it does not prevent persons from going by any other boat from A. directly to C., though it lies near B., provided it is not done fraudulently, and as a pretence for avoiding the regular ferry. *Tripp* v. *Frank*, 4 Term Rep. 666; 2 R. R. 495.

Where there is an ancient ferry from A. to B. which leads to a public highway, and another constructs a landing-place in C., a short distance from B., and carries passengers over from A. to C., whence they pass to the same highway upon which the ancient ferry is established, before it reaches any town or village, it is an injury to the ancient ferry, for which an action will lie. *Huzzey* v. *Field*, 2 C. M. & R. 432; 1 Gale, 166; 5 Tyr. 855; 4 L. J., Ex. 239.

But where there is a river passing by several towns or places, the existence of an ancient ferry over such river from a particular point on one side to a particular point on the other does not preclude persons from using the river as a public highway from or to all the towns or places on its banks which are not in a line leading from one terminus of the ferry to the other. *Ib.*

Where the owner of a boat which was accustomed to ply for hire, and to carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion received a passenger on board, and carried him across the haven, near the line of an ancient ferry, and paid the fare over to his master:—Held, that the servant was acting at the time in the course of his master's service, and for his master's benefit, and that the master was answerable for his act, and would have been liable for such act if it had been distinctly proved to have amounted to an evasion of the ferry. *Ib.*

Corporation having Statutory Powers.] — A corporation empowered by statute to establish and work a steam ferry, but on whom no obligation to maintain has been imposed, has not, like the owner of an ancient ferry liable to such an obligation, the right to maintain an action for an injunction to restrain a person who, without any title, has established a ferry which interferes with the profits of the ferry worked by the corporation. *Londonderry Bridge Commissioners* v. *M'Keever*, 27 L. R., Ir. 464—C. A.

Declaration — No Averment of Fraud.] — A count alleged that the defendant, contriving to disturb the plaintiff in the enjoyment of his ferry, injuriously, and against his will, carried passengers across the river, near the plaintiff's ferry, per quod he was deprived of profits of his ferry, and disturbed in the possession of it:—Held, that the count disclosed a good cause of action and was not bad for omitting to aver that the defendant, in carrying near the plaintiff's ferry, either intended to defraud the plaintiff or to set up a new ferry. *Blacketer* v. *Gillett*, 9 C. B. 26; 1 L. M. & P. 88; 19 L. J., C. P. 307; 14 Jur. 814.

Plea—Public Convenience.]—In an action for an evasion of an ancient ferry by carrying passengers across the river near thereto, the court refused to allow the defendant to add a plea alleging a variety of circumstances to shew, that, from the altered state of the neighbourhood, public convenience required that which the defendant had done, holding that the plea was clearly bad, and at the most amounting to not guilty. *Newton* v. *Cubitt*, 5 C. B. (N.S.) 627; 28 L. J., C. P. 176; 5 Jur. (N.S.) 847.

—— **Neglect of Duty.**]—Neglect of duty in the owner of a ferry is no answer to an action for disturbance. *Peter* v. *Kendal*, 6 B. & C. 703; 5 L. J. (O.S.) K. B. 282; 30 R. R. 504.

Ancient Ferry—Use of Boat of less than Four Tons Burthen.]—In an action for the disturbance of a ferry, the first count stated, that the plaintiffs were possessed of a ferry across the river Tyne, between North Shields and South Shields, for the conveyance of carriages and passengers; and that the defendant disturbed this ferry by carrying passengers. The second count stated a right to an ancient ferry. The defendant pleaded not guilty, not possessed, and also that the boat used by the defendant was of less than four tons burthen. The plaintiffs were a company incorporated by statute for establishing a ferry across the river Tyne, within the limits of Tynemouth and the townships of South Shields and Westhoe. Sect. 85 enacted, that, after the ferry shall be established, no other ferry shall be set up and used by any persons across the river Tyne within the limits; and if any person (except the company or persons acting under their authority) shall use any boat or other vessel of the burthen of four tons or upwards in ferrying for hire across the river within the limits, every person offending shall forfeit 5*l.* At the time the statute passed, there was an ancient ferry across the river within the limits which the company, under the power of their act, had purchased of the owners:—Held, first, that the word "burthen" in s. 85 did not mean registered admeasurement, but capacity of carrying. *North and South Shields Ferry Co.* v. *Barker*, 2 Ex. 136.

Held, secondly, that the latter part of s. 85 did not limit the general right of ferry, but only added a cumulative remedy by way of penalty. *Ib.*

Held, thirdly, that there was no variance by reason of the first count describing the ferry generally from North Shields to South Shields, and not from one particular terminus to another. *Ib.*

Held, fourthly, that the mere act of ferrying passengers was a disturbance of the franchise, although the franchise was not of a prescriptive ferry to the exclusion of all private boats, but simply of a ferry. *Ib.*

Held, fifthly, that on the purchase of the ancient ferry, and completion of the new ferry, the former became extinct by operation of the statute. *Ib.*

—— **Divisible Rights.**]—In an action for disturbing the enjoyment of an ancient ferry, the declaration stated that the plaintiff was possessed of an ancient ferry across the Thames, to and from the Isle of Dogs, from and to Greenwich. The pleas were: not possessed, and that there was no such ancient ferry. The only right proved was an ancient right of ferry from the Isle of Dogs to Greenwich:—Held, that the right alleged was divisible, and that the plaintiff was entitled to have the verdict entered for so much of the

right as was proved. *Giles* v. *Groves*, 6 D. & L. 146; 12 Q. B. 721; 17 L. J., Q. B. 323; 12 Jur. 1084.

New Ferry to provide for New Traffic.]—The owner of a ferry cannot maintain an action for loss of traffic caused by a new highway by bridge or ferry made to provide for a new traffic. *Hopkins* v. *G. N. Ry.*, 2 Q. B. D. 224.

Compensation.]—A railway company, under the authority of their act, constructed across a river, half a mile above an ancient ferry, a railway bridge and a foot-bridge, the foot-bridge being used by persons going to the railway station and also to other places. The traffic across the ferry fell off, and the ferry was given up. The owners of the ferry claimed compensation under the Lands and Railway Clauses Acts:—Held, reversing the decision of the queen's bench division, that no compensation could be recovered, first, on the ground that an action could not have been maintained for disturbance of the ferry in respect of the traffic either by the railway or by the foot-bridge, if they had been erected without the authority of an act; secondly, on the ground that, the injury to the ferry being occasioned, not by the construction, but by the working of the railway, the ferry had not been injuriously affected within the Lands Clauses Act or the Railway Clauses Act (*Reg.* v. *Cambrian Ry.*, L. R. 6 Q. B. 422, overruled). *Ib.*

See further Lands Clauses Act.

Injunction.]—Where the owner of a ferry obtained an act enabling him to substitute a bridge, and providing that persons evading the tolls by conveying passengers, &c., across, otherwise than by the bridge, should be liable to penalties to be summarily enforced by a justice, under a distress warrant, and in default of distress by commitment of the offender, and a railway company afterwards, having its terminus on the bank, established steamboats for the conveyance of its passengers across:—Held, that, the act giving no remedy by an action, and in a case where penalties might be recovered de die in diem, the court would protect by injunction an infringement of the right; and the court would not simply leave the complaining party to his remedy by distress, in order to try the legal right in replevin, but would direct an issue to try it, and not allow the defendant to object that the alleged wrong was done by a corporation, and require an account to be kept pending an inquiry at law, without prejudice to the legal question by granting the injunction in a case where the injury was not extreme nor irreparable. *Cory* v. *Yarmouth and Norwich Ry.*, 3 Hare, 593.

Injunction before answer to restrain other ferry boats decreed; granted to stay waste, or where the right appears of record. *Anon.*, 1 Ves. 476.

J. R.

WEIGHTS AND MEASURES.

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8. *Sale of Coals—See* COALS.

1. REGULATION OF, IN CONTRACTS, &c.

Weighing and Measuring Abroad.] — The 5 & 6 Will. 4, c. 63, s. 6, which abolishes the use of certain weights and measures, and s. 21, which enacts that any contract, bargain, or sale made by any such weights or measures shall be wholly null and void, do not render void a contract entered into in the United Kingdom for the sale of goods to be weighed or measured by the weights and measures mentioned in s. 6, unless such goods are also weighed or measured in this country. *Rossetter* v. *Cahlmann*, 8 Ex. 361; 22 L. J., Ex. 128.

Legality—Multiples and Parts of Imperial Measure.]—Under the Weights and Measures Act, 1878, a person may sell, not only by imperial measures, but by multiples and parts of the imperial measures. *Bellamy* v. *Pow*, 60 J. P. 712.

A contract for the sale of a certain number of tons of iron by the ton "long weight" is not in contravention of the 5 Geo. 4, c. 74, and 5 & 6 Will. 4, c. 63, as it is a multiple of the standard pound, and consequently such contract is valid. *Giles* v. *Jones*, 11 Ex. 393; 24 L. J., Ex. 259; 1 Jur. (N.S.) 982; 3 W. R. 576—Ex. Ch.

Semble, that 5 Geo. 4, c. 74, s. 15, is not repealed by 5 & 6 Will. 4, c. 63, and consequently that contracts by local weights may be lawfully made, if the proportion to the standard is expressed, though it is otherwise with respect to measures, all local measures being abolished by 5 & 6 Will. 4, c. 63, s. 6. *Giles* v. *Jones*, 11 Ex. 393; 24 L. J., Ex. 259; 1 Jur. (N.S.) 982; 3 W. R. 576—Ex. Ch.

—— **Corn—Sale of.**]—The buyer of corn by any other than the Winchester measure was subject to the penalty of 40*s.*, in addition to the value of the corn so bought, by 22 & 23 Car. 2, c. 12. *Rex* v. *Arnold*, 5 Term Rep. 353.

A contract for the sale of corn by the hobbet was in contravention of 22 Car. 2, c. 8, s. 2, and therefore an action would not lie for the breach of it. *Tyson* v. *Thomas*, M'Clel. & Y. 119.

A sale of wheat by hobbet, which is the denomination of a measure in Wales, if the quantity delivered is to be determined by the weight, is a sale by weight, and not by measure, and therefore not contrary to 5 & 6 Will. 4, c. 63, s. 6, which applies to sales by measure, and not to sales by weight. *Hughes* v. *Humphreys*, 3 El. & Bl. 954; 23 L. J., Q. B. 356; 1 Jur. (N.S.) 42; 2 W. R. 526.

Where malt was sold by the defendant to the plaintiff by a measure called a hobbet, being a measure established by local custom, without specifying the proportion which that measure bore to the standard, as directed by 5 Geo. 4, c. 74, s. 15, and the parties afterwards settled their accounts inter alia as to the malt:—Held, that, in an action by the plaintiff against the defendant for wages, he might prove the settlement of accounts as a payment of the demand. *Owens* v. *Denton*, 1 C. M. & R. 711; 5 Tyr. 359; 4 L. J., Ex. 68.

"**Quarters.**"]—If the reddendum in a hospital-renewed lease is so many quarters of corn, it will be understood to mean legal quarters, reckoning the bushel at eight gallons, although the old leases before 22 & 23 Car. 2, c. 12, contained the same reddendum; and although, till lately, the lessees paid by composition, reckoning the bushel

at nine gallons. *St. Cross Hospital* v. *Howard de Walden (Lord)*, 6 Term Rep. 338.

"Bushels."]—A contract described as having been made for a certain number of bushels of corn must be considered as a contract for that number of statute bushels. A bushel, without any other explanation, means a bushel by statute measure. *Hockin* v. *Cooke*, 4 Term Rep. 314; 1 Chit. 28 (*a*).

"Acres" — Evidence.] — A testator devised "forty-five acres of the lands of Dromquin, known as the house division," to A., and "fifty acres of the same lands" to B.:—Held, that extrinsic evidence was not admissible to shew that he meant Irish and not statute acres. By the statutory definition contained in 5 Geo. 4, c. 74, s. 2. the word "acre" has received a legal signification which must be attributed to that word, whether used in a will or other voluntary instrument, or in a contract. *O'Donnell* v. *O'Donnell*, 1 L. R., Ir. 284.

Levying Rates on Coals.]—Where, by a navigation act, certain rates were imposed on coals landed within a certain district, which were directed to be paid to the commissioners therein named:—Held, that after the passing of the 5 & 6 Will. 4, c. 63, the commissioners had power to levy the rates by the ton (they having been previously levied by the chaldron) without first applying to the sessions for an inquisition under s. 14. *Goody* v. *Penny*, 9 M. & W. 687; 11 L. J., Ex. 289. See also *Mills* v. *Funnell*, 2 B. & C. 899; 4 D. & R. 561; 2 L. J. (o.s.) K. B. 190.

Sale of Intoxicating Liquor in Marked Measure.]—By the Licensing Act, 1872, s. 8, all intoxicating liquor which is sold by retail, and not in cask or bottle, and is not sold in a quantity less than half a pint, is to be sold in measures marked according to the imperial standards. A publican, being asked for a pint of beer by a customer, went into an inner room, where he drew the beer into a marked measure and poured it into a jug, which he then brought into the room where the customer was sitting and handed to him. The customer could not see the beer drawn, and never saw it while in the measure. The publican having been convicted of an offence under s. 8:—Held, that the sale was not complete until the beer was handed to the customer, that the beer was not sold in a marked measure as required by the statute, and that the conviction was right. *Addy* v. *Blake*, 19 Q. B. D. 478; 56 L. T. 711; 35 W. R. 719; 16 Cox, C. C. 259; 51 J. P. 599.

A customer asked to be served with a "blue" of beer on licensed premises, and the publican handed him a vessel or blue containing beer, saying, "That is two pennyworth." An inspector of weights and measures tested the blue, and finding it contained one-third of a quart, there being no imperial measure answering to one-third of a quart, instituted proceedings against the publican under s. 8, and a conviction ensued:—Held, that the conviction must be affirmed. *Payne* v. *Thomas*, 60 L. J., M. C. 3; 63 L. T. 456; 39 W. R. 240; 17 Cox, C. C. 212; 54 J. P. 824.

Deficient Weight—Wrapping Goods Sold in Paper.]—H., a grocer, was charged, under 41 & 42 Vict. c. 49, s. 26, with committing a fraud in using his scales. A. bought sugar, tea, and currants, and in each case a paper bag was weighed along with the article, the total deficiency being forty-six drams. A. knew of the practice, and did not complain:—Held, the magistrate was wrong in convicting H. of fraud, of which there was no evidence. *Harris* v. *Allwood*, 57 J. P. 7.

Weighing of Cattle—Erection of Machine in Market.]—*See* MARKETS AND FAIRS.

2. CREATION BY CUSTOM.

Validity of.]—A custom that every pound of butter sold in a particular market town shall weigh eighteen ounces is bad. *Nobell* v. *Durell*, 3 Term Rep. 271.

Effect of Statute upon.]—A declaration stated, that a corporation from time immemorial until the 1st January, 1836 (when the 5 & 6 Will. 4, c. 63, s. 9, came into operation), had, by persons by them appointed, the sole and exclusive privilege of measuring, and from the 1st January, 1836, of weighing all coal imported into the port of London, and the right and privilege of appointing to perform such work a sufficient number of fit and proper persons, and of fixing a reasonable rate of payment for such work, to be proportioned previously to the 1st January, 1836, to the measured quantity, and subsequently to that day to the weight of the coals, such payments to be made to the persons who should do the work, and to be for their benefit. The declaration alleged a right and privilege of the corporation, that every owner of a vessel arriving in the port with coals should give notice to the corporation in order that the work might be done by the meters; and that the corporation had fixed a rate of payment for every score of tons weight, and had appointed meters, of whom the plaintiff was one; that the defendant imported several tons of coal into the port; and that, although it was his duty, on the arrival of the vessel, and before landing the coals, to give notice, he did not do so, whereby the plaintiff was prevented from weighing the coals, and earning the amount payable in respect thereof. Evidence was given of a custom to measure all coals imported into the port before the 1st January, 1836, and after that date to weigh them; and that the corporation had ordered that the meters should be paid at a rate per ton on coals weighed instead of per chaldron, as before:—Held, that, the right of the corporation by custom to measure coals imported was not converted by 5 & 6 Will. 4, c. 63, into a right to weigh. *Smith* v. *Cartwright*, 6 Ex. 927; 20 L. J., Ex. 401.

3. FALSE WEIGHTS OR WEIGHING MACHINES.

Conviction for Possessing—Necessity of Use.]—Justices convicted a person for possessing false weights and an unjust weighing machine. He was receiver of the metropolitan police, and a station-house and all the chattels there were vested in him under 10 Geo. 4, c. 44, s. 16; in the station-house were weights which were light, and a weighing machine which, from an injury, gave light weight; these were used in weighing coals, which were allowed to the constables. The conviction was quashed, because the weights and weighing machine were not being used within 5 & 6 Will. 4, c. 63, s. 21, and the station-house was not a store where goods were exposed or kept for sale, nor weighed for conveyance or carriage, and therefore s. 28 was inapplicable. *Wray* v. *Reynolds*, 1 El. & El. 165; 7 W. R. 86.

A farmer had in his barn or outhouse a balance or portable weighing machine and two iron weights, which were found by the inspector of weights and measures to be light. The inspector saw no produce about the premises, and could not prove that the farmer exposed or kept for sale, or weighed for conveyance or carriage, any goods or produce. He was convicted by justices under 5 & 6 Will. 4, c. 63, s. 28:—Held, that the conviction was wrong. *Griffiths* v. *Place*, 20 L. T. 484.

Scales the Property of the Post Office—Jurisdiction of Justices.]—By s. 25 of the Weights and Measures Act, 1878, every person who uses or has in his possession for use for trade any weight, measure, scale, &c., which is false or unjust, shall be liable to a fine; and by s. 59, where any weight, measure, scale, &c., is found in the possession of any person carrying on trade, or on the premises of any person which are used for trade, such person shall be deemed for the purposes of the act, until the contrary is proved, to have such weight, measure, scale, &c., in his possession for use for trade. The master of a post-office, who also carried on the business of a baker upon the same premises, was supplied by the post office authorities with a pair of scales, which, upon being tested, proved to be false. The scales were the property of the post office, and were supplied solely for the purposes of the post office business:—Held, that the justices had no jurisdiction to hear and determine an information under s. 25 charging the postmaster with having false scales in his possession for use for trade, the act having no application to scales which were the property of a government department. *Reg.* v. *Kent JJ.* or *Bromley JJ.*, 59 L. J., M. C. 51; 24 Q. B. D. 181; 62 L. T. 114; 38 W. R. 253; 17 Cox, C. C. 61; 54 J. P. 453.

Incorrect Machine—What is.]—A weighbridge at a railway station, which weighs correctly if properly adjusted before use, found by the inspector, who does not adjust it, to be incorrect, is not a weighing machine found incorrect upon a proper examination within 5 & 6 Will. 4, c. 63, s. 28. *L. & N. W. Ry.* v. *Richards*, 2 B. & S. 326; 8 Jur. (N.S.) 539; 5 L. T. 792.

At a station of a railway company was a weighing machine working by a spring, and having a dial plate and an index finger, with figures from zero to 560 lbs., which was used for weighing parcels and passengers' excess luggage. The machine becoming disordered, the index stood at 4 lbs. instead of zero:—Held, that the company was properly convicted of having in its possession a weighing machine which was found to be incorrect and unjust. *G. W. Ry.* v. *Bailie*, 5 B. & S. 928; 34 L. J., M. C. 31; 11 Jur. (N.S.) 264; 11 L. T. 418; 13 W. R. 203.

A pair of scales had a hollow brass ball hanging upon the weight end of the beam; the ball was constructed with a neck which could be unscrewed so as to allow shot to be placed inside, and being hung by a hook upon the beam, was easily removable. The scales were correct in that state; but if the shot inside the ball was removed the scales were unjust and against the purchaser:—Held, that justices were justified in finding that the ball loaded with shot was no part of the scales, and that consequently they were unjust. *Carr* v. *Stringer*, 9 B. & S. 238; 37 L. J., Q. B. 168; L. R. 3 Q. B. 433; 18 L. T. 399; 16 W. R. 859.

Unjustness is a Question of Fact.]—B. was charged with wilfully selling an unjust weighing machine. The machine consisted of a centre pan on a vertical spring, and when articles were put exactly in the centre it weighed correctly, but when put a little on one side it weighed incorrectly. The magistrate convicted, and the quarter sessions on appeal affirmed the conviction subject to a special case:—Held, that it was and must be a question of fact as to whether a weighing machine was unjust, and the justices having found that fact, the conviction must be affirmed. *Reg.* v. *Baxendale*, 44 J. P. 763.

H., a grocer, was charged, under 41 & 42 Vict. c. 49, s. 26, with committing a fraud in using his scales. A. bought sugar, tea, and currants, and in each case a paper bag was weighed along with the article, the total deficiency being 46 drams. A. knew of the practice, and did not complain:—Held, the magistrate was wrong in convicting H. of fraud, of which there was no evidence. *Harris* v. *Allwood*, 57 J. P. 7.

Where Stamp has become Obliterated.]—When weights or measures have once been duly stamped or sealed under the 5 & 6 Will. 4, c. 63, s. 22 (repealed), but the stamp or seal has become obliterated by time and use, the person using them is not liable to the penalty imposed by that section for the use of unauthorised weights or measures, provided such weights or measures are otherwise unobjectionable. *Starr* v. *Stringer*, L. R. 7 C. P. 383; 26 L. T. 735.

Measures, What are—Earthen Vessels.]—Earthenware jugs or drinking cups ordinarily used as imperial measures by a publican in his business are, although not stamped as measures and exempted by 5 & 6 Will. 4, c. 63, s. 21, from being so stamped, nevertheless measures within s. 28. *Reg.* v. *Aulton*, 3 El. & El. 568; 30 L. J., M. C. 129; 7 Jur. (N.S.) 238; 3 L. T. 699; 9 W. R. 278.

Churns used for Conveyance of Milk—Measure "for Use for Trade."]—A churn used by a vendor for conveying milk by rail, at his own expense and risk, to a purchaser, is a measure "for use for trade" within s. 25 of the Weights and Measures Act, 1878, where it is shown that both as between the vendor and the railway company and as between the vendor and purchaser such churn is treated as a measure. The fact that it is so treated as between the vendor and the railway company is sufficient to bring it within the section. *Harris* v. *London County Council*, 64 L. J., M. C. 81; [1895] 1 Q. B. 240; 15 R. 98; 71 L. T. 844; 18 Cox, C. C. 65.

Use in "Trade"—Stamping.]—Scales used by a lead smelter for weighing lead, the weights so ascertained being sent to purchasers in invoices, and to carriers by railway in consignment notes, are used for trade purposes within the meaning of s. 19 of the Weights and Measures Act, 1878, although the purchasers reweighed the lead themselves, and their weights were accepted by the seller. Such scales must, therefore, be stamped. *Crick* v. *Theobald*, 64 L. J., M. C. 216; 15 R. 514; 72 L. T. 807; 59 J. P. 502.

Liability to Seizure.]—Under 5 & 6 Will. 4, c. 63, earthen vessels are liable to seizure if ordinarily used as measures, and if on examination they are found to be unjust. *Washington* v. *Young*, 5 Ex. 403; 19 L. J., Ex. 348.

A person, when in the act of selling provisions upon a highway, used for the purpose of weighing the provisions a spring balance which was incorrect, as being against the seller and in favour of the purchaser. No fraud on the public was intended:—Held, that the spring balance could not be seized under 22 & 23 Vict. c. 56, s. 3 (repealed), nor was the seller liable to the penalty imposed by that section upon persons having in their possession false and unjust beams, scales, or balances. *Booth* v. *Shadgett*, 42 L. J., M. C. 98; L. R. 8 Q. B. 352; 29 L. T. 30; 21 W. R. 845. Provided for by 41 & 42 Vict. c. 49, s. 25. *And see* cases post, col. 207.

Proof of Measures.]—Contents of measures are not to be proved but by a production in court. *Chenie* v. *Watson*, Peake's Add. Cas. 123.

Action for Deceit—Declaration.]—It is not sufficient, if a declaration, in an action for deceit, charges the defendant with fraudulently selling to the plaintiff divers large quantities of ale and beer, to wit, &c. (specifying the quantities under a videlicet), contained in puncheons and casks, and with deceitfully delivering less and deficient quantities, as the defendant ought to be charged with fraud in selling the liquors in short and defective measures. *Miles* v. *Dell*, 3 Stark. 23. See also *Frend* v. *Butterfield*, 11 A. & E. 828.

4. Inspectors.

Appointment — Validity of.]—The quarter sessions, acting under 5 & 6 Will. 4, c. 63, s. 17, appointed an inspector and superintendents of police to be inspectors of weights and measures, without remuneration:—Held, that there was nothing in 2 & 3 Vict. c. 93, which rendered the appointment an excess of jurisdiction, and therefore it could not be questioned, the certiorari being taken away by 5 & 6 Will. 4, c. 63, s. 36. *Reg.* v. *Jarvis*, 3 El. & Bl. 640; 18 Jur. 1051.

—— **Jurisdiction to Make.**]—In counties of cities, and counties of towns, to which a court of quarter sessions has been granted under 5 & 6 Will. 4, c. 76, the recorder, by s. 105, has the powers relating to inspectors of weights and measures given by 5 & 6 Will. 4, c. 63, s. 17, to the magistrates in quarter sessions assembled. *Reg.* v. *Hull (Recorder)*, 8 A. & E. 638; 3 N. & P. 595; 1 W. W. & H. 385.

The 37 Geo. 3, c. 143, s. 1, by which the justices at their respective petty sessions within the divisions, districts, and other places of the several counties of England, were authorised to appoint examiners of weights and balances, extends only to such divisions, &c., as were known and recognised at the time when the act passed; and therefore such appointment made at petty sessions by two justices for a district which they had, without the consent of the other magistrates, created within the last five or six years, was illegal. *Rex* v. *Devon JJ.*, 1 B. & Ald. 588.

By a local act commissioners were appointed for a town, but they did not exercise any supervision with regard to weights and measures, except within the market-place. Under 37 Geo. 3, c. 143, and 55 Geo. 3, c. 43, the inhabitants of the parish of the town procured standard weights and measures, and the vestry nominated examiners of weights and measures, who were afterwards appointed by the justices of the county in petty sessions. Under 5 & 6 Will. 4, c. 63, s. 17, the justices of the county at quarter sessions appointed an inspector of weights and measures for a district comprising the parish. A charter of incorporation and a court of quarter sessions were afterwards granted to the town. The borough justices thereupon appointed an inspector of weights and measures within the borough, which was co-extensive with the parish; and the recorder appointed another person to the office:—Held, that by 5 & 6 Will. 4, c. 76, s. 105, the office of inspector of weights and measures was that of a district in the county, and that the power of appointing him was in the county justices at quarter sessions, and not in the recorder. *Duly* v. *Sharood*, 6 El. & Bl. 830; 25 L. J., M. C. 122; 3 Jur. (N.S.) 63; 4 W. R. 775.

Acting beyond Special District—Penalty.]—An inspector of weights and measures for a city, appointed by the mayor of the city, knowingly stamped, at his office in that city, weights sent to him for that purpose by a person residing within a district for which another inspector had been legally appointed by the justices of the county:—Held, that he thereby incurred the penalty provided by 5 & 6 Will. 4, c. 63, s. 25. *Reg.* v. *Skelton*, 1 El. & El. 816; 28 L. J., M. C. 222; 5 Jur. (N.S.) 1347; 7 W. R. 447; 8 Cox, C. C. 177.

Powers and Duties—Right of Search.]—An inspector of weights and measures, appointed by the sessions under 5 & 6 Will. 4, c. 63, s. 17, and having a general warrant from a magistrate under s. 28 to act as such within his jurisdiction, may, by virtue of such appointment and warrant, enter any shop within his district, at all seasonable times, to examine and seize false weights and measures, and need not have a special warrant from a justice in each individual case. *Hutchings* v. *Reeves*, 9 M. & W. 747; 11 L. J., M. C. 109; 6 Jur. 439.

A servant assisting such inspector in the discharge of his duty, but who has not himself received any warrant or authority in writing from the quarter sessions or a justice of the peace, is a person acting in pursuance of the act, and in execution of the powers thereof, so as to entitle him, in an action brought against him for carrying away measures declared false by the inspector, to plead the general issue, and give the special matter in evidence. *Ib.*

An inspector of weights and measures does not require a special warrant in order to authorise him to act in each individual case, his general warrant being sufficient for that purpose. *Kershaw* v. *Johnson*, 1 Car. & K. 329.

By s. 21, no weight above 56 lbs. is required to be inspected and stamped; but the inspector may still enter places within the meaning of the act in order to inspect, although no weight of 56 lbs. or under be kept therein. *Ib.*

—— **Right of Seizure.**] — An inspector of weights and measures duly entered a shop to examine weights and measures and weighing machines. He seized and carried away as forfeited a pair of scales, and detained them after being requested to give them up; the owner sued in a county court, when the jury found that the scales were in fact unjust, that they were a weighing machine, and not a weight or measure, and that the defendant bonâ fide believed that he was acting in pursuance of

the act :—Held, that under 5 & 6 Will. 4, c. 63, s. 28, weighing machines are not forfeited, though unjust, although weights and measures are; and consequently that the defendant was not authorised to seize the scales. *Thomas* v. *Stephenson*, 2 El. & Bl. 108; 22 L. J., Q. B. 258; 17 Jur. 597; 1 W. R. 325.

An inspector is not authorised in seizing any weight without having first compared it with the standard, in order to ascertain whether it is just or not. *Kershaw* v. *Johnson*, supra.

Refusal to produce Weights and Measures—Person left temporarily in Charge.]—In the absence of his employer, the respondent was left temporarily in charge of the employer's premises. The premises were visited by the appellant, an inspector of weights and measures, who claimed to inspect the weights and measures on the premises. The respondent refused to produce them. The justices dismissed the complaint, holding that the weights and measures were not "in his possession" within the meaning of s. 48 of the Weights and Measures Act, 1878 :—Held, that the justices came to a right conclusion. *Smith* v. *Webb*, 60 J. P. 517.

Application of Fees — County Rate.]—The police who are appointed to carry out the provisions of the Weights and Measures Act, 1878, are not, when so acting, engaged as constables in the execution of their duty. A private act authorised justices in quarter sessions to direct that fees paid to the police in the performance of occasional duties, or in the execution of their duty for which a fee was receivable, should be paid to the police superannuation fund :—Held, that the fees paid to the police appointed to carry out the provisions of the Weights and Measures Act, 1878, were not fees paid to them in the execution of their duty, and consequently could not be carried to the credit of the police superannuation fund, but were properly payable to the credit of the county rate. *Reg.* v. *Kesteven JJ.*, 58 L. J., M. C. 157; 61 L. T. 51; 37 W. R. 670; 16 Cox, C. C. 680; 53 J. P. 661.

5. Leet Jury.

Validity of Customs.]—A custom in a manor for the leet jury to break and destroy measures found by them to be false is lawful. *Wilcock* v. *Windsor*, 3 B. & Ad. 43.

A court leet, holden on the 28th of April, was adjourned, after the jury had been sworn in, till the 15th of December, which day was given them to make their presentments :—Held, that an adjournment of such duration (which was admitted to be according to the custom of the manor) was not unnecessarily unreasonable. *Ib.*

A custom to swear the jurors at one court leet to inquire and return their presentments at the next court is bad in law. *Davidson* v. *Moscrop*, 2 East, 56; 6 R. R. 373.

—— **Actions against Jurymen.**]—In an action for seizing weights and measures, four defendants pleaded that they were sworn, with divers, to wit, twenty others, as a leet jury, according to the custom of the manor of Stepney; and that it was the custom of the jury so sworn to examine weights and measures within the manor, and seize them if defective; and they alleged that they (the defendants), being on such jury so sworn as aforesaid, examined and seized the plaintiff's weights and measures, which they found defective. There was evidence at the trial that only five of the leet jurors were actually in the plaintiff's shop when the defendants made the seizure there, though the rest were close at hand; but the judge refused to let any question go to the jury on this part of the case, being of opinion that the objection was on the record :—Held, that the objection was on the record, and was valid; it not appearing by the plea that the examination and seizure were made by the jury sworn at the court leet, according to custom. *Sheppard* v. *Hall*, 3 B. & Ad. 433; 1 L. J., K. B. 152.

Distress—Justification.]—In an action against an officer and his assistant for distraining the goods of the plaintiff, it appeared that the annoyance jury of Westminster had visited the plaintiff's shop, and had condemned his scales. It further appeared that two only of the jury entered the shop, the rest being in the street, near the door and window :—Held, that the distress was not justifiable unless all the jury were sufficiently near to concur in the condemnation of the scales. *Holland* v. *Heath*, 2 Jur. 234.

Obstruction of Jury.]—An avowry stated the holding of a court leet, and an adjournment, and that the jurors proceeded according to the custom of the manor to examine the weights and measures within the manor; and that the plaintiff, not regarding his duty, but contriving to prevent the examination, according to the custom of the weights and measures, while the jurors were proceeding in their examination, knowingly and unlawfully obstructed them; that, therefore, at the court holden by adjournment, it was presented that he obstructed the jury in the execution of their duties in examining the weights and measures within the manor, and that by the judgment of the court he was amerced for his obstruction :—Held, that the presentment was insufficient for not stating what the act of obstruction by the plaintiff was. *Frost* v. *Lloyd*, 16 L. J., Q. B. 13; 9 Q. B. 130; 11 Jur. 59.

6. Distance.

Mode of Measurement.]—Under 9 & 10 Vict c. 95, s. 128, which gives the county court a concurrent jurisdiction with the superior courts in cases where the plaintiff dwells more than twenty miles from the defendant, the distance is to be measured in a straight line upon a horizontal plane, and not by the nearest practicable mode of access. *Lake* v. *Butler*, 5 El. & Bl. 92; 3 C. L. R. 1124; 24 L. J., Q. B. 273; 1 Jur. (N.S.) 499; 3 W. R. 458.

But in the construction of an engagement (a bond) not to open a shop within a mile of a certain spot, the shortest way of access by the footpath is to be taken. *Woods* v. *Dennett*, 2 Stark. 89.

So, under a covenant not to keep a public-house within half a mile of a particular spot, the distance must be estimated by the nearest mode of access at the time of the covenant. *Leigh* v. *Hind*, 4 M. & Ry. 579; 9 B. & C. 774; 7 L. J. (O.S.) K. B. 313.

By a local act the trustees of a turnpike road were prohibited from erecting any toll-gate, or taking any toll, within three miles of Bargate, in the town of Southampton :—Held, that the distance was to be measured in a straight line

along the horizontal plane, and not by the road. *Jewell* v. *Stead*, 6 El. & Bl. 350; 25 L. J., Q. B. 294; 2 Jur. (N.S.) 783; 4 W. R. 544.

For the purposes of an injunction not to carry on business within a fixed distance from a particular place, that distance must be measured as the crow flies, and not by the nearest practicable route. *Duignan* v. *Walker*, 1 Johnson, 446; 28 L. J., Ch. 867; 5 Jur. (N.S.) 976; 7 W. R. 562.

The defendant covenanted with the plaintiff not to carry on the business of a publican within half a mile of the plaintiff's premises. He afterwards carried on business within half a mile if the distance was measured in a straight line, as the crow flies, but not within half a mile if the distance was measured by the nearest mode of practicable access:—Held, that there had been a breach of the covenant. *Mouflet* v. *Cole*, 42 L. J., Ex. 8; L. R. 8 Ex. 32; 27 L. T. 678; 21 W. R. 175—Ex. Ch.

A. and B. agreed to enter into partnership as surgeons for three years; and A. covenanted, that after the determination of the partnership he would not at any time practise as a surgeon at No. 28, Dorset Crescent, or within the distance of two miles and a half thereof, measuring by the usual streets or ways of approach thereto, nor reside within the distance of two miles and a half of No. 28, Dorset Crescent, without B.'s consent. Breach, that after the expiration of the term, A. resided within the distance of two miles and a half of the premises:—Held, that the distance was to be measured, not by the most frequented public ways, but by any of the usual public ways. *Atkyns* v. *Kinnier*, 4 Ex. 776; 19 L. J., Ex. 132.

In calculating the distance from one place to another by the nearest public thoroughfare, for the purpose of determining whether the definition of a bonâ fide traveller in the Licensing Act, 1874, s. 10, is satisfied, it is proper to measure it across a navigable estuary where there is a public ferry which can be used by any person on payment of a toll. *Coulbert* v. *Troke*, 45 L. J., M. C. 7; 1 Q. B. D. 1; 33 L. T. 340; 24 W. R. 41.

The distance of 500 yards from the borders of a county for the purpose of conferring jurisdiction on the courts in criminal cases means 500 yards measured in a direct line from the border, and not 500 yards by the nearest road. *Reg.* v. *Wood*, 5 Jur. 225.

"Near"—"Next."]—The word "near" in a penal case must be construed strictly, and is not equivalent to the word "next." *Rex* v. *Hervey*, 1 W. Bl. 20.

WEIRS.

See FISH AND FISHERY.

WELLS.

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See HUSBAND AND WIFE.

WILD BIRDS.

Preservation—Authority of Owner or Occupier of Land.]—By the 3rd section of the Wild Birds Preservation Act, 1880, it is provided that any person who between the 1st day of March and the 1st day of August in any year after the passing of the act shall knowingly and wilfully shoot or attempt to shoot any wild bird, or shall use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird, shall forfeit, &c., but the section is not to apply to the owner or occupier of any land, or to any person authorised by the owner or occupier of any land, killing or taking any wild bird on such land. R. having, with the authority of the occupier of certain land, shot wild birds thereon, which were taken on other lands without the authority of the owners or occupiers thereof, was charged with an offence against the section:—Held, that R. did not come within the exemption contained in the section, and was rightly convicted. *Reg.* v. *Gilham*, 52 L. T. 326; 49 J. P. 357.

Foreign Bird—Exemption from Penalties.]—The Wild Birds Protection Act, 1880, s. 3 (repealed), imposes a penalty on any person who shall shoot or take wild birds between the 1st of March and the 1st of August, or who "shall expose or offer for sale, or shall have in his control or possession after the 15th day of March, any wild bird recently killed or taken . . . unless such person shall prove that the said wild bird was either killed or taken, or bought or received during the period in which such wild bird could be legally killed or taken, or from some person residing out of the United Kingdom." The appellant, a poulterer, was summoned, under this section, for having in his possession and exposing for sale some wild birds on the 18th of March, 1881. He proved that he had bought them from S., a salesman in Leadenhall Market, who had bought and received them from a person residing out of the United Kingdom:—Held, that the appellant had not brought himself within the

exemption clause, which contemplated a direct purchase or receipt from a person residing out of the United Kingdom. *Taylor* v. *Rogers*, 50 L. J., M. C. 132 ; 45 L. T. 314. *See now* 44 & 45 Vict. c. 51.

WILD'S CASE, RULE IN.

See WILL.

WILL.

[BY H. J. NEWBOLT.]

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I. TESTAMENTARY CAPACITY.

A. SOVEREIGN.

The probate court has no jurisdiction to inquire into the validity or invalidity of a will of a sovereign of the realm. *Geo. III., In goods of*, 3 Sw. & Tr. 199; 32 L. J., P. 15; 8 Jur. (N.S.) 1134; 11 W. R. 190.

The will of the sovereign has no effect in conveying the demesne lands of the crown. *Att.-Gen.* v. *Windsor (Dean and Canons)*, 8 H. L. Cas. 369; 30 L. J., Ch. 529; 6 Jur. (N.S.) 833; 2 L. T. 678; 8 W. R. 477.

B. SOLDIERS AND SAILORS.

Soldiers.]—When a will made by an officer whilst engaged on active military service was signed by him, but not attested, the court required that there should be an affidavit of two disinterested persons, stating in terms the signature to be in his handwriting, and that the form for an affidavit given in the rules should be strictly followed. *Neville, In goods of*, 4 Sw. & Tr. 218; 28 L. J., P. 52.

When a will made by a soldier while engaged on active military service is signed by his mark, before the will can be proved an affidavit must be filed in the registry in compliance with the rules, that the deceased had at the time of its execution a knowledge of its contents. *Hackett, In goods of*, 4 Sw. & Tr. 220; 28 L. J., P. 42.

—— **Proof as to.**]—A mere averment that the deceased held such a rank in his regiment, was in such a place, and was in actual military service, at the date of writing the paper in question, is not necessarily enough to entitle such paper to be treated as a soldier's testament; but the affidavit should contain a statement of the circumstances full enough to enable the court to judge whether the case falls within the meaning attributed by previous cases to 7 Will. 4 & 1 Vict. c. 26, s. 11. *Thorne, In goods of*, 4 Sw. & Tr. 36; 34 L. J., P. 131; 11 Jur. (N.S.) 569; 12 L. T. 639.

Master and Part Owner of Trading Vessel.]—A master and part owner of a trading vessel, in

the course of a voyage, arrived at Port Adelaide, whence he wrote, and forwarded by post, a letter, some sentences of which were testamentary. The vessel was subsequently lost at sea:—Held, that he was a mariner at sea, and consequently, that such a letter, being in his handwriting, and testamentary, was entitled to probate. *Parker, In goods of*, 2 Sw. & Tr. 375; 28 L. J., P. 91; 5 Jur. (N.S.) 553.

Mate under Age.]—A mate, whilst on board her majesty's ship "Excellent," which was permanently stationed in Portsmouth harbour, and when under age, executed a will, of which probate was granted to one of the executors named in it. On an application to revoke the probate, the court held that the deceased came under the exception contained in 7 Will. 4 & 1 Vict. c. 26, s. 11, as a seaman at sea, and, although a minor at the time, that he had legally executed a will. *M'Murdo, In goods of*, 37 L. J., P. 14; L. R. 1 P. 540; 17 L. T. 393; 16 W. R. 283.

Surgeon in Navy.]—A surgeon in the navy was invalided when on foreign service. On his voyage in a passenger ship, after being so invalided, he wrote a letter signed by him, but not in the presence of two witnesses, giving directions as to the disposition of his personal estate after his death, and died before reaching England:—Held, that the letter was entitled to probate as the "will of a mariner or seaman being at sea," within 7 Will. 4 & 1 Vict. c. 26, s. 11. *Saunders, In goods of*, 35 L. J., P. 26; L. R. 1 P. 16; 11 Jur. (N.S.) 1027; 13 L. T. 411; 14 W. R. 148.

c. Blind Persons.

When in Conformity with Instructions.]—Will executed by a blind testatrix established, the will being in conformity with the instructions given by the testatrix to her solicitor, though not proved to have been read over to her previously to execution. *Edwards* v. *Fincham*, 4 Moore, P. C. 198.

A codicil prepared by a solicitor, appointing him a joint executor, with a legacy, which was read over to the testator, who was blind, and, at the time of execution, of fluctuating capacity, in the presence of the attesting witnesses, pronounced against; there being no direct evidence that it was prepared in consequence of instructions from the testator, or satisfactory proof that at the time of the execution he was cognizant of its contents, and in a condition to exercise, and did exercise, thought, judgment, and reflection respecting the act he was doing. *Dufar* v. *Croft*, 3 Moore, P. C. 136.

Acknowledgment of Signature by Testator.]—A testator who is so blind that he can do little more than distinguish night from day, is capable of acknowledging his signature to his will. *King* v. *Berry*, Ir. R. 5 Eq. 309.

d. Married Women.

1. In General.

Assent of Husband.]—Will by feme covert good, and provable in the ecclesiastical court if made with assent of her husband. *Marlborough (Duke)* v. *Godolphin (Lord)*, 2 Ves. 70.

A married woman, having power to dispose of a fund by will, made a will disposing of it, and also of another fund over which she had no power, and appointed her husband her executor, and he proved her will generally:—Held, that as to the latter fund the will was valid, as being made ex assensu viri. *Trustees' Relief Act, In re*, 16 Sim. 406.

Husband, before marriage, gives bond to enable his intended wife to dispose by deed or will of her freehold estate. She devises during coverture. Her heir-at-law is bound and shall convey to the devisee. *Rippon* v. *Dawding*, Ambl. 565.

A general assent to a wife's making a will is not sufficient, but the husband's assent to the particular will which his wife has made ought to be proved. Without the husband's knowledge of the contents of a will made by a married woman, the will cannot be said to be made with his assent. *Willock* v. *Noble*, infra.

—— **As to Copyholds.**]—Feme covert without husband's joining, but in his presence, surrenders her copyhold to use of her will or appointment, and devises it. Quære, whether good. *Taylor* v. *Philips*, 1 Ves. 229.

Feme covert cannot at law make will of copyhold lands, surrendered by her before marriage to the use of her will, nor can she declare the uses of the surrender. *George* v. *Jew*, Ambl. 627.

Surrender before marriage is void or suspended by marriage. *Ib.*

—— **Realty—Renunciation by Husband.**]—Mere renunciation by an intended husband of his marital rights in his wife's real property is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee. And upon the death of the wife without issue during her husband's lifetime, her heir-at-law, and not her devisee, will be entitled to the land of which she is seised in fee simple. *Rippon* v. *Dawding* (Ambl. 565) commented on. *Dye* v. *Dye*, 53 L. J., Q. B. 442; 13 Q. B. D. 147; 51 L. T. 145; 33 W. R. 2—C. A.

Power under Wills Act.]—A married woman possesses under 7 Will. 4 & 1 Vict. c. 26, no greater or different power to make a will than she possessed before that statute. *Willock* v. *Noble*, 44 L. J., Ch. 345; L. R. 7 H. L. 580; 32 L. T. 419; 23 W. R. 809.

The 24th section does not, retroactively, operate to give effect to her will as to property which it was not in her power to dispose at the time when the will was made. *Ib.*

A married woman was entitled to 3,822*l.* consols for her separate use, and, by settlement made on her marriage, she was entitled to 14,000*l.*, if she survived her husband, absolutely, and if she died in his lifetime she had a power of appointing that sum by will notwithstanding coverture. She had also a fee-simple estate over which she had a power of appointment by will. Her husband, who died in her lifetime, bequeathed to her the residue of his personal estate. The wife by will, made in the lifetime of her husband, who consented to her making a will, though it did not appear that he knew the contents of it, after disposing of her separate estate and appointing the fee-simple estate, gave to her niece all the residue of her real and personal estate of which at the time of her death she should have power to dispose. The will was not republished after the husband's death:—Held, that, though the will was valid and effectual so as to pass the consols to which she was entitled for her separate use, and so as to appoint the fee-simple estate, it was not valid or effectual as an exercise of the power of appointing the 14,000*l.*, nor so as to

pass the property acquired by her under her husband's will. *Ib.*

Held, also, that the death of the husband operated as a revocation of any assent he had given to his wife's will. *Ib.*

Where there is a devise of real estate to a married woman, for her, her heirs, executors, administrators, and assigns, for her and their own use and benefit for ever, free and without the intermeddling or control of her husband:—Held, that a will by the devisee passed the real estate. *Hall* v. *Waterhouse*, 5 Giff. 64; 11 Jur. (N.S.) 361; 12 L. T. 297; 13 W. R. 633.

A wife may make a will disposing of property, which she only has in autre droit, as executrix, without her husband's consent. *Scammell* v. *Wilkinson*, 2 East. 552.

Sections 8, 24, and 27 of the Wills Act leave unaltered the testamentary capacity of a married woman, though it may give her will, when duly made, a different and more extended operation. The contrary intention required by the 24th and 27th sections of the Wills Act must be one which can be attributed to a testator up to the time of his death. *Thomas* v. *Jones*, 1 N. R. 138; 2 John. & H. 475; 31 L. J., Ch. 732; 8 Jur. (N.S.) 6124; 7 L. T. 154; 10 W. R. 853. Affirmed, 1 De G. J. & S. 63; 32 L. J., Ch. 139; 9 Jur. (N.S.) 161; 7 L. T. 610; 11 W. R. 242.

See also cases, post, col. 256.

—— **Wife of Convicted Felon.**]—The wife of a convicted felon is a feme sole as to the power of disposing by will at least, of property acquired after her husband's conviction. *Coward, In goods of*, 4 Sw. & Tr. 46; 34 L. J., P. 120; 11 Jur. (N.S.) 569; 13 L. T. 210.

Where the husband was attainted of felony, and pardoned on consideration of transportation, and afterwards the wife became entitled to some personal estate as orphan to a freeman of London, this personal estate decreed to belong to the wife as to a feme sole. *Newsome* v. *Bowyer*, 3 P. Wms. 37.

A wife whose husband is by act of parliament banished for his life may make a will, and in everything act as a feme sole, and as if the husband was dead. *Portland* (*Countess*) v. *Prodgers*, 2 Vern. 104.

Will made during Coverture—Husband Predeceasing.]—By a marriage settlement personal property was assigned to trustees to pay the income to the wife for her separate use for life, without power of anticipation, and after her death, in case her husband should survive, to pay him so much of the income as she should by deed or will appoint for his life, and subject thereto for the children of the marriage; and in case there should be no children, then upon trust, in case the wife should survive her husband, for her, her executors, administrators, and assigns, for her sole and separate use; but if she should not survive her husband, then for such of her relations as she should, notwithstanding coverture, by deed or will appoint. The wife made a will in exercise of the power during coverture, and survived her husband without having had issue of the marriage:—Held, that the will, made during coverture, was a good disposition of all the property. *Bishop* v. *Wall*, 45 L. J., Ch. 773; 3 Ch. D. 194; 25 W. R. 93.

If a wife, with her husband's assent, makes a will of personalty, in which she has an expectant interest, but that interest does not actually vest in her until after her husband's death, she must, to give validity to her will, re-execute it after his death. *Willock* v. *Noble*, supra.

So, also, if her will affects property which (by his will made some years before and never altered) he had bequeathed to her absolutely. *Ib.*

The death of the husband before his wife operates as a revocation of his assent. *Ib.*

2. Separate Estate.

Rule.]—A feme covert, when not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation of that estate by instrument inter vivos or will. *Taylor* v. *Meads*, 4 De G. J. & S. 597; 5 N. R. 348; 34 L. J., Ch. 203; 11 Jur. (N.S.) 166; 12 L. T. 6; 13 W. R. 394.

A feme covert may dispose by will of property settled to her "sole and separate use, to be disposed of by her as if sole." She may also dispose by will of property which was hers previous to the marriage, and on her separation was conveyed to trustees for her sole and separate use. *White* v. *Dillon*, Wall. Lyn. 302.

Power of disposition by will is incident to trusts for separate uses of feme covert, and husband is a trustee, having taken a transfer. *Rich* v. *Cockell*, 9 Ves. 369.

Wife, having specific effects to her separate use, disposes of her separate property by will. After her death her husband sells part of these effects and dies: his representative is accountable to the wife's administratrix with the will annexed. *Peacock* v. *Monk*, 2 Ves. 190.

Will, by a wife, of her separate property and its produce, whether derived from her husband or a third person, is good. *Fettiplace* v. *Gorges*, 1 Ves. J. 46; 1 R. R. 79.

Where a personal estate is given to the separate use of a feme covert, she is considered as a feme sole, and may dispose of it and all the accrual when beyond seventeen. And where a father gives his daughter a power to dispose of all his real estates, if he had intended to exclude the disability of infancy, he would have taken care to express it, and expressio unius est exclusio alterius. *Hearle* v. *Greenbank*, 3 Atk. 709, 714; 1 Ves. 303.

A devise of real estate, without the interposition of trustees, to a married woman and her heirs for her separate use, free from marital control, gives her a right of disposition by will of the equitable fee, in like manner as if she were discoverte. *Hall* v. *Waterhouse*, 5 Giff. 64; 6 N. R. 20; 11 Jur. (N.S.) 361; 12 L. T. 297; 13 W. R. 633.

Under Power.]—A wife may, by a deed duly acknowledged to which her husband is a party, acquire a power to dispose by will of her real estates, whether in possession or reversion. *Pride* v. *Bubb*, 41 L. J., Ch. 105; L. R. 7 Ch. 64; 25 L. T. 890; 20 W. R. 220.

By a deed of separation made between husband and wife and trustees, and duly acknowledged by the wife, it was agreed that the wife should hold all the real and personal estate of the husband and wife, or either of them in right of the wife, as her separate property, and should have power, by will, to devise or bequeath the same. The husband then purported to convey to a trustee all such real and personal estate, to be held upon corresponding trusts:—Held, that though the wife did not expressly convey real

estate vested in her, it was the intention of the deed that she should have power to dispose thereof as if she was unmarried, and accordingly that an estate of which a trustee was seised in trust for her separate use during her life, with remainder to herself in fee, passed by her will. *Ib.*

Husband conveys lands to a trustee in fee, in trust out of the rents to pay 6*l.* per annum, for the separate use of the wife, and to be at her disposal, then to the use of the husband for life; after his decease, to the use of the heirs of the wife, until the heirs or assignees of the husband should pay to the executors, or administrators, or assigns of the wife, 100*l.* with interest, from the death of the husband, then to the wife for her jointure, remainder over. The wife dies first, and having by her will disposed of this 100*l.*:—Held, the wife had no power to dispose of this money. *Sawyer* v. *Bletsoe*, 2 Vern. 328.

If a wife has a power to dispose of money in the life of her husband, she may dispose of it by a writing in nature of a will, though not provided. *Ib.*, 329.

Savings.]—Feme covert may in life of husband dispose of money saved out of her separate maintenance. *S. C.*, 1 Vern. 244.

A feme covert who has pin-money, or a separate maintenance settled on her, may, by writing in nature of will, dispose of what she saves out of it; and such disposition shall bind the husband. *Herbert* v. *Herbert*, Pre. Ch. 44.

A wife who lives with her husband and has separate property, over which she has a power of appointment by deed or will, is entitled to dispose, not only of the capital, but also of the savings out of income, and that by a general residuary clause in her will. *Humphery* v. *Richards*, 25 L. J., Ch. 442; 2 Jur. (N.S.) 432; 4 W. R. 432.

The income of property settled to the separate use of a wife is not converted into general personalty, nor is the right of control over it abandoned by its being transmitted by the halves of notes of the Bank of England, one half of which only had been received and acknowledged by her before her death, or by being invested in the names of trustees in the purchase of long annuities, without any reference to her settlement or to the source whence the purchase-money arose, or by its being secreted in the house of her husband; but a sum of money found after her death secreted in the house of her husband, without any evidence of the source whence it was derived, was held to be the property of the husband. *Ib.*

A married woman invested a sum of 525*l.* stock, out of moneys which she had as pin-money, to her separate use, in the names of trustees, in confidence that the fund should be held by them in trust for such persons as she should direct or appoint. She afterwards made a will, giving the interest of the money she had in the stocks to her servant maid for life, and afterwards to the poor of certain parishes. The wife having died, administration, with the will of his deceased wife annexed, was granted to her husband. To a bill filed by the husband alone, as such administrator, against the surviving trustee of the stock, the defendant, by her answer, suggested that the legatees under the will were necessary parties: but the court, without requiring the legatees to be parties to the suit, ordered payment of the stock to the plaintiff, with costs. *Musters* v. *Wright*, 2 De G. & Sm. 777.

—— **Out of Alimony.**]—A married woman to whom alimony has been granted by the ecclesiastical court, may dispose by will, as against her husband, of her savings thereout, in the same manner as if she was a feme sole. *Moore* v. *Barber*, 34 L. J., Ch. 667; 11 Jur. (N.S.) 539; 12 L. T. 664; 13 W. R. 935.

Rent-charge for Life — Accumulations.]—A married woman, entitled under her marriage settlement to a rent-charge for life for her separate use, made a will operative to pass separate estate, became a lunatic, survived her husband, and died without having republished her will or made another. Her rent-charge was accumulated by her husband during his life to the amount of 13,000*l.*, which sum on his death was handed over to the trustee of the marriage settlement. The rent-charge and the income of the 13,000*l.* were both accumulated by the trustee after the husband's death:—Held, that the 13,000*l.* and all accumulations passed under the will; but that the rent-charge payable after the death of the husband did not pass. *Wilson, In re, Menteath* v. *Campbell*, 26 W. R. 848.

The will purported to be, but was not, in exercise of a power of appointment; the fund purported to be appointed, except so much as passed as separate estate, fell into the general residue:—Held, that the fund which passed by the will was liable to the costs of letters of administration with the will annexed. *Ib.*

Future Separate Estate—Assent of Husband.]—The will of a married woman who had no personal estate belonging to her for her separate use at the date of the will, made without the assent of her husband, is effectual to dispose of personal estate to her separate use which she afterwards acquires and is entitled to at her death. *Charlemont (Earl)* v. *Spencer*, 11 L. R., Ir. 490—C. A.

Separate Estate in Reversion.]—By antenuptial articles, reciting the intended marriage and an agreement to the following effect, the husband agreed to pay to the wife for her sole and separate use during the coverture, or to such person as she should by writing appoint, an annuity of 500*l.*; and also that he, his heirs, executors, and administrators would pay to her, her executors, administrators, or assigns, immediately after his death, the sum of 10,000*l.* for her sole and absolute use and disposal. The wife died in her husband's lifetime:—Held, that she was entitled to the 10,000*l.* for her separate use, and had power to dispose of it by will in her husband's lifetime. *Baker* v. *Ker*, 11 L. R., Ir. 3.

Contingent Interest—No Republication.]—By a marriage settlement, the income of certain property was settled on the wife, for her life, for her separate use, without power of anticipation; and the corpus, if there were no children of the marriage, and she survived her husband, on her absolutely, for her separate use; if she should not survive her husband, then as she should by deed or will appoint. She made a will in pursuance of the power in her husband's lifetime, and survived him, but did not republish the will after his death. There were no children of the marriage:—Held, that the will passed her separate property. *Bishop* v. *Wall*, 45 L. J., Ch. 773; 3 Ch. D. 194; 25 W. R. 93.

Subsequently acquired Property—Republication when Discovert.]—Testatrix, a married woman, having under her marriage settlement a power of appointment over some 15,000*l.* worth of securities, and being entitled to jewels and furniture for her separate use, by her will in 1883, in exercise of this power and "of all other powers enabling her in this behalf," appointed, gave, and bequeathed "all the property of whatever nature comprised in the said settlement, and over which I have any power of appointment or disposition by will" to trustees upon certain trusts. In August, 1885, the husband of the testatrix died, and she thereupon became entitled to certain real estate, and had 7,500*l.* worth of personal estate; in December, 1885, she made a codicil by which she devised certain real estate therein referred to as having come to her from her late husband, but which did not otherwise refer to or confirm her will. Testatrix died in 1886:—Held, that the will as originally executed was only intended to deal with the property comprised in the settlement, that the codicil merely confirmed the will as it originally stood, and in no way enlarged its scope so as to make it include 7,500*l.* subsequently acquired from her husband, and that as to this amount there was an intestacy. *Taylor, In re, Whitby* v. *Highton*, 57 L. J., Ch. 430; 58 L. T. 842; 36 W. R. 683.

Sect. 1, sub-s. 1, of the Married Women's Property Act, 1882, gives a married woman power to dispose by will only of property of which she is seised or possessed while she is under coverture. Consequently, notwithstanding s. 24 of the Wills Act, her will made during coverture is not, unless it is re-executed after she has become discovert, effectual to dispose of property which she acquires after the coverture has come to an end. *Price, In re, Stafford* v. *Stafford*, or *Price* v. *Stafford*, 54 L. J., Ch. 509; 28 Ch. D. 709; 52 L. T. 430; 33 W. R. 20.

Banking accounts were kept in the joint names of husband and wife, and investments in railway stock were made in their joint names. The wife survived her husband five days, having executed a will during coverture:—Held, that the balances of the joint accounts and the joint investments survived to the wife, but did not pass under her will. *Young, In re, Trye* v. *Sullivan*, 54 L. J., Ch. 1065; 28 Ch. D. 705; 52 L. T. 754; 33 W. R. 729.

Effect of Married Women's Property Act, 1882—Gift towards the Erection of a Church Invalid.]—Under the stat. 43 Geo. 3, c. 108, which contained a power to all persons having an interest in any lands or in any goods or chattels, to give by deed enrolled, or will executed, three months before death, lands not exceeding five acres, or goods and chattels not exceeding in value 500*l.*, for or towards the erecting of any church, with a proviso that the act should not extend to any persons being within age, nor women covert without their husbands to make any such gift:—Held, that the proviso was not affected by the Married Women's Property Act, 1882, which by s. 1, sub-s. 1, gave power to a married woman to dispose by will of any real or personal property as her separate property in the same manner as if she were a feme sole. Consequently a gift by a married woman, by will executed three months before death, to the vicar and churchwardens of a church of a sum of 300*l.* to be applied by them in the erection of a new church, and to be paid out of personal estate which was legally applicable for the purpose, was held to be invalid. *Smith's Estate, In re, Clements* v. *Ward*, 56 L. J., Ch. 726; 35 Ch. D. 589; 56 L. T. 850; 35 W. R. 514; 51 J. P. 692.

E. Infant.

Boy of age fourteen is competent to make will of personal estate. *Holyland, Ex parte*, 11 Ves. 11; 8 R. R. 67.

An infant male may make a will of his personal estate at fourteen, a female at twelve. *Hyde* v. *Hyde*, Pre. Ch. 316.

A female may make a will at twelve, a male at fifteen, if proved to be a person of discretion. *Bishop* v. *Sharp*, 2 Vern. 469.

A child entitled to an orphanage share of his father's personal estate, dying under twenty-one and unmarried, cannot devise it by his will, for by the custom it survives to the other children, but he may devise his share under the statute of distributions. *Wilcocks* v. *Wilcocks*, 2 Vern. 559.

A city orphan cannot by will before twenty-one dispose of his orphanage part, so as to prevent survivorship. *Anon.*, Pre. Ch. 537.

Money to be laid out in land; an infant cannot dispose of it by will as money, but it will on the infant's death descend to his heir, who may take either way. *Carr* v. *Ellison*, 2 Bro. C. C. 56; Dick. 796.

F. Alien.

An alien, resident in England, purchased an equitable interest in freehold lands, and also a lease for a long term of years, and afterwards obtained letters of denization, which, in terms, conferred upon him, not only the power of acquiring lands in future, but of retaining and enjoying all lands which he had theretofore acquired:—Held, that he had power to devise the freehold and chattel interest in land which he had purchased previously to the letters of denization. *Fourdrin* v. *Gowdey*, 3 Myl. & K. 383; 3 L. J., Ch. 171.

By the stat. 7 Anne, c. 5 (A.D. 1708), it was enacted that the children of all natural-born subjects born out of the legiance of her then majesty, her heirs and successors, should be deemed, adjudged, and taken to be natural-born subjects of this kingdom to all intents, constructions, and purposes whatsoever. By the statute 13 Geo. 3, c. 21 (A.D. 1772), it was enacted that all persons born, or thereafter to be born, out of legiance to the crown of England, or of Great Britain, whose fathers were, or should be, by virtue of the statute 7 Anne, c. 5, and the explaining statute 4 Geo. 2, c. 21, entitled to all the rights and privileges of natural-born subjects, should be taken to be and were thereby declared to be natural-born subjects of the crown of Great Britain, as if born in this kingdom. A devise of real property in England was made by a testator domiciled in England, but having been born in Holland, his parents having been married there, and his mother being a Dutch subject. The testator's father was born in Holland in the year 1744, his mother being also a Dutch subject, and his father having also been born in Holland in the year 1696. The testator's paternal great-grandfather was a natural-born British subject, and the commander of a British regiment sent to serve in Holland in 1691, who had married, while on service, a Dutch wife, the testator's grandfather being the eldest son of that marriage. The

testator's grandfather took service in his father's regiment, which, however, had then ceased to be in British pay, and the testator's father, in his turn, also joined it:—Held, that the statute 7 Anne, c. 5, gave the testator's grandfather the status of a natural-born British subject, and the statute 13 Geo. 3, c. 21, gave also to the testator's father the rights belonging to that status. *De Geere* v. *Stone*, 47 L. T. 434.

Held, further, that the testator himself was an alien, and that, as the statute 33 Vict. c. 14, is not retrospective, the real property of the testator belonged to the crown. *Ib.*

A. and B., two domiciled English subjects resident in Paris, with the intention of permanently residing there, entered into a contract of marriage, in the French form, in contemplation of a marriage "intended immediately to take place according to law," and also of a marriage in conformity with the rites of the Church of England. The English marriage was duly solemnised in the chapel of the English ambassador at Paris, but the intended French marriage never took place. The contract of marriage stipulated that the future couple should have the enjoyment in common of all property, according to the disposition of the custom of Paris, which should regulate their future community, even in the event of their residing in foreign parts, where different laws prevailed; that the portion which the wife was to bring into community should be received by the husband, and be accounted for by him to his wife; that whatever should come in future to the wife should be invested by the husband, and that the principal should belong to the wife as her own separate property (bien personnel), and that the interest alone should enter into the community. The effect of this contract by the French law, supposing it to be valid, would be to give the wife a testamentary power over her separate estate, independently of her husband. Part of the property brought by the wife into community consisted of a sum of 2,000*l.* charged upon real estates in England. Shortly after the English marriage, and before the solemnisation of the contemplated French marriage, the parties, never having cohabited together, separated entirely. The wife, in the lifetime of her husband, made her will in the English form, disposing of, among other property, the 2,000*l.*:—Held, that the marriage contract gave the wife a testamentary disposition, and that the property passed by the will. *Este* v. *Smyth*, 23 L. J., Ch. 705; 18 Jur. 300; 2 W. R. 148.

G. Soundness of Mind.

Presumption of Sanity.]—The competency of a testator is to be assumed until it is impeached by evidence, but it is not to be assumed, as a matter of law, that a will is valid as made by a competent testator unless the court or jury who has to decide upon it is convinced that he was competent. *Sutton* v. *Sadler*, 3 C. B. (N.S.) 87; 26 L. J., C. P. 284; 3 Jur. (N.S.) 1150; 5 W. R. 880.

If a testamentary paper, rational on the face of it, is shewn to have been executed and attested as prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding; but if there are circumstances in evidence which counterbalance that presumption, the court will pronounce against it, unless on the whole the evidence is sufficient to establish affirmatively that the testator was of sound mind when he executed it. *Symes* v. *Green*, 1 Sw. & Tr. 401; 28 L. J., P. 83; 5 Jur. (N.S.) 742.

Knowledge and Approval of Contents of Will—Presumptions.]—Knowledge and approval of a will is necessary and must be proved; the execution of a will by a competent testator is presumptive and primâ facie proof of the fact; and if a competent testator has read the will, or heard it read, the presumption is strong and conclusive, unless there are special circumstances attending the execution, e.g. fraud which includes dereliction of duty. Whether read or not, if in any way the contents of the will have been brought to the notice of the testator, the effect is the same, and even where there has been a reading of the will, but the state of the testator was such that he could not have had an intelligent appreciation of the words, he must be taken to have known and approved of the will if the words have been bonâ fide used by a person whom he trusts to draw it up for him. *Beamish* v. *Beamish*, [1894] 1 Ir. R. 7.

Although the instructions for a will may not have originated with a testator, yet his subsequent approval of them is sufficient to render his will valid. Weakness of mind and forgetfulness are not sufficient to invalidate a will, if it is proved that the mind of testator was, when called to exertion, capable of attention and application. *Tufnell* v. *Constable*, 3 Knapp, 122.

What constitutes "Soundness of Mind."]—In contemplation of law the expression "sound mind" does not mean a "perfectly-balanced mind." The question of mental soundness is one of degree. In considering it large allowance must be made for the difference of individual character; but in every case the highest degree of mental soundness is required in order to constitute capacity to make a testamentary disposition, inasmuch as the act involves a larger and a wider survey of facts and things than is required in the other transactions of life. *Boughton* v. *Knight*, 42 L. J., P. 25; L. R. 3 P. 64; 28 L. T. 562.

A man moved by capricious, frivolous, mean, or even bad motives, may disinherit wholly or partially his children, and leave his property to strangers. He may take an unduly harsh view of the character and conduct of his children, but there is a limit beyond which it will cease to be a question of harsh, unreasonable judgment, and then the repulsion which a parent exhibits to his child must be held to proceed from some mental defect. If such repulsion, amounting to a delusion as to character, is shewn to have existed previously to the execution of his will, it will be for the party setting up that document to establish that it was inoperative when the will was made, and the jury, in determining whether or not the delusion was operative, will have regard to the contents of the will and the circumstances surrounding the execution of it. *Ib.*

To constitute a sound disposing mind, a testator must not only be able to understand that he is by will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of the property, and the nature of the claims of others whom by his will he is excluding from participation in that property. *Harwood* v. *Baker*, 3 Moore, P. C. 282.

A sound and disposing mind means a mind of natural capacity, not unduly impaired by old age or enfeebled by illness or tainted by morbid influence. *Smith* v. *Tebbitt*, 36 L. J., P. 97; L. R. 1 P. 398; 16 L. T. 841; 16 W. R. 18.

If disease is once shewn to exist in the mind of a testator,—it matters not that the disease is discoverable only on a certain subject, or that on all other subjects the action of the mind is apparently sound and the conduct even prudent, —the testator must be pronounced incapable. Further, the same result follows whether or not the particular subjects upon which disease is manifested have any connection with the testamentary disposition before the court. *Ib.*

The testamentary capacity involves more than the mere fact of recognising familiar persons or objects, and means a sound disposing mind; that is to say, a power of understanding the nature of the property and the family, and the effect of the will. *Sefton* (*Earl*) v. *Hopwood*, 1 F. & F. 578.

A bill in equity will lie to set aside a will made under the influence of superstitious terrors. *Middleton* v. *Sherburne*, 4 Y. & C. 358.

An Englishman who had resided for many years in India, and become imbued with Eastern notions, professing himself at different times a believer in the Hindoo and Mahometan faiths, and to a great degree adopting the habits of life of the latter, by his will (which, with the exception of a small legacy, excluded his brother, his only next of kin, from any benefit), after bequeathing several legacies and specific bequests, gave the residue of his property to the Turkish ambassador, or the person for the time being representing him, to be applied for the benefit of the poor of the city of Constantinople, and for the erection of a cenotaph at Constantinople, with a light burning, and a description of the testator engraved thereon. This will, which was in conformity with his written instructions, was duly executed during the last illness of the testator. The prerogative court, by its sentence, refused probate, upon the ground of the extraordinary nature of the bequest, coupled with the wild and extravagant conduct of the testator about the time of execution, which the court considered as amounting to insanity. Such sentence reversed upon appeal, and the will established, the judicial committee being of opinion that, as the will was in conformity with the written instructions of the deceased, the true test to ascertain its validity was to look into the previous habits and opinions of the testator to account for the extravagant behaviour and language; and that though the dispositions in the will might be absurd and irrational in a native of England and a Christian according to English habits, they were accounted for in the case of the testator, who had, in early life, adopted the manners and mode of living of a Mahometan. *Austen* v. *Graham*, 8 Moore, P. C. 493.

A will executed by a husband on his deathbed in favour of his wife, to the exclusion of the other members of his family, he being of a weakened and impaired capacity at the time of the factum, from disease affecting the brain, which produced torpor, and rendered his mind incapable of exertion unless roused, pronounced against, the disposition in the will being a total departure from, and contrary to, his previous expressed intentions. *Harwood* v. *Baker*, 3 Moore, P. C. 282.

Testator Subject to Delusions.]—The mere fact that a testator is subject to insane delusions is not sufficient reason why he should be held to have lost his right to make a will, if the jury is satisfied that the delusions have not affected the general faculties of his mind and cannot have influenced him in any particular disposition of his property. *Banks* v. *Goodfellow*, 39 L. J., Q. B. 237; L. R. 5 Q. B. 549; 22 L. T. 813. Followed in *Murfett* v. *Smith*, 12 P. D. 116; 57 L. T. 498; 51 J. P. 374.

Where insanity, though confined to certain one or more delusions, has once existed, and the evidence shews the deceased to have been instructed to conceal the continued existence of such delusion or delusions, and the evidence to prove perfect recovery of capacity is at least doubtful, a will made by a person so affected, though rational and rationally instructed and executed, is not entitled to probate. *Dyce Sombre* v. *Troup*, Deane, Ecc. Rep. 22.

Where a person afflicted with habitual insanity, with intermissions, makes a will, the fact that the will is a rational one, and made in a rational manner, though not conclusive, is strong evidence of its having been made in a lucid interval. *Nichols* v. *Binns*, 1 Sw. & Tr. 239.

Where a person is labouring under an insane delusion, his sanity is to be tested by directing his attention to the subject-matter of such delusion, but where a person is afflicted with habitual insanity, unaccompanied with delusions, his sanity is to be tested by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them, and with regard to the conduct of individuals. *Ib.*

Exposition of the doctrine of monomania and partial insanity as applied to wills. *Waring* v. *Waring*, 6 Moore, P. C. 341; 12 Jur. 947.

If the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is erroneous to suppose such a mind is really sound on other subjects; it is only sound in appearance, for if the subject of the delusion be presented to it, the unsoundness would be manifested by such a person believing in the suggestions of fancy, as if they were realities; any act, therefore, done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind. *Ib.*

Delusion is the belief of things as realities which exist only in the imagination of the patient. The frame of mind which indicates his incapacity to struggle against such an erroneous belief constitutes an unsound frame of mind. *Ib.*

To constitute a lucid interval, the party must freely and voluntarily, and without any design, at the time, of pretending sanity and freedom from delusion, confess his delusion. *Ib.*

Where delusions are proved to have existed, both before and after the factum, the presumption is, that they existed at the time of the factum, and in such case proof of a lucid interval, at the time of the factum, is thrown upon the party propounding a will. It is immaterial that the delusions do not appear on the face of the will. *Ib.*

A will written in 1834 by a widow (without children, a person originally eccentric, and, in after-life, developing unsound delusions), conferring great benefit on a stranger, the will not

betraying, on the face of it, marks of insanity, in the circumstances pronounced against. *Ib.*

A will was held to be invalid on the ground that the testator, though sane in his general conduct, laboured under an unsound delusion of mind with respect to his only child. *Dew* v. *Clarke*, 5 Russ. 163 ; 6 L. J. (o.s.) Ch. 186.

When Competency Doubtful.]—On motion, where the competency of a testator was doubtful, the court refused to make a grant, as in the case of intestacy, but made a grant with the will annexed. *Hanson* v. *Shepherd*, 17 L. T. 123 ; 16 W. R. 144.

Will of a testator subsequently found a lunatic directed to be deposited in the custody of the master. *Thompson, In re*, 1 Russ. & M. 355.

Question for Jury.]—At a trial, where the question was as to the testamentary capacity of a testator, it was proved that at one period of his lifetime he had been confined in a lunatic asylum, and that at the time of making his will he was subject to certain fixed delusions. These delusions, however, could not be connected with any of the dispositions in the will. The judge left it to the jury to say whether at the time of making his will the testator was capable of having such a knowledge and an appreciation of facts, and was so far master of his intentions and free from delusions, as to be able to have a will of his own in the disposition of his property and to act upon it :—Held, that there was no misdirection. *Banks* v. *Goodfellow*, 39 L. J., Q. B. 237 ; L. R. 5 Q. B. 549 ; 22 L. T. 813.

W. S. was subject to insane delusions on one particular subject. Apart from them, he appeared to be perfectly rational, managed his affairs with ordinary prudence, and exhibited in various ways considerable mental capacity. His last will was contested by his next of kin on the ground that when he executed it he was not of sound mind. The president, in directing the jury, followed the ruling in *Banks* v. *Goodfellow*, supra, in which it was laid down that the mere fact that a testator is subject to insane delusions is no sufficient reason why he should be held to have lost his right to make a will, if the jury are satisfied that the delusions have not affected the general faculties of his mind and cannot have influenced him in any particular disposition of his property. *Smee* v. *Smee*, 49 L. J., P. 8 ; 5 P. D. 84 ; 28 W. R. 703 ; 44 J. P. 220.

Proof and Establishment.]—A will cannot be admitted to probate in a contested case, unless the strength or degree of proof offered is such as to satisfy the court, without reasonable doubt, that the testator was, at the time of execution, of sound mind, memory, and understanding. *Keays* v. *M'Donnell*, Ir. R. 6 Eq. 611.

Therefore, when the evidence was inconsistent and unsatisfactory, and the balance was against his competency, the court refused to grant probate of the will. *Ib.*

Testamentary incapacity established by the cross-examination of the plaintiff's witnesses merely, without any direct evidence on the part of the defendant. *Ib.*

A testator gave to his niece all his bond debts, and he gave C., a person in whom he reposed great confidence, besides other benefits, all the residue of his property. Four months after the date of the will the testator took from a bond debtor a conveyance of an estate to himself for life, with remainder to C. in fee, and the bond was delivered up to be cancelled. C. took a part in promoting this transaction, but no direct fraud was established against him, and it did not appear that he exercised any positive control over the testator. Two days afterwards the testator committed suicide. The evidence as to the soundness of the testator's mind was conflicting, many acts consistent with sanity having been done by him up to the time of his death ; but the court, being of opinion, upon the whole evidence, that the testator, at the time of purchasing the estate in exchange for the bond, was of unsound mind, and considering the state of his mind in connection with the confidence which he placed in C., without directing an issue, set aside the conveyance, and declared the testator's niece entitled to the benefit of the bond. *Steed* v. *Calley*, 1 Keen, 620.

Where sanity is impeached, and the evidence is conflicting, the question is not, whether the facts adduced in support of it are not in general indications of sanity; but whether they are inconsistent with, or sufficiently explanatory of, the indications of insanity produced on the other side, on which the onus lies. *Ib.*

Where a will and codicils were made by a person of the age of eighty-six, of feeble and impaired mind, in favour of her medical attendant, with whom she resided, and the will was prepared by her solicitor, the instruments were pronounced for, upon the balance of evidence negativing alleged fraud, although inconsistent with former testamentary dispositions ; but, on a further allegation as to facts noviter ad notitiam perventa being admitted, the second codicil was pronounced against, and the sentence below reversed as to it. *Jones* v. *Goodrich*, 5 Moore, P. C. 16.

The question being as to the sanity of a testatrix, evidence of a surviving medical attendant in a lunatic asylum in which she resided at the time of making the will was received to shew that she was sane, and that her continuance in the asylum was voluntary. *Martin* v. *Johnston*, 1 F. & F. 122.

Will of a resident in a receptacle for lunatics, established upon the then state of his mind, compared with antecedent declarations. Distinctions, if not then competent. *Bootle* v. *Blundell*, 19 Ves. 508 ; 15 R. R. 93.

—— **Onus of Proof on Party propounding.**]—The burden of proving capacity to make a will rests upon those who propound the will, and à fortiori when it appears that the testator was subject to delusions. *Smee* v. *Smee*, supra.

He who relies upon a will, in opposition to the title of the heir-at-law, must prove that it is the will of a person of sound mind. Such proof having been given, if incompetency of the testator to make a will is alleged, it is incumbent on the party alleging it to prove it. *Sutton* v. *Sadler*, 3 C. B. (N.S.) 87 ; 26 L. J., C. P. 284 ; 3 Jur. (N.S.) 1150 ; 5 W. R. 880.

Where a testamentary disposition is propounded under circumstances of suspicion, as where the party propounding it was the drawer, and was benefited by it, and it was executed at a time when the testator was of doubtful capacity, without any evidence of instructions previously given, or knowledge of its contents, the party propounding it must prove the testator knew and approved the contents of the instrument. *Mitchell* v. *Thomas*, 6 Moore, P. C. 137.

A codicil, which varied the bequest contained in the will of the testator, to the benefit of the drawer, and executed at a time when the testator was supposed to be dying, in the absence of proof of the knowledge by the testator of its contents, pronounced against. *Ib.*

Proof of the actual reading over of the instrument to the testator before execution is not necessary. *Ib.*

A will and five codicils being propounded, the will and four codicils were established, but the last codicil, which was drawn up by a solicitor in his own favour, was rejected, the testator being of fluctuating capacity, and the proof that he knew the contents of the instrument being insufficient. *Dufaur* v. *Croft*, 3 Moore, P. C. 136.

Insanity having been once established, proof of recovery is upon the other party; otherwise the insanity must be established by proof applying to the particular date. *White* v. *Wilson*, 13 Ves. 88.

When a testator has been found to be of unsound mind under a commission of lunacy, which commission has not been superseded, the legal presumption is against the validity of any testamentary instrument, and the onus of proving the soundness of mind of the testator is imposed upon the party setting up the instrument. Under such circumstances it is competent to the party setting up a testamentary instrument to maintain either that the testator was always of sound mind, or that though he may have been formerly of unsound mind, he had completely recovered, or that the will was made during a lucid interval. In such a case, where unsoundness of mind has been before proved, though previous circumstances are entitled to some weight, the true inquiry is, whether the deceased testator had entirely recovered, or was of sound mind at the time of giving instructions for and the execution of the instrument in question. A will and codicil made and executed under such circumstances, when it was clearly proved that at the time of their execution the insane delusions of the testator which existed at the time the commission of lunacy was issued still continued to exist, were held by the judicial committee of the privy council, affirming the judgment of the prerogative court, to be invalid. The circumstances of the case being deemed to be such as to make it essential to the purposes of justice that the validity of the testamentary instruments should be submitted to judicial decision, the appellants (the executor and the parties interested under the will) were allowed one set of costs between them out of the estate, including the costs of the appeal. *East India Co.* v. *Dyce Sombre*, 4 W. R. 714.

—— **Evidence of Acts of Competency.**]—On a question as to the competency of a devisor to make a will, letters addressed to him found after his death open, with their seals broken, in a cupboard under his book-case in a private room, together with other letters indorsed by him, to some of which answers had been written by him, are not admissible, as there is nothing to shew any knowledge or act of the testator with regard to them. *Wright* v. *Doe* d. *Tatham*, 2 N. & P. 303; 7 A. & E. 313; 7 L. J., Ex. 340. Affirmed in Dom. Proc., 4 Bing. (N.C.) 489; 6 Scott, 58; 5 Cl. & F. 670.

But a letter addressed to the testator requesting him to communicate on a matter of business with his attorney, and found with the other letters indorsed by the attorney, who lived some miles off, is admissible, as it shews an act done upon it by the testator. *Ib.*

Where the parol evidence is of a very contradictory nature, it is safer to judge by collateral facts, where they are sufficiently strong, as to the competency of a party to make a will. *Wright* v. *Tatham*, 9 L. J. (o.s.) Ch. 265.

A long and varied correspondence, carried on by and with the testator for a series of years, and the execution of various deeds by him, and of others to him, involving property to a large amount, is sufficient to shew his general competency to dispose of his property. *Ib.*

Lunatic — Report of Chancery Visitors — Admissibility as Evidence.]—Sect. 186 of the Lunacy Act, 1890, provides that (1) the reports of the chancery visitors shall be filed and kept secret in their office, and shall not be open to the inspection of any person save the members of the board of visitors and the judge in lunacy, and such persons as he specially appoints; (2) all reports relating to any particular patient shall be destroyed on his death, &c. On the trial of a probate action, where the testatrix had been found of unsound mind on inquisition, a visitor stated that these reports had not been destroyed: —Held, that the reports must be treated as destroyed on the death of the testatrix, and could not be produced even on subpœna. Subsequently the visitors gave evidence of the state of mind of the testatrix at the times when their reports were made. *Roe* v. *Nix*, 62 L. J., P. 36; [1893] P. 55; 1 R. 472; 68 L. T. 26.

Costs.]—The jury having found that the testatrix was of testamentary capacity when she made her will, the court pronounced for the will, and, following *Davis* v. *Gregory* (L. R. 3 P. 28), gave all parties their costs out of the estate. *Ib.*

—— **Right of Executor to.**]—Primâ facie an executor is justified in propounding his testator's will, and if the facts within his knowledge at the time he does so tend to shew eccentricity merely on the part of the testator, and he is totally ignorant at the time of the circumstances and conduct which afterwards induce a jury to find that the testator was insane at the date of the will, he will, on the principle that the testator's conduct was the cause of litigation, be entitled to receive his costs out of the estate, although the will is pronounced against. *Boughton* v. *Knight*, 42 L. J., P. 25; L. R. 3 P. 64; 28 L. T. 562.

H. Undue Influence and Fraud.

Equitable Jurisdiction.]—A will of land may be good at law as well executed, and yet ill in equity, as if obtained by fraud. *Goss* v. *Tracy*, 1 P. W. 288; 2 Vern. 699.

Legatee of a bond, which after the will and shortly previous to the suicide of the testator had been cancelled on a conveyance of the estate held as a collateral security, decreed entitled to have the bond replaced, the transaction being one of doubtful sanity and fraudulent exercise of influence. *Steed* v. *Calley*, 1 Keen, 620.

What constitutes Undue Influence.]—Undue influence may exist in the form of bad companionship and bad example, and yet not be sufficient to invalidate a will made under its

operation. To be within the meaning of the rule of law, so as to produce that effect, it must be an influence exercised by coercion or by fraud. But actual violence is not necessary to constitute coercion; imaginary terrors may be sufficient for that purpose. *Boyse* v. *Rossborough*, 6 H. L. Cas. 2; 26 L. J., Ch. 256; 3 Jur. (N.S.) 373; 5 W. R. 414.

In order to set aside the will of a person of sound mind, it must be shewn that the circumstances under which it was executed are inconsistent with any hypothesis but that of undue influence, which cannot be presumed, but must be shewn to have been exercised, and exercised in relation to the will itself, and not merely to other transactions. *Ib.*

A pressure, of whatever character, whether it acts on the fears or on the hopes of an individual, if so exerted as to overpower the volition, without convincing the judgment, is a species of restraint under which no valid will can be made. *Hall* v. *Hall*, 37 L. J., P. 40; L. R. 1 P. 481; 18 L. T. 152; 16 W. R. 544.

Supposing a will made by a person of testamentary capacity, it is not sufficient to avoid it that it is not such a will as a sensible person would make, or that it is harsh, capricious, or unjust; nor, on the other hand, is it enough to avoid it on the ground of undue influence, that it was made under the influence of acts of attention and kindness; but the influence or importunity must be such as to deprive the testator of the free exercise of his will. *Sefton* (*Earl*) v. *Hopwood*, 1 F. & F. 578.

Undue influence, to defeat a will, made by a person otherwise of testamentary capacity, must not be such as arises from the influence of gratitude, affection, or esteem, but it must be the control of another will over that of the testator, whose faculties have been so impaired as to submit to that control, so that he has ceased to be a free agent, and has quite succumbed to the power of that controlling will. *Lovett* v. *Lovett*, 1 F. & F. 581.

To establish undue influence sufficient to invalidate a will, it must be shewn that the will of the testator was coerced into doing that which he did not desire to do, and the mere fact that the testator in making his will was influenced by immoral considerations does not amount to such undue influence so long as the dispositions of the will express the wishes of the testator. *Wingrove* v. *Wingrove*, 55 L. J., P. 7; 11 P. D. 81; 34 W. R. 260; 50 J. P. 56.

Exaggeration of the conduct of a party benefited by a will towards the testatrix, though it induce her to revoke the will, and the bequest made in his favour, and to execute another will to his exclusion, is not such a fraud as to destroy free agency, and render the will invalid. Neither does such conduct amount to undue influence or importunity. *Browning* v. *Budd*, 6 Moore, P. C. 430.

—— **Different from that in Gifts inter vivos.**]—The influence which is undue in the case of gifts inter vivos is different from that which is required to set aside a will. In the case of gifts or other transactions inter vivos, it is considered by the courts of equity that the natural influence arising out of the relation of parent and child, husband and wife, doctor and patient, attorney and client, confessor and penitent, or guardian and ward exerted by those who possess it to obtain a benefit for themselves is an undue influence. Gifts or contracts brought about by it are, therefore, set aside, unless the party benefited can shew affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment. The law regarding wills is different. The natural influence which such relations as those in question involve may lawfully be exerted to obtain a will or a legacy, so long as the testator thoroughly understands what he is doing and is a free agent; and hence the rules adopted in courts of equity in relation to gifts inter vivos are not applicable to the making of wills. *Parfitt* v. *Lawless*, 41 L. J., P. 68; L. R. 2 P. 462; 27 L. T. 215; 21 W. R. 200.

May affect Part of Will only.] — Where a portion of will has been introduced through fraud or perhaps inadvertence, it may be rejected and probate granted of the remainder if the two are severable. But where the rejection of part alters the sense of the remainder, quære, whether there is a valid will within the meaning of 7 Will. 4 and 1 Vict. c. 26, s. 9. *Rhodes* v. *Rhodes*, 51 L. J., P. C. 53; 7 App. Cas. 192; 46 L. T. 463; 30 W. R. 709. S. P. *Trimlestown* (*Lord*) v. *D'Alton*, Dow & Cl. 85.

Evidence—Undue Influence.]—Where there is evidence tending to shew some mental incapacity, and also evidence tending to shew some undue influence, it is easier to satisfy the court that undue influence has been exercised, inasmuch as the degree of influence required to induce a person of strong mind and in good health to do any act is much greater than that which would induce a person of feeble mental capacity and in a weak state of health. *Hampson* v. *Guy*, 64 L. T. 778—C. A.

Although a man have a mind of sufficient soundness and discretion to regulate his affairs in general, yet if such a dominion or influence be obtained over him as to prevent his exercising such discretion in the making his will, he cannot be considered as having such a disposing mind as will give effect to his will. Quære, what evidence will be sufficient to establish such a case. *Mountain* v. *Bennet*, 1 Cox, 353.

Injunction granted to restrain executor claiming under a will, and also by gift from testatrix in lifetime, from selling, upon affidavit of undue influence. *Edmunds* v. *Bird*, 1 Ves. & B. 542.

Knowledge and Approval of Contents—Presumption—Proof.]—There is no rule that if it is proved or admitted that a testator was of sound mind, memory and understanding, and that a will has been read over to him or that he has read it to himself, and that he has signed it, he must be taken to have known and approved of the contents of such will, and that such knowledge and approval must be held to extend to every part of such will. *Fulton* v. *Andrew*, 44 L. J., P. 17; L. R. 7 H. L. 448; 32 L. T. 209; 23 W. R. 566.

The presumption in favour of every part of the will arising where these circumstances exist may be removed, where the proof that the will was read to or by the testator is open to suspicion, or where there is room for a suggestion of fraud, especially in a case where the will has been prepared and propounded by strangers in blood to the testator, but who are beneficiaries under it. *Ib.*

The rule in *Barry* v. *Butlin* (infra), *Fulton*

v. *Andrew* (supra), and *Brown* v. *Fisher* (infra), that those who take a benefit under a will and have been instrumental in preparing or obtaining it, have the onus thrown upon them of shewing the righteousness of the transaction is not confined to the single case in which a will is prepared by or on the instructions of the person taking a benefit under it, but extends to all cases in which circumstances exist which excite the suspicion of the court. *Tyrrell* v. *Painton*, [1894] P. 151; 6 R. 540; 70 L. T. 453; 42 W. R. 343—C. A.

If it is proved or admitted that a testator is of sound mind, memory and understanding, that a will has been read over to him, or that he has read it to himself, and that he has put his signature to it, the question whether he knew and approved of the contents of such will must be answered in the affirmative, and such knowledge and approval will be held to extend to every part of the will. *Atter* v. *Atkinson*, L. R. 1 P. 665; 20 L. T. 404.

It is essential to the validity of a will that at the time of its execution the testator should know and approve of its contents. *Hastilow* v. *Stobie*, 35 L. J., P. 18; L. R. 1 P. 64; 11 Jur. (N.S.) 1039; 13 L. T. 473; 14 W. R. 211.

Unless fraud can be proved in obtaining the execution of a will, the fact that such will has been read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, will, when coupled with his execution of it, be conclusive evidence that he both knew and approved its contents. *Guardhouse* v. *Blackburne*, 35 L. J., P. 116; L. R. 1 P. 109; 12 Jur. (N.S.) 278; 14 L. T. 69; 14 W. R. 463.

A testatrix having made a will, whereby she charged certain legacies upon her real estate, and having subsequently desired to grant an additional legacy, her attorney prepared a draft codicil, which he carefully read over to her, and which she approved. He immediately afterwards made a fair copy, but inserted certain words not consistent with the instructions of the testatrix, nor contained in the draft. This copy was hastily read over to the testatrix, and executed by her:—Held, that parol evidence could not be admitted to vary the written provisions contained in a paper so executed. *Ib.*

A testatrix during her last illness made a will in favour of two persons who were strangers in blood. The will was in accordance with her previously-expressed intentions, but the instructions for it were given to the persons interested under it when no one else was present, and it was not read over to her, and its contents were not distinctly explained to her before or at the time of the execution. Her next of kin were denied access to her during her illness:—Held, that there was evidence that the testatrix knew and approved of the contents of the will, and it was pronounced for; but the costs of the unsuccessful opposition of the next of kin were allowed out of the estate. *Goodacre* v. *Smith*, 36 L. J., P. 43; L. R. 1 P. 359; 15 L. T. 511; 15 W. R. 561.

If a testatrix has given instructions for her will, and it is prepared in accordance with them, the will will be valid, though at the time of execution the testatrix merely recollects that she has given those instructions, but believes that the will which she is executing is in accordance with them. *Parker* v. *Felgate*, 52 L. J., P. 95; 8 P. D. 171; 32 W. R. 186; 47 J. P. 808.

—— **Onus probandi.**]—The burden of proving that a testator knew and approved of the contents of his will lies upon the party propounding it. *Cleare* v. *Cleare*, 38 L. J., P. 81; L. R. 1 P. 655; 20 L. T. 497; 17 W. R. 687.

A party who pleads that the deceased did not know and approve of the contents of his will may therefore, upon that question, cross-examine the witnesses produced by the plaintiff, without being liable to costs, if he has given the notice required by the rule of court. *Ib.*

The onus of proving an instrument as the last will of a free and competent testator lies on him who propounds it, and where the person propounding is himself a beneficiary under it and also a stranger in blood to the testator, the court should be vigilant and jealous in examining the evidence supplied in support of the instrument or will. *Fulton* v. *Andrew*, supra.

Where there are circumstances of suspicion attending the making and execution of a testamentary paper, as where the party propounding it is the person benefited, and he prepared the paper, and had it executed at a time when the testator was supposed to be dying, the court of probate requires proof to satisfy it that the testator was aware of the contents of the paper, and approved of it. And this rule has not been altered by the late Wills Act, 7 Will. 4 and 1 Vict. c. 26, which assimilates the formalities for the execution of wills of real and personal estate. But proof of actual reading over of the paper to the testator is not necessary. *Michell* v. *Thomas*, 12 Jur. 967.

Wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to prove affirmatively that the testator knew and approved of the contents of the document; and it is only when this is done that the burden of proof is thrown on those who oppose the will. *Tyrrell* v. *Painton*, supra.

—— **Will procured by Beneficiary—Not read over—Contents not known and approved.**]—The court is to approach with suspicion the consideration of a will procured and propounded by a person taking a large benefit thereunder, although fraud is not pleaded by the person opposing the will; and where there was no testamentary incapacity on the part of the testator or the witnesses. Where a beneficiary, who had procured and subsequently propounded a will, failed, under those circumstances, to satisfy the court by affirmative and conclusive evidence, that the testator did in fact know and approve of the contents of the will which he had actually executed. The court, applying and acting upon the principles laid down in *Fulton* v. *Andrew* (supra), refused probate of such will, with costs. *Brown* v. *Fisher*, 63 L. T. 465.

Legacy to a Person who prepared Will and took active Part in its Execution.]—A person propounding a will prepared by himself without the assistance of any third person, and under which he takes a benefit, is bound to give clear and convincing evidence that the testator knew and approved of the clause under which he takes the benefit; and this principle applies even in the case of a near relative of the testator. In the absence of such evidence, probate of that portion of the will may be refused, and granted of the remainder. *Hegarty* v. *King*, 7 L. R., Ir. 18—C. A.

Several authorities, in which the fact of a legatee being the writer of a will and similar suspicious circumstances have been held to raise presumptions against it, reviewed and compared, and the principle of the decisions observed on. *Von Stentz* v. *Comyn*, 12 Ir. Eq. R. 622.

Circumstance that one residuary devisee was the attorney who drew the will not decisive evidence of fraud. *Paine* v. *Hall*, 18 Ves. 475.

Where an attorney, who draws the will of the testator, takes a benefit under it, the case is to be considered with peculiar jealousy, and the jury who try the validity of the will must be satisfied that the testator knew its contents; but their consideration need not to be confirmed to direct evidence, and they may find for the will upon circumstantial evidence only. *Raworth* v. *Marriott*, 1 Myl. & K. 643.

Where a legacy is given to the party employed to draw the will, it may raise a presumption more or less strong, according to circumstances, against the validity of the will; but there is no such rule as that it is necessary in every such case to prove that the will was actually read over to the testator, or prepared from instructions given by him. *Barry* v. *Butlin*, 2 Moore, P. C. 480.

A will written, or procured to be written, by the party to be benefited by it is not void, but is open to suspicion, and if not clearly shewn to be according to the intentions of deceased will be rejected. Accordingly, a will of a married woman, under a power prepared by husband's solicitor, unknown to testatrix, by which he was appointed sole executor and residuary legatee, and executed by the wife under his control, was declared void, as, according to the evidence, contrary to her previously-expressed intentions. *Baker* v. *Batt*, 2 Moore, P. C. 317.

It is the duty of any person who expects that a will is about to be made in his favour to see that the testator receives proper and independent advice, and he should take care that the testimony called in support of the will should not be that of himself alone, but that it should be independent and impartial. The mind of the testator should be left perfectly free and untrammelled. The fact that a person propounding a will under which he benefits largely is the person who alone took the instructions for it and either prepared or procured its preparation, is a circumstance of grave suspicion, and calls for special care and vigilance on the part of the court and jury in examining the evidence adduced in support of it; and unless that suspicion is removed and the court and jury are judicially satisfied that the terms of the document actually express the true wishes of the testator, the plea of undue influence is established, and the will ought to be pronounced against. The onus probandi being in every case upon the person propounding a will, he must satisfy the court and jury that the instrument he is setting up is the true last will of a free and capable testator. *Parker* v. *Duncan*, 62 L. T. 642; 54 J. P. 280.

The person propounding the alleged last will of a testatrix was the chairman of the board of guardians of the union, in whose workhouse infirmary the testatrix was an inmate at the time the alleged will was made, and in which she died. The plaintiff obtained from a solicitor a form of will, filled up in pencil; he refused to allow the solicitor to go to the deceased. Having got the form of will, the plaintiff called on a friend of his own, and with him went to the infirmary, and the testatrix put her mark to the will in their presence and that of a nurse. The learned judge directed the jury as above, and, in the result, they found the plea of undue influence established. *Ib.*

Confessor and Penitent.]—A Roman Catholic lady gave the bulk of her property to a Roman Catholic priest, whom she named residuary legatee and devisee. He had lived in her house, and had been her confessor for a number of years:—Held, that undue influence could not be inferred from the relation in which he stood to the testatrix—confessor and penitent—combined with the disposition of the property, and that it lay on the party who impeached the residuary clause on the ground of undue influence to establish the allegation. *Parfitt* v. *Lawless*, supra.

A Roman Catholic priest had resided with the testatrix and her husband many years as chaplain, and for a part of the time as confessor. He was a confessor at the time the will in dispute was made. There was no evidence that he had interfered in the making of such will, or that he had procured the gift of the residue to himself, or that he had brought such gift about by coercion or dominion exercised over the testatrix against her will, or by importunity not to be resisted. Moreover, it was not shewn that even in the common affairs of life, in business or in anything else, the testatrix was under the priest's control or dominion:—Held, that there was no evidence to go to a jury on an issue of undue influence. *Ib.*

Doctor and Patient.]—Although there is no rule of law which forbids a man to bequeath his property to his medical attendant, yet it is not a favourable circumstance for one in such a confidential position, with respect to a patient labouring under a severe disease, to take a large benefit under such patient's will, more particularly if executed in secrecy, and the whole transaction assumes the character of a clandestine proceeding. In such a case the onus will lie very heavily upon the party benefited to maintain the validity of the will. *Ashwell* v. *Lomi*, L. R. 2 P. 477.

Where a will is prepared and written by a medical man in attendance on a testatrix, at that time dangerously ill, and without professional advice, by which he is made the principal object of the testatrix's bounty, to the exclusion of her near relations, a court of justice, regarding the subsisting relation of a medical man and patient, will view his conduct with the utmost jealousy. *Greville* v. *Tylee*, 7 Moore, P. C. 320.

Duty of Solicitor in Drafting Will—Legacy to Solicitor's Wife.]—B., a solicitor, drew the will of R., his father-in law, which bequeathed a share of residue, amounting to 45,000*l.* to B.'s wife, and appointed B. sole executor. The will contained no direction that this sum should be for the separate use of B.'s wife. There was no evidence as to what had passed between B. and R. at the time of the execution of the will:—Held, that, in the absence of evidence, the court could not assume such a dereliction of duty on B.'s part in not informing R. of the effect of the will, as to make B. a trustee for his wife. *Birchall, In re, Wilson* v. *Birchall*, 44 L. T. 243; 29 W. R. 461.

Animus testandi.]—It is not sufficient to support a devise that the testatrix knew she was signing her will and disposing of her property, unless also the particular devise expresses her mind and will; but it is not sufficient evidence that it does not do so, that it is a devise to the mother of the attorney who prepared the will, and that it was made in a state of great debility on her deathbed. *Haddock* v. *Trotman*, 1 F. & F. 31.

A person sent instructions to his solicitor to prepare a codicil, by which his daughter was to be deprived of all participation in his property. The document so prepared was executed by him in the presence of two witnesses. At the trial of an issue, whether this document was a codicil to his will or not, evidence was admitted to shew, that neither at the time he sent instructions for, nor when he executed, the paper, did he intend it to operate on his death, and the jury found a verdict in accordance with that evidence:—Held, that as the facts proved plainly and conclusively established that he had no animus testandi when he signed the paper, it could not be admitted to probate. *Lister* v. *Smith*, 3 Sw. & Tr. 282; 33 L. J., P. 29; 10 Jur. (N.S.) 107; 9 L. T. 578; 12 W. R. 319.

The court will not pronounce against a properly-executed paper, testamentary on the face of it, simply because a jury has been induced to find that it was not intended to operate as testamentary. It must consider the character and nature of the evidence upon which the verdict is founded. *Ib.*

A testator ordered a will to be drawn up, leaving blanks for names of legatees, trustees, executors, and the amounts of an annuity and legacies. He did not sign it until shortly before his death, when he did so at the earnest desire of his friends, but expressing his doubts as to its validity in consequence of the blanks not being filled up. These were not filled up by him because he did not know the amount of his money or property, and frequently expressed an intention of having a valuation made in order to enable him to fill them up in a satisfactory manner. The court considered that the requirements of 7 Will. 4 and 1 Vict. c. 26, had been complied with, and declined to hold, on a motion supported by affidavit only, that the testator had no animus testandi at the time he signed the will. *Pool, In goods of*, 35 L. J., P. 97; L. R. 1 P. 206; 14 L. T. 859; 14 W. R. 976.

When a person claims probate of a paper signed and attested, but not on the face of it clearly testamentary, the burthen of proof is on that person to satisfy the court that it was executed animo testandi. *Thorneroft* v. *Lashmar*, 2 Sw. & Tr. 479; 31 L. J., P. 150; 8 Jur. (N.S.) 595; 6 L. T. 476; 10 W. R. 783. *See also Cases* post.

II. TESTAMENTARY INSTRUMENTS, WHAT ENTITLED TO PROBATE, &c.

A. General Principles.

What Testamentary—Paper duly executed as Testamentary Document.]—A person executed as a will a paper writing, which commenced: "I have given all that I have to B."; and contained provisions which were consistent with an intention that it should take effect after his death:—Held, that the instrument was testamentary. *Coles, In goods of*, 41 L. J., P. 21; L. R. 2 P. 362; 25 L. T. 852; 20 W. R. 211.

A paper, purporting to be a last will and testament, duly executed, but containing simply an appointment of a guardian of his children by a father, and not disposing of personal property, nor appointing an executor, is not entitled to probate. *Morton, In goods of*, 3 Sw. & Tr. 422; 33 L. J., P. 87; 9 L. T. 809; 12 W. R. 320.

Where a testatrix duly executed a document as a codicil, but the paper, which had been drawn up by her husband with her full concurrence, was headed, "This is not meant as a legal will, but as guide":—Held, that the expression of intention appearing on the face of the document negatived the presumption that it was executed as a valid testamentary paper, and the court refused to admit it to probate. *Ferguson-Davie* v. *Ferguson-Davie*, 59 L. J., P. 70; 15 P. D. 109; 62 L. T. 703.

—— **Instructions to make Will.**]—The court granted probate as of the last will and testament of a deceased person of a testamentary paper, drawn up in the form of instructions for a will, which had been duly executed *Fisher, In goods of*, 20 L. T. 684.

A testator desired that instructions previously given by him on the same day to an attorney's clerk, should be carried out. The instructions were oral, but the clerk had at the time made short notes of them in the testator's presence:—Held, that the notes could not be included in the probate. *Pascall, In goods of*, 38 L. J., P. 3; L. R. 1 P. 606; 19 L. T. 366.

—— **Memorandum cancelling Will.**]—On the death of H. his will was found cancelled, and beneath the signature there appeared this memorandum, which was duly executed: "This my last will is hereby cancelled, and as yet I have made no other." The court admitted the memorandum of proof. *Hicks, In goods of*, 38 L. J., P. 65; L. R. 1 P. 683: 21 L. T. 300.

An instrument which disposes of no property, but simply declares an intention to revoke a previous will, is not a will or a codicil, and is therefore not entitled to probate. *Fraser, In goods of*, 39 L. J., P. 20; L. R. 2 P. 40; 21 L. T. 680; 18 W. R. 263.

—— **Letter—"Deathbed Request."**]—M., on his deathbed, signed a letter to his brother, which had been written in pencil at his dictation, and his signature was attested by two witnesses. The letter contained the following clauses: "It is my deathbed request that you will consent to charge the estates with a sum, to be equally divided between our dear brothers and sisters, and that it shall be raised and paid as soon as possible after my death. I make this request knowing that it is not legal, but trusting in your affection":—Held, that the letter was testamentary and entitled to probate. *Mundy, In goods of*, 2 Sw. & Tr. 119; 30 L. J., P. 85; 7 Jur. (N.S.) 52; 3 L. T. 380; 9 W. R. 171.

—— **"Last Will and Letter."**]—A paper writing in the form of a letter, and commencing "My dear C.—This is my will and letter to you," contained the expression, "I have invested this . . . to save you the trouble and expense of taking out administration," and "I leave my plate and the family plate to Mrs. Towers." The existence of the document was never communicated to the beneficiaries:—Held, that the language and the circumstances connected with

it indicated an intention that it should operate as a testamentary disposition, and that it was not a declaration of trust. *Towers* v. *Hogan*, 23 L. R., Ir. 53.

—— **Promissory Notes inclosed in Letter.**]—Among the papers of a testator were found two letters sealed and directed "for S. G., my late servant." S. G. had been in his service as housekeeper for some years before his death, but had left him for some time previously to that event. These letters contained promissory notes for large sums of money, and one of the letters stated that the testator "inclosed 200*l.* as a mark of respect," and the other letter stated that "the inclosed was for her long and faithful services." S. G. applied to the executors for payment of the notes, but they refused to pay:—Held, that an action was not maintainable by S. G. upon the notes, which were in effect a legacy, and an informal one in not being duly attested as required by 7 Will. 4 & 1 Vict. c. 26, s. 9, and therefore void. *Gough* v. *Findon* or *Tindon*, 7 Ex. 48; 21 L. J., Ex. 58.

—— **Orders on Savings Bank.**]—B. having been informed that he could not recover from the illness under which he laboured, expressed a wish that his wife should be in a position to receive, at his death, certain sums of money in two savings banks, and signed, in the presence of witnesses, two orders on a savings bank to pay to his wife, at any time she might apply for the same, any money deposited. B. died on the following day. The court granted administration with the two orders, as together containing the will of B. annexed, to his widow. *Marsden, In goods of*, 1 Sw. & Tr. 542; 6 Jur. (N.S.) 405; 2 L. T. 87.

A deceased executed, in the presence of two witnesses, a paper to the effect: "I wish my sister to have my savings bank book for her own use." On the same day she gave her sister the book, and authorised her to draw out all the money in the bank; but, from some informality, that was not done in the deceased's lifetime:—Held, that from the terms of the paper itself, and from the declarations of the deceased at the time she executed it, the court was satisfied that the deceased intended it should operate on her death, and that it must be admitted to probate. *Cock* v. *Cooke*, 36 L. J., P. 5; L. R. 1 P. 241; 15 L. T. 296; 15 W. R. 89.

—— **Instrument relating to Rent after Death of Lessor.**]—An agreement for a seven years' lease, duly executed, and attested by two witnesses, contained a provision as to the application of the rent in the event of the lessor's death before the expiration of the lease, the lessee being beneficially interested in such application:—Held, that as no part of the agreement was revocable, and as it came into operation immediately upon its execution, it was not entitled to probate as a testamentary paper. *Robinson, In goods of*, 36 L. J., P. 93; L. R. 1 P. 384; 17 L. T. 19.

—— **Appointment to Situation after Death of Testator.**]—W. signed, in the presence of two witnesses, a document as follows:—"To A. B.: I hereby offer you the situation of collector and overseer of my property, at a salary of 3*l.* 3*s.*; and I further wish that A. B. shall continue in the office, with the same salary, after my decease, and same allowances":—Held, not testamentary. *Thorncroft* v. *Lashmar*, 2 Sw. & Tr. 479; 31 L. J., P. 150; 8 Jur. (N.S.) 595; 6 L. T. 476; 10 W. R. 783.

—— **Deed.**]—An instrument may pass property from the dead to the living, and yet not be testamentary or subject to legacy duty. *Brown* v. *Advocate-General*, 1 Macq. H. L. 79.

Instrument in any form, whether a deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. *Habergham* v. *Vincent*, 2 Ves. J. 228; 4 Bro. C. C. 353.

A document purporting to be a deed of gift, but duly executed as a will, and intended by the grantor to come into operation only after her death, admitted to probate as a will. *Slinn, In goods of*, 59 L. J., P. 82; 15 P. D. 156; 63 L. T. 229; 39 W. R. 175.

A deed-poll was executed with the formalities required for the execution of wills:—Held, that it was capable of being admitted to probate. *Robson, In re, Emly* v. *Davidson*, 51 L. J., Ch. 337; 45 L. T. 418; 30 W. R. 257—C. A. See also *Morgan, In goods of*, post, col. 262.

The court granted probate of a will executed in the form of a deed, although the attesting witnesses had no precise recollection of the circumstances of the execution. *Colyer, In goods of*, 14 P. D. 48; 60 L. T. 368; 37 W. R. 272; 53 J. P. 134.

A. and his wife of the first part, and B. of the second, executed a deed by which A. granted all the real and personal estate he then possessed to B., in trust, upon the decease of A., to pay the annual income arising therefrom to A.'s wife, and on her death to divide the whole trust property amongst the children of A. in the proportions and on the conditions therein expressed. The deed also reserved a power to A., at any time during his life, by a deed, duly executed, to revoke, annul, or make void the whole or any of the trusts in and by the deed created, and to declare new and other trusts respecting the property conveyed. After-acquired property was not vested in the trustee, nor was he authorised to pay the deceased's debts. A court of competent jurisdiction in the Isle of Man, the place of domicil of the deceased, granted probate of this deed as testamentary to B., as executor according to the tenor thereof. The court followed the grant so far as to recognise the deed as testamentary, but not the appointment of B. as executor. *Cosnahan, In goods of*, 35 L. J., P. 76; L. R. 1 P. 183; 14 L. T. 387; 14 W. R. 969.

A person being possessed of some pure personalty, but of considerable property in mortgages, executed some years before his death an indenture by which, declaring a wish to found certain charities, he covenanted to pay, or that if he did not pay during his lifetime, his executor should, within twelve months after his death, subject to his debts and legacies, pay, to certain persons therein named 60,000*l.*, to be invested in their names on the trusts thereby declared; the trusts were charitable trusts. This deed was never enrolled in chancery. On the same day he made a will, giving certain legacies, and appointing executors, most of whom were the persons named in the deed. These papers were never communicated by him to anybody. Just before his death he caused the papers to be

produced from the drawers, and handed them to the persons attending his deathbed. They were tied up with a memorandum, which declared that they had been prepared in that form, under advice, to save the legacy duties, and in order that if probate duty was paid, in the first instance, it might be got back again in consequence of the covenant creating a debt to be paid out of the assets:—Held, that the indenture was a deed, and not a testamentary paper. *Jeffries* v. *Alexander*, 8 H. L. Cas. 594; 31 L. J., Ch. 9; 7 Jur. (N.S.) 221; 2 L. T. 768. And see *S. C.* nom. *Alexander* v. *Brame*, 7 De G. M. & G. 525; 1 Jur. (N.S.) 1032; 3 W. R. 642.

A., being in India in 1840, executed the following instrument, attested by two witnesses: "Know all men, that I make B. my lawful attorney, for me, in my name, and to my use, to ask, demand, or receive the possession of, or produce of the rent of the freehold of, &c., and I do empower her (B.) to hold and retain all proceeds of the property for her own use until I may return to England and claim possession in person; or, in the event of my death, I hereby, in my name, assign and deliver to B. the sole claim to the property, to be held by her during her life, and disposed of by her as she may deem proper at the time of her death; at the same time I wish it to be understood, that I claim all right and title to the property on my arrival in Great Britain, when the term of B.'s occupancy shall be considered at an end. In witness," &c. The instrument was acted on as a power of attorney by B. Afterwards A. died in India, without returning to Great Britain, and left B. surviving:—Held, that the instrument operated, on A.'s death, as a devise to B. *Doe* d. *Cross* v. *Cross*, 8 Q. B. 714; 15 L. J., Q. B. 217; 10 Jur. 564.

A person, by an instrument, attested by one witness, covenanted with trustees, that his devisee or heirs, executors, or administrators, should after his death, on being satisfied that all his debts were paid, convey and assign to them all the realty and personalty to which he, or any one in trust for him, should at the time of his death be seised, possessed, or entitled for any beneficial estate or interest, or which he should then have disposed of by his will. By the same instrument the trustees declared that they would stand possessed of the property to pay debts, and convert in their discretion, and transfer the remainder to his wife if she should be living, and if not, to his next of kin:—Held, that this instrument was a valid deed, and not a will. *Patch* v. *Shore*, 2 Dr. & Sm. 589; 1 N. R. 157; 32 L. J., Ch. 185; 9 Jur. (N.S.) 63; 7 L. T. 554; 11 W. R. 142.

Testator, having bequeathed his personal estate to his wife, with a contingent disposition to any child she might be enceinte with, by an instrument executed in the East Indies, during his last illness, empowers A. and B. to invest any gold dust, &c., which he had in bottomry, &c., as they should think most advantageous, and deliver the same over to his wife, or her assigns, she running all risk:—Held, that this instrument, though it had been proved in the Ecclesiastical Court, was merely an act inter vivos, and not a revocation of the will. *Pigott* v. *D'Anson*, 1 Eden, 469.

—— **Instrument made in Contemplation of Marriage.**]—In 1873, a father, in contemplation of the marriage of his son, signed, and two witnesses attested, a written instrument. The contemplated marriage having been solemnised, and the father having died:—Held, that by the solemnisation of the contemplated marriage the instrument had been rendered irrevocable. *Halpin, In goods of*, Ir. R. 8 Eq. 567.

Held, secondly, that the words, "I give them supreme command," were words of present operation, and the postponed interest had vested immediately; and that, therefore, the instrument could not be admitted to probate as a will. *Ib.*

W., in anticipation of a marriage with a deceased sister's husband, executed a deed whereby she transferred funds to trustees, in trust, in case she died in the lifetime of C., her intended husband, for such persons as she should by deed or will appoint. A marriage was, in fact, solemnised with C., which was of course invalid. W. subsequently executed a will, which contained a clause, "Now I hereby ratify and confirm the settlement, and in pursuance and exercise of the power reserved to me, and of all other powers enabling me, I do direct and appoint." W. survived C., and executed no other testamentary paper:—Held, that as W. intended to give her property in a certain manner, in whatever way her authority to do so was acquired, and as she had an absolute power over it, the will was valid, although the opportunity for exercising the special power never arose. *Southall* v. *Jones*, 1 Sw. & Tr. 298; 28 L. J., P. 112; 5 Jur. (N.S.) 369; 7 W. R. 381.

A. in 1828 made his will in contemplation of his intended marriage, providing for his intended wife and for the children of such marriage, and making his intended wife executrix:—Held, that the marriage which ensued, together with the birth of a child, operated as a total revocation of the will. *Cadywold, In goods of*, 1 Sw. & Tr. 34; 27 L. J., P. 36; 6 W. R. 375.

Incomplete Instruments.]—If it appears upon a will of personal estate that something more is intended to be done, and the party is not arrested by sickness or death, the usual declaration at the beginning that it is testator's will is not sufficient. *Coles* v. *Trecothick*, 9 Ves. 249; 7 R. R. 167.

A holograph paper found concealed in the bedstead where the testator slept, beginning, "Head of instructions to my solicitor, J. Lee, to add to my will the following codicil," and concluding, "This is my last will and testament," and then signed, containing various legacies to a large amount to persons described by the initial letters of their names, the testator having lived four months afterwards, when he died suddenly through accident, admitted to probate, there being evidence that the testator had spoken of some testamentary paper which would be found after his death, and of his having often during the four months talked of going to Mr. Lee, his solicitor, and having made two appointments to go there (with important papers), one of which he put off, and the other was prevented by accident. *Castle* v. *Torre*, 2 Moore, P. C. 133.

An unfinished testamentary paper is of no effect as a will, the party having lived eight days afterwards. *Griffin* v. *Griffin*, 4 Ves. 197, n.

The presumption raised against the intended finality of a paper by the existence of an attestation clause without actual attestation:—Held, to be sufficiently rebutted by the evidence, particularly that of the testator having been told, with reference to the will of another person, that actual attestation was not necessary, the court

observing upon the weight that was due, in such cases particularly, to the opinion of the judge below. *Stewart* v. *Stewart*, 2 Moore, P. C. 193.

Probate refused to a paper professing to dispose of a testator's real and personal property, and subjecting them both to the payment of his debts and funeral expenses, which was in the testator's handwriting, and sealed and signed by himself, but not attested, although an attestation clause was subjoined to it. The circumstance of a testator having subjected his real estate to the payment of his debts and funeral expenses, in a writing not attested, so as to pass real estate, furnishes a strong, though not a completely irresistible, presumption against his final intention that that writing should be his last will. *Douglass* v. *Smith*, 3 Knapp, 1.

—— **When disposing of Realty only.**]—When a will disposes of real estate only, directions in it for the payment of debts, for the sale of a portion of the estate and the payment of legacies out of the proceeds, do not give the court jurisdiction to grant probate. A probate of such a will cannot be granted to suit the convenience of the parties interested. *Bootle, In goods of*, 43 L. J., P. 41; L. R. 3 P. 177; 31 L. T. 273.

A will limited to the disposition of real property only is not entitled to probate, although it contains the appointment of an executor, and the real estate is given to such executor, with directions to convert the same into personal estate. *Barden, In goods of*, L. R. 1 P. 325.

A will disposing of realty only, but containing an appointment of an executor, is entitled to probate notwithstanding the renunciation of the executor. *Jordan, In goods of*, 37 L. J., P. 22; L. R. 1 P. 555; 16 W. R. 407.

—— **Equitable Conversion.**]—Where freehold property is, by the doctrine of equitable conversion, to be considered as personalty, it is liable to probate and legacy duty, and a will disposing of it is entitled to probate. *Gunn, In goods of*, 53 L. J., P. 107; 9 P. D. 242; 33 W. R. 169; 49 J. P. 72.

Probate of Copy.]—The copy of a will may be admitted to probate in order to aid the completion of the title of a testator's representative in the court of chancery, but the consent of those persons, if any, who may be interested in the event of an intestacy is required before a grant of probate can be made. *Entichnap, In goods of*, 35 L. T. 427.

—— **Of Translation Retranslated.**]—A British subject resident in France made his will and died there, having appointed A. and B., who were resident in France, and C. and D., who were resident in England, his executors. The will was translated into French, and the translation was registered by A. and B. in the proper court in Paris. A duly authenticated copy of the translation was then procured, and translated into English by a notary public in London, and that translation was proved by C. and D. in the prerogative court. *Bain* v. *Lescher*, 11 Sim. 397.

Where several Testamentary Papers.]—Effect of several testamentary papers. *Morrison* v. *Morrison*, 1 Jur. 671.

If a man leave several papers behind him, executed at different times, as to personal property, they shall all be taken as one will, and so construed that all may answer the testator's intention. *Stone* v. *Evans*, 2 Atk. 87.

When the ecclesiastical court has given probates of two instruments as constituting one will or testamentary document, the whole is to be construed as one will. Semble, that a testamentary instrument which is left incomplete by reason of the testator's sudden death, or other incapacity of making a will suddenly supervening, is not void in toto, but is good as far as it goes. *Armstrong* v. *Millar*, Longf. & T. 557; 4 Ir. Eq. R. 659.

Will written in Separate Parts.]—The testatrix wrote her will on a sheet of notepaper, one part on the first page and another part on the fourth page. It was duly executed by her at the foot or end of the first page, and there attested. It was proved that both parts were read to her as her will before she signed it with her mark; that she was a woman of some education and intelligence, and signed with a mark from physical debility. The court admitted the whole document to probate. *Efrench, In goods of*, 23 L. R., Ir. 433.

Fraud or Inadvertence—Rejection of Part.]—Where a portion of a will has been introduced through fraud or perhaps inadvertence, it may be rejected, and probate granted of the remainder if the two are severable. But where the rejection of part alters the sense of the remainder, quære, whether there is a valid will within the meaning of 7 Will. 4 & 1 Vict. c. 26, s. 9. *Rhodes* v. *Rhodes*, 51 L. J., P. C. 53; 7 App. Cas. 192; 46 L. T. 463; 30 W. R. 709—P. C.

Clause Inserted per incuriam.]—Where a clause is introduced in a testamentary paper per incuriam, and the deceased executes the paper, not having given any instructions for and being ignorant of the existence of such clause, it forms no part of his will, and probate will be granted of the remainder of the paper, omitting such clause. *Duane, In goods of*, 2 Sw. & Tr. 590; 31 L. J., P. 173; 8 Jur. (N.S.) 752; 6 L. T. 788.

Will Executed by Mistake.]—B. and C., sisters, living together, having agreed to make mutual wills, B. prepared the instruments. In both wills the bequests and objects of the sisters' testamentary bounty were the same, with this exception, that while B. gave a legacy of 19*l.* 19*s.* to a particular charity, C. gave a legacy of like amount to a different charity; and in both wills the same executors were appointed. On the death of B. it was found that each sister had by mistake executed the paper prepared for the other. The court was moved to grant probate of the instrument executed by B., but declined to treat it as her will, and rejected the application for probate. *Hunt, In goods of*, 44 L. J., P. 43; L. R. 3 P. 250; 33 L. T. 321; 23 W. R. 553. See also *Nosworthy, In goods of*, infra.

After Supposed Intestacy.]—A person died, as was supposed, intestate, and letters of administration were granted to his wife. She realised as much as she could of the estate, and left the country. A will was subsequently discovered, and a citation was issued calling on her to bring in the letters of administration, which she did not obey. The court admitted the will to probate, notwithstanding that the letters had not

been brought in, but directed the fact that the administration was outstanding to be recited on the probate. *Ingall* v. *Drayton*, 21 L. T. 367.

On Probate of Second Will Renounced.]—A testator left two wills, disposing of his property in different ways. The second will was executed the day before his death, when he was supposed to be of unsound mind. The universal legatee appointed by it renounced probate, but the court declined to grant probate of the first will until the next of kin, who were interested in the first will being established, had been cited. *Thomas, In goods of*, 31 L. T. 553.

Evidence to shew Testamentary Character.]—Evidence not admissible that devisor did not mean what he has expressed, but admissible to shew that a particular expression was not his will. *Powell* v. *Mouchett* and *Lichfield* v. *Mouchett*, 6 Madd. 216; 22 R. R. 276.

Parol evidence is admissible to shew that instrument is not the will of testator as to particular estate, but not to set up the disappointed intention of the testator. *Newburgh (Earl)* v. *Newburgh (Countess)*, 5 Madd. 364; 21 R. R. 310.

A will made on the eve of a journey abroad, under some words used in the will:—Held, a contingent will and avoided by the testator's return; and collateral proofs of his afterwards taking notice of the will cannot be admitted, unless some acts were done to republish the will. *Parson* v. *Lanoe*, Ambl. 559; 1 Ves. 189; 1 Wils. 243.

Where a testatrix made her will disposing of real and personal property, and signed and sealed it, and a clause of attestation in the common form was subjoined, but to which there was no subscription of witnesses, and where the will was found at her death wrapped in an envelope, on which was written, "I signed and sealed my will to have it ready to be witnessed the first opportunity I could get proper persons":—Held, that the instrument, appearing incomplete (something more having been intended), was not a good will as to the personal property. But parol evidence admitted as to the circumstances of the papers, and as to the testatrix's intention. *Walker* v. *Walker*, 1 Mer. 503.

Where something to suggest a doubt as to whether an instrument is intended to be testamentary appears on the face of it, extrinsic evidence as to the circumstances of its execution is admissible; but the burden of proof is not thereby thrown upon the persons propounding the instrument. *Whyte* v. *Pollock*, 7 App. Cas. 400; 47 L. T. 356; 47 J. P. 340—H. L. (Sc.)

Evidence of the declarations of an alleged testator as to the contents of a will not forthcoming, made after its execution, is not admissible to prove the contents. *Quick* v. *Quick*, 3 Sw. & Tr. 442; 33 L. J., P. 146; 10 Jur. (N.S.) 682; 10 L. T. 619; 12 W. R. 1119.

But the intention of a testator, that a duly executed paper writing should operate as a will, may be proved by parol evidence. *English, In goods of*, 3 Sw. & Tr. 586; 34 L. J., P. 5; 11 L. T. 612; 13 W. R. 503.

D. duly executed a will, wherein he named three persons executors; he subsequently instructed his attorney to draw out a codicil to this will, for the sole purpose of altering two bequests therein contained. The attorney, in drawing the codicil, intended to conclude with a paragraph, "and in all other respects I confirm my will," but by error wrote "revoke" instead of "confirm"; and in this state the codicil was executed:—Held, that there was not sufficient ambiguity on the face of the codicil to authorise the admission of evidence as to his intention. *Davy, In goods of*, 1 Sw. & Tr. 262; 29 L. J., P. 161; 5 Jur. (N.S.) 252.

A person duly executed a will and five codicils. The fourth codicil revoked the three preceding codicils, and the fifth confirmed all:—Held, that there was sufficient ambiguity on the papers to allow of the introduction of parol evidence; and as that clearly shewed that in executing the fifth codicil the intention of the testator was to confirm the will and fourth codicil only, probate was granted of the will, and the fourth and fifth codicils only. *Thomson, In goods of*, 35 L. J., P. 17; L. R. 1 P. 8; 11 Jur. (N.S.) 960; 13 L. T. 608; 14 W. R. 316.

The fifth codicil was wrongly dated. The court declined to alter the date on the face of the instrument, but directed probate to issue as having been executed on the 30th August, 1865, the correct date. *Ib.*

A testator having erased a clause in his will after the execution, asked a friend to make a fresh copy of it, omitting the erased clause. The copy was made, but the person who made it by mistake omitted several other clauses. The copy was duly executed, and the omissions were not discovered until after the testator's death, both wills having remained in his custody up to that time. The two wills were not inconsistent with each other, and the latter contained no express clause of revocation. Probate was granted of both documents upon parol evidence of the circumstances under which they were drawn up and executed as together containing the deceased's last will and testament. *Birks* v. *Birks*, 4 Sw. & Tr. 23; 34 L. J., P. 90; 13 L. T. 193; 13 W. R. 638.

A testatrix duly executed two inconsistent wills bearing the same date, and written on different sides of the same sheet of paper. Evidence was admitted to shew that the deceased signed one of them only as her will, and signed the other by mistake. The court granted probate of the paper signed by the testatrix, with the intention that it should operate as her will, and not of the other paper. *Nosworthy, In goods of*, 4 Sw. & Tr. 44; 34 L. J., P. 145; 11 Jur. (N.S.) 570.

—— **Onus of Proof.**]—The mere fact of proving a testamentary instrument to be a holograph does not shift the onus of proving the handwriting of the testator from the party propounding the instrument. *Anderson* v. *Anderson*, 6 W. R. 526—H. L.

The genuineness and authenticity of a document tendered for confirmation as the last will of a deceased person lies on the party who propounds it. As it purports to deprive the next of kin of a right which would otherwise belong to them, the tenderer or propounder of the document must shew, not only that it is genuine and authentic, but that it constitutes the last will of a free and capable testator. *Anderson* v. *Gill*, 3 Macq. H L. 180.

To shift the onus probandi, and cast it on those who dispute the genuineness and authenticity of the document, it is not enough simply to shew that it is a holograph instrument, meaning thereby an instrument all in one hand. It must be proved that the document is holograph of the deceased. *Ib.*

B. FOREIGN AND COLONIAL.

Generally.]—As personal property, wherever situate, follows the person, the court will grant probate of a document, though it purports to deal only with property out of its jurisdiction. *Winter, In goods of*, 30 L. J., P. 56.

But when it appears, on the papers before the court, that the only property of which a person died possessed is not in this country, the court will decline to grant administration of the goods of the deceased. *Fittock, In goods of*, 32 L. J., P. 157 ; 9 Jur. (N.S.) 311.

A will disposing only of property in a foreign country is not entitled to probate in this country. *Coode, In goods of*, 36 L. J., P. 129 ; L. R. 1 P. 449 ; 16 L. T. 746.

Will executed in Foreign Form by Foreigner domiciled in England.]—Lord Kingsdown's Act (24 & 25 Vict. c. 114) applies only to the wills of British subjects. Therefore the court refused to admit to probate the will of a foreigner domiciled in England at the time it was made, such will having been executed according to the law of Baden—which was the testator's domicil of origin—but not with the forms required by the laws of this country. *Keller, In goods of*, 61 L. J., P. 39 ; 65 L. T. 763.

Two Wills—English and Foreign—Independent Disposition—Different Executors—Probate granted to English Will only.]—The testator executed two wills—one according to the English form, appointing executors, and disposing solely of his property in this country, the other according to the Swiss form, by which no executors were appointed, which purported to be entirely independent of the English will, and which affected only property in Switzerland and Italy:—Held, on an affidavit being filed, that if the English executors intermeddled with the Swiss estate they would come into conflict with the Swiss court, which by the law of the country had the administration of the estate, and, on a copy of the Swiss will being filed, that probate might be granted of the English will alone. *De la Rue, In goods of*, 15 P. D. 185 ; 63 L. T. 253 ; 39 W. R. 64.

Executed Abroad—According to what Law.]—A will executed in a foreign country by a foreign subject in accordance with the requirements of English law is not entitled to probate in this country. *Von Buseck, In goods of*, 51 L. J., P. 9 ; 6 P. D. 211 ; 30 W. R. 140 ; 46 J. P. 104.

Before 7 Will. 4 & 1 Vict. c. 26, a will must be executed according to the law of the country where the testator was domiciled at the time of his death. *Whicker* v. *Hume*, 7 H. L. Cas. 124 ; 28 L. J., Ch. 396 ; 4 Jur. (N.S.) 933 ; 6 W. R. 813.

The grant of probate not appealed against, conclusively established that it was so executed. *Ib.*

When an executor is cited by next of kin to prove a will, and has appeared, he cannot try the question of the domicil of the testator before propounding the will. *Hawarden* v. *Dunlop*, 2 Sw. & Tr. 150 ; 4 L. T. 339.

Where a declaration propounding a will depends on due execution according to the law of a testator's domicil, it must contain a distinct averment that it was duly executed according to the law of the domicil. An averment that the will was admitted to probate by a competent court of the domicil is insufficient. *Isherwood* v. *Cheetham*, 2 Sw. & Tr. 607 ; 31 L. J., P. 99 ; 7 L. T. 250.

A will made by an alien, who was domiciled abroad at the time of making her will and of her death, and executed according to the forms required by English law, but not in manner required by the law of the country of her domicil, is not entitled to probate, though her domicil of origin was English. *Bloxam* v. *Favre*, 53 L. J., P. 26 ; 9 P. D. 130 ; 50 L. T. 766 ; 32 W. R. 673 —C. A. Affirming 47 J. P. 377.

Form of Grant of Foreign Will.]—R., domiciled in Mexico, made a will according to the law of Mexico. The proper court there decreed probate of a Spanish translation and not of the original:—Held, that the grant in this country must be made upon the production of an English translation of the Spanish copy, and not of the certified copy of the original. *Rule, In goods of*, 47 L. J., P. 32 ; 4 P. D. 76 ; 39 L. T. 123 ; 26 W. R. 357.

P., domiciled in Brazil, made a will according to the law of that country. The will was written in Portuguese, and probate granted of such will as written in that language. The court refused to grant probate of an English translation of the will made in Brazil, and certified in that country by the British consul. The only document on which it can act is the document which was before the foreign court, and which must be re-translated after it has been brought into the registry here. *Rule, In goods of* (supra), distinguished. *Petty, In goods of*, 41 L. T. 529.

Foreign Will — Original not produced—Notarial Copy admitted to Proof.]—The testator left the following testamentary papers : (1) Will, dated the 3rd June, 1875, relating to property in Argentina, and made in the form there prevailing ; (2) A settlement of testamentary disposition, bearing date the 28th June, 1875, and comprising property in Scotland ; (3) Will dated the 30th March, 1882, with two codicils dated respectively the 16th April, 1884, and the 7th July, 1888, relating to property in England. The testator left an only child B. whom he appointed sole executor of the Argentine and Scotch documents ; but H. and F. were, together with the said B., appointed executors of the English documents. The Argentine will was executed in the way usual in that country, i.e. before a notary public. The original was not forthcoming, but an authenticated copy was produced, and probate was sought of the said copy, together with the other testamentary papers. The court accordingly made a general grant to his son B. of all the documents, and a grant to his co-executors limited to the three English documents. *Bridges, In goods of*, 65 L. T. 764.

The will of a British subject domiciled abroad at the time of his death had been proved in the French courts and deposited with a notary, who by the law of France was forbidden to allow it to be removed from his custody :—Held, that probate might be granted of a copy of the original will properly proved limited to such time as might elapse before the original itself should be brought in. *Lemmé, In goods of*, 61 L. J., P. 123 ; [1892] P. 89 ; 66 L. T. 592.

British Subject—Domiciled Abroad.]—A testator, by birth a British subject, but domiciled in

Spain at his death, executed a will in England, and subsequently several codicils valid by the law of Spain. Lastly he executed a paper in England which confirmed the English will in whatever it did not clash or interfere with the contents of the codicil, which was to be considered as his last and deliberate will:—Held, that the Spanish codicils were not revoked by the last-mentioned paper, but as forming part of the will which did not clash with such paper, were confirmed by it. *De la Saussaye, In goods of*, 42 L. J., P. 47; L. R. 3 P. 42; 28 L. T. 368; 21 W. R. 549.

An Englishwoman was married to a Frenchman, and resided with him in France until his death. Some time after that event she gave up her house in that country, and proceeded to a seaport, where she embarked, with her children and effects, on board an English steamboat, with an intention of permanently residing in England. Before the vessel left the harbour she was seized with illness, and was carried on shore, and died there:—Held, that her domicil was French, and that a will made in the English form could not be admitted to probate. *Raffenel, In goods of*, 3 Sw. & Tr. 49; 32 L. J., P. 203; 9 Jur. (N.S.) 386; 8 L. T. 211; 11 W. R. 549.

A. throughout his life. and at his death, was domiciled in Portugal, where he died a bachelor, leaving a natural son, B. B. instituted a suit of filiation and inheritance in the court of first instance at Faro, and obtained a decree, by which he was declared entitled to the movable and immovable property of A. This decree was ultimately confirmed by the supreme court at Lisbon:—Held, that as A. was domiciled in Portugal, the succession to his personal estate, whether he died testate or intestate, must be determined by the law of that country; and that as the proper courts in Portugal had already decided to whom the inheritance belonged, the probate court was bound by that decision. *Doglioni* v. *Crispin*, 35 L. J., P. 129; L. R. 1 H. L. 301; 15 L. T. 44. Affirming 11 W. R. 850.

British Subject married to Naturalised Frenchman—Will recognised as valid by French Law—Conflict of Laws.]—By s. 10, sub-s. 1, of the Naturalisation Act, 1870, the domicil of a married woman follows that of her husband, but by French law naturalisation is purely personal. Where a testatrix, a British subject married to a naturalised Frenchman, made a will, according to the requirements of English law, the court granted probate of the document, being satisfied that the testatrix by French law was a British subject, and that the French courts would give effect to the will so far as it dealt with property in France. *Brown-Séquard, In goods of*, 6 R. 565; 70 L. T. 811.

—— **Wills separately disposing of English and Colonial Property.**]—A testator died leaving two wills—one limited to property in England, the other to property in Tasmania, and he appointed different executors in each. The court granted probate of both papers as together constituting his will, to the executors named in the English will. *Harris, In goods of*, 39 L. J., P. 48; L. R. 2 P. 83; 22 L. T. 630; 18 W. R. 901.

Three duly-executed testamentary papers bore the same date, two of which purported to dispose of the residue. It was proved that the first was intended to apply only to property in Canada, and that the two last were intended to apply only to property in England. The three papers were admitted to probate as together containing the testator's last will and testament. *Nickalls, In goods of*, 4 Sw. & Tr. 40; 34 L. J., P. 103; 13 W. R. 1047.

Where a testator left two wills, one disposing of his property in Australia and the other of his property in England, on the same trusts, the court directed an affidavit of the contents of the Australian will to be attached to the probate. *Cole, In goods of*, 20 L. T. 894.

Where a testator at the time of his decease was possessed of property both in England and South Africa, and had executed two wills, by one of which he purported to dispose of his English property only, and by the other of that which he possessed in South Africa only, and the two wills were specifically stated to be independent of each other, so that neither will should have any effect on any property disposed of by the other, and different executors were appointed for each will, the court granted probate of the English will only, and further held that it was unnecessary that the South African will should be brought into the registry, but ordered an affidavit to be filed, exhibiting a copy of such will, and that a statement should be inserted in the probate to the effect that such affidavit had been filed. *Astor, In goods of* (1 P. D. 150), followed. *Calloway, In goods of*, 59 L. J., P. 73; 15 P. D. 147; 63 L. T. 227; 38 W. R. 528.

Naturalized.]—An Italian by birth obtained in 1852 letters of naturalisation as a British subject, and in 1871 he executed in England his will according to the laws prescribed by the English law. The letters of naturalisation excepted from the privileges conferred on the testator "any rights and capacities of a natural-born subject out of and beyond the dominions of the British crown and the limits thereof"; and he died. in 1876, domiciled in Italy:—Held, that the will was entitled to probate under 24 & 25 Vict. c. 114, s. 2. *Gally, In goods of*, 45 L. J., P. 107; 1 P. D. 438; 24 W. R. 1018.

A will made according to the forms of English law by an alien who, though her domicil of origin was English, was domiciled abroad at the time of making her will and of her death, is not entitled to probate in this country. In determining what is the valid will of an alien, the general principles of law prior to the passing of the Naturalisation Act, 1870, are still applicable. *Bloxam* v. *Favre*, 52 L. J., P. 42; 8 P. D. 101; 31 W. R. 610; 47 J. P. 377.

—— **Dying Abroad.**]—A Frenchman by birth but naturalised in England, executed at Paris a will and codicil in the English form relating to his property in England only, and a holograph will, signed and dated, disposing of his property in France, but referring directly to the English will. He died at Paris:—Held, that if it could be shewn that the will and codicil in the English form were made in a form permitted by the law of France in the case of British subjects resident in France, they could be admitted to probate under 24 & 25 Vict. c. 114, s. 1, as valid according to the law of the place where made. *Lacroix, In goods of*, 46 L. J., P. 40; 2 P. D. 94.

When a British subject dies abroad, after the passing of this act, leaving a will executed in England, in accordance with the law of England, upon motion for probate it is not necessary to consider whether he had or had not acquired a foreign

domicil. *Rippon, In goods of*, 3 Sw. & Tr. 177 ; 32 L. J., P. 141 ; 9 L. T. 117.

A testator made a will in India, and added a codicil at Florence. They were not witnessed, and were invalid both by the law of England and Italy. He wrote on the back of the will, at Genoa, a second codicil, which was also not witnessed, but which was well executed, though not valid, according to the law of Italy :—Held, that in determining the question whether a paper is valid as a testamentary instrument under 24 & 25 Vict. c. 114, s. 1, the court can have regard to the law of one country only at a time. It therefore declined to regard so much of the Italian law as held the second codicil well executed, and then, recurring to the English law, to apply the principle of confirmation, and refused probate of all three papers. *Pechell* v. *Hilderley*, 38 L. J., P. 66 ; L. R. 1 P. 673 ; 20 L. T. 1014 ; 17 W. R. 865.

A., a British-born subject, left England many years before death, resided in Paris for the last fifteen years of her life, and died there ; assumed for many years an Italian name, and described herself and was described in legal documents as widow of an Italian. There was no evidence of the fact of marriage ; and the statements made by the deceased in respect to the marriage were contradictory. She had real property in India, the bulk of her personalty in England, and made her will in the English form, disposing of her property, with the exception of four small legacies, amongst English persons :—Held, that by the law of nations the deceased was domiciled in France, but that, as she had not been naturalized, nor obtained an authorised domicil in and as required by the law of France, she might by the French law make a will in the English form, and that such will was entitled to probate in this country. *Bremer* v. *Freeman*, 1 Deane, Ecc. Rep. 192.

A testator made a will in England, appointing A. and B. his executors. He afterwards made a codicil in India, in which he desired that his affairs might not be placed in the hands of the administrator-general, but might be managed entirely by C. and D., whom he appointed his executors in that country :—Held, that C. and D. were not entitled to probate in England. *Wallich, In goods of*, 3 Sw. & Tr. 423 ; 33 L. J., P. 87 ; 9 L. T. 809.

An application for probate of a testamentary instrument executed by a person when domiciled abroad should be supported by evidence that, according to the law of the domicil, such instrument is a good will. *Stoddart, In goods of*, 2 Sw. & Tr. 356 ; 31 L. J., P. 195.

A holograph will, confirmed by the tribunals of France, in which country a testatrix was legally domiciled, will be admitted to probate, but the directions of such tribunals will be acted upon only so far as they are in accordance with, or not contrary to, the practice of the court. *D'Orleans (Duchesse), In goods of*, 1 Sw. & Tr. 253 ; 28 L. J., P. 129 ; 5 Jur. (N.S.) 104 ; 7 W. R. 269.

A. died beyond the sea, and made a nuncupative will. B. took administration here, and brought his bill for a discovery of the supposed intestate's personal estate. The defendant pleaded the will, and that he was executor, and that A. left no assets but what were beyond seas. Plea allowed. *Jauncy* v. *Sealey*, 1 Vern. 397.

Scotch Will.]—If a will has been formally recognised and acted upon by the court of competent jurisdiction in the country of the testator's domicil at the time of his death, and remains unquestioned in that country, the court of probate will not allow the validity of such will to be litigated here. *Miller* v. *James*, 42 L. J., P. 21 ; L. R. 3 P. 4 ; 27 L. T. 862 ; 21 W. R. 272.

A testator executed a trust disposition and settlement, valid according to the law of Scotland, and applicable to the whole heritable and movable estate which should belong to him at time of his death. He subsequently executed a will, by which he disposed of all his real and personal estate, whether in Scotland or in England. By the law of Scotland, the English will was ineffectual as a conveyance of the Scotch heritage, and did not revoke the previous settlement, and the two documents together formed the complete testamentary disposition of the testator. His domicil was English, but he had a freehold estate in Scotland. The court granted probate of the will and trust disposition as together containing the will of the deceased. *Donaldson, In goods of*, 42 L. J., P. 19 ; L. R. 3 P. 45 ; 28 L. T. 477 ; 21 W. R. 549.

A domiciled Scotchman made a will, and afterwards married in Scotland. He subsequently left Scotland, and died domiciled in England :—Held, that, under Lord Kingsdown's Act, the will was not revoked by his change of domicil, and was entitled to probate. *Reid, In goods of*, 35 L. J., P. 43 ; L. R. 1 P. 74 ; 12 Jur. (N.S.) 300 ; 13 L. T. 680 ; 14 W. R. 316.

B. and C., domiciled Scotch people, in contemplation of their marriage entered into a contract, or a settlement, in 1823, under which they had certain powers of appointment. On the fly-sheet of the settlement appeared what described itself as a codicil of September, 1832, signed by B. and C., and attested by two witnesses. Below this, of the date of 1st January, 1857, was a holograph of Alexander Stoddart, and signed by him, which purported to be testamentary. In 1855, the deceased acquired an English domicil, which he retained till death. The court refused to grant letters of administration with the settlement, and two writings annexed, as together containing the last will and codicil thereto of the deceased. *Stoddart, In goods of*, 2 Sw. & Tr. 356 ; 31 L. J., P. 195.

In the repositories of the deceased, who left no other testamentary instrument, was found a holograph writing, signed and dated and complete in its testamentary provisions ; but headed "Notes of intended settlement by" the deceased. The proof allowed threw no light on the intentions of the deceased :—Held, affirming the decision of the court below, that the document was the last will and settlement of the deceased. *Whyte* v. *Pollock*, 7 App. Cas. 400 ; 47 L. T. 356 ; 47 J. P. 340—H. L. (Sc.)

Per Lord Watson : A mere ambiguity occurring in the descriptive title written by the testator cannot qualify the terms or destroy the validity of the document which it professes to describe, when the legal character and effect of the document taken by itself are not doubtful. Such an ambiguity will justify inquiry ; but should the parties lead no proof, or should the proof adduced by them be inconclusive, the document must receive effect according to its tenor and substance. *Ib.*

—— **Invalid according to English Law—Leaseholds in England.**]—An Englishman resident in Scotland bequeathed his whole means

and estate to a trustee to pay certain pecuniary legacies and all the rest of his means and estate to be divided equally among certain of his godchildren. The execution of the will was valid according to the law of Scotland, but invalid according to English law. The testator possessed leasehold property in England:—Held, that the English leaseholds passed under the will by virtue of the statute 24 & 25 Vict. c. 114, s. 2. *Watson, In re, Carlton* v. *Carlton*, 35 W. R. 711.

Dutch Mutual Wills.]—By the Roman-Dutch law, the mutual will of a husband and wife, notwithstanding its forms, is to be read as the separate will of each. *Denyssen* v. *Mostert*, 8 Moore, P. C. (N.S.) 502; 41 L. J., P. C. 41; L. R. 4 P. C. 236; 20 W. R. 1017.

The dispositions of each spouse are to be treated as applicable to his or her half of the joint property. *Ib.*

Each is at liberty to revoke his or her part of the will during the co-testator's lifetime, with or without communication with the co-testator, and after the co-testator's death; but when a spouse who dies first has bequeathed any benefit in favour of the survivor, and has afterwards limited the disposal of the property in general after the death of such survivor, then such survivor, if he or she accepts such benefits, may not afterwards dispose of his or her share in any manner at variance with the will of the deceased spouse. *Ib.*

Executor's Affirmation not Oath.]—A., a native of and domiciled in Germany, made and duly executed his last will and testament, with ten codicils thereto, according to German law, and thereof appointed B., his nephew, executor. The will was proved in the court of Gera, in Germany. It was requisite that probate of it should also be obtained in this court, and the necessary papers for the purpose, with due instructions, were forwarded to B., the executor, in Germany. The papers were returned by B., accompanied by an affirmation which was made by him before the British vice-consul at Breslau, but it contained no statement that he had a conscientious objection to the taking of an oath, so as to bring him within the exemption created by the Common Law Procedure Act, 1854, s. 20. The court held that the affirmation was defective, and refused to receive the papers. *Henry LXIX. of Reuss-Kostritz, In goods of*, 49 L. J., P. 67; 41 L. T. 803; 28 W. R. 398.

Affidavit, &c., of Execution.]—A will made in Queensland, and attested by witnesses resident there, was proved and lodged in the Supreme Court of New South Wales at Sydney. The executor having applied for probate in Ireland, upon the evidence of one of the attesting witnesses of its due execution (to whom a copy only of the will had been exhibited), and upon an affidavit of a solicitor and officer of the court at Sydney that they had inspected the will there, and had set out a true copy of it in the affidavit, and proving the handwriting of the signatures of the testator and attesting witnesses, there being no suspicious circumstances attached to the will:—Held, that probate should be granted, it being assumed, in the absence of evidence to the contrary, that Queensland was outside the jurisdiction of the courts of New South Wales. *Wilson* v. *Collum*, 9 L. R., Ir. 150—C. A.

C. By Married Woman.

Testamentary Capacity.]—*See* ante, col. 217.

Generally.]—The 24th and 27th sections of the Wills Act (7 Will. 4 & 1 Vict. c. 26) apply to the wills of married women in the same manner as those of other persons. *Noble* v. *Phelps* or *Willock*, 40 L. J., P. 60; L. R. 2 P. 276; 25 L. T. 65; 19 W. R. 1115.

Power in feme covert to dispose by writing purporting to be a will does not give it authority of one in ecclesiastical court, and husband must be examined to his consent before it can be proved. *Henley* v. *Philips*, 2 Atk. 48.

Probate of the will of a married woman, which is now necessary, though formerly otherwise, limited to her power by the assent of her husband, with respect to any beneficial interest; not to her right as executrix of another person, to make an executor, and continue the representation. *Stevens* v. *Bagwell*, 15 Ves. 139.

General or Limited Grant.]—The limitation inserted before the Married Women's Property Act, 1882, in the probate of the will of a married woman, ought no longer to be required, and the court will henceforth make a general grant. *Price, In goods of*, 56 L. J., P. 72; 12 P. D. 137; 57 L. T. 497; 35 W. R. 596; 51 J. P. 615.

The court refused to limit a grant of probate of a married woman's will, even where such will was made, and the person who made it had died before the Married Women's Property Act, 1882, and when the will and codicils were executed by virtue of a power of appointment. *Homfray, In goods of*, 57 L. T. 498, n.; 51 J. P. 615.

Since the Married Women's Property Act, 1882, probate of the will of a married woman appointing executors, though the will is made in exercise of a power, and contains no disposition of property to which she was entitled outside the power, will be granted in the general form, and not, as heretofore, in a limited form. *Ievers, In Goods of*, 13 L. R., Ir. 1.

Granting Probate without prejudicing Questions as to Property.]—A woman, when under coverture, executed a will in which, having disposed of property to which she was entitled for her separate use, she bequeathed the residue of the real and personal estate which she should possess or have power to dispose of at the time of her death to her niece. She survived her husband, who left to her considerable personal property, but she did not re-execute her will:—Held, that although the court may be of opinion that the language of the will of a woman made during coverture, taking it to speak and take effect at the time of her death, is sufficiently large to include the whole property, it will not grant a general probate, but limit it in such a way as to leave the whole question as to the property affected by such will open to a court of equity, without concluding or prejudicing the rights of any party. *Ib.*

By a marriage settlement, power was reserved to the wife to appoint all her settled property either by deed, revocable or irrevocable, or by will. She executed a will giving a life interest in all the property to her husband; but she afterwards executed a deed irrevocably appointing all the property to her husband, subject to her own life interest. The court granted probate of the will, leaving the effect of the deed to be determined

by the court of construction. *Parkinson* v. *Townsend*, 44 L. J., P. 32; 33 L. T. 232; 23 W. R. 636. *See next Case.*

—— **Of what Property consists.**]—When the will of a married woman is tendered for probate on the ground that she had separate property, and the probate is contested, if the court is satisfied that there is separate property, it has power to grant probate of all such property as the testatrix had power to dispose of without deciding what that property is. But it is generally the duty of the court, so far as the evidence and pleadings enable it to do so, to decide judicially of what such property consists. *Tharp, In goods of, Tharp* v. *McDonald*, 3 P. D. 76; 38 L. T. 867; 27 W. R. 770—C. A.

Disposing of Realty only—Appointment of Executors.]—A married woman had a power of appointment over certain real estate under a deed which provided that, in default of her making any appointment under such power, the estate should be vested in her for her sole and separate use; she made a will whereby she disposed of the whole of such real estate and also appointed executors, but the will did not purport to dispose of any personal estate, and after her death her husband obtained a grant of administration to her personal estate, on the ground that she had died intestate as to personalty:—Held, that the testatrix must be regarded as disposing by will of real estate of which she was seised, and that as her will appointed executors, it was entitled to probate; but having regard to the fact that a grant of administration to her personal estate was already in existence, the will could neither be admitted to probate nor a grant of administration with the will annexed made in favour of one of the devisees, until the existing grant was revoked. *Hornbuckle, In goods of*, 59 L. J., P. 78; 15 P. D. 149; 63 L. T. 464; 39 W. R. 80.

In the case of a married woman executing a will under a power, the appointment of executors is not sufficient to entitle the instrument to probate, if it disposes only of real estate. *Tomlinson, In goods of*, 50 L. J., P. 74; 6 P. D. 209; 46 L. T. 484; 30 W. R. 61; 46 J. P. 73.

The will of a married woman dealing only with realty, but appointing executors, is entitled to probate, where a portion of the estate consists of personalty vested in her by virtue of the Married Women's Property Act, 1882. *Cubbon*, or *Cubban, In Goods of*, 55 L. J., P. 77; 11 P. D. 169; 57 L. T. 87; 35 W. R. 200; 50 J. P. 744.

Arrears of Rent—Personalty.]—A married woman having a power of appointment over real property executed the power in favour of herself. She afterwards made her will, by which she directed (amongst other things) that a portion of the property should be sold to pay legacies, and to erect a memorial window. She also appointed an executor. There were arrears of rent due at the time of her death and subsequently:—Held, that as she possessed the property as separate estate, and had appointed an executor and directed him to pay the legacies, &c., and as the arrears of rent were part of her personal estate, the will was entitled to probate. *Brownrigg* v. *Pike*, 51 L. J., P. 29; 7 P. D. 61; 46 L. T. 821; 30 W. R. 567; 46 J. P. 360.

Under Power of Appointment.]—By a marriage settlement, property was vested in trustees, as to a portion for A., if she survived her then intended husband; and in case she died in his lifetime, for such person or persons, and for such intents and purposes as she, notwithstanding her coverture, should by will appoint. In the lifetime of her husband, and in express exercise of the power given to her, as of every other power enabling her in that behalf, she duly executed a will. She survived her husband, and died without republishing it:—Held, that the court could not, on motion, make a general grant of probate of such a will. *Wollaston, In goods of*, 32 L. J., P. 171; 9 Jur. (N.S.) 727; 12 W. R. 18.

A married woman who clearly had power under a settlement to dispose of some part of her property, executed a will purporting to dispose of the whole of it. The court, without deciding whether or not it was a valid disposition of the whole of the property, made a grant of probate, limited to such property as she had power to dispose of. *De Pradel, In goods of*, 37 L. J., P. 2; 1 L. R., P. 454; 17 L. T. 220.

A feme covert, having made her will under a power during coverture, survived her husband, and subsequently died a widow without having republished it:—The court granted a general administration, with the will annexed, to her executor, on the consent of all the next of kin except one, who was resident in New Zealand, but required the administrator to give justifying security. *Thorild, In goods of*, 16 L. T. 853.

A. died, leaving a will, whereby he appointed his wife sole executrix and universal legatee. She proved his will, and afterwards married B., and during her coverture made a will in execution of a power vested in her, and appointed B. sole executor. Upon her death, B. took limited probate of her will, and also administration of the rest of her effects:—Held, that B., as representing the whole of his wife's personal estate, was entitled to administration of the unadministered effects of A. *Martin, In goods of*, 3 Sw. & Tr. 1; 32 L. J., P. 5; 8 Jur. (N.S.) 1134; 7 L. T. 756; 11 W. R. 191.

Where a married woman in execution of a power devises real estate only, and names executors "of this my will," she, if she survives her husband, without altering, revoking, or republishing such will, is intestate as regards any property not specifically mentioned therein, and such executors taking nothing jure representationis. *Parkin, In goods of*, 1 Sw. & Tr. 465; 29 L. J., P. 47; 5 Jur. (N.S.) 1366.

—— **When Right to Appoint Doubtful.**]—When the court is satisfied that a bonâ fide question as to the existence of a power enabling a married woman to make a will is intended to or may be raised, it will grant a limited probate of such will, in order to enable the question as to the existence of the power to be determined by the court of chancery. *Paglar* v. *Tongue*, L. R. 1 P. 158.

—— **Subsequent Will not reciting Power.**]—A married woman executed a will in pursuance of a power therein recited, leaving all the property comprised in the power to her son. By a later will containing no recital of a power and no words of a revocation, she left all her property to her son. She was possessed of property other than that appointed by the first will, on which the second will could operate. Both the wills were included in the probate, as together

containing her last will. *Fenwick, In goods of*, 36 L. J., P. 54; L. R. 1 P. 319; 16 L. T. 124.

—— **Subsequent Will as to Property not included in Power.**]—A married woman, by virtue of powers given to her, which were particularly set out, executed a will in which she appointed three persons executors. She afterwards, by a second testamentary paper, disposed of other property which had been left to her for her separate use. In this she nominated one of the above persons sole executor. Probate was granted of both papers, as together containing her will, to the three executors named in the paper of earlier date. *Morgan, In goods of*, 36 L. J., P. 64; L. R. 1 P. 323; 16 L. T. 181.

Under Protection Orders.]—A wife, having been deserted by her husband, obtained a protection order by reason of his desertion. On her death, in the life of her husband, intestate, the court decreed letters of administration, limited to such personal property as she had acquired or become possessed of since the desertion, without specifying of what that property consisted, to be granted to one of her next of kin. *Worman, In goods of*, 1 Sw. & Tr. 513; 29 L. J., P. 164; 5 Jur. (N.S.) 687.

A married woman obtained a protection order for her property on the 12th of April, 1861; she made a will on the 19th, and died on the 24th. The order was not entered with the registrar of the county court till the 24th, being more than ten days after it was obtained:—Held, that the requirements of the 20 & 21 Vict. c. 85, s. 21, as to the entry of the order with the registrar was directory and not imperative, and, on affidavits from the executors that they were ignorant of the husband's place of abode, probate was granted, limited to the property acquired since the date of desertion. *Faraday, In goods of*, 2 Sw. & Tr. 369; 31 L. J., P. 7; 7 Jur. (N.S.) 252.

In order to obtain administration of the effects of a married woman who died intestate, after obtaining a protection order from the court of divorce, it is not necessary that the husband should be cited. *Brighton, In goods of*, 34 L. J., P. 55.

A woman was deserted by her husband in 1843. She subsequently acquired property by her own industry. In 1851 she made a will, disposing of her property, but did not obtain a protection order until 1858. The order, however, stated that it was "to protect all earnings and property acquired since 22nd of July, 1843, the commencement of the desertion":—Held, that the will was entitled to probate. *Elliott, In goods of*, 40 L. J., P. 76; 2 L. R., P. 247; 25 L. T. 203; 19 W. R. 1072.

Wife of Convict.]—A wife of a convicted felon is a feme sole as to her testamentary capacity, and a will made by her whilst her husband is undergoing his sentence is entitled to probate. *Coward, In goods of*, 4 Sw. & Tr. 46; 34 L. J., P. 120; 11 Jur. (N.S.) 569; 13 L. T. 210.

Assent of Husband—Power to revoke.]—A married woman made a will with the assent of her husband, and after her death he assented to the will:—Held, that he could not afterwards revoke his assent, and that the will was entitled to probate. The form of the judgment and probate determined. *Chappell* v. *Charlton*, 56 L. J., P. 73: 57 L. T. 496; 51 J. P. 215.

Where Will cannot be found.]—When a wife has executed a will during coverture with the consent of her husband, and the will is not forthcoming at her death, and no copy can be found, the court will make a grant of probate of the draft of the will limited until the original will, or an authentic copy of the will, is brought into the registry, and limited also to all such personal estate and effects as she had power and a right to dispose of, and has in and by the draft appointed and disposed of. *Trippleton, In goods of*, 35 L. T. 909.

Deed of non-Community of Property—Colonial Law.]—A married woman and her husband had their domicil at the Cape of Good Hope, and, in accordance with the laws of that colony, previously to their marriage, they executed a deed of non-community of property, and such deed was duly registered. The court granted administration to the brother and next of kin of the wife, to the exclusion and without the citation of the husband. *Probart, In goods of*, 36 L. J., P. 71; 16 L. T. 298; 15 W. R. 798.

D. By Deaf and Dumb Persons.

Where a testator, who was deaf and dumb, made his will by communicating his testamentary instructions to an acquaintance by signs and motions, who prepared a will in conformity with such instructions, which was afterwards duly executed by the testator, the court required an affidavit from the drawer of the will, stating the nature of the signs and motions by which the instructions were communicated to him, and ultimately refused to grant probate on motion. *Owston, In goods of*, 2 Sw. & Tr. 461; 31 L. J., P. 177; 6 L. T. 368; 10 W. R. 410.

And where probate was sought of the will of a testator who was deaf, dumb and illiterate, the court required evidence on affidavit of the signs by which the testator had signified that he understood and approved of the provisions of the will, before making the grant. *Geale, In goods of*, 3 Sw. & Tr. 430; 33 L. J., P. 125; 12 W. R. 1027.

E. By Persons Dying Abroad.

(*See ante*, col. 252.)

F. By Soldiers and Sailors.

Soldiers.]—Probate of a will made by a soldier in actual service, signed but not attested, will not be granted unless the signature is proved to be in his handwriting by the affidavits of two disinterested persons. *Neville, In goods of*, 4 Sw. & Tr. 218; 28 L. J., P. 52.

It is not sufficient that the affidavits state that the whole paper-writing is in the handwriting of the deceased, but they should in terms state that the signature is in his handwriting. *Ib.*

The form for an affidavit of handwriting given in the rules should be strictly followed. *Ib.*

The rule of court, which directs that the registrars are not to allow probate of the will, or administration with the will annexed, of any obviously illiterate person to issue, unless they have previously satisfied themselves that the will was read over to the deceased before the execution, or that the deceased had at such time knowledge of its contents, applies to a will made by a soldier in actual military service and executed

by mark. *Hackett, In goods of*, 4 Sw. & Tr. 220 ; 28 L. J., P. 42.

Sailors.]—A general grant of administration of the effects of a seaman in the navy, who died a bachelor, bastard and intestate, having wages or prize-money due to him, will not be granted to the solicitor of the treasury for the use of the crown, unless the provisions of the 11 Geo. 4 & 1 Will. 4, c. 20, s. 56, have been complied with, those provisions, although they do not in any terms affect the crown, being binding on the court. *Beran, In goods of*, 35 L. J., P. 25 ; L. R. 1 P. 1 ; 11 Jur. (N.S.) 982 ; 13 L. T. 608 ; 14 W. R. 147.

Surgeon in Navy—Letter written before sailing.]—A staff-surgeon in the navy wrote a letter, some sentences of which were testamentary, on board H.M.S. "Serpent" at Devonport. The ship was lost at sea a few days after :—Held, that the letter was entitled to probate as the will of a "seaman being at sea." *Rae, In goods of*, 27 L. R., Ir. 116.

Advertisements.]—The court refused to dispense with the usual advertisement in newspapers before presuming the death of a sailor who had been last heard of in 1859, as then about to sail from New Zealand to China in a barque now believed to have been lost. *Atkinson, In goods of*, Ir. R. 7 Eq. 219. *See also Cases* ante, col. 216.

G. Felo de se.

A party, after having executed her will, committed suicide by taking poison, and a coroner's jury returned a verdict of felo de se :—Held, that the will was entitled to probate. *Bailey, In goods of*, 2 Sw. & Tr. 156 ; 31 L. J., P. 178 ; 7 Jur. (N.S.) 712 ; 4 L. T. 477.

H. Where there are Several Instruments.

1. Probate Granted to more than one Will.

No Executors appointed in later one.]—A testator left two testamentary papers, in the earlier of which was an appointment of executors. In the later one he disposed of his whole property in a manner at variance with the dispositions made in the earlier paper, but no executors were appointed, nor was the previous appointment revoked. The court included both papers in the probate. *Lewis, In goods of*, 25 L. T. 510 ; 19 W. R. 1038.

A person left two testamentary papers, and the bequests of the second were inconsistent with those of the first. The second paper, however, did not appoint any executors, and did not revoke the appointment contained in the first. The court granted probate of both papers as together constituting his will. *Griffith, In goods of*, L. R. 2 P. 457 ; 26 L. T. 780 ; 20 W. R. 495.

A testator, by a will fully disposing of his property, bequeathed various legacies, appointed executors, and named a residuary legatee ; and afterwards made another will, beginning "This is my last will," repeating some of the legacies in the same words, altering others, and making additional ones, but naming no executor or residuary legatee :—Held, that the two documents were to be taken together as his last will and testament. *Leslie* v. *Leslie*, Ir. R. 6 Eq. 332.

Identity of Testamentary Papers.]—A testatrix left a will revoking previous wills, and in which, after reciting that by two deeds of certain dates made in exercise of a power under her marriage settlement she had settled certain properties in a certain way, she confirmed the deeds. No such deeds existed, but two testamentary papers similar in dates and substance were found. The court held, that the proof of identity was sufficient, and incorporated the two papers in the probate. *Hastings, In goods of*, 26 L. T. 715 ; 20 W. R. 616.

In Form of Deeds.]—A person executed on the same day three indentures, described as deeds of gift, by which he assigned to trustees all his property for the benefit of his three children :—Held, that, as it appeared from the contents of such documents that they were to take effect only on the death of the deceased, they ought to be admitted to probate as together containing the will of the deceased. *Morgan, In goods of*, 35 L. J., P. 98 ; L. R. 1 P. 214 ; 14 L. T. 894 : 14 W. R. 1022. S. P., *Robson, In re, Emly* v. *Davidson*, ante, col. 242.

Under Power of Appointment.]—G., a widow, by a will dated 25th February, 1862, bequeathed certain specified property, over which she had a power of appointment under her marriage settlement, between her four sons, R., L., W. and G., and made R. sole executor. By another testamentary paper, dated 28th October, 1862, she left all the property of which she might die possessed between her three sons, L., W. and G., and appointed W. sole executor :—Held, that both papers ought to be included in the probate. *Graham, In goods of*, 3 Sw. & Tr. 69 ; 32 L. J., P. 113 ; 8 L. T. 610 ; 11 W. R. 638.

A married woman having a power to appoint by will under her marriage settlement, executed on the same day two instruments, the first purporting to be a deed of gift to her sister of all her property ; the second, after reciting the contents of the first, expressing a wish that her sister should pay certain bequests out of the property. These two papers were handed by the deceased after their execution, inclosed in an envelope, to the sister, in whose custody they remained till her death. It was shewn that the deceased had afterwards spoken of the papers as constituting her will, and that the property referred to in them had remained under her control up to her death :—Held, that the papers were testamentary, and entitled to be proved. *Webb, In goods of*, 3 Sw. & Tr. 482 ; 33 L. J., P. 182 ; 10 Jur. (N.S.) 709 ; 11 L. T. 277.

Two Documents separately Executed].—A writing, comprising two parts, on different pages, separately signed and attested, but executed on the same day and occasion, the first part appointing executors, and commencing, "I further will," and disposing of further property, admitted to probate as one entire will. *Bonner, In goods of*, 21 L. R., Ir. 339.

When First revoked by Second Will.]—A testatrix made a will on the 9th February, 1884, which she declared to be her last will, revoking all previous wills, and appointing a residuary

legatee and an executor. On 19th February, 1884, she made another will, which commenced, "I declare this to be my last will," and bequeathing part of her property in legacies, and appointing another executor:—Held, that the latter will did not revoke the former, and both were admitted to probate. *O'Connor, In goods of*, 13 L. R., Ir. 406.

A married woman, in exercise of a power to appoint real estate (subject to a trust for sale, but not sold), by will, made in 1870, appointed a life interest therein to her husband, and after his death as she should further appoint. By a subsequent will, made in 1880, also purporting to be made in exercise of the same power, she appointed three rent-charges — one to her husband, and the others to two of her children; and, subject to such rent-charges, she appointed the lands to her sons and daughters successively in tail with an ultimate remainder to her sisters (who were not objects of the power) in fee, thus purporting to deal with the entire estate; and she appointed her husband residuary legatee and devisee:—Held, that the first will was revoked by the second, and that the latter will should alone be admitted to probate. *Macfarlane, In goods of*, 13 L. R., Ir. 264.

No Revocation Clause in later Will.]— A mother executed a will, in which, after disposing in legacies of a small part of her property, she left the rest to her daughter absolutely, and she appointed her executrix. She subsequently executed another instrument, which purported to be her last will and testament, but had no revocatory clause. By this she gave the whole of her property to her daughter for life, and made her whole and sole executrix. On the death of the daughter she gave legacies to a larger amount than in the first will, but did not dispose of the residue:—Held, that the two instruments ought to be admitted to probate as together containing the will of the deceased. *Petchell, In goods of*, 43 L. J., P. 22; L. R. 3 P. 153; 30 L. T. 74; 22 W. R. 353.

Administration with Will annexed as to one revoked—Granted as to both.]—A married lady, the absolute owner of property and the donee of a power to appoint a trust fund to the children of her marriage, appointed the fund, by a will of the 11th of January, 1864, in favour of five of the children, among them R. H. B., and made her husband residuary legatee and executor. On the 24th of December, 1873, she made another will, disposing of her own property, not referring to her power, and appointing R. H. B. residuary legatee. She died in 1879, and administration with the will annexed was granted to R. H. B. by a district registry without referring to the will of 1864; the husband died in 1880 without having proved the will of 1864, but having appointed R. H. B. executor, who obtained probate. The court on the application of R. H. B. revoked the administration with the will of 1863, and granted him administration with both wills annexed. *Bland, In goods of*, 9 L. R., Ir. 53.

Letter revoking prior Will, but not disposing of Residue.]—The instructions for a will were reduced to writing, and the testator duly executed the paper pending the preparation of the more formal instrument. In this paper the residue was disposed of. On the following day the testator executed a second and more formal will. It did not dispose of the general residue, and it expressly revoked all former wills. In both papers the same executors were appointed. All parties consenting, and the papers not being entirely inconsistent with one another, the court granted probate of both documents as together constituting the will of the deceased. *Robinson* v. *Clarke*, 47 L. J., P. 17; 2 P. D. 269; 39 L. T. 43.

Similar except as to Dates.]—A testator executed two testamentary papers of different dates, but otherwise exactly similar. Each purported to dispose of all his property, and contained charitable bequests affecting land. The testator lived for more than three months after the execution of the first paper, but died within three months of the execution of the second:—Held, that the papers together constituted one will, and should be admitted to probate. *O'Leary* v. *Douglass*, 1 L. R., Ir. 45.

Several Papers consistent with each other.]—When several testamentary papers are found after a death, each consistent in all important respects with the others, the whole will be taken to form one will, and will be admitted to probate as such, even where one or more may be irregular in form and imperfect in attestation. *Rotton, In goods of*, 35 L. T. 518.

Second giving additional Legacies.]—A testatrix duly executed a holograph will. Four years afterwards she signed her name to a paper directing certain additional legacies to be given. This paper was annexed to the original will by a pin, and her signature was attested by two witnesses, who placed their own signatures on the back of the will:—Held, that the second document was duly executed and attested, and probate was granted of the will as altered. *Braddock, In goods of*, 45 L. J., P. 96; 1 P. D. 433; 24 W. R. 1017.

One English and One Colonial.] — Where a testator left two wills, one disposing of his property in Australia, and the other of his property in England, on the same trusts, the court held that it was unnecessary to incorporate the Australian will with the English will, but directed an affidavit of its contents to be attached to the probate. *Cole, In goods of*, 20 L. T. 758.

A testator died leaving two wills, one limited to property in England, the other to property in Tasmania, and he appointed different executors in each. The court granted probate of both papers to the executors named in the English will. *Harris, In goods of*, 39 L. J., P. 48; L. R. 2 P. 83; 22 L. T. 630; 18 W. R. 901.

Three duly executed wills bore the same date, two of which purported to dispose of the residue. It was proved that the first was intended to apply only to property in Canada, and that the two last were intended to apply only to property in England. The three papers were admitted to probate. *Nickalls, In goods of*, 4 Sw. & Tr. 40; 34 L. J., P. 103; 13 W. R. 1047.

English and Foreign Wills—Incorporation—Grant.]—A testatrix made two wills, one in 1888 relating to and disposing of her property in England only, the other in 1889 relating to and disposing of her property in Italy only, but it contained a clause confirming the English will.

The executors of the two wills were different :—Held, on an application by the executors of the English will for grant of probate, that the Italian will must be included in the grant. *Lockhart, In goods of*, 1 R. 481 ; 69 L. T. 21 ; 57 J. P. 313.

If a testator leaves two independent wills, one disposing of his property in this country, and the other of his property abroad, the former alone should be admitted to probate by the English court. If, however, the two wills are not independent, the will which is last may incorporate the earlier will, and both ought to be admitted to probate in England, as they virtually become one. The question in each case for the court to decide will be whether or not the testator intended the two documents (or, where there are codicils, the two sets of documents) to be kept entirely apart. *Howden* (*Lord*), *In goods of* (post, col. 287), followed. *Murray, In goods of*, 65 L. J., P. 49 ; [1896] P. 65 ; 44 W. R. 414.

Estate in England and Belgium—Two Wills—One in Belgian, other in English Form.]—A testator, having an English domicil of origin died in Belgium possessed of property in England and in Belgium. He left two wills, one in the English form disposing of his property in this country, the other in the Belgian form disposing of his estate situate in Belgium. The court, on the renunciation of the Belgian executor and on an affidavit that according to the law of Belgium the Belgian will only applied to the property in that country, granted probate of both wills, as together constituting the last will of the deceased, to the English executor. *Bolton, In goods of*, 57 L. J., P. 12 ; 12 P. D. 202 ; 36 W. R. 287.

British Subject domiciled in Belgium—Will made abroad according to Foreign Law—Deed-poll.]—The deceased, being at the time unmarried, a British subject, and domiciled in England, executed in 1847 a declaration of trust of certain property, whereby it was to be held in trust as the deceased should by deed appoint, and, subject thereto, and after her decease, for such persons as she should by will appoint. In 1849 she married a Belgian subject domiciled in that country. Before her marriage she settled the property comprised in the deed of 1847, if she should die in the lifetime of her husband, upon such trusts as she should by revocable deed or will appoint. In 1865 she obtained a divorce from her husband in Belgium, but continued to retain a Belgian domicil until October, 1887. In 1880 she executed a will in the English form, appointing executors, and purporting to dispose of all her property, including that over which she had a power of appointment. In 1884 she executed another will in Belgium, according to Belgian but not according to English law, appointing executors, and purporting to dispose of all her property, but without specially mentioning that over which she had power of appointment. In June, 1887, she executed a revocable deed-poll, sufficiently executed as a will according to the provisions of the Wills Act, whereby she appointed the settled property upon certain trusts "on and after her death." In October of the same year she abandoned her Belgian and reverted to her English domicil, and in 1889 she executed another revocable deed-poll slightly varying that of 1887, such deed being duly executed as a will, and its provisions not being intended to take effect until after her death :—Held, that the will of 1884 and the deed-poll of 1887 and 1889 together constituted the last will of the deceased. *Milnes* v. *Foden*, 59 L. J., P. 62 ; 15 P. D. 105 ; 62 L. T. 498.

2. Probate Granted to one only.

Different Residuary Legatees—No Revocation Clause.]—A party duly executed two testamentary instruments, of different dates, appointing the same persons executors, but nominating different residuary legatees. The later instrument, though it did not in terms revoke the former, was alone admitted to probate, as his last will. *Pepper* v. *Pepper*, Ir. R. 5 Eq. 85.

—— **Words "Last Will."**]—The words "last will," contained in a testamentary instrument, are not, of themselves, sufficient to constitute it the last will of the testator. *Ib.*

When Second does not refer to First.]—A testator, having executed a will, completely disposing of his own property, and also of other property over which he had a disposing power, subsequently, and after some changes had taken place in the investment of the property, and having the former will before him, executed a later will complete in form, having no word of a codicillary character, and no reference to the former—by which he fully disposed of his own property, but not of that over which he had the power, although on comparing the two together it was plain that he intended to dispose of both ; the effect of admitting the former will to probate would be the retention, contrary to the intention of the testator, of a certain appointment :—Held, that the latter will alone should be admitted to probate. *Shiel* v. *O'Brien*, Ir. R. 7 Eq. 64.

Inconsistency.]—A testator made his will, appointing no executor, and without any clause of revocation. He afterwards made a second will exactly in the same terms as the first will, except that he gave by it a small additional legacy. The second will could not be found, but it was last traced to the testator's possession, and parol evidence was given of its contents :—Held, that the second will, although it did not contain a clause of revocation, revoked the first. *McAra* v. *McCay*, 23 L. R., Ir. 138.

A second testamentary document did not in terms revoke a prior will, but nevertheless dealt with the entire property of the testator. Parol evidence was offered to prove that the second document was intended by the testator as a codicil, but rejected on the ground that there was no such ambiguity in the second document as would render necessary an explanation by parol evidence :—Held, that the second document, being unambiguous and dealing with the entire property of the testator, must be admitted to probate as the true will. *Palmer, In goods of*, 58 L. J., P. 44.

Different Persons named as Executors.]—See *Bridges, In goods of*, ante, col. 250.

Where Second could not be found.]—A testator made a will in 1831. A few years before his death in 1863, he produced to two acquaintances a paper dated 4th June, 1847, which he alleged to be his will, and got one of them to make a copy of it. This paper was in substance the

same as the will of 1831. It had his name and the names of two attesting witnesses at the bottom of it, but neither of the persons to whom it was shewn could speak to any of the signatures. The copy which he signed in their presence was forthcoming, but the original document could not be found. The court held that there was no evidence of its existence as a will, and granted probate of the will of 1831. *Gray, In goods of*, 39 L. J., P. 42 ; 22 L. T. 489 ; 18 W. R. 900.

C. made a will on the 30th April, 1857, in which he devised to H. a freehold house for life, and the residue of his real and personal estate to C., making H. and C. executors. In September, 1857, he made a codicil "to my last will of 30th April, 1857," by which he left H. 200*l.* in addition to the devise in the will, and left other specific money legacies. On 13th February, 1858, he made another codicil referring to his will of 1857, and bequeathed a leasehold house and the furniture therein to H., and otherwise confirmed his will. On 3rd June, 1858, he made a will identical with that of 1857, except the substitution of F. for C. ; at the same time he re-executed the codicil of September, 1857, which then purported to be a codicil "to my last will, dated 3rd June, 1858." On C.'s death in March, 1862, the will of April, 1857, and the two codicils, were found in an envelope sealed and indorsed by C., "Sealed 13 June, 1860—P. F. M'C." The will of 1858 was not forthcoming, though it had been in the testator's possession. There was evidence tending to shew that before the beginning of 1860 the deceased intended to exclude F. and reinstate C., and that he had destroyed the will of 1858. In June, 1860, the deceased wrote a letter to H., confirming what he had already done by will for her, which letter was signed by him and attested. The court granted probate of the last will of C., as contained in the letter and the papers found in the sealed envelope. *M'Cabe, In goods of*, 2 Sw. & Tr. 474 ; 31 L. J., P. 190 ; 6 L. T. 474 ; 10 W. R. 848.

A testator made a will in 1864, appointing his wife sole executrix, and duly executed another document in 1877. There was no evidence of the contents of the second document except that after its execution the testator said, "I have made a will altering my affairs, and I have taken care of Ellen, and there will be something for Roby," and except a memorandum at the foot of the will as follows : "This will is now useless, a new will having been made in October, 1877, upon my wife telling me she was sorry she had ever seen me," &c. :—Held, that in the absence of proof of an alteration as to the executrix or of a revocatory clause of disposition wholly inconsistent with the first will, that will was not revoked, and was therefore entitled to probate. Quære, whether the memorandum was admissible in evidence to shew an intention to revoke the first will. *Hellier* v. *Hellier*, 53 L. J., P. 105 ; 9 P. D. 237 ; 33 W. R. 324 ; 49 J. P. 8.

The testatrix made a will in 1886, leaving all her property to her two sisters. Upon the death of one of the latter, the testatrix executed another will, leaving all her property to her surviving sister, and appointed her sole executrix. The second will did not, in terms, revoke the first. Both wills were taken charge of by the testatrix, but after her death only the earlier will was found. The effect of both wills would be the same in the circumstances which had happened. The court refused probate of the contents of the second will, and admitted the earlier will to proof. *Radcliffe, In goods of*, 65 L. T. 165.

Codicil the only executed Paper forthcoming.]—At the death of a testatrix the sole testamentary papers forthcoming were a duly executed codicil and two drafts of wills, as to the execution or revocation of which there was no evidence :—Held, that though the codicil by its language was dependent on the will to which it belonged, and could not be construed without it, it ought to be admitted to probate, not having been revoked in any of the methods prescribed by the Wills Act. *Black* v. *Jobling* (L. R. 1 P. 685) followed. *Gardiner* v. *Courthope*, 56 L. J., P. 55 ; 12 P. D. 14 ; 57 L. T. 280 : 35 W. R. 352 ; 50 J. P. 791.

One only executed—Probate of the executed Document, with Directions to administer the Estate in conformity with the Trusts of the unexecuted Document.]—A testatrix left two testamentary documents, of which only one was duly executed. The first or unexecuted document made various specific bequests, and appointed an executor. The second, which was duly executed, bequeathed all the property of the testatrix to her nephew, "for the purposes I require him to do absolutely" :—Held, that the two documents could not be admitted to probate as together constituting the will of the deceased, but that probate might be granted of the second or executed document, with directions to the executor to administer the estate in conformity with the trusts of the first document. *Marchant, In goods of*, 62 L. J., P. 114 ; [1893] P. 254.

Internal Evidence as to which last executed.]—Two letters, lettered A. and D., of even date, similar in substance, but differing in language (will D. being on the face of it an amended copy of will A.). In the absence of extraneous evidence to determine which was last executed, the court acted on the internal evidence afforded by the wills themselves, and granted probate of will D. alone. *Stephens, In goods of*, 22 L. T. 727 ; 18 W. R. 528.

No Evidence as to Execution—Earlier Will admitted to Probate—Refusal to pronounce against later Will.]—A will of 1881 was propounded by the plaintiffs as executors. The defendants pleaded that it was revoked by a will of 1884, which, in its turn, they alleged to have been revoked by tearing, and said that the deceased died intestate ; and they counter-claimed for a decree against both wills. The plaintiffs, in reply, denied the revocation, and joined issue upon the other parts of the defence and counter-claim. No evidence was offered to shew that the later will had ever been executed. The court pronounced for the will of 1881, but declined to pronounce against the will of 1884. *Grubb* v. *Grubb*, 62 L. T. 644 ; 54 J. P. 663.

Words of Reference — Incorporation.]—A testatrix, by a will executed in 1873, bequeathed the residue of a fund over which, under the will of her brother, she had a power of appointment to her two daughters, Mrs. B. and Mrs. P., with remainder to their respective husbands and children. She had also previously by deed appointed the residue of another fund between them, and Mrs. P.'s share so appointed was

settled on her on her marriage. Mrs. B. predeceased her mother, and by a codicil executed in 1877 the testatrix revoked the bequest to her and her family; but she made no alteration in the bequest to Mrs. P. In 1881, testatrix made another will, which revoked all former wills, and appointed C. O., the defendant in the suit, her residuary legatee. This will contained the following recital: "Whereas I have also settled one undivided moiety of the residue of the said third part of 100,000*l.*, to which I am entitled under the will of my said brother, in favour of my said daughter, E. J. P." :—Held, that this recital did not refer to the will of 1873 so as to raise the question whether it incorporated it by reference; and, further, that there was no such ambiguity as to make declarations by the testatrix of her intention admissible in evidence. *Paton* v. *Ormerod*, 61 L. J., P. 120; [1892] P. 247; 66 L. T. 381.

English Will—Will dealing solely with Land Abroad—Incorporation of Documents.]—A testator domiciled in England executed five documents—a will and two codicils, disposing of all his property, real and personal, in England and his personal property in Russia; a will dealing exclusively with his real and immovable property in Russia, which he devised simply to two persons; and a deed of covenant by which these two persons covenanted to sell the Russian property and hand over the proceeds to the executors and trustees of the English will, to be held by them on the trusts of that will. This deed was excuted before the second codicil, in which it was recited, and in which also was a recital of the testator's intention to execute the Russian will:—Held, on motion, that the deed of covenant and the Russian will ought not to be included in the English probate. *Tamplin, In goods of*, 63 L. J., P. 75; [1894] P. 39; 6 R. 533; 42 W. R. 287.

English and Foreign Wills—Probate of English Will only.]—A testator made a will in England, which disposed only of English property. Subsequently he made abroad another will, which disposed of property abroad and cancelled all previous dispositions. The court, with the consent of all the parties interested, ordered probate of the English will only, and allowed the foreign will to be delivered out of the registry for probate abroad. *Smart, In goods of*, 53 L. J., P. 57; 9 P. D. 64; 32 W. R. 724; 48 J. P. 456.

—— **Canadian.**]—Where a testator had duly executed two wills, by one of which he purported to dispose of his Canadian property only, and by the other to dispose of his English property only, and appointed different executors for each will, the court granted probate of the English will only, without requiring the executor to bring in the Canadian will, on an affidavit being filed in the registry exhibiting a copy of it, and a statement being made in the probate that this had been done; and it was further ordered that a preliminary affidavit be filed shewing that all the movables mentioned in the Canadian will were in Canada, and all the movables mentioned in the English will in England at the time of the testator's death. *Calloway, In goods of* (15 P. D. 147), followed. *Seaman, In goods of*, 60 L. J., P. 96; [1891] P. 253; 64 L. T. 805.

—— **Scotch.**]—A testator died possessed of property both in Scotland and England, having duly executed certain testamentary papers (having the effect of a will and codicils by Scotch law), whereby he disposed of his Scotch property only, and an English will and codicil whereby he disposed of his English property only. The Scotch testamentary papers contained a direction that all just and lawful debts and expenses should be paid out of the Scotch property. There was no reference to the payment of debts in either the English will or codicil. The court, being satisfied that none of the creditors would be prejudiced, granted probate of the English will alone, without requiring the Scotch testamentary documents to be incorporated, but ordered a note to be made on the probate that an exemplification of such Scotch testamentary papers had been filed. *Astor, In goods of* (1 P. D. 150), distinguished but followed. *Fraser, In goods of*, 60 L. J., P. 93; [1891] P. 285; 64 L. T. 808.

Foreign Will—English Testamentary Appointment—No Mention of Testamentary Appointment in Foreign Probate—Limited Grant.]—A testator in 1880 made a testamentary appointment in England of certain funds, and in 1888 executed a will in New Zealand, wherein he recited the said testamentary appointment and disposed of all the rest and residue of his estate. The executors obtained probate of the will of 1888 in New Zealand, and an exemplification of such probate was sent to England by the New Zealand court, but all mention of the testamentary appointment of 1881 was omitted from such exemplification. Under these circumstances the court refused an application for a grant of administration to the appointee, with the testamentary appointment annexed, limited to the funds comprised in such appointment, and ordered the exemplification of the will to be handed out of the registry to the attorney of the executors, in order that they might apply to the New Zealand court to revoke the existing probate and include the testamentary appointment in a fresh probate. *Crawford, In goods of*, 60 L. J., P. 16; 15 P. D. 212; 63 L. T. 232; 54 J. P. 504.

The probate of a will should contain the whole, and not a part only, of the testamentary papers of the deceased. *Ib.*

3. Codicils and Wills.

Principles.]—A will and codicil are to be taken together as one act. *Reeves* v. *Newenham*, 2 Ridgw. P. C. 43.

A codicil is, in its nature, a part of the will; an extension of the intention of the testator. *St. Albans (Duke)* v. *Beauclerk*, 2 Atk. 639.

Codicil considered as part of the will, and intent drawn from the whole. *Hill* v. *Chapman*, 1 Ves. J. 407; 2 Bro. C. C. 612.

The prerogative courts having admitted testamentary papers to probate as a will and codicil, is conclusive evidence upon their being distinct instruments. *Russell* v. *Dickson*, 1 Con. & L. 284; 2 Dr. & War. 133; 4 Ir. Eq. R. 339.

There being several codicils to a will, some of which were bare repetitions of others, the court declared them to be only substitutions. *Campbell* v. *Radnor (Earl)*, 1 Bro. C. C. 271.

As a general rule, the probate should contain the whole, and not a part only, of the testa-

mentary papers of the deceased. Accordingly where a testatrix had executed (1) a will disposing of her property in Ireland and elsewhere, except in America, and appointing executors of the will, and (2) a codicil of even date, disposing of her American property, and appointing a different person executor in relation thereto, and (3) a codicil substituting a new executor of the will in place of one of those formerly appointed, the court granted probate to the executors named in the will and second codicil of all three documents without reserving power to the executor appointed by the first codicil. *Power, In goods of*, 25 L. R., Ir. 509.

Reference to prior Will by Mistake.]—A. executed a will on February 13th, 1864, and another on June 24th, 1865, revoking all former wills. He afterwards executed a codicil which purported to be a codicil to his will dated February 13th, 1864, and after devising some property, confirmed his will. The solicitor who prepared the codicil had inserted the date of the first will, under the supposition that it was the last will. There was nothing in the codicil which shewed an intention to revive the first will:—Held, that the second will and codicil were entitled to probate. *Anderson, In goods of*, 39 L. J., P. 55; 22 L. T. 308

A testator executed a will in 1877, in which he directed the residue of his real and personal property to be sold and divided between his six children, to each of whom he had made certain devises and bequests. In 1878, he executed another will, in which he directed all his property, real and personal, to be realised and divided among his six children, directing further that certain arrears of accrued rent should be deducted from the shares of two of them. In the year 1880, his solicitor prepared a codicil by his direction, which should, if rightly drawn as applying to the latter will, have deprived those two of his children of all participation in this property. The solicitor, by an error, drew the codicil as applicable to the will of 1877, making in it no mention of the will of 1878:—Held, that to render the testamentary papers intelligible, they must all be included in the probate. *Stedham, In goods of*, or *Dyke, In goods of*, 50 L. J., P. 75; 6 P. D. 205; 45 L. T. 192; 29 W. R. 743; 45 J. P. 784; 46 J. P. 40.

Unattested Codicil—Subsequent Codicil not referring to prior Codicil.]—A testator drew a will in his own handwriting. He signed it and then added something to it, in which he referred to what was written above as his "last will." He subscribed the addition by again writing his name. He then summoned two witnesses into the room, who saw the paper there, signed with the two signatures. The testator acknowledged his signature in their presence. According to the evidence, in doing so, he pointed to the upper signature and directed the witnesses to sign their names in the space opposite the first signature. The testator subsequently executed a codicil (duly attested) in these terms: "By this codicil to my last will I leave and bequeath to . . . the sum of 7*l.* sterling":—Held, that the first and third parts of the document (excluding the second) constituted the last will of the testator. *Woodroofe* v. *Creed*, [1894] 1 Ir. R. 508.

Mistake—Inconsistent Attestation Clause.]—In an attestation clause of a third codicil, it was stated by mistake that the first codicil was cancelled:—Held, that an attestation clause forms no part of a codicil, and that therefore the first codicil must be admitted to probate. *Atkinson, In goods of*, 52 L. J., P. 80; 8 P. D. 165; 31 W. R. 660; 47 J. P. 440.

Codicil not revoking last Will as intended.]—A testatrix being desirous to revive a will and codicil which had been revoked by a will of later date, sent them to her solicitor, in order that he might prepare a new will for that purpose. To save time he directed his clerk simply to re-copy them, which the clerk did, including the reference by date of the codicil to the first will. In this state the will and codicil were executed on the same day:—Held, that as there was no distinct intention expressed in the codicil to revoke the last will, the probate should be granted of it, together with the codicil. *Ince, In goods of*, 46 L. J., P. 30; 2 P. D. 111; 36 L. T. 519; 25 W. R. 396.

Mistake in Date of Will.]—A testatrix left a will, dated 3rd June, 1868, and three codicils. The second codicil referred to a will dated April, 1870. No such will could be found, and the only evidence of its existence was an entry in the bill book of her solicitor. The court held that there had been a mistake in the date, and granted probate of the codicil, as being a codicil to the will of 1868. *Dent, In goods of*, 31 L. T. 552; 23 W. R 417.

Misrecital in Codicil—Inconsistent Dispositions—Effect given to Later Disposition.]—The mere misrecital of a will by a codicil is inoperative, and will not modify the dispositions of the will; but an erroneous recital of a will, coupled with or followed by a clear indication of the testator's intention to make some modified or different disposition, inconsistent with the dispositions of the will, is operative to modify or alter the earlier gifts. *Margitson, In re, Haggard* v. *Haggard*, 48 L. T. 172; 31 W. R. 257—C. A.

A testator by his will gave to his daughter (in events which happened) an estate tail in his real property, and an absolute estate in his personal property. By a codicil, after reciting that his daughter would take an estate for life in his property, with remainder to her issue, he directed that the life estate should be for her separate use, that she should have a power of appointing a life estate to any husband who should survive her, and that if she should have more than one son, and her eldest son should inherit property from other sources of a certain value, then her second son should succeed to the property given by the will, with certain gifts over:—Held, that the estates given by the will were modified by the codicil, and that the daughter was entitled to a life estate only in the real and personal property of the testator, with remainder by implication to her eldest son absolutely, subject to the appointment by her of a life estate in favour of a husband, and to a shifting use in favour of a second son. *Ib.*

Three Codicils on Three Separate Papers—One only signed.]—A testatrix wrote three separate lists of legacies on three separate sheets of paper, the first of which was headed "Codicil to the will of S. P.," and signed all three sheets in the presence of the witnesses, but they attested her signature to the first sheet only. There

being nothing in the contents of the three papers to connect them with each other, and the first which was attested being complete in itself, the court refused to grant probate to the two which were unattested. *Pearse, In goods of*, 36 L. J., P. 117; L. R. 1 P. 382; 16 L. T. 853.

Misdescription of Codicil.]—A testator died leaving a will revoking all former wills. He subsequently executed a codicil, which by mistake he described as a codicil to a previous will:—The court admitted the codicil to probate. *Law, In goods of*, 21 L. T. 399.

Codicil revoking other Codicils.]—At the foot of a deed to which a woman was a party, but which disposed of no property after her death, the following document, duly executed as a will, was written:—"I do add unto my will this codicil, hereby revoking any other codicil or codicils heretofore made by me. I constitute and appoint my son A. G." (a trustee under the deed) "my sole and only trustee and administrator under my will." When she executed this document, she said, pointing to the deed, "This is my will":—Held, first, that the deed, as it was not of a testamentary nature, was not entitled to probate. *Hubbard, In goods of*, 35 L. J., P. 27; L. R. 1 P. 53.

Held, secondly, that as there was no will A. G. was not executor. *Ib.*

Held, thirdly, that as the codicil, though it disposed of no property, revoked other codicils, administration with it annexed should be granted to the next of kin. *Ib.*

D. executed a will containing certain bequests, and subsequently a codicil purporting to be a codicil to that will, the provisions of which were in no way dependent upon those of the will, and in all other respects he confirmed the will. Afterwards, being offended at persons benefited by the will, he cancelled it animo revocandi. The court refused to grant administration with the codicil annexed upon motion whereby the parties interested in case of intestacy had not been cited. *Dutton, In goods of*, 3 Sw. & Tr. 66; 32 L. J., P. 137; 8 L. T. 609; 11 W. R. 1063.

Identification of Codicil.]—A testator duly executed a will and five codicils. The first executed codicil, dated the 25th of March, 1848, commenced: "This the second codicil to the will of A."; and ended, "In all other respects I confirm my said will, save only so far as the same is unrevoked by my first codicil thereto, and I do hereby confirm the said codicil." It did not appear that the testator had executed any codicil to his will prior to this one, described as the second codicil to his will; but his solicitor, after the date of the will, and before the date of this codicil, forwarded to him for his perusal, a draft codicil, which, when he prepared this codicil, he erroneously concluded had been executed, and therefore described it as a second codicil. The draft codicil was, after the testator's death, found tied up in a parcel containing the will and five executed codicils:—Held, that the draft codicil was not sufficiently identified as the paper intended to be referred to by the deceased in his first-executed codicil, and could not be admitted to probate. *Allnutt, In goods of*, 3 Sw. & Tr. 167; 33 L. J., P. 86; 9 Jur. (N.S.) 581.

Revocation of Will—Revokes Codicil.]—T. M. B. having executed a codicil at the foot of his will, cut off his signature to the will. Upon proof that he thereby intended to revoke the codicil the court held that the codicil was also revoked. *Bleckley, In goods of*, 52 L. J., P. 102; 8 P. D. 169; 31 W. R. 171; 47 J. P. 663.

—— **By Codicil.**]—K., by his will dated in 1862, after reciting that he had two children, namely, his son F. and his daughter M., and that under a codicil of his father he had power by deed or will to appoint to his children, in such proportions as he might think fit, the principal share wherein he took a life interest in the residuary estate of his father, in exercise of such power directed and appointed that such share should, from and after his decease, go and belong absolutely to his daughter M., but in case she should die in his lifetime, then to his son F. The testator's daughter was married to B. By a settlement dated in 1866, and made upon her marriage, it was declared that K., in consideration of the marriage, appointed his daughter to receive the property over which he had a power of appointment, only reserving to himself the faculty of disposing in favour of his wife of the reversion of 10,000 francs during her life. K., by a codicil to his will dated in 1871, and made in France, where he was then residing, stated as follows: "When I married my daughter . . . I expressed the desire of leaving to my wife . . . a small revenue at my death . . . but not having it in my power to do so, my daughter and her husband . . . proposed to me as follows: that if I would consent to leave to them the whole of the sum of my share of the residue of my father's estate . . . which I have power to dispose of in favour of my children, that they would take the engagement at my death to have placed in my said wife's name, for her life, the sum of 10,000 francs . . . and at my wife's death the said sum to return to my said daughter . . . In the case that my said daughter and . . . her husband should respect my memory and their signature, then it is my will and desire that my daughter and her husband should and may have the whole of the sum of my aforesaid share." This codicil was written and signed by the testator, but was unattested. It was, however, admitted to probate under 24 & 25 Vict. c. 114:—Held, that the appointment under the settlement and codicil were invalid, as being respectively frauds upon the power; that neither the settlement nor the codicil operated so as to revoke the will of 1862; but that the bargain which had been made had, in equity, the effect of preventing the appointee from taking under the appointment in the will, and consequently the fund must go as in default of appointment. *Kirwan's Trusts, In re*, 52 L. J., Ch. 952; 49 L. T. 292.

Codicil—Appointment of additional Executor.]—A testator appointed his wife, his brother and two sisters executors by his will, and his wife and a fresh executor joint executors by a codicil. All executors, with the exception of the wife and one sister of the testator, renounced. The wife took out probate and died while the estate was being administered. Upon an application alternatively to grant probate to the sister who had not renounced, or to allow the joint executor appointed by the codicil to retract his renunciation and prove:—Held, that the appointment of executors by the codicil did not revoke that of those under the will, and that the executrix

appointed by the will who had not renounced was entitled now to prove, but the executor who had been appointed by the codicil and had renounced could not be allowed to withdraw the renunciation and prove. *Elmsley, In goods of*, 48 L. T. 125.

Codicil to lost or revoked Will.]—When a will and a codicil have been in existence, and the will could not be found, the court will not grant probate of the codicil unless it is satisfied that the testator intended it to operate separately from the will. *Greig, In goods of*, 35 L. J., P. 113; L. R. 1 P. 72; 13 L. T. 681; 14 W. R. 349.

Will and Codicil improperly attested.]—A signed her will below the signatures of the attesting witnesses, but before they signed. She afterwards executed a codicil, but signed it after the witnesses who attested it, though on the same occasion. The will was held entitled to probate, but the codicil was not. *Hoskins, In goods of*, 32 L. J., P. 158.

Probate of Will without Codicils — Until Question as to Codicils decided.] — Where a testator left a will and two codicils and the executors sought to propound the will with one codicil in order to raise the question as to whether or not both codicils should be admitted to probate, on a motion for the appointment of an administrator pendente lite, the court admitted the will to probate in common form and allowed the question as to the codicils to be tried subsequently. *Wainewright* v. *Wainewright*, 6 R. 562; 71 L. T. 265.

Probate of Will and Part of Codicils.]—A testator left a will and six codicils. The will and first two codicils were in the possession of the executor in England. The other codicils were in India, and probate of them had been granted by the court at Calcutta, but no exemplification or authentic copies of them had been sent to this country. It being for the benefit of the estate that the executor in England should be at once qualified to act, the court decreed to him probate of the will and two codicils in his possession, reserving power to him to prove the other codicils when they reached England, and he filing and undertaking to do so. *Robarts, In goods of*, 42 L. J., P. 63; L. R. 3 P. 110; 28 L. T. 913; 21 W. R. 824.

Codicil confirming Will.]—When a testator by a codicil confirms his will, the will, together with all previous codicils, is taken to be confirmed. *Green* v. *Tribe*, 47 L. J., Ch. 783; 9 Ch. D. 231; 38 L. T. 914; 27 W. R. 39.

Where a prior codicil has a proper force of its own, the mere fact that a testator in a subsequent codicil describes the will by reference to its original date is not sufficient to exclude the inference that the will referred to is the will as modified by the prior codicil. *Ib.*

A will or a codicil, containing a devise of real estates, but not duly witnessed, was held good if confirmed by a subsequent codicil, having the proper attestation, though the latter document was in no way annexed to the will or prior codicil, and though the attesting witnesses to the latter codicil did not see the former one or the will. *Utterton* v. *Robins*, 1 A. & E. 423.

Before 7 Will. 4 & 1 Vict. c. 26, a codicil was duly executed and attested, and expressly referred to in an unexecuted will on the same paper:—Held, that such execution gave effect to the will, and that it thereby became a good will of lands. *Doe* d. *Williams* v. *Evans*, 1 C. & M. 12; 3 Tyrw. 56; 2 L. J., Ex. 39.

The rule, that a codicil confirming a will makes the will for many purposes to have the date of the codicil, is subject to the limitation that the intention of the testator be not defeated thereby. *Doe* d. *Biddulph* v. *Hole*, 15 Q. B. 848; 20 L. J., Q. B. 57; 15 Jur. 13.

Though a codicil for certain purposes confirms a will, and brings it down to the date of the codicil, it does not necessarily make the will operate as if it had been originally made at the date of the codicil. *Hopwood* v. *Hopwood*, 7 H. L. Cas. 728; 5 Jur. (N.S.) 897.

Implied Revocation of Will.]—The fact that a will is found with a codicil in an envelope, indorsed as containing the codicil only, will not raise any presumption that the will was not meant to take effect. *Bellamy, In goods of*, 14 W. R. 501.

Implied Revocation of Intermediate Codicil.]—A testator by will gave legacies to three of his daughters, and devised and bequeathed his residuary real and personal estate upon trusts for his wife and children. By a first codicil in 1878 he revoked one of the legacies in his will and increased another, concluding: "In all other respects I confirm my said will." By a second codicil, after reciting that he was desirous of altering the residuary devise contained in his will, he made a specific devise, and in all other respects confirmed his will. He afterwards made a third codicil, by which, after referring to his will by date and reciting a promise to that effect, he directed his trustees to grant an underlease of a house to his daughter-in-law, and gave his wife a pecuniary legacy in addition to the benefit she derived under his said will, and concluded: "In all other respects I confirm my said will except as altered by a certain codicil made thereto in 1878, whereby I revoked a legacy to my daughter Mary":—Held, that the words of confirmation in the first and third codicils were to be read as meaning that the testator did not intend to alter his general testamentary dispositions further than in the specific way mentioned in those codicils; and that the devise in the second codicil being clear, no intention to revoke it had been shewn with sufficient clearness to enable the court to reject that devise. *Follett* v. *Pettman*, 52 L. J., Ch. 521; 23 Ch. D. 337; 48 L. T. 865; 31 W. R. 779.

Evidence—That two Codicils are one.]—At the death of a testator two copies of his will were produced, one of which had been retained by himself, the other deposited with his bankers; each with a codicil containing the same gift in the same words, but of different dates, and attested by different witnesses. Probate having been granted of the duplicate will and of the two codicils:—Held, that evidence by one of the attesting witnesses to one of the codicils was admissible for the purpose of shewing, from the circumstances attending the execution, that the two codicils were not two but one instrument, and accordingly, that the legatee therein named

was entitled to one legacy only. *Hubbard* v. *Alexander*, 45 L. J., Ch. 740; 3 Ch. D. 738; 35 L. T. 52; 24 W. R. 1058.

—— **Two Codicils—Identical Gifts—Inference—Intention to revoke First Codicil.**]—In determining what documents constitute the will of a testator, the court will ascertain from the documents themselves, and if necessary, by external evidence, what was the intention of the testator. Where a testator made a will and two codicils, and the second codicil contained several gifts which were merely repetitions as to amount of gifts in the first codicil, and only one gift of an increased amount, the court held that the intention of the testator was to revoke the first codicil and substitute for it the second, and granted probate of the will and second codicil. *Chichester* v. *Quatrefagas*, 64 L. J., P. 79; [1895] P. 186; 11 R. 605; 72 L. T. 475; 43 W. R. 667.

—— **Parol.**]—A person duly executed a paper which commenced, "I hereby make a free gift to," &c. The court admitted parol evidence to explain his intention, and being satisfied therefrom that he intended the operation of such paper to be dependent on his death, granted probate of it as a codicil to his will. *Robertson* v. *Smith*, 39 L. J., P. 41; L. R. 2 P. 43; 22 L. T. 417.

T. executed a will and three codicils. He subsequently executed a fourth codicil, in which he directly and absolutely revoked the three previous codicils. He afterwards executed a fifth codicil, in which he confirmed his will and four codicils:—Held, that there was sufficient ambiguity on the papers to allow of the introduction of parol evidence; that that clearly shewed that the error had been made by the copying clerk, and that consequently probate would be granted of the will, and of the fourth and fifth codicils only. *Thomson, In goods of*, 35 L. J., P. 17; L. R. 1 P. 8; 11 Jur. (N.S.) 960; 13 L. T. 608; 14 W. R. 316.

I. Incorporation of Unattested and Detached Papers.

Principle of Admission.]—An unattested paper, which would have been incorporated in an attested will or codicil, executed according to the statute of frauds, is now in the same manner incorporated, if the will or codicil is executed according to the requirements of the 7 Will. 4 & 1 Vict. c. 26, s. 9. *Allen* v. *Maddock*, 11 Moore, P. C. 427; 6 W. R. 825.

Where there is a reference, in a duly-executed testamentary instrument, to another testamentary instrument imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence, and such parol evidence is not excluded by 7 Will. 4 & 1 Vict. c. 26. *Ib.*

If the parol evidence satisfactorily proves that in the existing circumstances, there is no doubt as to the instrument referred to, it is no answer that by possibility circumstances might have existed in which the instrument could not have been identified. *Ib.*

A married woman, having power under a settlement to make a will, in 1851 made a testamentary instrument in her own handwriting, which she intended to operate as a will, but which was not attested according to the requirements of 7 Will. 4 & 1 Vict. c. 26, s. 9. In 1856 she duly executed a codicil, which was headed, "This is a codicil to my last will and testament." This codicil contained no reference to the testamentary paper of 1851, which was not produced at the time the codicil was executed, but was found at her death in a trunk in her room in her residence, enclosed in a sealed envelope, on which was indorsed, "Mrs. Anne Foote's will." The codicil was found in a drawer in her bedroom. No other will or testamentary paper was found:—Held, first, that as there was a distinct reference in the codicil to a last will and testament, and as no other will had been found, the testamentary paper of 1851 was, by parol evidence, sufficiently identified as the last will referred to by the codicil of 1856. *Ib.*

Held, secondly, that, though informally executed, the testamentary paper of 1851 was incorporated with and made valid by the duly-executed codicil of 1856, and probate was granted of both papers as together containing the last will and codicil of the testatrix. *Ib.*

The court will not extend the principle of incorporation of law as laid down in the above case. *Greves, In goods of*, 1 Sw. & Tr. 250; 28 L. J., P. 18; 7 W. R. 86.

To incorporate a document in the probate of a will, three things are necessary—(1) that the will should refer to the document as then in existence; (2) proof that the document propounded was in fact written before the will was made; and (3) proof of the identity of such document with that referred to in the will. A testator bequeathed all property he died possessed of to his executors, to be disposed of in charity in such manner as "I may direct them; and in case I may not leave directions or instructions, then they may dispose of it in such manner as they may think fit." The testator signed a paper, bearing the same date as the will, and in his own handwriting, containing directions for the management of his property for charitable purposes, and headed "Directions to the executors of my last will, executed the 13th February, 1879, how they are to manage my affairs":—Held, that the will did not sufficiently describe the paper of directions as then existing, and that parol evidence was not admissible to identify it as the document referred to in the will. The court, therefore, refused to incorporate the directions with the probate. *Kehoe, In goods of*, 13 L. R., Ir. 13.

Where will recites and refers to a voluntary deed, which is not found at the testator's death, but is by verdict of jury declared to have existed at the time of such death, this reference and recital in the will shall establish the deed, and it shall be considered as incorporated with, and constituting part of, the will. *Healey* v. *Copley*, 7 Bro. P. C. 496.

Unattested paper clearly referred to in a devise of real estate considered part of the will if made previously: not if subsequent. *Wilkinson* v. *Adam*, 1 Ves. & B. 445.

Legacies by an unattested paper included under a charge of legacies on a real estate by a will duly attested; but the produce of the sale of a real estate cannot be directly disposed of by an unattested paper. *Id.* 446.

Where a testator refers expressly to a paper already written, and describes it sufficiently, it is as if incorporated in the will. *Habergham* v. *Vincent*, 2 Ves. J. 228; 4 Bro. C. C. 353.

Duty of the Court of Construction in regard to.]—It is the duty of the court of construction to decide whether a document merely omitted from probate is incorporated, or not, and, if incorporated, it is of equal efficacy with the rest of the will both as to real and personal estate. *Watson* v. *Arundell*, Ir. R. 11 Eq. 53.

Document must be referred to in Will.]—L. signed her name to a testamentary paper, but not in the presence of two witnesses, nor did she acknowledge her signature in their presence. She afterward duly executed another paper, in which she nominated A. executor, and empowered him to draw her money and employ it for her after her decease in all things necessary. The first paper was lying before her at the time she executed the latter, and she placed both of them in one envelope, and delivered it to A., in whose possession it remained until the death of the deceased :—Held, that the first paper was not so referred to in the latter ; that it could be incorporated with it, or admitted to probate. *Luke, In goods of*, 34 L. J., P. 105 ; 11 Jur. (N.S.) 397.

A person executed a will on the first side of a sheet of paper ; on the back of the will was a codicil, to which the signatures of the deceased and two witnesses were attached, but which had not been executed in accordance with the requirements of the statute. Below this codicil, and partly on the third side of the sheet of paper, was another codicil, duly executed. In this last document there was no other reference to the first codicil than that a specific legacy given in such first codicil was revoked, the legatee's name being misstated :—Held, that as there was a reference, although in erroneous terms, to the contents of the first codicil in the one duly executed, and they were on the same paper, the court would grant probate of both as incorporated. *Widdrington, In goods of*, 35 L. J., P. 66 ; 14 L. T. 369 ; 14 W. R. 774.

A father gave his residuary estate upon trust for his two sons and four daughters equally, and declared that all such sums of money as he had then already advanced, or should thereafter advance, to or for the benefit of either of his children, as should appear in any account in his handwriting kept by him for that purpose, or as should be shewn in any other manner, should be considered and taken in full for or, as the case might be, in part of his or her share of and in the trust estate. Subsequently to the date of his will the testator advanced to one of his sons 1,575*l.*, and to the other 1,560*l.* He afterwards wrote letters to each of them stating that it was his intention to make a present to them of sums of 640*l.* and 650*l.*, part of the 1,575*l.* and 1,560*l.* respectively, and requiring them to send him promissory notes for the balance :—Held, that these letters were not admissible in evidence to vary the operation of the proviso contained in the will, and that the sums of 640*l.* and 650*l.* must be brought into account by the sons. *Smith* v. *Conder*, 47 L. J., Ch. 878 ; 9 Ch. D. 170 ; 27 W. R. 149.

A will commenced as follows : "I give, devise and bequeath to my trustees and executors hereinafter named, all my property . . . on trust." The will was signed and duly attested. Below the signature and attestation clause were these words : "I find, on reading the above, previous to the execution thereof, that I omitted to name my trustees and executors. I hereby appoint my son and my friend L. my executors and trustees." It was proved that these words were written by the testator prior to the execution of the will :—Held, that the added words could not be included in probate of the will. *White, In goods of*, [1896] 1 Ir. R. 269.

—— **So that it can be Identified.**]—In order that an unattested paper may be adopted as part of a duly-attested will, it must be referred to by the will in such a manner as shall, with the assistance of parol evidence when necessary and properly admissible, leave no doubt of its identity. *Dickinson* v. *Stidolph*, 11 C. B. (N.S.) 341.

In order that an unexecuted paper writing may be incorporated, it must be so described in the will as to leave no doubt in the mind of the court that it is the paper writing referred to. *Brewis, In goods of*, 3 Sw. & Tr. 473 ; 33 L. J., P. 124 ; 10 Jur. (N.S.) 593.

A testatrix wrote a letter, addressed to her nephew, in which she gave directions as to her funeral, and as to the distribution of her property. She signed it, but not in the presence of witnesses, and inclosed it in a sealed envelope. On a subsequent occasion, by the advice of A., the following words were written on the outside of the envelope, signed by the deceased, and duly attested : "I confirm the contents written in the inclosed document, in the presence of" :—Held, that the words of this confirmation were sufficiently clear to allow evidence to be admitted to identify the document referred to, and that the evidence so admitted was sufficient for its purpose. *Almosnino, In goods of*, 1 Sw. & Tr. 508 ; 29 L. J., P. 46 ; 6 Jur. (N.S.) 302 ; 2 L. T. 19.

A testator left a will revoking all former wills, by which he directed certain articles to be distributed by the executors according to written instructions affixed to his will. No such instructions were found affixed to the will, but a paper was found duly executed, which had been referred to in a former will, and which contained instructions to his executor. The court refused to incorporate it with the existing will, on the ground that it did not correspond to the description therein, and also refused to admit it to probate independently, as it had been revoked by the last will. *Gill, In goods of*, 39 L. J., P. 5 ; L. R. 2 P. 6 ; 21 L. T. 399.

But where a duly-executed paper refers to a written document then existing in such terms as to enable the court to identify the latter document, probate will be granted of both documents, as containing the will of the testator. *Norris, In goods of*, 14 W. R. 348.

When a will refers to a paper, such paper cannot be incorporated with the will, unless it is clearly identified with the description of it given in the will, and is shewn to have been in existence at the time the will was executed. Both these matters must be established, and though there may be no doubt about the former, unless the latter also is proved, there can be no incorporation of the paper with the will. *Singleton* v. *Tomlinson*, 3 App. Cas. 404 ; 38 L. T. 653 ; 26 W. R. 722—H. L. (Ir.)

Legacies out of real estate given by unattested paper cannot stand unless that paper is clearly referred to by will duly executed so as to be incorporated with it ; the circumstance of its being inclosed in same cover with will not sufficient. *Smart* v. *Prujean*, 6 Ves. 560 ; 5 R. R. 395.

Parol evidence is not admissible for the purpose of incorporating in a duly-executed testamentary paper, papers not duly executed, unless the duly-executed paper refers to some written document as then in existence, and describes it in such a manner as to enable the court to ascertain its identity. *Watkins, In goods of*, 35 L. J., P. 14; L. R. 1 P. 19; 12 Jur. (N.S.) 12; 13 L. T. 445.

—— **What is Sufficient Identification.**]—A testamentary instrument was written on the first three pages of a sheet of paper. The portion on the first page only was duly executed, and the only reference it contained to any other paper was the following clause:—"I bequeath the following sums to my sons and daughters hereunder named, and I declare the under-mentioned sons and daughters to be my executors." No names were mentioned in the first page, but on the second and third pages there were unexecuted bequests, and the names of sons and daughters:—Held, that there was not a sufficient reference in the duly-executed portion of the paper to render parol evidence admissible for the purpose of incorporating in it the portion not executed. *Ib.*

S. duly executed a will and two codicils. The will contained the following clause: "I direct my executors to distribute" . . . all pictures, books, and other "articles according to any list or lists signed by me." A paper was found, without any date, but which was executed before the second codicil, headed "list referred to in my will and codicils." By this paper a picture was given to a nephew; wearing apparel, one year's wages, and mourning to a servant, and directions to the executors as to the inscriptions on the tombstone. The second codicil commenced: "This is a codicil to the last will and testament, with other codicils annexed, of me. . . . I hereby confirm my said last will, with all the codicils thereto duly signed by me":—Held, that the unattested paper was sufficiently identified and referred to in the will, and, having been signed before the execution of the codicil, was entitled to be admitted to probate as a portion of the will confirmed by the codicil. *Stewart, In goods of*, 3 Sw. & Tr. 192; 32 L. J., P. 94; 9 Jur. (N.S.) 417; 11 W. R. 540.

A testatrix left a will by which a portion of her property was to be disposed of according to instructions contained in "any document or documents accompanying this my will." Three letters were found along with the will, one dated anterior to the will, another bearing date before the will, but evidently altered after, and the third written after the execution of the will:—Held, that none of the documents were sufficiently identified as being in existence when the will was executed, and probate refused of all three. *Yockey, In goods of*, 29 L. T. 699.

Testator, by his will made in 1823, directed his executors to pay any legacies he might afterwards give by any testamentary writing witnessed or not, and, after making various codicils, he in 1838 made a codicil which was signed but not attested, and, by a further codicil in 1839, duly signed and attested, he declared that he thereby "ratified and confirmed his said will and codicils":—Held, that such general reference was not sufficient to identify and so incorporate the codicil of 1838 in that of 1839, and probate of such codicil refused. *Croker* v. *Hertford* (*Marquis*), 4 Moore, P. C. 339.

A testatrix duly executed her will in 1875, and (inter alia) bequeathed to trustees named in the will all her watches, jewellery, and other personal effects, "upon trust to deliver the same, as soon as conveniently may be after my decease, to such my children and issue as I shall, by any memorandum in writing, purporting to dispose thereof, and signed by me, direct." She subsequently drew up a memorandum, putting the name of the beneficiary against each article, but she did not sign the document. About two months later she made a codicil, by which she confirmed her will, except in so far as it was altered by this codicil. Upon the executors applying for probate of all three documents, the registrars refused to admit the memorandum, and, upon appeal to the court:—Held, that they were right, and that the memorandum, by reason of its never having been signed, was not incorporated in the will, either by the terms of that document or by the subsequent execution of the codicil. *MacGregor, In goods of*, 60 L. T. 840; 53 J. P. 231.

Where a testator made seven holograph documents, the last only being duly attested, and it referred to six documents signed by him "in the joint presence of the attesting witnesses, who thereupon signed their names in his and each other's presence," the court being satisfied that the witnesses had never seen the six documents sought to be incorporated, held that they were not incorporated so as to exclude the possibility of mistake, that they were not clearly identified with the description of them given in the attested document, and were not proved to have been in existence at the date of the attested document, and as the attested document was inoperative, refused probate of all the testamentary papers. *Garnett, In goods of*, 63 L. J., P. 82; [1894] P. 90; 6 R. 579; 70 L. T. 37.

Appointment of guardians by an unattested will made good by a codicil with three witnesses on the same paper, referring to the will as annexed, making some alterations as to legacies, and confirming it in all other respects, as in the case of a devise of land. *De Bathe* v. *Fingal* (*Lord*), 16 Ves. 167.

—— **Onus of Proof.**]—The onus of establishing existence and identification lies on the person who seeks to make the paper admissible for such a purpose. *Singleton* v. *Tomlinson*, supra.

Necessity of Existence of Papers referred to.]—A. inclosed and sealed up in an envelope two sheets of paper, on which she had in writing expressed her wishes as to the disposal of moneys belonging to her, and of her jewellery and other personal effects. These papers were not duly executed. On the inner side of the envelope she wrote as follows:—"It is my wish for my husband to administer the moneys; and for the smaller bequests B. will attend to them." This memorandum was signed by A., in the presence of two witnesses. The only surviving witness deposed that after the execution two similar sheets of paper to those found therein were placed and sealed up in the envelope by A., but that she could not further identify them. The envelope had been opened after the execution:—Held, that as the words in the memorandum did not refer to any paper as existing, or if so not in such terms as to enable the court to identify it; and as the evidence did not shew that the papers found in the envelope were the

same as those placed there after the execution by A., the papers so found inclosed were not entitled to probate, and that without them the memorandum was not testamentary. *Van Straubenzee* v. *Monck*, 3 Sw. & Tr. 6; 32 L. J., P. 21; 8 Jur. (N.S.) 1159; 7 L. T. 723; 11 W. R. 109.

When a will referred to a paper, as not then existing, the court refused to incorporate the paper with the will, although the paper and the will were written on the same day. *Sims, In goods of*, 17 L. T. 619; 16 W. R. 407.

When a will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of a document to which it refers, such document, although not in existence until after the execution of the will, is entitled to probate by force of the codicil. But where the reference in the will was to a future document, and the language of the codicil, in which the language was repeated, was ambiguous, and might be read as pointing either to an existing or future document, the court refused to incorporate unexecured papers written by the testatrix between the date of the will and codicil. *Reid, In goods of*, 38 L. J., P. 1; 19 L. T. 265.

Where a will did not refer to a paper as existing at the date of the will the court refused to admit the same to probate, and held that the codicils could not have the effect of incorporating the paper with the documents of which probate was granted. *Reid, In goods of*, supra, followed. *Durham* v. *Northen*, [1895] P. 66; 6 R. 582; 69 L. T. 691.

A testatrix left the residue of her property to trustees, save and except such articles of furniture in her house at the time of her death "as may be ticketed or may be described in a paper in my own handwriting, to shew my intention regarding the same." The testatrix, at the time she instructed her attorney to draw a will, produced to him two lists, which she informed him were the papers she intended to refer to, but they were not at the time the will was executed shewn to the witnesses:—Held, that as the will did not describe the papers as being then in existence, the court could not receive parol evidence of the fact, and could not allow them to be incorporated in the probate. *Sunderland, In goods of*, 35 L. J., P. 82; L. R. 1 P. 198; 14 L. T. 741; 14 W. R. 971.

A testator gave a policy of assurance to two trustees, "to hold the same upon uses appointed by letter, signed by them and myself." No such letter existed at the date of the will, but the testator had previously asked the trustees, who had consented to accept the bequest for the benefit of persons and objects then named by the testator. Long after the date of his will the testator wrote a letter, addressed to his executors, stating that he had, by his will, left the policy to the two trustees, to be delivered up to them for the purposes they had agreed to carry out. At the same time the testator signed an unattested memorandum, declaring the trusts on which the trustees were to hold the policy given to them by his will. The trustees retained the letter and the memorandum until after the testator's death. Upon a claim, by one of the persons beneficially interested under the memorandum, against the executors and the trustees:—Held, that the testator could not prospectively create for himself a power to dispose of property by an instrument not duly executed as a will, and that the trustees held the proceeds of the policy in trust for the residuary legatees under the testator's will. *Johnson* v. *Ball*, 5 De G. & Sm. 85; 21 L. J., Ch. 210; 16 Jur. 538.

Devise and bequest of all the testator's real and personal estate in Grenada to pay all such annuities, legacies, or bequests as he should give or bequeath, to be paid out of, or charged upon his real or personal estate in Grenada by his will or any codicil, whether witnessed or not. A charge by an unattested codicil is void, this being not a charge by the will of legacies, but a reservation by a will executed according to the statute of frauds of a power to charge by an unattested paper. As to the objection that the real estate was not charged as a subsidiary fund to the general personal estate, quære. *Rose* v. *Cunningham*, 12 Ves. 29.

Reference in Will—To Lists or Schedules.]—A testatrix having directed her executors in her will to distribute certain articles according to any list or lists signed by her, and having prior to the execution of a second codicil, signed a list to which no reference was made in the second codicil, the court allowed the list to be included in the probate. *Stewart, In goods of*, 4 Sw. & Tr. 211.

A testator empowered his executors to pay his debts and funeral and testamentary expenses out of the proceeds of his property, and after reciting that he was possessed of landed and chattel property, "as stated in the annexed schedule," directed his executors to sell his property. The will was written by the testator himself on three sides of a sheet of paper and duly executed; the schedule was on the fourth side, also written and signed by him, and dated the same day as the will, but unattested; it was omitted from the probate, and there was no extrinsic evidence that it was already written when the will was executed:—Held, that the identity and previous existence of the schedule were sufficiently established by its position and its being referred to in the will as "annexed," and that it was therefore incorporated. *Watson* v. *Arundell*, Ir. R. 11 Eq. 53.

G., in 1866, executed a will, and a few days afterwards a paper, which he called directions to his executors, to form a part of his will. In 1868 he executed a fresh will, revoking all former wills and codicils. In this last will he expressed a wish that the goods and chattels in and about the rooms he should occupy at the time of his death should be disposed of according to the written directions left by him, and affixed to his will. No paper was found affixed to his will, but the codicil above mentioned, which in many respects answered to the written directions described in the will, was found in his private room:—Held, that it could not be included in the probate. *Gill, In goods of*, 39 L. J., P. 5; L. R. 2 P. 6; 21 L. T. 399.

A testator by his will dated the 22nd day of November, 1872, declared for the information of his trustees that the amount or values expressed in his ledger and entered on the twenty-first page and signed by him and dated the 8th of November, 1872, were, and were the only, advancements either by way of gift or loan made by him to any of his children before the 8th of November, 1872. The twenty-first page of the ledger was not admitted to probate. The sums entered therein were not in all instances the true amounts actually received by the children:—

Held, that the will must be read as if the entries in the ledger were incorporated into it, and that the entries were conclusive for the purposes of the will. *Quihampton* v. *Going*, 24 W. R. 917.

A will began, "I direct my executors to pay the expenses of my funeral, and all my lawful debts, out of the proceeds of my property." It went on thus:—"Whereas I am possessed of landed and chattel property, as stated in the annexed schedule; I direct my executors to sell my landed property, namely" (and then four separate pieces of landed property were named), "for its full value." Several legacies were then given, and then a fifth landed property was specially devised to W., a person fully described, with an ultimate remainder to T., and then came the gift of other legacies, and finally the will declared, "I constitute the said T," describing him, "my residuary legatee." The will was written on three sides of a sheet of paper, the signature and attestation were at the bottom of the third side, the schedule was on the fourth side; it was in the handwriting of the testator, was signed by him and bore the same date as the will. It described the four portions of landed estate, and as to the fifth landed estate said, it "is not included in the above schedule, being willed by me to W.; my executors have no control over it." The witnesses who attested the will had not seen the schedule when they made their attestation:—Held, that as the schedule was not proved to have been written at the time of the execution of the will, it could not be incorporated with the will nor referred to for the purpose of assisting in its construction. *Singleton* v. *Tomlinson*, 3 App. Cas. 404; 38 L. T. 653; 26 W. R. 722—H. L. (Ir.)

A lady, by her will, gave to A. all such articles of silver plate and plated articles "as are contained in the inventory signed by me and deposited herewith." A list of such articles, professedly the one referred to in the will, signed by the deceased at the foot of each page and at the end, but having on it a date on the last page later than the date of the will, was deposited with the will by her at her bankers'. In conversation with one of the witnesses, before the execution, she referred to this list, but it was not shewn to the witnesses at the time of the execution of the will. She subsequently executed a codicil, which described itself as a codicil to the will of such a date, but did not confirm it in direct terms:—Held, that the will might be read as if it had been executed at the time of the execution of the codicil; and as the court was satisfied from the language of the will so read that the list referred to was then in existence, and from the other evidence that it had been before that date signed by her and deposited with her will, it might be taken to be incorporated therewith, and be admitted to probate. *Truro (Lady), In goods of*, 35 L. J., P. 89; L. R. 1 P. 201; 14 L. T. 893; 14 W. R. 976.

W. bequeathed all her jewels, furniture, &c., to such of her children in such portions as she should by any list signed by herself direct. She subsequently duly executed a codicil in the following words: "I declare that this writing shall be a codicil to my will." When she executed the codicil there was a list annexed to it in her own writing, but unsigned by her, and expressed to be made for the purpose of carrying out the intentions expressed in her will, disposing of different articles of jewellery, furniture, &c., amongst her children. The court granted probate of the will and codicil, but without the list annexed to the codicil. *Warner, In goods of*, 10 W. R. 566.

A testator, after executing his will, delivered to his brother a list of small sums of money which he wished to be paid to different persons after his death. Subsequently he wrote him a letter which was duly executed, in which he referred to the list thus: "In the legacies I gave to you":—Held, that the list was sufficiently identified, and that it should be included in the probate. *Daniell, In goods of*, 52 L. J., P. 23; 8 P. D. 14; 48 L. T. 124; 31 W. R. 248; 46 J. P. 808.

Direction in a will, that "all and every such sums of money which I have already advanced or may hereafter advance to any children, as will appear in a statement in my handwriting," should be brought into hotchpot:—Held, that a subsequent unattested statement in testator's handwriting was admissible in evidence of advances, the court construing "which" as meaning "as," and the clause, "as will appear," &c., as mere words of reference, forming no part of the identification of the subject. *Whateley* v. *Spooner*, 3 K. & J. 542.

But such unattested document cannot be looked upon as proving that an advance was made which was not actually made, nor conversely; and a direction therein that shares so advanced, and which had become depreciated in value, should be estimated at their selling price at the time when the estate should be divided is inadmissible. *Ib.*

A testator left all books contained in a certain library catalogue to Selwyn College, Cambridge. The registry required that this catalogue should be treated as as an incorporated document and brought into the registry for probate. The catalogue was very cumbrous, and the expenses of making a copy and engrossing and registering the same would have amounted to about 200*l.*:—The court, with the consent of all persons interested, ordered that the college should hold the catalogue on behalf of the registry, a note being made on the probate to this effect, and the college undertaking to allow anyone to inspect it who was legally entitled to do so. *Balme, In goods of*, 66 L. J., P. 161; [1897] P. 261; 77 L. T. 219.

—— **To Codicil.**] — Testatrix gives, by her will, legacies to all her nephews and nieces, except those thereinafter named; she desires her executors to look upon all memorandums, &c., in her own hand as parts of a codicil to her will, and bequeaths by will her residue to the children of her sisters, E., J., &c. By a codicil she gives legacies to some other nephews and nieces:—Held, that the children of E., J., &c., the residuary legatees under the will, were excluded from the legacies; but that the legatees under the codicil were not, and were entitled to both. *Fuller* v. *Hooper*, 2 Ves. 242.

"Testament" includes a will, codicils, &c. "Instrument" signifies the will alone. *Ib.*

—— **To Memorandum.**]—M. duly executed a will, in which she directed her trinkets to be divided "as I shall direct in a small memorandum." She afterwards wrote a list of trinkets, which she headed, "Memorandum of trinkets referred to in my will." Subsequently she duly executed a codicil, which did not confirm the

will, nor did it refer to the memorandum :—Held, that the memorandum could not be included in the probate. *Mathias, In goods of*, 3 Sw. & Tr. 100 ; 32 L. J., P. 115 ; 9 Jur. (N.S.) 630 ; 8 L. T. 471 ; 11 W. R. 808.

A testatrix bequeathed personalty to certain legatees, "in the confidence that they will distribute it as I may by memorandum or deed, or otherwise, direct." She afterwards executed a codicil, revoking some legacies, but confirming her will in all other respects. After her death, the will and codicil, and several unattested memoranda in her handwriting, containing directions for the distribution of the personalty, bearing dates later than the will, and earlier than the codicil, were found tied up together :—Held, that the memoranda could not be admitted to probate, *Lancaster, In goods of*, 29 L. J., P. 155.

—— **To French Will.**]—A testator executed a will in France in 1858, and added a codicil thereto in 1865, and a second codicil in 1872. In 1860 he executed a second will, which he deposited with his bankers in England, and in it appointed executors, and confirmed and renewed in all its parts the will of 1858. The French will (1858) disposed only of his property in France, the English will (1860) disposed only of his property in England, and both contained statements to the effect that they were independent of each other :—Held, that the French papers were incorporated by reference with the English will, and that all should be included in the probate. *Howden (Lord), In goods of*, 43 L. J., P. 26 ; 30 L. T. 768 ; 22 W. R. 711.

—— **To Annulled Will.**]—A will made in November, 1861, contained a clause, "I make no specific bequest to my brother's children, &c. Upon this subject I refer my wife to my annulled will, dated the 11th of February, 1851." The annulled will contained no bequest to those children ; in it the testator stated that in the present aspect of affairs there was every prospect that they would be left well provided for, but, that if any reverse should overtake them, he trusted and felt sure that his wife would share her all with them. Upon motion for probate of the will of November, 1861 :—Held, that the annulled will did not raise any implied trust in favour of the children, and that therefore it need not be embodied in the probate. *Ouchterlony, In goods of*, 3 Sw. & Tr. 175 ; 32 L. J., P. 140 ; 9 L. T. 117.

—— **To Copy of Will.**]—M. made his will in India and deposited it with a bank at Calcutta. While temporarily resident in Scotland he executed a codicil, in which he referred in distinct terms to a copy of the will. This copy he produced to the witnesses at the time he executed the codicil, and he deposited both papers in the hands of his executor :—Held, that the copy was incorporated by the codicil, and probate of the copy will and codicil granted, without the production of the original will. *Mercer, In goods of*, 39 L. J., P. 43 ; L. R. 2 P. 91 ; 23 L. T. 195 ; 18 W. R. 1040.

—— **To Settlement.**]—L. bequeathed certain leaseholds to trustees upon the same trusts as declared in a certain indenture of settlement. With a slight exception, the whole of these leaseholds were included in the settlement, which was of great length. The court granted probate without requiring the settlement to be embodied in it, upon an affidavit being filed describing and giving the date of the settlement. *Lansdowne (Marquis), In goods of*, 3 Sw. & Tr. 194 ; 32 L. J., P. 121 ; 9 L. T. 22 ; 11 W. R. 749.

A testator bequeathed the residue of his estate to trustees, upon the same trusts as those contained in a deed of settlement made between third persons, and in which the testator had no interest. The court, upon an affidavit that the persons in whose possession the deed was refused to produce it, decreed probate without requiring a copy of the deed to be inserted therein. *Sibthorp, In goods of*, 35 L. J., P. 73 ; L. R. 1 P. 106 ; 13 L. T. 803 ; 14 W. R. 543.

D. devised his real and leasehold estates in accordance with the provisions of a deed of settlement made by his son on his marriage, so far as they related to a particular property. He left no leaseholds, and the trustees of the son's marriage settlement declined to allow it to be taken into the registry :—Held, that the court would not compel the trustees to bring in the deed of settlement, and that probate might issue without any portion of the deed of settlement being included in it, the party applying being willing to take it in that form. *Dundas, In goods of*, 32 L. J., P. 165 ; 9 Jur. (N.S.) 360 ; 12 W. R. 18.

A testatrix bequeathed all her estate on the same trusts as those contained in her marriage settlement. The court dispensed with the necessity of incorporating the whole of the settlement in the probate, and required only such extracts as would explain the nature of the bequests. *Garbett, In goods of*, 21 L. T. 366.

A domiciled American subject made a will in the United States, by which he directed his property in this country to be paid over, after the discharge of specified legacies, to his executors in America, and to be by them distributed according to the provisions of a trust deed also executed in the United States. The deed did not affect the devolution of property in this country, and the court therefore allowed probate to go without incorporating it, an affidavit being filed in the registry identifying it by date and the names of the trustees. *Peabody, In goods of*, 21 L. T. 730.

A husband left a will containing the following clause : "I confirm the provision made for my wife by her marriage settlements, and of the settlement made on the marriage of my son." The court allowed probate of the will to go, without requiring the settlements to be incorporated, but directed a copy of the settlements to be deposited in the registry. *Leigh, In goods of*, 28 L. T. 914.

Reference in Codicil—to prior Codicil.]—A testator made his will, duly attested, so as to pass freehold estate, dated in 1828. In May, 1831, he made a codicil, which was attested by two witnesses only, declaring it to be a codicil to his will, and directing that it should be annexed thereto. This codicil varied the disposition of parts of his real estate. In September, 1831, he made a second codicil, duly attested, so as to pass freehold estate, which he declared to be a second codicil to his will, and directed the same to be annexed thereto and taken as part thereof. The second codicil concluded by confirming his will :—Held, that the second codicil gave the same

effect to the first codicil as if it had been duly attested by three witnesses. *Aaron* v. *Aaron*, 3 De G. & Sm. 475 ; 14 Jur. 125.

—— **To Letter.**]—A testatrix, the day before undergoing an operation which ended fatally, wrote two letters ; the first, which was addressed to a personal friend, gave directions as to certain articles of plate to which the testatrix had affixed the names of various donees, and the second to her executor. In this letter, which was duly attested as a codicil, she mentioned having written the first letter :—Held, that the second letter, which constituted a valid codicil, incorporated the first letter and that the first letter incorporated the papers therein referred to. *Symes* v. *Appelbe*, 57 L. T. 599 ; 51 J. P. 632.

Paper annexed to Will.]—Two papers, A. and B., wafered together and sealed up in an envelope, indorsed, "The will of James Wood, 2nd and 3rd December, 1834," were propounded as a will. Paper A., which was headed, "Instructions for the will of me, James Wood," and was dated the 2nd December, and signed by the testator but not attested, purported to appoint four gentlemen by name executors, whom he desired to take possession of his personal estate, subject to the payment of his debts and to such legacies as he should thereafter direct, and the paper went on to declare that he would dispose of his real estates by writing indorsed thereon. Paper B., dated 3rd December, signed by the deceased and attested by the three witnesses, began, "I, James Wood, do declare this to be my will for disposing my estate as directed by my instruction," and gave all his real and personal estates "which he might not dispose of," and, subject to his debts and to any legacies or bequests which he might thereafter make, to "his executors," not naming or describing them. Both papers were in the handwriting of one of the executors, the attorney of the deceased, and it appeared in evidence that they had been annexed together, sealed up in an envelope, indorsed, and deposited in testator's bureau, by such attorney during the last illness of the testator, and without his directions or knowledge :—Held, that the two papers constituted a valid will. *Hitchings* v. *Wood*, 2 Moore, P. C. 355.

Paper referring to Will.]—If testator, by paper subsequent to will, says he has bequeathed that which he has not bequeathed, that paper may be proved as testamentary, and property will pass. *Druce* v. *Denison*, 6 Ves. 397.

—— **To Codicil.**]—A paper being propounded which was alleged to be a holograph of and signed by the deceased, and to have been sent to one of the legatees named in it in an anonymous note by the threepenny post, leaving legacies amounting to 210,000*l*., and referring to a legacy in another codicil not forthcoming (there being traces in the evidence of other testamentary papers which were not forthcoming), partially torn and partially burnt, as was alleged to have been done to this and other testamentary papers since the death of the testator, or in his lifetime without his knowledge, the evidence as to the handwriting being contradictory, though the affirmative greatly preponderated, and the disposition being probable, the court held the paper to be a valid codicil. *Hitchings* v. *Wood*, supra. See also *Ridout* v. *Bouchier*, 2 Moore, P. C. 428, n.

Presumption that Papers fastened together at Execution.]—A will had been engrossed by a law stationer on fifteen brief sheets of paper, consecutively numbered. On the sixteenth sheet the testator had written a codicil, and on the eighteenth and last a schedule of property referred to in the will. On his death, it was found that the original fourth sheet had been removed and placed loose in his desk, and that the original seventeenth sheet had been used by him in substitution of the fourth. The several sheets were tied together with tape :—Held, that the legal presumption that papers bound together and constituting the will, as found at his death, were so bound together at the time of execution and attestation was not rebutted by the circumstances of the case. *Rees* v. *Rees*, L. R. 3 P. 84 ; 29 L. T. 375.

Incorporation—Of invalid Will by Codicil.]—S. M. H., while a married woman, made a will which was invalid. Afterwards, when a widow, she executed a document beginning with the words "This is a codicil to the last will and testament of me." The codicil was written on the same paper as the will, and immediately after it, and it was proved that she had made no other will :—Held, that the will was incorporated in the codicil. Probate granted of both documents. *Heathcote, In goods of*, 50 L. J., P. 42 ; 6 P. D. 30 ; 44 L. T. 280 ; 29 W. R. 356 ; 45 J. P. 361.

—— **By Enumeration of Codicils.**] — Semble, a document containing the words "This is a third codicil to my will" is not incorporated in a codicil of subsequent date by the words "This is a fourth codicil to my will." *Stockil* v. *Punshon*, 50 L. J., P. 14 ; 6 P. D. 9 ; 44 L. T. 280 ; 29 W. R. 214 ; 45 J. P. 159. Explained in *Heathcote, In goods of*, supra.

When Unincorporated.]—A. executed his will in February, and a codicil on the same paper in December ; below the signature to the will, and before the commencement of the codicil, appeared a memorandum which, from the evidence of the solicitor who prepared the will, had been written on the paper before the execution of the will :—Held, that the memorandum, being no part of the will as originally executed, was not entitled to probate by reason of the duly-executed codicil of a subsequent date, such codicil referring merely to the will. *Willmott, In goods of*, 1 Sw. & Tr. 36 ; 6 W. R. 409.

D. made a testamentary disposition on a first page of a sheet of note paper, which was signed by himself and attested by one witness only. He shortly afterwards duly executed a testamentary disposition (but which contained no reference to the former disposition) on the third side of the same sheet. At the time of the execution he did not mention to the attesting witnesses the writing on the first page, and one of them believed that he asked them to attest his will :—Held, that the disposition on the first page was not incorporated in the document executed on the third page, and was therefore inoperative ; that, as the disposition on the third page related exclusively to real property, it was not entitled to probate. *Drummond, In goods of*, 2 Sw. & Tr. 8 ; 2 L. T. 391 ; 8 W. R. 476.

A testatrix made a testamentary disposition on the first three pages of a sheet of letter paper, which was signed by herself, but unattested.

She some time afterwards duly executed a testamentary disposition (but which contained no reference to the former disposition) on the fourth page of the same sheet. At the time of the execution the testatrix told the witnesses that it was her will; but the paper was so folded that they could not see the writing above her signature, and they did not know that there was any writing on the other pages :—Held, that the disposition on the first three pages of the sheet was not incorporated in the document executed on the fourth page, and was therefore inoperative. *Tovey, In goods of*, 47 L. J., P. 63 ; 39 L. T. 235 ; 27 W. R. 140.

Where Probate allowed without Incorporation.]—An American, by a will and codicils, disposed of his property generally, and by a second will, in which he named separate executors, of moneys he had invested in the British funds. He expressed a distinct wish that the British will should take effect as a separate testamentary disposition of property independently of and disconnected from his general will :—Held, that it was unnecessary to incorporate the American will, which was very bulky, in the English probate, but that an authenticated copy of the American will and codicils should be filed in the registry, and a note be added to the English probate to the effect that such copy had been so filed. *Astor, In goods of*, 45 L. J., P. 78 ; 1 P. D. 150 ; 34 L. T. 856 ; 24 W. R. 539.

—— **Deeds of Settlement.**]—*See* supra, col. 287.

K. Conditional and Contingent.

Conditional Will—What is.]—The deceased, an officer in the army, whilst on active service during the Maori war in 1864, wrote a letter to his sister, of which the material portion was in the following words : "This is the most important part of my letter. If we remain here, . . . the chances are in favour of more of us being killed, and as I may not have another opportunity of saying what I wish to be done with any little money I may possess in case of an accident, I wish to make everything I possess over to you." (Here followed a description of the testator's property.) "Keep this until I ask you for it." The testator lived till July 10, 1896, without ever having asked his sister for the letter or having in any way revoked the testamentary disposition contained therein :—Held, that the terms of the letter did not limit its operation to the period of the Maori war or the period of the testator's active service ; that the document was not conditional on his death at any particular time ; and that as it was a good military will under s. 11 of the Wills Act, it must be admitted to probate. *Spratt, In goods of*, 66 L. J., P. 25 ; [1897] P. 28 ; 75 L. T. 518 ; 45 W. R. 159.

The testator, a Scotchman by birth, resident principally in India, made a will whereby he gave his wife the income of the residue of his estate for life, provided she remained a widow. In the event of her marrying a second time he divided the residue into three parts, one of which he gave to his wife for life with power to bequeath the same by will, and the other two to certain specified legatees. He omitted, however, to provide for the disposition of his estate after his wife's death in case she remained a widow. In 1892, twelve years after the date of the original will, being about to sail with his wife from Calcutta to England, he wrote a letter to his brother, the executor of his will, which letter was shown to be a valid testamentary document according to the law of Scotland. This letter contained the following passage : "If anything happens to us on the way, my will has been accidentally packed away in a tin box to which I cannot now get access, as I forget which box it has been put into. However, if we both come to grief, I appoint you my executor ; if I only, then in conjunction with Nan. If Nan survives me the revenue of my estate goes to her for life ; on her death, 10,000*l.* to be paid in equal proportions to George, Sam, and Lizzie, or, in the event of their death, then to their children. The residue I leave to you" :—Held, that there was no period defined in which alone the will was to be operative, and that there was nothing in the disposition of the property which pointed to a limitation of the effect of the will, but rather the direct opposite ; and that therefore the will was not conditional, and must be admitted to probate. *Halford* v. *Halford*, 66 L. J., P. 29 ; [1897] P. 36 ; 75 L. T. 520.

Sailor.]—A master mariner, whilst on a voyage, wrote with his own hand a will which commenced, "This is the last will and testament of me, that in case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London, then I give and bequeath," &c. :—Held, that the dispositions of the will were dependent on the event referred to at the beginning of it, and that it had therefore only a contingent operation. *Robinson, In goods of*, 40 L. J., P. 16 ; L. R. 2 P. 171 ; 23 L. T. 397 ; 19 W. R. 135.

A mariner's will, commencing "Instructions to be followed if I die at sea or abroad," is conditional. *Lindsay* v. *Lindsay*, 42 L. J., P. 32 ; L. R. 2 P. 459 ; 27 L. T. 322.

A master mariner being about to sail from Liverpool to Wales, made a will, which contained the following clause : "Should anything happen to me on my passage to Wales, or during my stay there, I leave all my goods." &c. He returned from that voyage, but evidence was offered of adherence to and recognition of the will subsequently :—Held, that the will was conditional, and that no evidence was admissible to show that he intended that it should be operative after the time limited in the condition had expired. *Roberts* v. *Roberts*, 2 Sw. & Tr. 337 ; 31 L. J., P. 46 ; 8 Jur. (N.S) 220 ; 5 L. T. 689.

On Going a Journey.]—When a will is expressed to take effect during absence on a particular voyage, and the writer returns to England, the court cannot admit evidence to show the writer's intention of adhering to that will during a subsequent absence. *Winn, In goods of*, 2 Sw. & Tr. 147 ; 7 Jur. (N.S.) 764 ; 4 L. T. 655 ; 9 W. R. 852.

W. executed a paper in which he stated that he was on the eve of embarking for foreign parts, and thereby, in case of his decease during his absence being fully ascertained and proved, he made certain bequests. He returned from that voyage the following year, and subsequently again left England, and was supposed to have died in Australia :—Held, that the paper was conditional, to operate only if he died on his

then intended voyage; and that, as he returned from it, the will had no further effect. *Ib.*

Where a person wrote with his own hand a will in which he stated he did so "being about to proceed on a long voyage, and not knowing what will happen to me"; and he made a tour, and returned home, and subsequently duly executed this paper in the presence of two witnesses:—Held, entitled to probate. *Hobson, In goods of*, 7 Jur. (N.S.) 1208.

"In Case of my Death on the Way."]—A testator being about to travel, made his will, which contained the following words: "On leaving this station for T. and M., in case of my death on the way, know all men this is a memorandum of my last will and testament":—Held, that the will was not contingent upon his death before arriving at T. or M.; and therefore it was admitted to probate. *Mayd, In goods of*, 50 L. J., P. 7; 6 P. D. 17; 29 W. R. 214; 45 J. P. 8.

A person executed his will in England. He then went to India, and while there executed a second will, which contained this clause: "I write this as my last will and testament in case of a sudden or accidental death befalling me in India." He died in England:—Held, that the will was contingent on his dying in India, and that, as the event had not occurred, the instrument was inoperative. *Newton, In goods of*, or *Jobson* v. *Ross*, 42 L. J., P. 58; 28 L. T. 677; 21 W. R. 648.

A party executed a paper in which he made use of the following language: "Being obliged to leave England to join my regiment in China, I leave this paper containing my wishes. Should anything unfortunately happen to me whilst abroad, I wish everything that I may be in possession of at that time, or anything appertaining to me hereafter, to be divided," &c. The deceased returned to England from China:—Held, that the dispositions of the will were dependent upon his death in China, and therefore that the will itself was conditional. *Porter, In goods of*, 39 L. J., P. 12; L. R. 2 P. 22; 21 L. T. 680; 18 W. R. 231.

After the death of a testator a will was found amongst his papers which had been executed two years previously, commencing, "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave all my property," &c.:—Held, that the will was not contingent upon his death by accident during the journey he was about to take. *Dobson, In goods of*, 35 L. J., P. 54; L. R. 1 P. 88; 13 L. T. 758; 14 W. R. 408.

A person wrote and signed a will on the 14th of August, 1858, beginning, "In the prospect of a long journey, should God not permit me to return to my home, I make this my last will." He afterwards went on a journey, and returned on the 25th of September, 1858. In February, 1859, he acknowledged his signature to the will in the presence of two witnesses, who duly subscribed the same:—Held, that the will was entitled to probate, as it was executed after the completion of the journey contemplated. *Cawthron, In goods of*, 3 Sw. & Tr. 417; 33 L. J., P. 23; 10 Jur. (N.S.) 51; 12 W. R. 443.

A testator made his will as follows:—"As I am about to leave home for Bangor, should any accident, &c., take me out of this world, I will to E. M'D., of, &c., 200*l.* and also furniture to the amount of 50*l.* at her selection," for her sole and separate use. "The remainder of all I am possessed of, or may be entitled to possess, I leave to my daughter, S. C., for her sole and separate use, &c.; and should, in God's inscrutable providence, anything take her and her son away from this world before I again make my will—S. C. and her son—I will everything I may be possessed of to E. M'D., of, &c., for her sole and separate use," &c. The testator went to Bangor the same day, and returned home in a week, without meeting with any accident, and did not again leave Ireland, or make any other will, until his death—more than six years afterwards:—Held, that the will was not conditional or contingent on any accident to him during his projected journey to Bangor. Principles of construction in determining whether a will is conditional or absolute. *Stuart, In goods of*, 21 L. R., Ir. 105.

On Death from particular Illness.]—A will in these words: "I, W. M., being physically weak in health, have obtained permission to cease from all duty for a few days, and I wish during such time to be removed from the brig Apellina, to the floating hospital ship Berwick Walls, in order to recruit my health; and in the event of my death occurring during such time, I do hereby will and bequeath," &c., is not contingent on the event of the testator's death in consequence of the illness from which he was suffering when the will was made. *Martin, In goods of*, 36 L. J., P. 116; L. R. 1 P. 380; 17 L. T. 32.

On Death from particular Climate.]—The words "I request that in the event of my death while serving in this horrid climate, or any accident happening to me," do not make a testamentary paper conditional in the event of death while in that climate. *Thorne, In goods of*, 4 Sw. & Tr. 36; 34 L. J., P. 131; 11 Jur. (N.S.) 569; 12 L. T. 639.

"On my Son Dying under Twenty-one," &c.]—A general probate decreed of a will intended "to take effect only in the event of my son, Charles, dying under twenty-one and my daughter dying under that age unmarried." *Cooper, In goods of*, 1 Deane Ecc. Rep. 9; 4 W. R. 182.

"Until I recover," &c.]—A will, executed in 1851, contained a clause in the following terms: "I leave to P. and D. the house and lands of L., until I am able to live there and enjoy it myself." At the date of the will the testator was absent from L., and was suffering from a dangerous illness; he, however, survived a considerable time, and on several occasions afterwards resided at L., and many years after the execution of the will executed codicils which referred to and republished it. In an ejectment by parties entitled to the residuary real estate against P. and D., to recover the lands of L., parol evidence was offered by the defendants, and admitted, showing that the testator entertained peculiar religious opinions, and believed that he would revisit the earth after his death for a period which he described as the millennium, and that he had frequently stated that he would reside at L. during that period:—Held, independently of the parol evidence as to the religious opinions of the testator, first, that the above clause in the will was to be construed as a devise,

operating as a testamentary disposition, to take effect upon his death, and not as a gift inter vivos of the lands, or the profits thereof, until the testator, on recovering from his then illness, should be able in his lifetime to enjoy them. *Bunbury* v. *Doran*, Ir. R. 8 C. L. 516 Affirmed, Ir. R. 9 C. L. 284—Ex. Ch.

—— **When contingent Clauses rejected.**]—Held. secondly, that the words "until I am able to live there and enjoy it myself" should be rejected as a limitation until an impossible event, and that the estate in the lands given to P. and D. passed to them unqualified by these words. *Ib.*

Husband and Wife.]—A husband made a will by which he left all his property to his wife, and made her sole executrix. He subsequently, with his wife, executed a joint will, which was expressed to take effect in case they should be called out of the world at one and the same time and by one and the same accident. By this will they revoked all former wills. The husband died in the lifetime of his wife:—Held, that the joint will was dependent upon a contingency which did not happen, and was, therefore, inoperative even to revoke a previous will. *Hugo, In goods of*, 46 L. J., P. 21; 2 P. D. 73; 36 L. T. 518; 25 W. R. 396.

A wife made a will in exercise of a power, but appointed no executor. The will was dependent on events which never happened, and the legatees named in it died in her lifetime. The will being clearly inoperative, the court refused to admit it to probate. *Graham, In goods of*, 41 L. J., P. 46; L. R. 2 P. 385; 26 L. T. 529; 20 W. R. 614.

A. disposed of his personal and certain of his real property, and appointed executors. He subsequently executed another testamentary paper, in which was the clause, "If my wife survives me, in two years after my wife's death my second cousin, B., and next of kin, to take possession of all my real and personal property, and to pay all my just debts according to my will. . . . I give B. this written document, as I am afraid my executors will not put my will into court." The executors died in the lifetime of A.:—Held, that as the paper was testamentary and duly executed, although not to operate until some time after the death of the testator, it was entitled to probate, and that B. was executor according to the tenor thereof, but that he must take probate of the will as well as of that paper. *Newns, In goods of*, 7 Jur. (N.S.) 688.

A testator wrote a codicil with his own hand, which concluded as follows: "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary":—Held, that the validity of this paper was conditional on the assent of the wife, and that as she elected not to avail herself of its provisions, it ought not to be included in the probate. *Smith, In goods of*, 38 L. J., P. 85; L. R. 1 P. 717; 21 L. T. 340; 17 W. R. 1110.

A codicil, expressed to be in event of testator's death before he joins his wife, was executed after their separation in West Indies, upon an intended voyage to England. The voyage being prevented by accident, he joined her, and they lived together there and in England, having returned together; and the testator having afterwards gone to Corsica, and thence to Lisbon, died there. The codicil held to be contingent, and did not take effect under circumstances. Probate is not conclusive, not being refused except in plain case. *Sinclair* v. *Hone*, 6 Ves. 607.

L. Joint and Mutual Wills.

Upon Death of both.]—Probate granted of a joint will of two persons, as a distinct will, upon the death of both. *Stracy, In goods of*, Deane Ecc. Rep. 6; 1 Jur. (N.S.) 1177; 4 W. R. 164.

A. and B., partners in a farming business, and joint tenants in certain freeholds, executed a will containing various devises and bequests, to take effect after the decease of both of them. On the death of A., B. surviving, application for probate, as of the will of A., was made by the executor therein named:—Held, that probate could not be granted of such an instrument till after the death of both parties. *Raine, In goods of*, 1 Sw. & Tr. 144; 6 W. R. 816.

Two sisters executed a joint will, in which they stated their desire, that as they were living mutually together upon the joint savings of each other, at the death of either, the survivor should have all that remained; and further, on the death of the survivor, that any residue should be divided amongst certain persons. The surviving sister did not prove this document, but on her death, administration, with this paper annexed as the will of the survivor, was granted to one of the parties entitled in distribution to her property. *Lovegrove, In goods of*, 2 Sw. & Tr. 453; 31 L. J., P. 87; 8 Jur. (N.S.) 442; 6 L. T. 131.

Contingent.]—Husband and wife executed a joint will, which was expressed to take effect in case they should be called out of the world at one and the same time, and by one and the same accident. The husband died in the lifetime of the wife:—Held, that the joint will was dependent upon a contingency which did not happen, and was therefore inoperative. *Hugo, In goods of*, 46 L. J., P. 21; 2 P. D. 73; 36 L. T. 518; 25 W. R. 396.

Only appointing Executors.]—The principle that a will appointing executors, and not disposing of any personal estate, is entitled to probate, will be applied to the case of a joint will on the death of one of the co-testators. *Miskelly, In goods of*, Ir. R. 4 Eq. 62; 18 W. R. 215.

Probate of Part only.]—A husband and wife wrote out and signed a document as their will, leaving all their property to each other, and further, making provisions as to what was to be done with the property in the event of the survivor dying without altering those provisions. The wife died first. Upon the application of the husband, the court granted probate to him of so much only of the document as became operative through the death of the wife. *Piazzi-Smyth, In goods of*, 67 L. J., P. 4; [1898] P. 7; 77 L. T. 375.

M. In Execution of a Power of Appointment.

Generally.]—Before the passing of the 20 & 21 Vict. c. 77, though the ecclesiastical court could grant probate of the will or testamentary appointment of a married woman, yet if parties who claimed under such will were about to institute

a suit in equity to enforce their right to a part of the fund bequeathed by it, a court of common law would not interfere by prohibition, to restrain the ecclesiastical court from granting probate of such will or testamentary document, limited only to so much of the sum bequeathed as was sought to be recovered; it appearing that, according to the practice of the court of chancery, such limited administration was necessary for the purpose of instituting the suit. *Tucker* v. *Southcote*, 12 L. J., C. P. 21. *S. C.*, nom. *Tucker* v. *Inman*, 5 Scott (N.R.) 843; 4 Man. & G. 1049; Car. & M. 82.

7 Will. 4 & 1 Vict. c. 26, s. 10, applies as well to powers of appointment created after the act as to those previously created, and therefore a power created after the act, to appoint by will attested by three witnesses, is well executed by a will attested by two witnesses, in conformity with s. 9. *Hubbard* v. *Lees*, 4 H. & C. 418; 35 L. J., Ex. 169; L. R. 1 Ex. 255; 12 Jur. (N.S.) 435; 14 L. T. 367; 14 W. R. 694.

A power of appointment which is not in terms a power to appoint by will is not well executed by a will executed in the manner required by the Wills Act, unless the formalities required by the power are also observed. *Taylor* v. *Meads*, 34 L. J., Ch. 203; 11 Jur. (N.S.) 166; 11 L. T. 6; 13 W. R. 394.

The circumstances that a will is made in execution of a power does not exempt it from the general rule that probate cannot be granted of an instrument, unless it is duly executed as a will in conformity with the law of domicil of the testator. *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441; 29 L. J., P. 1; 5 Jur. (N.S.) 1222; 1 L. T. 70; 8 W. R. 49.

In the absence of a contrary intention apparent on the face of a will, a general residuary bequest operates as an exercise of a general power of appointment, of which the testator is the donee, although the residuary legatees are the persons who would be entitled, in default of appointment, under the instrument creating the power. *Att.-Gen.* v. *Brackenbury*, 1 H. & C. 782; 32 L. J. Ex. 108; 9 Jur. (N.S.) 257; 8 L. T. 22; 11 W. R. 380.

If in such case the testator has in the first instance charged his residuary estate with the payment of debts and legacies, it is not competent for the residuary legatees to disclaim the fund under the appointment, and elect to take under the gift to them in the original instrument. *Ib.*

Where a testamentary paper is alleged to have been made in execution of a power, and proof of a power enabling the deceased to dispose of property by will is given, the court is bound to decree probate, and has no authority to inquire whether the will is in the form required by law for the due execution of a power, or whether it has been executed with the formalities required by the power. It is for a court of construction to decide whether the will is operative. *De Chatelain* v. *Pontigny*, 1 Sw. & Tr. 411; 29 L. J., P. 147; 5 Jur. (N.S.) 579; 7 W. R. 497.

A will of a person who dies domiciled abroad disposing of personal estate in this country, if made in pursuance of a power of appointment, and executed in compliance with the requisites of the power, is entitled to probate, though not executed according to the testamentary law of the domicil of the testator. *Alexander, In goods of*, 29 L. J., P. 93; 6 Jur (N.S.) 345; 2 L. T. 56; 8 W. R. 451.

Exercise of Power—Will revoked by subsequent Marriage.]—The will of M., by which he exercised a power of appointment and also disposed of his own personal estate, having been, as to his own estate, revoked by his subsequent marriage, the court granted letters of administration of his effects, save as to such of them as he was entitled to appoint by will. *Mason, In goods of*, 30 L. J., P. 168. *See also cases*, ante, col. 256 et seq.

Married Women — Revocation.]—A widow, under the powers given to her by her marriage settlement, executed a will in favour of B., without having executed any fresh settlement of the property included in her first marriage settlement:—Held, that she had a right to revoke the will so made by any of the methods prescribed by the Wills Act. *Hawkesley* v. *Barrow*, 35 L. J., P. 67; L. R. 1 P. 147; 14 L. T. 672; 14 W. R. 822.

A married woman exercised two powers of appointment in separate wills executed at different times. The later will contained a clause revoking all former wills. Evidence being adduced that she did not thereby intend to revoke the appointment in the first will, the court granted probate of both wills. *Meredith, In goods of*, 29 L. J., P. 155.

A married woman made a will in 1848, in execution of a power of appointment, and in 1857 made another in execution of another power of appointment. The later will contained a general revocatory clause, but it did not refer to the will of 1848, or to the power in execution of which it was made; or to the property thereby appointed:—Held, that the will of 1848 was not revoked. *Joys, In goods of*, 4 Sw. & Tr. 214; 30 L. J., P. 169. *See also cases*, post, col. 375.

—— **Scotch Domicil—Will made in English form, but not valid by Scots Law.**]—A married woman domiciled in Scotland, made a will under a power in the English form, but not valid by the law of Scotland:—Held, that it was entitled to probate. *Hallyburton, In goods of*, 35 L. J., P. 122; L. R. 1 P. 90; 12 Jur. (N.S.) 416; 14 L. T. 136.

—— **Foreign Domicil—Will in Engish form, but not valid by Foreign Law.**]—Where a will is executed under a power, and the instrument creating the power directs it to be executed by will in a particular form, such will may be good for the purposes of the appointment, if executed according to the law of this country, though not according to the law of the domicil of the testator. *Huber, In the goods of*, 65 L. J., P. 119; [1896] P. 209; 75 L. T. 453.

Nuncupative Will.]—One seised in fee of land limits a term to trustees for one hundred years, upon such trust as he, by deed or will, should appoint, and for want of such appointment, to attend the inheritance, and afterwards, by a nuncupative will, gives all to J. S., and, being a bastard, dies without issue. This will not pass the trust of the term. *Thruxton* v. *Att.-Gen.* 1 Vern. 340.

N. ALTERATIONS, ADDITIONS AND OMISSIONS.

General Rules as to.]—The court will rectify an expression, or even supply proper words, in a will, in order to effectuate a testator's intention. *White* v. *Barber*, 5 Burr. 2703.

The rule of construction of a devise is to give effect, if possible, to every word used by the testator; and particular words used by him are not to be rejected, unless the retaining of them would induce a construction totally irreconcilable with the rest of the instrument. *Doe* d. *Littlewood* v. *Green*, 2 Jur. 859.

If a will contains passages cancelled by the testator, they cannot be called in aid to explain the remaining parts of the will, but it must be read as if the cancelled passages were a blank. *Doe* d. *Spencer* v. *Pedley*, 2 Gale, 106.

It is a common rule of construction, that if the words of a gift are of themselves plain, distinct and capable of having a legal effect, effect must be given to them, notwithstanding any improbability which may arise from looking at the other parts of the will. On the other hand, if the words are ambiguous in expression or effect, they are not to be rejected for uncertainty, but you must collect, if you can, from the other parts of the will, an indication of what the testator meant by those words which by themselves appear to be ambiguous. *Wilson* v. *Eden*, 11 Beav. 289.

Where the words of a will are capable of a construction which will give effect to every word, it is not within the competency of the court to alter their collocation. *S. C.*, 12 Beav. 454.

Words may be supplied in a will to render a sentence complete and intelligible, in aid of the apparent intent to be collected from the whole context. *Doe* d. *Leach* v. *Micklem*, 6 East, 486: 2 Smith, 499. And see *Right* d. *Day* v. *Day*, 16 East, 67; 14 R. R. 294.

Case in which the house of lords held that certain documents, though in several places erased and obliterated, were nevertheless not only probative and testamentary, but contained a good and an effectual expression of an intention to establish in Dundee an hospital to accommodate one hundred boys. *Dundee Magistrates* v. *Morris*, 3 Macq. H. L. 134.

Made before Execution of Codicil.]—Interlineations and alterations in a will admitted to probate where it was proved that they had been inserted before the date of the execution of a codicil to the will. *Tyler* v. *Merchant Taylors' Co.*, 60 L. J., P. 86; 15 P. D. 216; 63 L. T. 779.

A testator, after the execution of his will, made various alterations and interlineations, some of which were attested and some unattested. Among the latter was an interlineation giving a legacy of "1,000*l.* to each of my executors." In the body of the will he gave a legacy of 10,000*l.* to one of his executors. In a codicil the testator recited that he had given a legacy of 11,000*l.* to this particular person:—Held, that this reference showed that the interlineation had been made prior to the execution of the codicil, and that it was therefore incorporated by it. *Heath, In goods of*, 61 L. J., P. 131; [1892] P. 253; 67 L. T. 356.

Presumption is that they were made after Execution.]—Obliterations, interlineations, or other alterations in a will, after execution, are void, if not affirmed in the margin or otherwise by the signature of the testator and the attestation of witnesses. *Greville* v. *Tylee*, 7 Moore, P. C. 320.

The mere circumstance of the amount, or the name of a legatee, being inserted in different ink, and in a different handwriting, does not alone constitute an obliteration, interlineation, or other alteration, within the meaning of the statute, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been superinduced by other writing. Under such circumstances, the onus probandi lies upon the party who alleges such alteration to have been done prior to execution, to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator. *Ib.*

As a deed cannot be altered after execution without fraud or wrong, the presumption, if an alteration appears, is that it was made before execution. But this presumption does not apply in the case of a will which may be altered by the testator without fraud or wrong. *Doe* d. *Tatum* v. *Catomore*, 16 Q. B. 745; 20 L. J., Q. B. 364.

Alterations on the face of a will are presumed to be made after the will is made, until evidence to the contrary is adduced. *Doe* d. *Shalleross* v. *Palmer*, 16 Q. B. 747; 20 L. J., Q. B. 367; 15 Jur. 836.

A will contained alterations and erasures affecting the amount and objects of the testator's bounty, the existence of which, at the time of the execution, the attesting witnesses could not depose to:—Held, there being an absence of all direct evidence as to the alterations and erasures, that the presumption of law was, that such alterations and erasures were made after the execution of the will, and probate of the will was granted in its original form. *Cooper* v. *Bockett*, 4 Moore, P. C. 419; 10 Jur. 931.

Unattested alterations in the handwriting of the testator in a will made before 7 Will. 4 & 1 Vict. c. 26, s. 20, came into operation, will in the absence of any evidence as to their date, be presumed to have been made before the act came into operation. *Streaker, In goods of*, 4 Sw. & Tr. 192; 28 L. J., P. 50.

—— **How rebutted.**]—The presumption of law, that the interlineations in a will were made after execution prevails only in the absence of evidence to the contrary, and very slight affirmative evidence is sufficient to rebut the presumption. *Duffy, In goods of*, Ir. R. 5 Eq. 506.

Alterations in substantialibus, in an instrument written manu alienâ, are presumed to have been made after its execution, but not so in holograph writings. The rules which have been laid down as to erasures, &c., in the former do not generally apply to the latter. Distinction between interlineation and obliteration: the former must be intentional, the latter may not. Semble, in holographs, erased words may be regarded to discover the meaning of words not erased. When the subject of a bequest is an indefinite quantity of money, or anything else, the gift is void. But where a bequest was for the establishment of an hospital (school) for one hundred boys:—Held, that it was the gift of such a sum as would reasonably be sufficient to erect a suitable building, to maintain and educate one hundred boys, and to pay officers, &c. Semble, there is no material (if any) difference between the law of England and Scotland in regard to charities

except as to mortmain; the statute 9 Geo. 2, c. 37, not applying to Scotland. *Ewan* (*Provost of Dundee*) v. *Morris*, 6 W. R. 556.

—— **Presumption as to Date of, in Will made before Wills Acts.**]—A testator, by his will dated in 1834, devised and bequeathed real, copyhold and personal estate upon certain trusts. Certain of the words in the declaration of trust were interlineated. Probate was granted of the will by the consistory court of C. A question being raised, whether, with regard to the real estate, the interlineation was made before or after the execution of the will, it was held, having regard to the granting of the probate by the consistory court, that it was made before the execution of the will. *Cruttenden, In re*, *Davey* v. *Lansdell*, 45 L. T. 465; 30 W. R. 57.

Alterations and Additions — Evidence that they were made before Execution.]—Although, when alterations are apparent on the face of a will, it cannot be presumed that they were made before execution, and they cannot be admitted to probate without some affirmative evidence that they were in fact so made, yet a court or jury trying this question of fact is not confined to any particular species of evidence, but may act upon any evidence which, having regard to all the circumstances, reasonably leads the judgment to the conclusion that the alterations were made before execution. *Moore* v. *Moore*, Ir. R. 6 Eq. 166.

A lawyer's holograph will settled property on his younger grandson Stephen for life, remainder to his first and other sons in tail male, then to his elder grandson Richard, remainder, &c. The word "Richard" was interlined and "Stephen" struck out in the first, and vice versâ in the second case. These alterations were in the handwriting of, and initialled by, the testator, who had previously expressed his intention of settling the property on his grandsons in priority of birth, who also knew their names, and there was no reason why the younger should be preferred. There having been a subsequent opportunity for correcting the mistake before execution, and the appearance of the wills and alterations raising the presumption, confirmed by the opinion of two experts, of contemporaneous writing, probate was decreed with such alterations. *Ib.*

A will contained several unattested interlineations, most of them of single words, each of which was required to complete the sentence to which it belonged. They were apparently written with the same ink and at the same time as the rest of the will, but at the time of execution the body of the will was covered up by the testatrix, so that the witnesses could not see whether the interlineations were there or not. The court held that it was not bound to presume that these interlineations were made after execution, and included them in the probate. *Cadge, In goods of*, 37 L. J., P. 15; L. R. 1 P. 543; 17 L. T. 484; 16 W. R. 406.

Some trifling alterations and interlineations appeared on the face of a holograph will, and there was no evidence whether they were written before or after the execution, except the affidavit of an expert, that in his opinion they were written at the same time as the rest of the will. On that evidence the court admitted them to probate. *Hindmarch, In goods of*, 36 L. J., P. 24; L. R. 1 P. 307; 15 L. T. 391.

—— **Declaration in Attestation Clause.**]—Where the attestation clause in a codicil contains a declaration that some alterations have been made in the codicil before execution, the court may infer from this circumstance, and from the appearance of the codicil itself, that all the alterations were made before execution. *Doherty* v. *Dwyer*, infra.

—— **Absence of Proof.**]—In the absence of any proof that alterations in a will were made before its execution, beyond the fact that they bear an earlier date than the will in the handwriting of the testator, such alterations will not be recognised by the court, or appear in the probate. *Adamson, In goods of*, L. R. 3 P. 253.

—— **Next of Kin and Heir-at-Law concurring.**]—A testator wrote out his will in 1885 and signed and dated it, but did not have it attested. He subsequently destroyed all but the last sheet, and wrote out two fresh sheets, which he attached to the said last sheet. He then, in 1888, inked over his signature in the presence of two attesting witnesses, who duly signed their names at the foot of the attestation clause. The testator died in 1889, and after his death the will was found with the name of the residuary legatee altered, and with several other alterations, all being in the testator's own handwriting. There was no evidence as to when these were made. The next of kin and heir-at-law concurred in the application of the sole executor for probate. The court admitted the will to proof. *Maule* v. *Maule*, 62 L. T. 702.

—— **Where Deliberative.**]—A testator executed a will and codicil. At some time after the execution of the will, but before that of the codicil, he, with a pencil, struck through several paragraphs of his will, and made his initials on the margin; he also placed a query opposite other paragraphs. The codicil confirmed, in so far as it did not alter, the will:—Held, that the alterations so made were only deliberative, and not final, and not included in the confirmation of the codicil, and, therefore, to be omitted from the probate. *Hall, In goods of*, 40 L. J., P. 37; L. R. 2 P. 256; 25 L. T. 384; 19 W. R. 897.

—— **Words in Pencil.**]—A lady executed a printed form of a will. The blanks were filled up by her in her own handwriting, partly with ink and partly with a pencil. Some portion of the writing in ink extended over that in pencil, and some words of the latter had been rubbed out and obliterated. The words in ink were sensible as read with the printed part of the will. The attesting witnesses did not see the writing when they attested the will:—Held, that the words in pencil were deliberative only, and probate was granted without them. *Adams, In goods of*, 41 L. J., P. 31; L. R. 2 P. 367; 26 L. T. 526; 20 W. R. 400.

—— **Partly in Ink and partly in Pencil.**]—A person executed a draft will in April, 1847. In May, 1847, he executed an engrossed will. In September, 1854, he executed a codicil purporting to be a codicil to his last will, of April, 1847. It was supposed that he really intended it to be a codicil to the will of May, 1847. The draft will contained interlineations in the testator's hand-

writing in ink and pencil, and cancellations. Both wills were in the handwriting of the same person, who deposed that he copied the engrossed from the draft will. The engrossed will agreed with the draft will as altered in ink, but not as altered in pencil:—Probate decreed of the draft will of April, 1847, including the alterations in ink, but not those in pencil, in so far as they agreed with the will of May, 1847, together with the codicil of 1854. *Wyatt, In goods of*, 2 Sw. & Tr. 494; 31 L. J., P. 197; 6 L. T. 694; 10 W. R. 783.

When a will seemed to have been first written in pencil and afterwards traced with ink, but not completely, words in some cases being written in ink above, and apparently in substitution for, the pencil writing, and in other parts the pencil writing standing alone, the court declined to include the pencil writing in the grant. *Bellamy, In goods of*, 14 W. R. 501.

—— **Attestation of.**]—The clause appointing executors was written partly on the second and partly on the third side of a will. Subsequently the testator altered the clause, but his signature and those of the attesting witnesses appeared opposite only to the alterations, which were made on the second side. The court granted probate of all the alterations. *Wilkinson, In goods of*, 6 P. D. 100; 29 W. R. 896; 45 J. P. 716.

In granting probate of a will an alteration will not be admitted to probate, either in the ordinary way or in fac-simile, unless attested in the manner required by the Wills Act, and the court will decline to entertain any argument drawn from the intention of the testator as revealed by the context. *Gaussen, In goods of*, 17 L. T. 354; 16 W. R. 212.

—— **Unattested presumed to be made before Wills Act.**]—Unattested alterations appearing in a will executed prior to the Wills Act (7 Will. 4 & 1 Vict. c. 26) coming into operation, will, in the absence of any evidence as to their date, be presumed to have been made before the act came into operation, and are therefore entitled to probate. *Streaker, In goods of*, 4 Sw. & Tr. 192; 28 L. J., P. 50.

—— **In Lithographed Form — Evidence of Intention.**]—A testator made his will on a lithographed form, which he adapted to his purposes by filling up the blank spaces therein and by making certain obliterations and interlineations which appeared in the body of the will. The surviving attesting witness could give no information as to whether or not the obliterations and interlineations were on the will when he attested it; but it appeared that the testator had made certain declarations as to his intentions before the date of the execution of the will, and that to give effect to those intentions it was necessary that the alterations in question should be so made in it. In these circumstances the court came to the conclusion that the alterations were made before the execution of the instrument and decreed probate of it in its altered form. *Dench* v. *Dench*, 46 L. J., P. 13; 2 P. D. 60; 25 W. R. 414.

Unfinished Bequest indorsed on Back.]—A testator wrote his will on the first side of a half-sheet of paper. There was an unfinished bequest in the body of the will, and this he completed on the back of the page, marking by an asterisk the place where the indorsement was to be read into the will. The attesting witnesses did not see the indorsement, which was written before the execution of the will:—The court held that the indorsement formed part of the will, and ordered it to be included in the probate. *Burt, In goods of*, 40 L. J., P. 26; L. R. 2 P. 214; 24 L. T. 142; 19 W. R. 511.

In Will of Soldier presumed to be made whilst on Service.]—Where a will in the testator's handwriting contains material alterations, about the making of which no information can be obtained, and such will was signed by the testator whilst, as a soldier, he was employed in actual military service, the alterations will be presumed to have been made during the continuance of such military service, and will be included in the probate. *Tweedale, In goods of*, 44 L. J., P. 35; L. R. 3 P. 204; 31 L. T. 799.

Obliterations.]—The testator duly executed his will in 1875, giving an annuity to his widow, charged upon certain property over which he had a power of appointment; and, subject thereto, to his daughters. This will remained in the custody of his solicitors, and, down to the time of his death, the testator frequently expressed his regret that he was not in a position to benefit his widow more largely. In 1888 he executed a second document in form of a will, which he enclosed in a sealed envelope with instructions that it was to be opened at the same time as his will. By it he left to a Mrs. B. certain house property which he had purchased out of his savings. No executors were therein appointed, and the printed revocation clause was struck through with a pencil:—Held, that both documents were entitled to probate, and that the second of them should not include the revocatory words. *Tonge, In goods of*, 66 L. T. 60.

A testator in the beginning of his will disposed of certain leasehold houses in trust for the benefit of his children. The words of the description of one of such houses were struck through by a pen, and the testator's signature, but not those of the witnesses, was placed near such alteration. At the end of the will a clause was interlined, by which he bequeathed the same house to his trustees for the sole benefit of his wife. Under the signatures of the testator and the witnesses at the termination of the will a memorandum was added to the effect that the above words were struck out for the benefit of his wife. This memorandum was signed by the testator and attested by the witnesses:—Held, that the memorandum referred to both alterations, the obliteration and interlineation, and that the will so altered should be admitted to probate. *Treeby, In goods of*, 44 L. J., P. 44; L. R. 3 P. 242.

Erasure and Substitution of Words.]—In the absence of any evidence that words written over erasures in a will were added before the execution of a codicil to the will, probate must be granted with blanks wherever erasures occur, if the words erased cannot be ascertained. *Doherty* v. *Dwyer*, 25 L. R. Ir. 297.

A testatrix after the execution of her will erased certain parts, substituting in their places other words. Probate was granted of the will with these parts erased in blank, the original

words not being discernible on the face of the paper, and there being no evidence to show what they were. *James, In goods of*, 1 Sw. & Tr. 238.

A testatrix duly executed a holograph will, which after her decease was found with the word "one" written in the place of another word. There was no evidence to show when the alteration was made. The original word was quite illegible:—Held, that it was the duty of the court to decide what the obliterated word was, if, from the evidence, it was able to do so with "reasonable certainty," and in that event to admit the will to probate with the word so decided upon in place of the word substituted for it by the testatrix. *Jeffery* v. *Cancer Hospital*, 57 L. T. 600; 51 J. P. 503.

A will contained no nomination of executors in the body of it, but at the bottom, below the attestation clause, were the words, "executors, A. and B." There was an asterisk before these words and an asterisk before the word "executor" wherever it occurred in the will. It was proved that these words were written before the execution of the will. After the execution, the testator directed the name of B., who was an attesting witness as well as executor, to be erased, and the name of C. to be written over the erasure. The will was not re-executed after these alterations had been made:—Held, that the nomination of executors might be included in the probate, but that the name of B. must be restored both as executor and attesting witness. *Greenwood, In goods of*, 61 L. J., P. 56; [1892] P. 7; 66 L. T. 61.

Name of Witness Erased and Rewritten.]—Where the name of one of the attesting witnesses to a will was written on an erasure, but it appeared that the will had been duly executed and attested, and that subsequently the attesting witness's name had been erased by the testator, and had at his request been rewritten by the attesting witness, the court granted probate to the widow on affidavit that she and two infant children were the only persons entitled in distribution, and that notice had been given to the children. *Coleman, In goods of*, 2 Sw. & Tr. 314; 30 L. J., P. 170; 5 L. T. 119.

Interlineation—Definition of.]—The definition of the word "interlineation" in the Wills Act is not to be confined to something written between the lines. Something put into one of the lines, but written on the line, is equally an "interlineation" within the meaning of the act. *Bagshawe* v. *Canning*, 52 J. P. 583.

What will be considered to be an Interlineation.]—W. made a will which was written on the first and third pages of several sheets of notepaper. At the bottom of one of these pages were the words and mark, "I leave the whole of my property to the following religious societies, viz. ×, to be divided in equal shares among them." On the top of the opposite page was a similar mark to that following the "viz.," and the names of four religious societies. There being no evidence that the names of the societies were written before the execution of the will, the court, considering them to be interlineations, excluded them from probate. *White, In goods of*, 30 L. J., P. 55; 6 Jur. (N.S.) 808.

A. produced to B. a sheet of paper, having on the first side a formal heading and ending of a codicil, and asked B. to write a codicil for her. B. not having finished the dispositive part when he reached the formal ending, turned over the page and continued the sentence and other dispositive clauses on the second side. The signatures of A. and of the attesting witnesses following the formal ending were on the first page. On motion for probate, counsel suggesting that the writing on the second side might be considered as an interlineation, the court refused to decide such a question on motion, but left the parties to propound the paper, if they thought fit. *Peach, In goods of*, 1 Sw. & Tr. 138; 6 W. R. 865.

Interlineation in Holograph Will not Attested.]—A testator left a holograph will. One clause was unintelligible, but an unattested interlineation in his handwriting made the clause intelligible when taken with it, and also in accordance with declarations proved to have been made by him before the execution of the will. Evidence was also given tending to prove that the will had been kept in a fastened-up envelope from five days after its date in 1867 to a couple of hours before his death in 1874; and an expert gave his opinion that the interlineation was written at the same time and with the same pen and ink as the will. The court granted probate of the will with the interlineation. *King, In goods of*, 23 W. R. 552.

Substitution of Unattested Sheets after Execution.]—A testator after duly executing his will, which was in five sheets, each of which was signed by himself and initialled by the attesting witnesses, took out three sheets and substituted three new ones, which he signed, but which were not attested. He did not alter the date of will, nor did he re-sign it, nor was it reattested:—Held, that the will was not entitled to probate. *Treloar* v. *Lean*, 58 L. J., P. 39; 14 P. D. 49; 60 L. T. 512; 37 W. R. 560.

Interlineation after Execution Initialled by Witnesses and Approved of by Testatrix, though not Executed.]—Testatrix duly executed her will in the presence of two witnesses, who subscribed and attested it. Immediately after its execution an omission was discovered in the will, and this omission was supplied by an interlineation. Testatrix approved of the will as altered, acknowledging it as her "last word and testament," and the witnesses then, in her presence, placed their initials in the margin opposite the interlineation:—Held, that there had been no re-execution of the will, and that consequently the interlineation should be omitted from the probate. *Shearn, In goods of*, 50 L. J., P. 15; 43 L. T. 736; 29 W. R. 445; 45 J. P. 308.

Testator and Witnesses tracing former Signatures with Dry Pen.]—A testator having made some alterations in a duly-executed will, he and the attesting witnesses traced their former signatures with a dry pen, and the attesting witnesses placed their initials in the margin opposite each of the alterations. The court refused to regard the initials in the margin as evidence that the alterations had been duly executed and attested, and declined to grant probate of the will with alterations. *Cunningham, In goods of*, 4 Sw. & Tr. 194; 29 L. J., P. 71. See also *Maddock, In goods of*, post, col. 354.

Pasting over—Effect on Legacy.]—When a testator has pasted over a whole legacy a piece

of paper on which at some time, about which the witnesses can give no information, he has written a new bequest, the court will not order the upper paper to be removed, and will direct the probate to issue in blank as to that legacy; but if the testator has covered over the amount of a legacy only, leaving the legatee's name untouched, the court will consider it a case which comes under the principle of a dependent relative revocation, and will endeavour to discover the amount of the legacy originally bequeathed by removing the upper paper. *Horsford, In goods of*, 44 L. J., P. 9; L. R. 3 P. 211; 31 L. T. 553; 23 W. R. 211.

"Apparent Alteration."]—A testator pasted strips of paper over certain passages in his will. In 1874 probate of the will was granted with these passages in blank, on the assumption that they could not be ascertained by inspection. In 1893 it was found that these passages were legible. The court being satisfied by expert evidence that these passages could be read without resort to artificial means, held that these passages were "apparent" within s. 21 of the Wills Act, and must, therefore, be admitted to probate. *Finch* v. *Combe*, 63 L. J., P. 113; [1894] P. 191; 6 R. 545; 70 L. T. 695.

Writing on Back—Paper pasted over—Removal in Registry.]—The court ordered the removal in the registry of a blank piece of paper found pasted over writing by the testatrix on the back of a testamentary document. *Gilbert, In goods of*, 62 L. J., P. 111; [1893] P. 183; 1 R. 478; 68 L. T. 461.

"Or" and "and."]—Under a devise to A. for life, remainder to B. and her heirs, but if B. died before A., or if she died without heirs of her body, then to C. and his heirs:—Held, that the devise over to C. after B. could only take effect if B. died before A. and without issue, for that, unless "or" were read as "and," the devisee over would take if B. died before A., although B. left issue, which would clearly be against the apparent intent of the devisor, which was to prefer the issue of B. to C. *Denn* d. *Wilkins* v. *Kemeys*, 9 East, 366; 9 R. R. 581.

A. being seised of lands holden upon leases for lives, devised to B., his brother, all his real and freehold estates, subject to an annuity to his mother for her life, "but in case B. should die before he attained the age of twenty-one, or without issue living at his death," to his mother for ever. A. died; B. attained the age of twenty-one, and then died without issue:—Held, that the word "or," in the devise over, must be construed as "and"; and that the mother took nothing upon the death of B. *Fairfield* d. *Hawkesworth* v. *Morgan*, 2 Bos. & P. (N.R.) 38; 9 R. R. 609. And see *Right* d. *Day* v. *Day*, 16 East, 67; 14 R. R. 294.

Under a devise to A. (a natural son), then under age, and the heirs of his body, and if he died before twenty-one, and without issue, then over to other relations, and ultimately to the testator's own right heirs:—Held, that, A. having attained twenty-one, the limitations over did not take effect, as, by the natural sense of the word "and," they were made to depend on the happening of both events (i.e. the son's dying before twenty-one and without issue), and this construction was not varied by a codicil made after the son attained twenty-one, by which the testator confirmed every part of the will so far as his affairs were consistent. *Doe* d. *Usher* v. *Jessep*, 12 East, 288; 11 R. R. 380.

"And" is construed "or" where one member of the compound sentence is included in the other, and would be superfluous unless disjoined. This construction is generally made in favour of vesting, not to defeat a previously-vested gift. *Day* v. *Day*, Kay, 703; 18 Jur. 1013; 2 W. R. 700.

A testator, after certain legacies, devised as follows: "In case my daughter should have no lawful issue, after her death I will that my property that shall be remaining to return to my relations, viz., to my nephew J. 100*l.*; likewise I leave, in case my daughter has no issue, to my nephew S. and my niece A. 80*l.* each; the remainder of my personalty I leave to my daughter's disposal, if she lives to maturity. As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real and all my other property to my brothers, equal between them; but in case my daughter shall have lawful issue, then I leave the whole of my property, real and personal, to her and her heirs":—Held, that the word "or" should be read "and," and that the daughter, on attaining twenty-one, took an estate in fee-simple. *Johnson* v. *Simcox*, 7 H. & N. 344; 31 L. J., Ex. 38; 8 Jur. (N.S.) 284; 4 L. T. 836; 9 W. R. 895—Ex. Ch.

Omitting and inserting Words by Court—General Powers.]—A testator gave oral instructions for a will to his attorney, who made a memorandum of them in his presence. The residuary clause was as follows: "And the residue equally amongst all the sons, including the eldest son for the time being on attaining twenty-one." From the memorandum a draft will was drawn, which disposed of the residue in the following terms: "The trustees to stand possessed of all the residue and remainder of my real estate in trust to divide the same," &c. The draft will was left with the testator, and on his suggestion certain alterations were made in it, but not in reference to the words of the residuary clause above given. The will with such words was executed by the testator:—Held, that however clearly an error can be established in a will, unless words have been inserted by fraud or by mistake without the knowledge of the testator, the court of probate cannot correct it either by the omission of words or by the insertion of other words. *Harter* v. *Harter*, 42 L. J., P. 1; L. R. 3 P. 11; 27 L. T. 858; 21 W. R. 341.

The will of the testator contained a bequest in favour of "Florence Lilian Savory and Thomas Savory, the two children of my nephew J. F. Savory"; another bequest to "my nephew Allen Edward Savory" for his life, and thereafter in trust for "his two children, Gordon Savory and Ronald Savory, in equal shares"; and a further bequest to "Florence Savory, the wife of Allen Edward Savory, during her life," and, subject thereto, "in trust for her two children, Gordon Savory and Ronald Savory, in equal shares." These were, in fact, the names of the children of J. D. Savory, while the children of Allen Edward and Florence Savory were named Florence Lilian and Thomas. Upon motion to omit from the probate the christian names so transposed in the will:—Held, that this could not be done, as it was not shown that the testator did not mean those names to be

inserted in the will, though he might not have meant so to benefit the persons to whom those names actually belonged. *Durlacher, In goods of*, 75 L. T. 664.

—— **Striking out when Inserted by Mistake.**]—A mother by her will left a portion of her furniture and household effects to her daughter, and disposed of the residue of her property, appointing trustees and executors. Subsequently she was advised that the bequest to her daughter should be secured to her separate use, and she gave directions that a testamentary paper should be prepared to that effect. The paper thus prepared purported to be her last will and testament, and, in addition to a clause to the effect above mentioned, contained one revocatory of all former wills. This paper was executed by her, but was not read over to or by her, and she was not aware that it contained such words of revocation:—Held, that as the words of revocation had been introduced per incuriam and without instructions, and their presence there was unknown to her when she executed the will, they ought to be omitted from the probate. *Oswald, In goods of*, 43 L. J., P. 24; L. R. 3 P. 162; 30 L. T. 344.

Where a testatrix left a will dated June 3, 1868, and three codicils dated respectively January 30, 1870, April 30, 1870, and December 9, 1870, and the codicil of April 30, 1870, referred to "the last will of me which bears date the 26th day of April, 1870," the court, having come to the conclusion that there never was any will of April 26, 1870, and that there had been a mere mistake in the date, granted probate of the will and three codicils. *Dent, In goods of*, 31 L. T. 552; 23 W. R. 417.

A testatrix of testamentary capacity duly executed as her will, without, however, its having been read over by or to her, a paper writing, the contents of which she knew and approved of, except only that there had been introduced into it, without instructions from her, clauses of appointment of executors and of revocation of former wills:—Held, that those clauses ought to be omitted from the copy of will to be annexed to the letters of administration. *Wray, In goods of*, Ir. R. 10 Eq. 266.

A testator, in the instructions for his will, directed that all his B. shares should be given to his nephews, but the word "forty" was inserted several times in the will before the word "shares," and the will was executed with that word repeated several times before the word "shares." The jury found that the word "forty" was introduced by mistake, that the clauses including the word were never read over to the testator, and that he only approved of the will upon the supposition that all his B. shares were given to his nephews, and thereupon the court ordered the word "forty," wherever it occurred in the will, to be struck out. *Morrell* v. *Morrell*, 51 L. J., P. 49; 7 P. D. 68; 46 L. T. 485; 30 W. R. 491; 46 J. P. 328.

—— **Omitting Defamatory Matter.**]—The court will not exercise its power of omitting from the probate offensive or libellous passages in a will, except in cases of a very special and definite character. It therefore refused to omit from the probate a paragraph in a will which, though offensive, was not calculated to injure. *Honeywood, In goods of*, 40 L. J., P. 35; L. R. 2 P. 251; 25 L. T. 164; 19 W. R. 760.

—— **Inserting Words.**]—A will, after a legacy to B., contained a gift of other legacies to S., with directions to the latter concerning the testatrix's funeral, and concluded with the words, "I appoint him, my brother B., executor of this my last will":—Held, that the word "with" should be understood as interposed between the words "him" and "my," and that as well S. as B. was entitled to probate. *Boardman* v. *Stanley*, Ir. R. 6 Eq. 590.

When a testator in his will used the words "I herewith empower and authorise my executors," and in the last clause of the will used the words "I herewith appoint and empower James Claney and Pat O'Connor," and when there was no other appointment of executors, the court supplied the words "my executors," omitted in the last clause, and gave liberty to James Claney and Pat O'Connor to apply for probate in common form as executors. *Morony, In goods of*, L. R. 1 Ir. 483.

—— **Inserting Trust Omitted.**]—Codicil reciting a specific and limited purpose revokes the whole devise, declaring the trusts again, with the proposed alteration, and confirms the will in every particular not thereby altered or revoked. The omission of one trust, though probably against the intention, cannot be supplied. *Holder* v. *Howell*, 8 Ves. 97.

Mistake in Copying—Altering Will to correspond with Draft.]—A testator in the draft of his will, which was duly executed and read over to him before execution, bequeathed a legacy to the Bristol Royal Infirmary. In the will, which was not read over to him, the bequest by a mistake in the engrossment was to the British Royal Infirmary. The court, subject to an affidavit that there was no such institution as the British Royal Infirmary, granted probate of the will, with the word "Bristol" substituted for "British." *Bushell, In goods of*, 57 L. J., P. 16; 13 P. D. 7; 58 L. T. 58; 36 W. R. 528; 51 J. P. 806.

The draft of a will for which the testator had given instructions was read over and explained to him by his solicitor. By the testator's request the word "including" was altered to "excluding" in a clause relating to the name and arms of the testator, and it was believed, at that time, that the alteration so made in the draft was correctly copied in the engrossment of the will. The latter was duly executed by the testator under that belief. Although he subsequently executed two codicils, he never again saw the will, which remained in the custody of the solicitor. It was found, after the testator's death, that the word had been altered in the engrossment in a different part of the will, through a clerical error. Upon motion by the executors to substitute the word "excluding" for "including" where altered by the said clerical error, and also to make the alteration from "including" to "excluding" where the same had been made in the draft will:—Held, that the clerical error should be rectified, but that the court could not take upon itself the other alteration in the will. *Huddlestan, In goods of*, 63 L. T. 255.

Codicils written by Inadvertence upon a former and Revoked Will.]—The testator executed a will in 1883. His wife died in August, 1884, and in November, 1884, he executed a fresh will. In October, 1890, the testator handed to

his solicitor a document which the solicitor understood to be the last will, and the testator requested that a codicil should be prepared. This was accordingly done and appended to the document in question and duly executed. In 1895 a second codicil was duly executed on the same document. After the testator's death it was discovered that the codicils had been appended to and made to refer to the document which was, in fact, the revoked will of 1883. The court, upon motion, allowed the words of misdescription in the codicils to be omitted from the probate, and, with such omissions, granted probate of the two codicils, and of the will of 1884, as together constituting the true testamentary intentions and dispositions of the deceased. *Snowden, In goods of*, 75 L. T. 279.

Words after Signature—Omission from Probate.]—A will was written principally on the first page of a printed form; the last sentence was continued and finished on the second page; the attestation clause and signatures of the testator and witnesses were at the foot of the first page. The court granted probate of the will as contained in the first page, omitting the words on the second page. *Anstee, In goods of*, 63 L. J., P. 61; [1893] P. 283; 1 R. 487; 42 W. R. 16.

A testatrix filled in the first page of a lithographed form of will and signed it at the foot in the presence of two witnesses. In it she made various bequests to "my sisters and friends." On the second and third pages she wrote the names of the "sisters and friends," with their addresses and particulars of the bequests:—Held, that the first page only could be admitted to probate. *Royle* v. *Harris*, 64 L. J., P. 65; [1895] P. 163; 11 R. 601; 72 L. T. 474; 43 W. R. 352.

6. When Lost, Mislaid, or Destroyed.

When Lost.]—A person duly executed a paper commencing, "This is a codicil to any will and testament of me, A. B." No will could be found, nor could evidence of any will having ever been executed be obtained:—Held, that such paper must be admitted to probate. *Coulthard, In goods of*, 11 Jur. (N.S.) 184.

A party duly executed a will, and subsequently a paper, which purported to be a codicil to his last will and testament. This codicil referred to a bequest not contained in the will, but in a deed of gift executed after the will and before the codicil. On his death the will was not forthcoming:—Held, that as the codicil was not revoked by any of the modes indicated by 7 Will. 4 & 1 Vict. c. 26, s. 20, it remained in full force and effect, and was entitled to be admitted to proof. *Black* v. *Jobling*, 38 L. J., P. 74; L. R. 1 P. 685; 21 L. T. 298; 17 W. R. 1108.

A. left a will dated and executed in 1854, and a codicil executed in 1856, which contained the following words: "I wish to add this codicil to the will I made in 1848." A draft will had in 1848 been prepared for his perusal, but there was no evidence that he had ever executed a will in that year:—Held, that the reference in the codicil to a will made in 1848 was a mere misdescription, and that the will executed in 1854 and the codicil must be admitted to probate. *Houblon, In goods of*, 11 Jur. (N.S.) 549.

A. executed a testamentary paper, called a codicil or an appendix to her last will, in the possession of the executor B., of London, of which will a copy was kept at Jerusalem. B. never had any will of A. in his possession, but such a will had been executed in his office, was in the possession of the executor C., of London, and a copy of it was found amongst the papers of the deceased at Jerusalem on her death:—Held, that these two papers were entitled to probate. *Cooper, In goods of*, 8 Jur. (N.S.) 394.

Advertisement.]—Before applying for probate of a lost will, an advertisement should be published offering a reward for production of the will. *Callaghan, In goods of*, L. R. 13 Ir. 245.

Proving Contents.]—The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence. *Sugden* v. *St. Leonards (Lord)*, infra.

The court received parol evidence of the contents of a lost will, and admitted it to probate, upon being satisfied by the evidence, which the court deemed clear, cogent, certain, and fairly free from suspicion, as to the factum of the alleged will; that its contents were substantially such as were alleged; and that the heir-at-law had, after the death of the testator, got possession of the will, and suppressed or destroyed it. *Mahood* v. *Mahood*, Ir. R. 8 Eq. 359.

Where probate has been asked of the substance of a lost will, as contained in the parol evidence of witnesses, the court has never acted but on the fullest and most stringent proof. *Wharram* v. *Wharram*, 3 Sw. & Tr. 301; 33 L. J., P. 75; 10 Jur. (N.S.) 499; 10 L. T. 163; 12 W. R. 889.

When a person who has himself destroyed a testamentary paper after the death of a testator asks for probate of the substance as contained in a copy or otherwise, the court will expect the fullest and most satisfactory proof of all the facts necessary to be established. *Moore* v. *Whitehouse*, 3 Sw. & Tr. 567; 34 L. J., P. 31; 11 L. T. 458.

A. made his will in 1855. In May, 1857, when the Indian Mutiny broke out, he escaped from Delhi, leaving his will, among other property, behind him. He died at Kussowlee in June, 1857. On the affidavit of one of the attesting witnesses as to the due execution, and of the same witness and of his widow as to the contents, probate was granted to the widow as sole executrix. *Gardner, In goods of*, 1 Sw. & Tr. 109; 27 L. J., P. 55.

When a will has been lost, and evidence of its contents is supplied by the production of a draft, and of the parol testimony of persons who had read the will, the parol evidence must be placed side by side with the draft, and out of them the court will extract the contents of the will to be proved. *Burls* v. *Burls*, 36 L. J., P. 125; L. R. 1 P. 472; 16 L. T. 677; 15 W. R. 1090.

It is not necessary for the parties seeking probate, having proved the factum of the original instrument, and given sufficient secondary evidence of its contents, to show how the original instrument was in fact destroyed or lost. *Patten* v. *Poulton*, 1 Sw. & Tr. 55; 27 L. J., P. 41; 4 Jur. (N.S.) 341; 6 W. R. 458.

Where a copy of a will, the original not being forthcoming, is found in the possession or amongst the papers of the legal adviser of one of the executors, it is evidence of the contents of such will, and may be admitted as such. *Sly* v. *Sly*, infra.

A will was brought to the house by an executrix, in whose custody it had been, on the morning of the funeral. It was suddenly missed, and there was reason to suspect that it had been abstracted and destroyed by the only party who was interested in an intestacy, and who was cited, but did not appear. The court, under these circumstances, did not require the will to be propounded in solemn form of law, but granted, on motion, probate of the substance as proved by parol evidence. *Colman, In goods of*, 13 L. T. 682; 14 W. R. 291.

Declarations, written or oral, made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents. *Sugden* v. *St. Leonards (Lord)*, infra.

The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached. *Ib.*

A declaration made by a testator after the execution of his will may be admitted as secondary evidence of the contents of part of the will, where that part of the will has been lost. *Ball, In goods of*, 25 L. R., Ir. 556.

A will was originally written by the testator on three sheets of paper, each of which was signed at the top by himself and the witnesses who duly attested the will. After the testator's death his will was found in an envelope, indorsed with the words—"The last will and testament of G. B."; the second and third sheets were found in their original condition, but the first sheet contained a statement that the original was torn and soiled, and that the testator had written out the sheet so found as a copy. The statement, as well as the rest of the sheet, was in the testator's handwriting. The original sheet was not found:—Held, that the declaration so made by the testator might be received as evidence of the contents of the missing sheet, and that the copy of the first sheet and the two subsequent original sheets should be admitted to probate. *Ib.*

In a suit to obtain probate of the contents of a lost will and codicils, it was proved that the alleged testator had given envelopes containing papers to T., stating that these documents were his will. After his death T. gave them to his widow, and she, previous to her death, declared them to be her husband's will. Evidence was given by two solicitors who had seen and perused the documents constituting the alleged will and codicils that they purported to be duly executed. There was no direct evidence of the factum of the will and codicils, nor was there any copy forthcoming:—Held, that the court would, under the circumstances, presume due execution, and being satisfied that there was clear and certain evidence as to the substance and effect of the lost will and codicils, would grant probate. Post-testamentary declarations of a testator that certain documents were his will admitted as secondary evidence of the fact that the papers purported to be his will signed by him. *Flood* v. *Russell*, L. R. 29 Ir. 91.

Contents not completely Proved.]—The plaintiff asked that probate might be pronounced for a non-existent document as the last will of her father, who died in 1877. At his funeral his wife produced a written paper in the form of a will, stating that it was the will of her deceased husband. By it she took a life interest in her husband's property, which at her death was to be divided among the children of the marriage. The document was subscribed with three names, one of which purported to be that of the deceased, written in his own handwriting. The two other names were signatures of the attesting witnesses. The widow continued to occupy the freehold house and land where the deceased had lived (and which was the only property left by him) until her own death, which occurred in July, 1885. She never took any steps to prove what she had alleged to be the will of her late husband, and at her death the paper produced at the funeral was not forthcoming. The plaintiff propounded that document, and pleaded that, although it had disappeared, the court ought to grant probate of it. No attempt had been made to show that the paper bore any date whatever, or that it contained an attestation clause to the names of the two witnesses. The court below pronounced for the paper, the contents of which had been proved in the course of the trial:—Held, on appeal, that the decision was justifiable, having regard to the circumstances. *Harris* v. *Knight*, 15 P. D. 170; 62 L. T. 507—C. A.

Probate of Part.]—When the contents of a lost will are not completely proved probate will be granted to the extent to which they are proved. *Sugden* v. *St. Leonards (Lord)*, 45 L. J., P. 49; 1 P. D. 154; 34 L. T. 372; 24 W. R. 60—C. A.

The absence of evidence as to some of the contents of a lost will will not prevent the court from granting probate, if it is satisfied that the instrument propounded contains the substantial parts of the lost will. *Ib.*

A testator duly executed a holograph will and eight codicils, and deposited them in a box, the key of which he always kept in his own possession. He frequently expressed adherence to the will down to within a few days of his death. On his death the codicils were found in the box, but the will was missing, and could nowhere be found. Thereupon the testator's unmarried daughter C., who had lived with him all her life, and had frequently read the will, in the preparation of which she had assisted him, wrote out from memory the alleged contents of the will, which included a bequest to her of 6,000*l.*, and of one-third of the residuary personal estate (equivalent to 10,000*l.*). Some corroboration of C.'s account of the contents of the will was found in the codicils and in certain quasi-testamentary papers of the testator. But her testimony as to the residuary bequest was not at all corroborated. C. admitted that the contents of the will as written out by her were not complete, there being some small legacies and certain ulterior limitations of real estate which she could not remember. C.'s veracity was not questioned by the persons who opposed the granting of probate:—Held, that her statement of the contents of the will was substantially correct, and that probate should be granted accordingly. *Ib.*

If a lost will is propounded for probate upon parol evidence alone, with evidence of a residuary bequest, but no sufficient evidence as to the rest of the will:—Quære, whether probate ought to be granted of the residuary bequest alone, unless the court is satisfied that it has before it substantially the testamentary intentions of the testator. Quære, also, whether post-testamentary declarations of the testator as to the contents are admissible in evidence. *Sugden*

v. *St. Leonards (Lord)*, supra, commented on. *Woodward* v. *Goulstone*, 56 L. J., P. 1; 11 App. Cas. 469; 55 L. T. 790; 35 W. R. 337; 51 J. P. 307—H. L. (E.)

No Evidence that Will related to Personalty.]—A will was registered but was never proved, and was said to have been lost on the day it was registered. The memorial of registration and affidavits filed contained no evidence that it dealt with personal estate. The next of kin applied for administration with copy of the will annexed as contained in the memorial of registration:—Held, that the deceased must be presumed to have died intestate as to his personalty and that the next of kin were only entitled to administration as upon an intestacy. *Attlay, In goods of*, 67 L. T. 502.

Proving Loss.]—When circumstances indicate no peculiarly likely place of deposit, searching in the drawers and boxes of a deceased person for a will, and finding none, is sufficient primâ facie evidence that there is no will. *Reg.* v. *Johnson*, Dear. & B. 340; 27 L. J., M. C. 52; 4 Jur. (N.S.) 55; 6 W. R. 64; 7 Cox, C. C. 379.

Declarations of a deceased person, who has been in possession of property, claiming a limited interest therein under a particular will, are admissible to prove the fact that such will had a legal existence, and also that certain persons were named executors therein. *Sly* v. *Sly*, 46 L. J., P. 63; 2 P. D. 91; 25 W. R. 463.

The court refused to grant probate of a lost codicil, of the execution of which no proof was forthcoming. *Wilson, In goods of*, 26 L. T. 405.

In propounding a copy of a lost codicil, it was proved by A. and B. that such a paper had existed, and by C. and D., the attesting witnesses, that they had signed some paper for the deceased, but were unable to say whether it was testamentary or not. The court held that in the absence of proof identifying the paper known to A. and B. with that signed by C. and D., there was not sufficient proof of the factum and execution of the codicil, and refused probate. *Crickett* v. *Field*, 23 L. T. 630; 19 W. R. 232.

When the execution of a will, its contents, and the fact of its existence unrevoked at the time of the death of the testator, have to be proved by parol evidence only, that evidence must be stringent and conclusive. *Silver* v. *Silver*, 27 L. T. 766.

When a will was not forthcoming at the time of the testator's death, and was not found in the repositories of a deceased attesting witness in whose custody it was stated to have been last seen, and where the account given by the witnesses as to its existence at that time was confused and conflicting, the court refused probate of the contents propounded seven years after the testator's death. *Ib.*

Evidence of Improper Execution.]—Where a testamentary paper is not in existence, and all the persons present at an intended execution of it agree that it was not duly executed, the court cannot on a mere suspicion to the contrary decree probate of it. *Eckersley* v. *Platt*, 36 L. J., P. 7; L. R. 1 P. 281; 15 L. T. 327; 15 W. R. 232.

Copies.]—An officer in her majesty's service executed a will and codicil, previously to leaving England with his regiment. The original will and codicil were deposited with his solicitor in England, but he took with him copies of these documents, which were found at his death enclosed in a sealed envelope in his desk. He never returned to England. The original will and codicil could not be found amongst the papers of the solicitor, who had died in the lifetime of the deceased, but there was evidence from which to infer that they had not returned into the possession of the deceased, or been destroyed at his request. Probate was therefore granted of the copies, limited until such time as the originals were produced. *Peckell, In goods of*, 6 Jur. (N.S.) 406.

When a will executed before the Wills Act was lost, and there was no surviving witness of its execution, the court admitted as proof an entry from the ledger of the solicitor who made the will, and granted probate of a copy. *Thomas, In goods of*, 41 L. J., P. 32; 25 L. T. 509; 20 W. R. 149.

A., being resident in India, sent in 1850 to England, in a letter to his solicitor, a copy of a will which he stated he had made there. In February, 1857, he transmitted in the same way copy of a codicil, stated by him to have been made at Delhi. A. lost his life in May, 1857, in the mutiny at Delhi, and the will and codicil were not forthcoming. On motion for probate of the will and codicil, as contained in the copies sent to England:—Held, there being no proof of the execution of the original will and codicil, except the statement of the deceased himself, made after their execution, the copies were not entitled to probate. *Ripley, In goods of*, 1 Sw. & Tr. 68; 4 Jur. (N.S.) 342; 6 W. R. 460.

A will was destroyed by a testator on the supposition that he had substituted another for it, but which was not duly executed. Probate of a copy of the first will was granted. *Scott* v. *Scott*, 1 Sw. & Tr. 258; 5 Jur. (N.S.) 288.

Draft Will—Original not forthcoming—Consent of all Parties.]—The testator duly executed a will and codicil, the former of which was last seen about a year before his death, when it was handed to the testator, at his own request Only the codicil could be found after his death. The widow had been separated from the testator, her husband, for over twelve years. His relations with his children never altered after the date of the will. All parties interested consented to probate of the draft of the missing will:—Held, that, as all parties consented, a liberal view might be adopted; that the presumption of law might be taken to be sufficiently rebutted; and that probate of the draft will might go to the executor therein named. *Berry, In goods of*, 65 L. T. 763.

Will not forthcoming—Probate of Codicil.]—Testator executed a codicil which was described as "a codicil to my will executed some years ago." After his death no trace of the will could be found:—Held, that probate of the codicil might be granted. *Clements, In goods of*, 61 L. J., P. 130; [1892] P. 254; 67 L. T. 356.

—— Will Executed by Married Woman.]—When a wife has executed a will during coverture with the consent of her husband, and the will is not forthcoming at her death, and no copy can be found, the court will make a grant of probate of the draft of the will, limited until the

original will, or an authentic copy of the will, is brought into the registry, and limited also to all such personal estate and effects as she had power and a right to dispose of, and has in and by the draft appointed and disposed of. *Thrippleton, In goods of*, 35 L. T. 909.

—— **Revocation of Will under Mistake.**]—Where a testator by misinformation as to the effect of a subsequent deed, settling his property in his lifetime, had been induced to revoke his will by cancellation, the court refused to grant probate of a copy on motion, but compelled the parties to propound it in solemn form. *James, In goods of*, 19 L. T. 610.

Limited Administration Granted.] — A will duly executed was on the death of the testator in the custody of the sole executor and universal legatee named in it. It was never proved, there not being at that time any property which could pass under it, and was subsequently lost or mislaid. No draft or copy of it was forthcoming. The court granted administration of the effects of the deceased, limited until the will or an authentic copy of it should be brought into the registry. *Johnson, In goods of*, 11 Jur. (N.S.) 184.

Destroyed—Presumption if last seen in Testator's Possession.]—The rule of the law is, that if a will is traced to the possession of the deceased, and last seen there, and is not forthcoming on his death, it is presumed to have been destroyed by himself, and that presumption must prevail, unless there is sufficient evidence to repel it, and to raise a higher degree of probability to the contrary. The onus of proof in such cases lies upon the party propounding the will. *Welsh* v. *Phillips*, 1 Moore, P. C. 299.

A testator executed his will at his solicitor's office, and took it away with him. It was never seen afterwards, and could not be found after his death in his repositories. He had made declarations inconsistent with his testamentary dispositions shortly before his death, but the court held, that he being the last custodian of the will, and it not being forthcoming, the presumption of revocation arose and was not rebutted. *Homerton* v. *Hewett*, 25 L. T. 854.

When a will traced to the possession of the testator cannot be found after his death, and there is no evidence what has become of it, the presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but this presumption may be rebutted by parol evidence. *Sugden* v. *St. Leonards (Lord)*, 45 L. J., P. 49; 1 P. D. 154; 34 L. T. 372; 24 W. R. 860—C. A. See also *Moore* v. *Whitehouse*, ante, col. 312.

See also cases post, col. 366, et seq.

—— **Partly.**] — A disappointed legatee got possession of the will after it had been read over to her, and tore it in pieces. One of the pieces was missing, and was supposed to have been carried away by her. The court allowed the contents of the missing part to be proved by affidavit, and granted probate of the pieces thus supplemented. *Clift, In goods of*, 29 L. T. 249.

Destruction Intentional—Animus revocandi.]—A testatrix destroyed a will without stating at the time her intention in doing so. Subsequently on the same day she said that she destroyed the will with the intention that a former will should take effect. The court on motion refused to grant probate of a draft of the destroyed will. *Weston, In goods of*, 38 L. J., P. 53; L. R. 1 P. 633; 20 L. T. 330.

A testatrix, being under an erroneous impression that a codicil had not been duly executed; directed it to be torn up and sent to her solicitor to be re-copied, but died before she could re-execute it:—Held, that in the circumstances, probate of the codicil might be allowed. *Thornton, In goods of*, 58 L. J., P. 82; 14 P. D. 82; 61 L. T. 200; 37 W. R. 624; 53 J. P. 407.

Testator Mutilating and afterwards Repairing Will.]—Where a testator cut a piece out of his will, which had been duly executed, containing the word "witnesses," and the names of the attesting witnesses, giving his reason at the time for having so cut the same, that he had some idea of altering it, and having a new will made; and subsequently, on the same day, refastened the piece he had so cut out, saying, "that his will would do for the present, and that if he wanted another will he could do it afterwards;" and died without making another will:—The court, with the consent of the parties interested in case of an intestacy, granted probate of the will to the executors named therein. *Eeles, In goods of*, 2 Sw. & Tr. 600; 32 L. J., P. 4; 7 L. T. 338; 11 W. R. 31.

Mutilation by Testator when of Unsound Mind—Grant to Executrix—Security.]—Where a testator left as his executrix and executors and only next-of-kin a widow and two sons, both of whom were abroad, and had when suffering from softening of the brain mutilated his will, the court granted probate to the widow, the consent of the eldest son having been obtained, and ordered her to give security to the extent of the interest which the younger son would have in the estate in case of an intestacy. *Hine, In goods of*, 63 L. J., P. 45; [1893] P. 282; 6 R. 573; 69 L. T. 458.

Reference in Codicil to Revoked Will—Mistake.]—In February, 1856, W. duly executed a will, which had been prepared for her by a solicitor. In November, 1858, she executed a copy of this will (a few legacies having been omitted), made by herself. In 1861, a codicil, which purported to be a codicil to her last will and testament, bearing date February, 1856, and which was prepared by the same solicitor, was also executed by her. On her death the will of November, 1858, and the codicil of 1861, were found together, the will of February, 1856, in another part of the house, with the signature of the deceased partly torn off. The court, acting on the evidence of the solicitor, concluded that the reference in the codicil to the will of February, 1856, was an error, and decreed probate of the will of November, 1858, and of the codicil. *Whatman, In goods of*, 34 L. J., P. 17; 10 Jur. (N.S.) 1242.

Practice on—Probate on Motion.]—As a general rule the court requires a draft or copy of a lost or destroyed will to be propounded before admitting it to probate; but where satisfactory evidence is given of the contents of a lost or destroyed will, of its due execution, of its existence at the time of the testator's death, and of

its subsequent loss or destruction, the persons interested under it, and the persons in whose custody it was not being in any way to blame for such loss or destruction, the court will, with the consent of the only person interested in the event of intestacy, grant probate of a draft or copy on motion ; but it will not on motion grant probate of the contents of a lost or destroyed will without either the consent of or notice to the next of kin. *Callan, In goods of*, Ir. R. 9 Eq. 484.

A will was lost while in the custody of a solicitor, who had received it for the purpose of obtaining probate, and no copy or draft was known to be in existence. The solicitor who prepared it and one of the attesting witnesses made affidavits that it was entirely in favour of the widow, and made no provision for the infant child of the testator. The court refused to grant probate on motion, but ordered the widow to propound it. *Brining, In goods of*, 22 L. T. 630.

Where it was satisfactorily shown that the destruction of a duly-executed will was not attributable to neglect or default on the part of those whose duty it was to take charge of it, the court allowed probate of the draft on motion. *Barber, In goods of*. 36 L. J., P. 19; L. R. 1 P. 267; 15 L. T. 192; 15 W. R. 231.

The court will not admit the draft of a will which has been inadvertently destroyed, to probate on motion. *Body, In goods of*, 4 Sw. & Tr. 9; 34 L. J., P. 55.

The court is always reluctant to grant probate of a document not before it, and it will not, as a rule, grant probate of such document on motion. *Kelly, In goods of*, 13 L. T. 303.

It is the invariable practice of the court not to allow the contents of a lost will to be proved on motion, except with the consent of all persons interested in an intestacy. *Pearson, In goods of*, 66 L. J., P. 8; [1896] P. 289; 45 W. R. 143.

—— **Party Destroying Condemned in Costs.**]—The court granted probate of the draft of a lost will, being satisfied that it was in existence at the time of the death of the testatrix, and that it had been either suppressed or destroyed by the next of kin, who opposed the application for probate: and condemned the next of kin in costs. *Podmore* v. *Whatton*, 3 Sw. & Tr. 449; 33 L. J., P. 143; 10 Jur. (N.S.) 756; 10 L. T. 754; 13 W. R. 106.

III. DONATIO MORTIS CAUSÂ.

General Principles.]—The nature of a donatio mortis causâ: in what it differs from the will. The evidence to prove it must be very strong. *Jones* v. *Selby*, Pre. Ch. 300.

Donatio mortis causâ is where a man lies in extremity, or being surprised with sickness, and not having an opportunity of making his will, lest he should die before he could make it, gives with his own hands his goods to his friends about him ; this, if he dies, shall operate as a legacy ; but if he survives, the property reverts to him. *Hedges* v. *Hedges*, Pre. Ch. 269; Gilb. 12; 2 Vern. 615.

Evidence of donatio mortis causâ. *Ashton* v. *Dawson*, 2 Coll. C. C. 363, n.

What things are necessary to make a gift donatio mortis causâ. *Parthrick* v. *Freind*, 2 Coll. C. C. 362, n.

A gift by a husband to his wife, either as a donatio mortis causâ, or as a donatio inter vivos, to her separate use, must be established by evidence beyond suspicion. A claim of that nature negatived. A defendant by her answer having claimed a gift from her husband as an absolute donatio inter vivos to her separate use, whether evidence can be received to establish it as a donatio mortis causâ. Quære, *Walter* v. *Hodge*, 2 Swanst. 92; 1 Wils. 445. S. P., *Grant* v. *Grant*. 34 L. J., Ch. 641; 11 Jur. (N.S.) 787; 13 L. T. 721; 13 W. R. 1057.

The plaintiff being possessed of shares in a public company, when in a state of extreme sickness transferred the shares into the name of the defendant. The plaintiff having recovered from his sickness, but having subsequently become lunatic, a bill was filed in his name by his committee to have the defendant declared a trustee of the shares :—Held, that as the plaintiff had survived the sickness during which the transfer was made, the gift could not operate as a donatio mortis causâ; and, it appearing that the gift had been received by the defendant upon the distinct understanding that it was to be absolute only in the event of the death of the plaintiff :— Held, that the defendant must be considered as a trustee of the shares for the plaintiff. *Staniland* v. *Willott*, 3 Mac. & G. 664.

Under the Wills Act.]—Donationes mortis causâ are not abolished by 7 Will. 4 & 1 Vict. c. 56, Wills Act. *Moore* v. *Darton*, 4 De G. & Sm. 517; 20 L. J., Ch. 626.

Nature of Gift.]—The deceased must at the time of the supposed gift part with all dominion over it. *Hawkins* v. *Blewitt*, 2 Esp. 663; 5 R. R. 761.

—— **Incomplete Gift.**]—The principle according to which equity will not render its assistance in perfecting an incomplete voluntary gift has no application to a donatio mortis causâ, and an instrument that does not pass by delivery may be the subject of a donatio mortis causâ, and the executors of the donor will be considered as trustees for the donee for the purpose of giving effect to the gift. *Dillon, In re, Duffin* v. *Duffin*, 59 L. J., Ch. 420; 44 Ch. D. 76; 62 L. T. 614; 38 W. R. 369—C. A.

—— **Delivery of Possession.**]—To constitute a good donatio mortis causâ there must be an absolute and unconditional delivery of possession to the donee, or to a third person in trust for him, which possession must continue uninterruptedly to the time of the donor's death. *Bunn* v. *Markham*, 2 Marshall, 532; 7 Taunt. 224; Holt, 352; 17 R. R. 497.

A dying person told her servant to take the keys of her dressing-case, and to deliver her watch and trinkets which it contained to the plaintiff. The servant took the keys and kept them in her possession until after the death of her mistress :—Held, not a good donatio mortis causâ. *Powell* v. *Hellicar*, 26 Beav. 261; 28 L. J., Ch. 355; 5 Jur. (N.S.) 232; 7 W. R. 171.

A verbal gift of a chattel, without actual delivery, does not pass the property to the donee. *Irons* v. *Smallpiece*, 2 B. & Ald. 551; 21 R. R. 395.

G. T. in his last illness showed a deposit note to his daughter the plaintiff, and told her in

effect that it was to belong to her in the event of his death. The plaintiff took the note, and by her father's directions placed it for safe custody in a cash-box which was kept in her father's bedroom, but of which she had the key, and to which she had resort for household purposes :—Held, that this was a good donatio mortis causâ. *Taylor, In re, Taylor* v. *Taylor*, 56 L. J., Ch. 597.

In the case of a donatio mortis causâ, an actual delivery is indispensable to vest the property, if the subject-matter is capable of delivery. If it be not so, there must be a delivery of what is equivalent to it at law. In the case of stock, &c., delivery of the receipts, &c., not sufficient to constitute such a gift, though strong evidence of the intent. *Ward* v. *Turner*, 2 Ves. 431.

In every donatio mortis causâ, delivery must be made by the party in his last sickness, and it may be to a wife, being in nature of a legacy, but need not be proved with the will. *Miller* v. *Miller*, 3 P. Wms. 357.

Where a disposition of money is attempted to be supported as a donatio mortis causâ, a mere general statement of the fact of a gift having been made is not sufficient, but the particulars of the case must be fully stated, and it is essential to the validity of a donatio mortis causâ, that the money or thing given should be actually handed over at the time. *Thompson* v. *Heffernan*, 4 Dr. & War. 285.

A person having a considerable amount of bank-notes concealed in her stays, being on her deathbed, took the stays and said to G., her cousin, who was standing by her bedside, that she was longing to give her these, at the same time holding the stays in her hands. G. took them up and put them at the foot of the bed; but on deceased saying, "Don't leave them, keep them, take them, keep them, and take care of them," G. asked for a key of a box in the room belonging to the deceased, which the deceased handed to her; thereupon G. locked them up in a box. Immediately after deceased's death, G. ripped up the stays, took out the bank-notes, and replaced the stays in the box. She took away a watch and several trinkets belonging to the deceased from the deceased's house, of which she gave no immediate account, nor did she mention the amount she had found in the stays :—Held, that having regard to the looseness of the alleged expressions used by the deceased when she handed the stays to G., of which the evidence itself was unsatisfactory, coupled with the conduct of G. in taking other property of the deceased, the circumstances could not be considered to be such a delivery as constituted a donatio mortis causâ. *Cosnahan* v. *Grice*, infra.

Property not transferred by words of gift without an act; therefore donatio mortis causâ cannot be by mere parol. Doubtful whether it may be by deed or writing. *Tate* v. *Hilbert*, 2 Ves. 120.

Deed poll not delivered, but operating at the death of grantor, and a bond given in favour of a natural daughter; she was put to her election. *Johnson* v. *Smith*, 1 Ves. 314.

Parol declaration of trust of money handed over to a third party, on trust, by a person in extremis, supported, but held invalid as to stock, for which a power of attorney had been given by the settlor, but which had not been acted on at her death. *Peckham* v. *Taylor*, 31 Beav. 250.

A testator, shortly before his death, said to the person who had for several years acted as his land agent, that he would make him a present of 300*l.*; and having been suddenly taken ill, he desired the agent to retain that sum out of a larger balance then in his hands. No third person was present at this declaration, and on the day after the testator died. The agent was also a solicitor, and acted as such, together with his partner, for the testator; and there was a suit pending against the latter in the exchequer at the time of his death. After the testator's death in 1831, the agent acted as the solicitor of the executors, and made out for them an account of the testator's assets, in which the 300*l.* was treated as a gift by the testator in his lifetime to the agent, and the inventory returned by the executors contained a similar account of that sum. In 1832 the agent furnished an account to the executors, stating all the circumstances under which he claimed credit for the 300*l.*, and taking credit for it against the balance in his hands, and stating that he retained the residue of the balance to meet the costs due to him and his partner, the amount of which he was then unable to ascertain. That account was retained by the executors without objection. In 1839 they filed a bill against the agent for an account of the sum due by him to the testator's estate :—Held, that the agent was not entitled to retain the 300*l.* at the death of the testator, and that the executors had not, by acquiescence, precluded themselves from disputing his right to it. *Walsh* v. *Studdart*, 6 Ir. Eq. R. 161; 2 Con. & L. 423; 4 Dr. & War. 159.

Delivery antecedent to Gift.] — Although delivery is essential to a valid donatio mortis causâ, it may be antecedent to the gift. *Cain* v. *Moon*, 35 L. J., Q. B. 587; [1896] 2 Q. B. 283; 74 L. T. 728.

Revocation.]—The gift will be revoked if the donor reserved possession. *Bunn* v. *Markham*, 2 Marshall, 532; 7 Taunt. 224; Holt, 352; 17 R. R. 497.

But the gift cannot be revoked by the will of the donor. *Jones* v. *Selby*, Pre. Cha. 304.

Quære, whether a donatio mortis causâ is avoided by the fact that a will or codicil is subsequently made; whether a remainder may be limited in a donatio mortis causâ; whether, the donatio mortis causâ being of a mortgage debt, a gift of the same sum with the same remainder over in a subsequent codicil is to be considered a satisfaction. *Hambrooke* v. *Simmons*, 4 Russ. 25.

May be coupled with a Trust.] — A donatio mortis causâ may be coupled with a trust or a condition, but the expression of the trust or of the condition must form part of the donation, either by being contemporaneous with it, or so coupled with it by contemporaneous words of reference, as in effect to be incorporated with it. *Dunne* v. *Boyd*, Ir. R. 8 Eq. 609.

The gift may be good although coupled with a trust that the donee shall provide the funeral of the donor. *Hills* v. *Hills*, 8 M. & W. 401; 5 Jur. 1185; 10 L. J., Ex. 440.

Where a party near to her end, and on whose pillow a pocket with some money in it was lying, said, "I wish A. to bury me comfortably, and have all I have"; subsequently to which she changed the money into another pocket, and in the course of the day paid a portion of it away, and then made a declaration to the same effect

as before :—Held, that it was properly left to the jury to say : first, was this meant by the deceased as a donatio inter vivos of the money and pocket ; and, secondly, if not, whether it was a donatio mortis causâ of those two things, or intended as a nuncupative will of her property generally. *Ib.*

Must be made in Contemplation of Death.]—A donatio mortis causâ must be made in contemplation of speedy death, and to take effect only in case of death. *Tate* v. *Hilbert*, 2 Ves. 111.

Issue directed to try whether there was donatio mortis causâ, as it did not appear to have been in the last illness. *Blount* v. *Burrow*, 1 Ves. J. 546 ; 4 Bro. C. C. 71.

To constitute a donatio mortis causâ, the evidence must be clear that the donor gave it in contemplation of death. *Cosnahan* v. *Grice*, 15 Moore, P. C. 215 ; 7 L. T. 83.

—— **Suicide of Donor—Public Policy.**]—The owner of a deposit receipt gave the document to her sister under circumstances such that the jury found that it was so given in contemplation of death which was to be effected by suicide, and that the gift was to take effect only in the event of the donor's death :—Held, that the gift did not constitute a valid donatio mortis causâ. Quære, Can there be a valid donatio mortis causâ when the donor at the time of the donation is in good bodily health ? *Agnew* v. *Belfast Banking Co.*, [1896] 2 Ir. R. 204—C. A.

Evidence of—Onus probandi.]—The burden of proof is necessarily on the donee, as, in the first place, so many opportunities, and such strong temptations present themselves to unscrupulous persons to pretend deathbed donations, that there is always danger of having an entirely fabricated case set up ; and secondly, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of a person languishing in mortal illness, and by a slight change of words, to convert the expressions of intended benefit into an actual gift of property ; and no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character. *Cosnahan* v. *Grice*, supra.

—— **Uncorroborated Evidence of Donee.**]—A gift by a dying man of a banker's deposit receipt under such circumstances as to constitute it a good donatio mortis causâ will be upheld, even though the only evidence in support of the claim be that of the donee, if the court considers the evidence trustworthy. *Farman, In re, Farman* v. *Smith*, 57 L. J., Ch. 637 ; 58 L. T. 12.

A donatio mortis causâ may be established by the evidence of the donee alone. *M'Gonnell* v. *Murray*, Ir. R. 3 Eq. 460.

When Presumed.]—Where the circumstances are such as to indicate an intention to make a testamentary gift, and the intention fails for want of proper attestation, a donatio mortis causâ will not be presumed. *Patterson, In re*, 4 De G. J. & S. 422 ; 33 L. J., Ch. 596 ; 10 L. T. 801 ; 12 W. R. 941.

What amounts to—Stock Certificates.]—A husband, two years before his death, gave to his wife a railway debenture subsequently converted into railway stock, which remained in his name, and on which the dividends were received by him but paid to his wife. He gave the certificates to his wife, and they remained in her possession until he required them in order to replace a lost dividend warrant. While on his deathbed he handed the certificates to his wife, saying, "These are yours," and also gave her a deposit-note :—Held, that the gift of the stock failed as incomplete, and could not be supported as a declaration of trust, the intention to make an immediate gift being inconsistent with a declaration of trust. *Moore* v. *Moore*, 43 L. J., Ch. 617 ; L. R. 18 Eq. 474 ; 30 L. T. 752 ; 22 W. R. 729.

On the 20th July, 1840, M., then in extremis, executed an ordinary bank power of attorney, and delivered it to her sister E., whereby the latter was empowered to transfer into her own name government stock standing in M.'s name. M. died on the 21st of July, 1840, and on the 23rd the transfer was made under the power :—Held (the evidence shewing a clear intention on the part of M. to give the legal and beneficial interest in the stock to her sister), that the gift was valid and effectual in favour of E., as against the other next of kin of the donor. *Kiddill* v. *Farnell*, 26 L. J., Ch. 818 ; 3 Jur. (N.S.) 786 ; 5 W. R. 324, 793.

A. in extremis gave all his shares in a particular bank to his son, on condition of his paying a debt which the testator owed upon the shares to the bank, and wrote a letter to the manager of the bank, directing that the shares should be transferred into the name of the son. The certificates of some of the shares were delivered to the manager as a preliminary to the preparation of the necessary deed of transfer. Before the deed was prepared, the testator died :—Held, that the transaction was incomplete, and that the shares formed part of the general estate. *Lambert* v. *Overton*, 11 L. T. 503 ; 13 W. R. 227.

—— **Bank-notes.**]—A deposit of bank-notes with the executors for the depositor's sister and her children is a gift of the money among them. *Powel* v. *Cleaver*, 2 Bro. C. C. 500.

One having by his will, given his wife 600*l.* in money on his deathbed, ordered his servant to deliver to his wife, then present, two bank-notes, payable to bearer, amounting to 600*l.*, saying he had not done enough for his wife : this gift is additional, and shall not be construed a payment of the former legacies in the testator's lifetime. *Miller* v. *Miller*, 3 P. Wms. 356.

—— **Bonds.**]—Upon the death of a testator ten Austrian bonds were found, amongst other securities, in a box at his house, with the following indorsement : "The first five numbers of these Austrian bonds belong to and are H. D.'s property," signed by the testator. H. D. was his housekeeper, and the key of the box was given into her custody :—Held, that as there had been no actual transfer or delivery of the bonds to H. D., they still remained part of the testator's assets. *Trimmer* v. *Danby*, 25 L. J., Ch. 424 ; 4 W. R. 399.

A bond, though only a chose in action, is a good subject for a donatio mortis causâ because the beneficial property or interest, which is the debt at law, still remains in the donor, notwithstanding his transfer of it. *Snelgrove* v. *Bailey*, 3 Atk. 214 ; Ridgw. t. Hardw. 202.

Gift of bond, by delivering it, and saying, "There, take that, and keep it," in last sickness, and donor dying two days afterwards, held to be donatio mortis causâ, and donee at liberty to sue

in executor's name on it; he indemnifying. *Gardner* v. *Parker*, 3 Madd. 184.

There cannot be a gift of bond or chose in action by way of donatio mortis causâ, neither can anything operate as such without having been delivered in the testator's lifetime by him or his order. *Miller* v. *Miller*, 3 P. Wms. 358.

The obligee of a bond, five days before her death, assigned a memorandum, not under seal, which was indorsed upon the bond, and which purported to be an assignment of the bond, without consideration, to her niece, to whom the bond was at the same time delivered:—Held, that the transaction could not be considered as a donatio mortis causâ, as there was no evidence to shew at what time, or under what circumstances, the bond first came into the niece's possession, and as the assignment was immediate and unconditional; and that, as the gift was incomplete, and was without consideration, the court could not give effect to it. *Edwards* v. *Jones*, 1 Myl. & Cr. 226; 5 L. J., Ch. 194.

—— **Railway Stock.**]—Held, also, that railway stock cannot be the subject of donatio mortis causâ. *Moore* v. *Moore*, supra.

—— **Deposit Note.**]—A deposit receipt in the ordinary form used by banks may be the subject of a donatio mortis causâ; and this is so, although the receipt is expressed to be not transferable. *Cassidy* v. *Belfast Banking Co.*, 22 L. R., Ir. 68.

A woman claimed railway certificates and a deposit note, either as having been given to her by her husband in his lifetime, or on the ground that he had constituted himself a trustee of them for her, or as a donatio mortis causâ:—Held, that she was entitled to the deposit note as a donatio mortis causâ. *Moore* v. *Moore*, supra.

—— **Deposit Note with printed Cheque Form on Back.**]—A dying man, in expectation of death, stated his wish to give his wife 500*l.* out of a sum of 2,700*l.* on deposit at a bank, which was evidenced by a deposit note in his possession for 2,700*l.* on the back of which was a printed cheque form which had attached to it a notice of withdrawal. He filled up the cheque and notice of withdrawal for 500*l.* and sent the document to the bank, but died within two days of that date. The practice of the bank was to require notice to be given seven days before withdrawal:—Held, that the 500*l.* did not pass by a donatio mortis causâ, as the cheque for that amount was not payable till after the testator's death. *Mead, In re, Austin* v. *Mead*, 50 L. J., Ch. 30; 15 Ch. D. 651; 43 L. T. 117; 28 W. R. 891.

A banker's deposit note is a good subject of donatio mortis causâ; nor is it the less so because it purports to be "not transferable," or because the depositor for the purpose of withdrawing the money is required by the bank to sign a cheque indorsed upon the note. The death of the donor before presentation of the cheque by the donee does not defeat the donatio mortis causâ. Whether a cheque on a donor's own account can be a subject of donatio mortis causâ, quære. *Mead, In re, Austin* v. *Mead*, supra, distinguished. *Dillon, In re, Duffin* v. *Duffin*, supra, col. 320.

—— **Unindorsed Deposit Receipt.**]—A deposit receipt unindorsed is a good subject-matter of a donatio mortis causâ. *Porter* v. *Walsh*, [1896] 1 Ir. R. 148—C. A.

—— **Evidence of Gift.**]—Assuming that a bank deposit receipt, whether indorsed or not, may, by manual delivery, be the subject of a donatio mortis causâ, the evidence of the gift must be clear and unequivocal. *Dunne* v. *Boyd*, Ir. R. 8 Eq. 609.

On the day before his death R. stated to B.'s wife how, in the event of his death, he wished his property to be disposed of, and, on the following morning, having dictated and signed an order on the Provincial Bank to pay to B. the amount of some bank deposit receipts, attempted to indorse them, but, after indorsing the first, was unable to proceed, and very shortly afterwards died without giving any further expression of his intention:—Held, not to be a valid donatio mortis causâ to B., either absolutely or as a trustee. *Ib.*

—— **Delivery of Savings Bank Book.**]—The delivery of the book of a depositor in a savings bank is not sufficient to constitute a donation of the money deposited. *M'Gonnell* v. *Murray*, 3 Ir. Eq. R. 460.

—— **Of Mortgage Deeds.**]—Whether a mortgage can pass by parol gift. Whether such a gift, in this case, is to be considered as donatio mortis causâ or donatio inter vivos. *Hassell* v. *Tynte*, Ambl. 318.

Delivery of a mortgage security:—Held, to be a good donatio mortis causâ, and the heir or executor bound to give effect to it. *Duffield* v. *Hicks*, 1 Dow. (N.S.) 1; 1 Bligh (N.S.) 497; 30 R. R. 69. Overruling *Duffield* v. *Elwes*, 1 Sim. & S. 239; 1 L. J. (O.S.) Ch. 213. *See* 24 R. R. 173.

Mere delivery up of deeds does not cancel mortgage debt; but when accompanied with the mortgage bond on purpose to release debt in case donor should die of the present illness is, it seems, a good donatio mortis causâ. *Hurst* v. *Beach*, 5 Madd. 351.

Gift of money due on mortgage and bond by testator some time before his death to a daughter, not sustainable by fact of merely changing the securities from one drawer of a bureau to another, proved by his widow, who sought to discharge herself by payments as executrix under the will. *Bryson* v. *Brownrigg*, 9 Ves. 1.

W., whilst suffering under an illness, from which he never recovered, and being a mortgagee of his son, gave his son the mortgage deed, saying, "Take this, but do not wrong your children, and do not mortgage your property," the father not being aware that the son had already mortgaged the estate:—Held, that this was a good donatio mortis causâ to the son alone. *Merideth* v. *Watson*, 17 Jur. 1063.

—— **Of Key of Box.**]—The court will not enforce an incomplete voluntary assignment, evidenced by delivery of a box (retaining the key), such box containing what purported to be a written memorandum of gift of real estates and chattels, the memorandum not being under seal. *Warriner* v. *Rogers*, 42 L. J., Ch. 581; L. R. 16 Eq. 340; 28 L. T. 863; 21 W. R. 766.

A person, having some Dutch bonds and the title deeds of certain estates, which he keeps in a box, delivers the key of the box to J., in whose house he lives and with whom he is on terms of

intimacy, and tells a third person that the contents of the box belong to J. He, however, keeps possession of the box, directing J. to open it for him from time to time as occasion requires. He also receives the dividends due on the bonds. A few weeks before his death, being in his eightieth year and infirm in health, he directs his nurse to deliver the box to J., which she accordingly does, and J. keeps the box till his death. Upon the box being subsequently opened, the envelope in which the bonds are contained, is found to be addressed in the handwriting of the deceased to the wife and sisters of J., with a direction that it is to be delivered "unopened," and attached to the envelope is a letter addressed by the deceased to the same person, stating the shares in which each is to have the benefit of the bonds, stating also, by way of postscript to J., that the writer takes this course solely to evade the legacy duty, and that he recommends perfect silence on the subject. The transaction amounts neither to a gift inter vivos, nor to a donatio mortis causâ in favour of the wife and sisters of J. *Farquharson* v. *Cave*, 2 Coll. C. C. 356 ; 15 L. J., Ch. 137 ; 10 Jur. 63.

—— **Bills of Exchange.**]—The same man under the same circumstances gave two bills of exchange drawn by himself to his own order, but unindorsed, to a friend, and requested him to present them and give the money to his wife ; the friend undertook to do so, and gave the bills of exchange to the wife, by whom they were not presented until after the testator's death :—Held, that the bills of exchange passed by a donatio mortis causâ. *M'Gonnell* v. *Murray*, supra.

A gift of bills of exchange, payable to the donor or order, by way of donatio mortis causâ, was supported. *Rankin* v. *Weguelin*, 27 Beav. 309 ; 29 L. J., Ch. 323, n.

—— **Promissory Note.**]—So a promissory note, payable to order, may be the subject of a donatio mortis causâ, and will pass thereby, though unindorsed. *Veal* v. *Veal*, 27 Beav. 303 ; 29 L. J., Ch. 321 ; 6 Jur. (N.S.) 527 ; 2 L. T. 228 ; 8 W. R. 2.

C., in 1858, bought in the incumbered estates court an estate for 3,025*l*., and had it conveyed absolutely to his daughter, H. C. She owned 1,525*l*. of the purchase-money ; C. contributed 1,500*l*. At the time of the purchase C. used some expressions as to his intention to give this sum to his daughter, but he soon after took from her a promissory note, payable seven days after date, in respect of the interest on which accounts were regularly stated and settled between the father and daughter during his life. In December, 1873, C. signed an indorsement on the note as follows :—"I direct that this promissory note be delivered up to be cancelled after my death, to the intent that my daughter H. C. shall be exonerated from payment of same. Dated 10th December, 1873.—P. C." This was attested by only one witness. There was reliable evidence that at various times, particularly when ill, the father told his daughter to take possession of the note when he was dying. He had the conveyance and the note tied together and placed in his deed-box, and he had a label on them, "These belong to H. C." C., having recovered from former illnesses, died after a few days' illness in 1876. In his last illness he said nothing as to the note. About an hour before his death, when he was insensible, the daughter got his keys and opened the deed-box, and found the conveyance and the note, as above described, and on reading the indorsement she replaced them in the box :—Held, that there was no gift of the note inter vivos, nor donatio of it mortis causâ, nor any valid testamentary disposition of it in the daughter's favour, and that it still remained part of C.'s assets. *Cross* v. *Cross*, 1 L. R. Ir. 389.

Some months before his death a testator gave to S., his nephew, who was residing with him, certain promissory notes, of which he was the holder and payee, with the words, "I give you these notes," adding, soon after, that S. should have them at his death, but that he wished to be master of them as long as he lived. On the same day each note was indorsed with these words, "I bequeath, pay the within contents to S. or his order at my death," and this indorsement was signed by the testator, and attested by a single witness :—Held, that this was intended only as a testamentary disposition, which failed through informality, and that the notes were part of the testator's estate. *Patterson, In re*, supra.

The indorsement and delivery of a promissory note to be effectual must be such as will enable the indorsee himself to indorse and negotiate it. *Ib.*

A gift of bills of exchange, payable to the donor or order by way of a donatio mortis causâ, was supported. *Rankin* v. *Weguelin*, 27 Beav. 309 ; 29 L. J., Ch. 323, n.

One, by will, disposes of his personal estate, and afterwards, by parol, gives 100*l*. bill to one to deliver over to his nephew, if the testator should die of that sickness, and gift decreed good. *Drury* v. *Smith*, 1 P. Wms. 404.

And see *Mead, In re*, *Austin* v. *Mead*, supra.

—— **Cheque.**]—A., four days before his death, gave to his wife a cheque for 1,000*l*., which she immediately afterwards, by his direction, exchanged for one of B.'s cheques for the same amount, which was post-dated, and therefore void. The testator's cheque having been paid to B. about two hours before the testator's death, B. shortly after that event gave to the widow of the testator a cheque for 1,000*l*., in exchange for that which he had previously given to her, and this second cheque was shortly afterwards paid to the widow :—Held, in effect, a good donatio mortis causâ from the testator to his wife. *Bouts* v. *Ellis*, 4 De G. M. & G. 249 ; 17 Jur. 585 ; 1 W. R. 400.

An uncle upon his deathbed delivered to his nephew a cheque for 4,000*l*., and with it his banker's pass-book. The cheque was not presented until after the donor's death :—Held, that the intended gift failed. *Beak* v. *Beak*, *Beak, In re*, 41 L. J., Ch. 470 ; L. R. 13 Eq. 489 ; 26 L. T. 281.

A husband being resident at St. Remo, in Italy, in his last illness drew his cheques on his London bankers, payable to order, and gave them to his wife, who indorsed them to her bank at St. Remo, and paid them into their bank. The cheques were not presented for payment in London till after his death :—Held, that the cheques were good donationes mortis causâ, and that the widow was entitled to the proceeds out of the testator's estate. *Rolls* v. *Pearce*, 46 L. J., Ch. 791 ; 5 Ch. D. 730 ; 36 L. T. 438 ; 25 W. R. 899.

A delivery of a cheque on the donor's banker, in his last illness, payable "to —— or bearer,"

and signed by the donor, is an adequate gift of the amount, if the donee receives the money from the banker in the donor's lifetime, or before the banker has notice of the donor's death; or if the donee negotiates the cheque for a valuable consideration, or in payment of a debt; but such cheque will not operate as an appointment of so much, if the donee retains it in his possession till after the donor's death. *Tate* v. *Hilbert*, 2 Ves. 111; 2 R. R. 175.

A lady, during the night in which she died, signed and handed to a trustee of a charity, established by herself, a cheque for 600*l.* for the use of the charity. The lady died before the morning, so that the cheque could not possibly be cashed before her death:—Held, that there was no donatio mortis causâ, and that the 600*l.* belonged not to the charity but to the residuary personal estate of the deceased. *Hewitt* v. *Kaye*, 37 L. J., Ch. 633; L. R. 6 Eq. 198; 16 W. R. 835.

A., being in a declining state of health, delivered to B. a locked cash-box, and told her to go at his death for the key; and that the box contained money for herself, and entirely at her disposal after he was gone, but that he should want it every three months while he lived. The box was twice delivered to A. by his desire, and he delivered it again to B., and it was in her possession at his death. The box was broken open by B. after A.'s death, and contained a cheque for 500*l.*, drawn by C. in favour of A., and inclosed in a cover indorsed with B.'s name; and the key (which A.'s son refused to deliver to B.) had a piece of bone attached to it, with B.'s name written on it:—Held, that this was no donatio mortis causâ. *Reddel* v. *Dobree*, infra.

A man in his last illness, a few days before his death, made a codicil to his will, giving certain benefits to his son-in-law, A., and appointed B. his executor. On the same day the testator drew a cheque on a plain sheet of paper for 900*l.*, payable to B., to whom he owed 200*l.*, and wrote on the same sheet, A. 200*l.*, B. 200*l.*, executorship fund 500*l.* The cheque was presented, and paid before the testator's death:—Held, that this was not a donatio mortis causâ, but a complete trust of 200*l.* in A.'s favour, and that it was not necessary that he should have any notice of it previously to the testator's death. *Tate* v. *Leithead*, 1 Kay, 658; 23 L. J., Ch. 736; 2 W. R. 630.

A cheque payable to the donor or order, and, without having been indorsed by him, given by the donor during his last illness to his son, stands on the same footing as a promissory note or bill of exchange payable to the donor or order, and will pass to the son by way of donatio mortis causâ. *Veal* v. *Veal* (supra) followed. *Clement* v. *Cheesman*, 54 L. J., Ch. 158; 27 Ch. D. 631; 33 W. R. 40.

—— **Policy of Insurance.**]—A policy of life insurance may be the subject of a donatio mortis causâ. *Witt* v. *Amiss*, 1 B. & S. 109; 30 L. J., Q. B. 318; 7 Jur. (N.S.) 499; 4 L. T. 283; 9 W. R. 691. *S. C.*, from *Amiss* v. *Witt*, 33 Beav. 619.

Insurance Money.]—A., having made his will in 1880, by which he gave the income of his property to his wife B., fell ill in 1887, and being in anticipation of death, signed the following document: "1887, March 1.—I give all my insurance money that is coming to me to my wife B. for her own use, as well as 200*l.* in the bank. This is my wish.—A., witness, C." This document was, at A.'s request, placed with his will, and remained there till his death in April, 1887. Evidence having been admitted as to the circumstances attending the execution of the document:—Held, that effect could not be given to the document as a donatio mortis causâ. *Hughes*, *In re*, 59 L. T. 586; 36 W. R. 821—C. A.

Debt.]—Donatio mortis causâ may be of a debt, but not in satisfaction of another debt. *Clavering* v. *York*, 2 Coll. C. C. 363, n.

A. lent B. 500*l.* in October, 1843, on which occasion B. wrote and signed the following document: "Received of A. 500*l.* to bear interest at 4*l.* per cent.," and gave it to A. In June, 1845, A., being dangerously ill, gave the document to her servant, with an expression to the effect that she wished the debt to be cancelled. Ten days after this delivery A. died:—Held, that this was a donatio mortis causâ in favour of B. *Moore* v. *Darton*, 4 De G. & Sm. 517; 20 L. J., Ch. 626.

A. lent B. 100*l.* in October, 1843, on which occasion B. wrote and signed the following document: "Received of A., for the use of C., 100*l.*, to be paid to her at A.'s death, but the interest, at 4*l.* per cent., to be paid to A." Underneath was written, "I approve the above," which was signed by A. This document was given to A. The money was not paid to A. in her lifetime. In June, 1845, A. died:—Held, that B. was a trustee for C. of 100*l.* at the death of A. *Ib.*

Chattels.] — Husband, on his death-bed, delivers to his wife a purse of 100 guineas, and bids her apply it to her own use. This is donatio mortis causâ, and a good legacy to the wife, and shall not go to the executors or administrators of the husband, if there is sufficient to pay debts. So, likewise, if the husband being ill (ut supra) draws a bill on his goldsmith to pay his wife 100*l.* for mourning, this is a good appointment; more doubtful if the money on the bill were received in the husband's lifetime. *Lawson* v. *Lawson*, 1 P. Wms. 441.

Bill by the administrator of the deceased for an account of personal estate given as a donatio mortis causâ to a negro, who had been brought to England as a slave, dismissed with costs. *Shanley* v. *Harvey*, 2 Eden, 126.

Testator makes a will, and encloses in it 100*l.* for the executor, in whose hands he places the will. He subsequently makes a fresh will, but keeps the former, and directs it to the first executor, saying it contained something for him:—Held, a good donatio mortis causâ. *Hill* v. *Chapman*, 2 Bro. C. C. 612.

Where A., the donor, delivered a cash-box, desiring B., the donee, to go after his death to his son, who had the key, stating that it contained money, to be entirely at B.'s disposal, but that he should want it every three months as long as he lived, and it was twice delivered back, but was in B.'s possession at the time of the death, the key being ticketed in the name of B., in the son's possession:—Held, not a sufficient donatio mortis causâ, nor such a trust for B. as the court would execute. *Reddel* v. *Dobree*, 10 Sim. 244; 3 Jur. 722.

M., in her last illness, requested of her husband,

that her wearing apparel, watch, rings, &c., in her possession, and used by her, might be given to her daughter, and put into a friend's hands for her daughter's use, which the husband promised, and after his wife's death gave the said things to his daughter, made an inventory, and locked them in a strong chest, gave the key to his wife's friend, and sent the things therein to her for his daughter's use :—Held, that although the husband afterwards took some of the things into his possession again, that is not sufficient to invalidate the gift, which was perfect by the former act. *Lucas* v. *Lucas*, 1 Atk. 270.

Law in Scotland.]—In the law of Scotland, general words of disposition in a mortis causâ deed are, in the absence of any proof of a contrary intention (and the law of Scotland allows such contrary intention to be proved by evidence of a kind which in England would not be admissible for that purpose), sufficient to pass heritable property vested at the date of the deed in the disponer with a special destination to heirs substitute. A. was fee simple proprietor of the estates of Kintarbert and Crossaig in Scotland. He died leaving a disposition and settlement, without prohibitory clauses, disponing these lands to B. and his heirs male, whom failing, to C. and his heirs male, whom failing, to certain cousins in succession, and their respective heirs male. B., who owned other estates, took possession, and died leaving a mortis causâ deed, giving, in language entirely general, all his heritable and movable property to C. and his heirs, whom failing, to his sister, D. C. entered into possession of all B.'s estates, and soon afterwards died intestate and without issue. The sister, D., then, as heiress of provision under B.'s general mortis causâ deed, claimed the estate of Kintarbert and Crossaig as well as the other lands of B. E. disputed D.'s right, claiming these estates as heir of provision under A.'s settlement; contending that the general term of B.'s deed could not be held to include Kintarbert and Crossaig, lands already settled upon a destination of heirs; nor was this B.'s intention :—Held, affirming the decision of the court below, that D. was entitled, because B. was absolute fiar, being the heir in possession under a settlement or entail without fetters, and therefore a general disposition by him passed these lands as part of the universitas of his estate, there being nothing in the mere nature of such a special destination, as here, to prevent it; and no proof of any contrary intention to limit the operation of such general words. *Campbell* v. *Campbell*, 5 App. Cas. 787—H. L. (Sc.)

—— **In Isle of Man.**]—In the Isle of Man the ecclesiastical court has jurisdiction to try the validity of an alleged donatio mortis causâ. *Cosnahan* v. *Grice*, supra.

Pleading.]—A statement of claim alleged that an intestate "two days before his death, made a good and valid donatio mortis causâ to the plaintiff, of the whole of his moneys standing on deposit to his account at the Ellesmere Savings Bank," but did not state any facts amounting to a donatio mortis causâ. Demurrer allowed, on the ground that the facts alleged in the statement of claim did not shew a valid donatio mortis causâ. *Townsend* v. *Parton*, *Parton*, *In re*, 45 L. T. 755; 30 W. R. 287.

IV. EXECUTION.

A. Signature of Testator.

1. Under the Statute of Frauds.

What is a Good Signing—Acknowledgment of Signature.]—Admission of signature by testator to will in presence of the witnesses good as to land. *Grayson* v. *Wilkinson*, Dick. 158; 2 Ves. 454.

Admission of sealing and delivery not sufficient evidence thereof. *Ib.*

Not necessary, under the Statute of Frauds, that a testator should sign in the presence of the witnesses; his acknowledgment of his handwriting is sufficient, although done to the several witnesses at different times. *Ib.*

Acknowledgment by devisor of his handwriting to one of the witnesses who did not see him execute, good. *Addy* v. *Grix*, 8 Ves. 505.

"I, A. B., do make this my will," equivalent to signature, and, if acknowledged before three witnesses, a good execution within the Statute of Frauds. *Morison* v. *Turnour*, 18 Ves. 183.

In proving execution of devise, actual signature by devisor in presence of three witnesses is not required, if he declares it to be his will before those who did not see him sign, and separate attestations sufficient. *Westbeech* v. *Kennedy*, 1 V. & B. 362.

Where the testator owns his hand before the witnesses who subscribe the will in the testator's presence, the will is good, though all the witnesses did not see the testator sign the will. *Stonehouse* v. *Evelyn*, 3 P. Wms. 254.

Will subscribed by three witnesses, before whom testator declared it to be his will, but did not sign it; such declaration is equivalent to signing before them, and such will is good within the 5th section of the Statute of Frauds, and is also a good will of revocation within the 6th. *Ellis* v. *Smith*, 1 Ves. 11.

Witness may attest separately; in that case, if testator acknowledged before each, or signs before one, and acknowledges before the rest, it is good; but otherwise if he signs it before each only, because three different executions, and no one good within the statute. *Ib.*, 16.

The construction of the execution of a will is the same in equity as at law. *Ib.*

A will of land written by the testator, and published in the presence of three several witnesses, at three several times, and attested by all at the said respective times in the presence of the testator, sufficient within the Statute of Frauds; but whether the man's owning the writing to be his in the presence of the witnesses be sufficient, quære. *Cook* v. *Parsons*, Pre. Ch. 184; 2 Vern. 429.

J. O., on the 13th June, 1825, made a will devising his real estate to E. O., and on the 25th November following executed another will, disposing of his personal estate merely, but containing a clause revoking all former wills, and attested by three witnesses in the following manner—namely, the testator told two of the witnesses that the document was his will, pointed out his name, and acknowledged the signature to be his, whereupon they subscribed and attested the will. Whilst the second witness was in the act of signing, the third witness accidentally came into the room, and was asked by the testator to become a witness, although he (the testator) said it was unnecessary. The testator then gave the witness

to understand that it was his will, but did not point out his name, or acknowledge it to be his signature, to this witness, who might, however, have seen the name J. O. whilst in the act of signing the document :—Held, that the second will was duly executed as a devising will under the Statute of Frauds :—Held, also, that although conversant about personal property merely, it was a good will of revocation of the freehold. *Jones* v. *Ogle*, Sau. & Sc. 1.

Semble, that, even as a "writing of revocation." it was well executed under the statute, the acknowledgment of the testator being equivalent to the signing in the presence of the witnesses. *Ib.*

Publication requires no formal words. *Maberley* v. *Sisson*, 1 Jur. 558.

—— **Declaration in Attestation.**]—A declaration by the testator, in attestation of part of his will, that lands should go to a certain person, not a sufficient devise of them under the Statute of Frauds, not being signed by the testator or by any person by his direction. *Blennerhassett* v. *Day*, 2 Ball & B. 104.

—— **Mark.**]—A will was sufficiently signed, within the Statute of Frauds, s. 5, by the devisor putting his mark instead of signing his name to it, although he was an educated person and able to write well. *Taylor* or *Baker* v. *Dening*, 3 N. & P. 228 ; 8 A. & E. 94 ; 1 W. W. & H. 148 ; 7 L. J., Q. B. 137 ; 2 Jur. 775.

A testator, unable from illness to sign his will, had his hand guided in making his mark :—Held, a sufficient signature within the Statute of Frauds. *Wilson* v. *Beddard*, 12 Sim. 28.

—— **Sealing.**]—Sealing a will was not a sufficient signing of it within the Statute of Frauds, 29 Car. 2, c. 3, s. 5, regarding the execution of wills. *Smith* v. *Evans*, 1 Wils. 313.

Execution of a devise under the Statute of Frauds, requiring signature by the devisor in the presence of three witnesses, and their attestation of his act by their subscription. *Wright* v. *Wakeford*, 17 Ves. 459.

Sealing not necessary to the execution of a devise under the Statute of Frauds, nor sufficient without signing. *Ib.*

In December A. made his will ; and in January following, designing to make an alteration, he ordered a devise to be interlined. The will was read in this state to the testator, who approved it, and put his seal on the wax in the presence of the same three witnesses who attested his will at first, but he did not subscribe his name de novo :—Held, a good signing, for the testator's subscribing is only with a view that the witnesses may know the will again. *Townsend* v. *Pearce*, 8 Vin. Abr. 142, pl. 3.

Testatrix executed her will in the presence of two witnesses ; she afterwards said, in the presence of a third, "This is my will," but did not put her seal, nor say her name was of her handwriting. Lord Hardwicke inclined this will was void, because not exactly conformable to the statute 29 Car. 2. *Gryle* v. *Gryle*, 2 Atk. 177.

Sealing her will without signing in the presence of a third witness would have been sufficient to make it a good will. *Ib.*

A will, written on nine sheets, was sealed by the testator, who signed the draft of a new will, and then tore off eight of the seals from the first will ; yet the first will was held a good will to pass the real estate, the statute not requiring all the sheets to be sealed ; and the second good to pass the personal estate as a casus omissus out of the statute. *Hyde* v. *Hyde*, 3 Ch. Rep. 155.

Will not duly Executed—Effect.]—Will not duly executed according to statute has no operation even to raise an election against person taking personal estate. *Ilchester* (*Earl*), *Ex parte*, 7 Ves. 372 ; 6 R. R. 138.

—— **Void as Appointment.**]—A. devises freehold lands for a charity, but the will was not executed in the presence of three witnesses ; adjudged, the will being void as a will, it could not operate as an appointment within the statute of 43 Eliz. *Att.-Gen.* v. *Barnes*, 2 Vern. 597 ; Pre. Ch. 270 ; Gilb. Eq. Rep. 5.

But such a will may operate as an appointment as to copyhold lands, where there is a surrender to the use of the will, they passing by the surrender and not by the will. *Ib.*

A. devises by will to which there are no witnesses, and afterwards makes a codicil, executed in the presence of three witnesses ; the will is void as to the land, and the codicil will not support it. *Ib.*

—— **No Revocation of Will of Realty.**]—Will sufficient to pass personal estate will not revoke a prior will of real estate made according to Statute of Frauds. *Limbery* or *Lunbery* v. *Mason*, 2 Comyn. 451.

Unexecuted Memorandum indorsed on Will.]—A. gives an annuity of 20*l.* to his daughter, and the heirs of her body, quarterly, without any abatement. B., the surviving executor of A., gives to the daughter of A. and her daughter an annuity of 20*l.* by his will, to be paid quarterly, without any abatement, out of his freehold houses in Holborn, and if they die without issue, then to return to the plaintiff, his heir, and by an indorsement upon the will in pencil, not executed according to the Statute of Frauds, he says, "I hope this 20*l.* will not be taken for another 20*l.* annuity her father left her and her daughter." This indorsement held invalid, because nothing can enlarge or diminish what affects real estate, unless it be executed according to the Statute of Frauds. *Heather* v. *Rider*, 1 Atk. 425.

What Property within the Statute—Produce of Real Estate Converted.]—Direction by will to sell real estates, and after the sale to pay certain legacies :—Held, upon the will, not a conversion out and out, and the surplus produce does not pass by an unattested codicil. *Sheddon* v. *Goodrich*, 8 Ves. 481.

Produce of real estates converted by will :—Held, to pass only where the will attested by three witnesses to the will. *Ib.*

Conversion directed by will of real estate into personal, not to all intents, but for the purpose only of answering legacies and annuities, subject to that as to the real estate, a resulting trust for the heir, which cannot be affected by an unattested codicil bequeathing a lapsed share of the residue. *Hooper* v. *Goodwin*, 18 Ves. 156.

Devise of real estates to be sold, and the produce applied in the same manner as the residue of the personal estate. Codicil not executed so as to pass real estates, revoking the bequest of the residue, does not affect the will as to the real. *Gallini* v. *Noble*, 2 Mer. 691.

Testator, resident in Jamaica, and seised of plantations and slaves in the island, by his will, dated June, 1834, after giving certain bequests, proceeded as follows: "Also, I give, devise and bequeath, share and share alike, unto R. and her children, all my right, title and claim to compensation such as may be awarded to me, as my portion of the compensation fund, for the emancipation of such slaves as may belong to me, and be living on the 1st August, 1834." This will was not attested so as to pass real estate, but was properly executed to pass personalty. By the law of Jamaica, slaves could only be directly devised as real estate. The Act for the Abolition of Slavery (3 & 4 Will. 4, c. 73, passed on the 28th August, 1833) provided that, on the 1st August, 1834, slavery should cease in the British dominions, and gave to the owners of the slaves a right to their services as apprentices, and to compensation for the loss of their services as slaves. The testator died before this period of manumission arrived. The court in Jamaica decreed that the compensation money partook of the nature of real estate, to the same extent as the slaves, and did not pass under the will. Upon appeal:—Held, reversing such decree, that (treating the slaves as real estate) the legislature became purchasers under the 3 & 4 Will. 4, c. 73, from the date of the act, giving a limited interest in the slaves for a term of years to the vendor, and that the money to be received under the compulsory sale of the slaves was converted into personal estate, and passed to H. and her children as specific legatees under the will. *Richards* v. *Jamaica* (*Att.-Gen.*), 6 Moore, P. C. 381; 13 Jur. 197.

—— **Shares in Waterworks.**]—The shares in the Chelsea Waterworks Company are personal property, and will therefore pass by a will not executed according to the provisions of the Statute of Frauds. *Bligh* v. *Brent*, 2 Y. & C. 268.

2. Under the Wills Act.

Signature by Agent.]—If the signature of a testator, who is too ill to write himself, is signed in his presence and that of the attesting witnesses by a third party, such signature must, nevertheless, be accompanied by some act or word on the part of the testator to shew that it was made at his request. *Marshall*, *In goods of*, 13 L. T. 643.

A testator at the time of the execution of his will was in such a weak state as to be unable to affix his signature, and it was signed for him by the person who drew it. The court, on affidavits that the testator had frequently afterwards confirmed the will, and that the next of kin did not object, granted probate of the will. *Elcock*, *In goods of*, 20 L. T. 757.

—— **Presumption of due Execution.**]—The cases which have been decided in reference to the presumption of due execution of wills apply as well where the alleged testator's signature has been affixed by his direction as where he has himself actually written his name. *Clery* v. *Barry*, 21 L. R., Ir. 152—C. A.

—— **With Initials.**]—A testator, in the presence of two subscribing witnesses, affixed a seal stamped with his initials to his will, which was entirely written by himself, placed his finger on the seal, and said, "This is my hand and seal":—Held, that the will was sufficiently signed by him. *Emerson*, *In goods of*, 9 L. R., Ir. 443.

—— **By Mark.**]—A will, purporting to be that of "S. Clarke," and delivered by her as such for safe custody to one of her executors shortly before her death, was executed by mark, against which appeared the name of "S. Barrell." The former was her maiden name, and the latter the name of the husband whom she had married:—Held, that there being no doubt as to the identity of the testatrix, her execution by mark was not vitiated by another person having written the wrong name against it. *Clarke*, *In goods of*, 1 Sw. & Tr. 22; 27 L. J., P. 18; 4 Jur. (N.S.) 24; 6 W. R. 307.

A. put his mark to a testamentary paper, in which he was throughout described as B. The court, being satisfied, on affidavit, that A. duly executed the paper by mark animo testandi, granted probate thereof as his will. *Dowce*, *In goods of*, 2 Sw. & Tr. 593; 31 L. J., P. 172; 8 Jur. (N.S.) 723; 6 L. T. 789.

A testator signed his will by putting his mark to it, and no evidence was given that it had been read over to him before its execution. An objection taken to the admissibility of the will on that ground, was unsustainable. *Clarke* v. *Clarke*, Ir. R. 2 C. L. 395.

A plaintiff propounded as a will a paper purporting to have been executed by a marks-woman, in the presence of two attesting witnesses, who also attached their marks thereto. The whole body of the will, and the names of the supposed testatrix and the witnesses, were in the handwriting of the plaintiff, who under it took almost the entire property. This paper, although in the custody of the plaintiff, was not offered for probate until many years after the death of the testatrix. Evidence was given of the execution of this paper by some person in the presence of two witnesses, but, except by the testimony of the plaintiff, such person was not identified as the deceased. The court refused to grant probate of the paper. *Edmonds* v. *Lewer*, 11 Jur. (N.S.) 911.

Where a testator from illness was unable to write, and his signature was made by having his hand guided:—Held, a sufficient signature to satisfy the statute. *Wilson* v. *Beddard*, 12 Sim. 28; 10 L. J., Ch. 305; 5 Jur. 624.

—— **By means of a Stamp.**]—B., by the direction, and in the presence, of A., who wished to execute a testamentary paper, affixed and impressed at the foot of such paper the signature of A., by means of a stamp or an engraving, which A., being paralysed, had had made for his ordinary use. A. afterwards acknowledged the signature and the codicil, and asked the witnesses to attest:—Held, that the affixing a stamp was equivalent to making a mark, at the direction of the testator, and that the making a mark was a signature. *Jenkyns* v. *Gaisford*, 3 Sw. & Tr. 93; 32 L. J., P. 122; 9 Jur. (N.S.) 630; 8 L. T. 517; 11 W. R. 854. But the court declined on motion to grant probate of the document so executed. *S. C.*, 32 L. J., P. 71; 9 Jur. (N.S.) 311; 11 W. R. 501.

Position of Signature.]—The words, "signed at the foot or end thereof," in the 9th section of the Statute of Wills, 1 Vict. c. 26, are to be construed strictly. *Smee* v. *Bryer*, 6 Moore, P. C. 404; 13 Jur. 289.

Where a holograph will, written on a sheet of foolscap paper, the depositive part of which ended on the third side, leaving, at the foot or end of the third side, a space sufficient to have received the signature of the deceased, and also that of the two attesting witnesses, if not accompanied by a formal attestation clause, was signed, with an attestation clause, in the middle of the fourth side, no part of the will being immediately above it:—Held, not to have been signed "at the foot or end," according to the requisites of the statute, and the will declared invalid. *Ib.*

A will filled the first and third pages of a sheet of foolscap paper, leaving no room at the bottom of the third page for the signature of the testator and of the attesting witnesses, which were written crossways on the second page:—Held, that the will was duly executed. *Coombs, In goods of*, 36 L. J., P. 25; L. R. 1 P. 302; 15 L. T. 363.

A testator's signature was written partly across the last line but one of the will, and entirely above the last line with the exception of one letter which touched the last line:—Held, that the will was signed at the foot or end thereof. *Woodley, In goods of*, 3 Sw. & Tr. 429; 33 L. J., P. 154.

A testator wrote a will on three sides of a sheet of note paper, the attesting clause and names of the attesting witnesses were at the bottom of the second side, a dispositive clause was written on the third side, and all the letters of the testator's signature, excepting the two last, which extended over to the third side, were on the second side:—Held, to be a good execution. *Powell, In goods of*, 4 Sw. & Tr. 34; 34 L. J., P. 107; 13 L. T. 195; 13 W. R. 696, 999.

A will ending in the middle of a third page of a sheet of foolscap paper, the lower half of the page being left blank, and the attestation clause and the signatures being written on the top of the fourth page, is duly executed. *Hunt* v. *Hunt*, 35 L. J., P. 135; L. R. 1 P. 209; 14 L. T. 859.

When the dispositive part of a codicil, written on a half sheet of note paper, occupied nearly the whole paper, and the names of the attesting witnesses were subscribed at the bottom of the page, and the signature of the testator was written down the lower part of the edge of the paper, the court held it to be a valid execution. *Jones, In goods of*, 4 Sw. & Tr. 1; 34 L. J., P. 41; 11 Jur. (N.S.) 118; 13 L. T. 210; 13 W. R. 414.

A will filled two pages of a sheet of note paper, leaving no room on the second page for the signatures of the testator and the attesting witnesses, which were written along the sides of the will upon the third page:—Held, to be a due execution. *Wright, In goods of*, 4 Sw. & Tr. 35; 34 L. J., P. 104; 13 L. T. 195.

A will was prepared and executed; the contents of the will filled the first page of a double sheet of foolscap, and the signature and attestation clause were in the middle of the fourth page:—Held, that the will was duly executed. *Fuller, In goods of*, 62 L. J., P. 40; [1892] P. 377; 1 R. 453; 67 L. T. 501; 56 J. P. 713.

Where a will terminated with a testimonium clause, about two inches from the foot of the second page of a sheet of paper, leaving ample room for the signatures both of the testator and the witnesses, all of whom, however, signed their names opposite to an attestation clause at the top of the third page, upon which no part of the will was written:—Held, that the will was properly signed within the meaning of the statute 1 & 2 Vict. c. 26. *Derinzy* v. *Turner*, 1 Ir. Ch. R. 341.

W. wrote his will on a sheet of foolscap paper. The writing covered three-fourths of the first side (the other fourth part at the bottom being blank) and the upper half of the second side. The lower half of this side was also blank. On the third side, at one-fourth the length of such side from the top, an attestation clause was written on lines not extending quite across the side; and opposite the second line of the attestation clause was his signature. The signatures of the witnesses written at the end of the attestation clause were in a line below the last words of the will when the sheet was opened:—Held, that the will was duly executed, the signature being opposite to the end of the will. *Williams, In goods of*, 35 L. J., P. 2; L. R. 1 P. 5; 11 Jur. (N.S.) 982; 13 L. T. 304; 14 W. R. 111.

A will and the attestation clause to it, which was in the usual form, were written by the testatrix herself. The only signature of the deceased attached to the will was squeezed into what had been a blank space in the attestation clause. The witnesses were asked by the deceased to sign her will, but she wrote nothing in their presence, nor did they or either of them notice her signature. The court being satisfied from the circumstances of the case, that she had signed her name before the witnesses subscribed, decreed probate of the will. *Huckvale, In goods of*, 36 L. J., P. 84; L. R. 1 P. 375; 16 L. T. 434; 16 W. R. 64.

A will was written on the upper part of one side of a piece of paper with a considerable blank beneath it, and on the back of the paper was written the attestation clause and signatures of the testator and witnesses. Upon proof that the will was written before execution:—Held, that it was duly executed. *Archer, In goods of*, 40 L. J., P. 80; L. R. 2 P. 252; 25 L. T. 274; 19 W. R. 785.

The dispositive part of a will was written on and occupied the entirety of the first page of a sheet of note paper; the signatures of the testatrix and the attesting witnesses were written upon and occupied the entirety of the fourth page, and the second and third pages were blank:—Held, that it was duly executed. *Rice, In goods of*, Ir. R. 5 Eq. 176.

The name of a testator was at the foot of a will, but below the names of the attesting witnesses. Both witnesses were dead, and there was no evidence of the order in which they and the testator signed the will, but a due execution was to be inferred from the attestation clause. The court decreed probate of the will. *Puddephatt, In goods of*, 39 L. J., P. 84; L. R. 2 P. 97.

A testatrix having obtained a form of will, lithographed on the first side of a sheet of foolscap paper, wrote her will on the second and third sides, terminating near the bottom of the third side; the fourth side was blank. The form was not filled up except as to the appointment of executors. She signed her name, in the presence of witnesses, at the foot of the lithographed form:—Held, that as regards the position of the signature, the execution was valid as within the provisions of 15 Vict. c. 24. *Wotton, In goods of*, 43 L. J., P. 14; L. R. 3 P. 159; 30 L. T. 75; 22 W. R. 352.

A will was written on the first and third sides of a sheet of foolscap, and the attestation was on the second page. The court, being satisfied from the evidence that the signature was intended to be placed at the foot or end, under

15 Vict. c. 24, granted probate. *Stoakes, In goods of*, 31 L. T. 552; 23 W. R. 62.

A will covered four pages of a sheet of foolscap paper, and was continued on a fifth page, being the first of a second sheet. At the bottom of the fifth page was a formal attestation clause, with the signatures of the witnesses, and the signature of the testator appeared at the top of the sixth or following page, preceded by these words: "To which will and testament I hereunto annex my seal and signature":—Held, a valid execution within 15 & 16 Vict. c. 24. *Horsford, In goods of*, 44 L. J., P. 9; L. R. 3 P. 211; 31 L. T. 553; 23 W. R. 211.

A testator wrote a codicil to his will upon a sheet of foolscap paper, covering the first page and half the second. The signatures of the testator and attesting witnesses were on a separate paper, which was attached to the codicil by a string. The court being satisfied that the papers were so attached when the testator acknowledged his signature to the witnesses, and they attested it:—Held, that the instrument was duly executed. *Ib.*

A will was written on a lithographed form. The testator wrote his name in the blank space left in the attestation clause, but did not sign it in the ordinary place, which was filled by the signatures of the attesting witnesses. The latter did not remember any of the circumstances of the execution:—Held, that the will was duly executed and attested. *Harris, In goods of*, 23 W. R. 734.

A will contained as an attestation clause the words: "Signed in the presence of us." Then followed the signatures of the attesting witnesses, and beneath their signatures that of the testator. The witnesses deposed that all three were present when they signed the instrument, but they could not say in what order they signed. The court held that the circumstances warranted it in coming to the conclusion that the will had been duly executed, and decreed probate of it. *Jones, In goods of*, 46 L. J., P. 80; 25 W. R. 215.

There being no room for the signature of the testator or witnesses at the foot of the single page on which a will was written, the testator signed by writing his name transversely along the left-hand margin, near the top, and running downwards as far as the commencement of the second line of the will. The names of the attesting witnesses were written above the will and opposite to portion of the testator's signature:—Held, to be good execution. *Collins, In goods of*, 3 L. R., Ir. 241.

Where, from the obvious sequence and sense of the context, it appears to the satisfaction of the court that the signature of the deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place in the paper literally above the dispositive parts or part thereof, such testamentary instrument will be entitled to probate. *Kimpton, In goods of*, 3 Sw. & Tr. 427; 33 L. J., P. 153; 10 L. T. 137.

—— **In Attestation Clause only.**]—A person with his own hand wrote out a will, which concluded with an attestation clause, "Signed, published and declared by the said A. B., the testator, as and for his last will and testament," &c. At the time of execution he declared the paper to be his will in the presence of two witnesses, and asked them to witness it, which they did, but he did not himself sign it in their presence, nor was there any direct evidence that the witnesses saw the signature. The only signature was in the attestation clause:—Held, that under 15 & 16 Vict. c. 24, the execution was valid. *Pearn, In goods of*, 45 L. J., P. 31; 1 P. D. 70; 33 L. T. 705; 24 W. R. 143.

A testimonium clause was as follows: "In witness whereof, I, Martin Hall Mann, have hereunto set my hand." The whole of this was in the handwriting of the testator, and his name written as he usually signed it, but the will was not otherwise signed by him:—Held, that the will was duly executed, the signature being placed "among the words of the testimonium clause," within the meaning of 15 & 16 Vict. c. 24, s. 1. *Mann, In goods of*, 28 L. J., P. 19.

A. wrote out his own will, concluding with an attestation clause, in which his name appeared. He afterwards called in two witnesses, told them the paper was his will, read the latter portion of it to them, including the attestation clause, and requested that they would sign their names, which they did. His name was not written at the foot or end otherwise than in the attestation clause:—Held, the execution was valid. *Walker, In goods of*, 2 Sw. & Tr. 354; 31 L. J., P. 62; 8 Jur. (N.S.) 314; 5 L. T. 766.

A. made his will on a printed form. After he had written his name in the attestation clause, he asked the witnesses to subscribe and attest the will, which they did in his presence. He then wrote his name underneath their signatures, and remarked that they were witnesses to his will. The court being satisfied that he intended by signing his name in the attestation clause to execute the will, ordered probate to issue without his signature written under the names of the witnesses. *Cusmore, In goods of*, 38 L. J., P. 54; L. R. 1 P. 653; 20 L. T. 497; 17 W. R. 627.

—— **On Paper Detached from Will.**]—Where the signatures of a testator and of the attesting witnesses were made, not on the paper on which the will was written, but on a piece of paper which had been attached to the paper on which the will was written:—Held, to be a good execution. *Cook* v. *Lambert*, 3 Sw. & Tr. 46; 32 L. J., P. 93; 9 Jur. (N.S.) 258; 9 L. T. 211; 11 W. R. 401. *See also cases*, post, cols. 354, 355.

Codicil executed on Margin of Will.]—A testator duly executed a will prepared by a solicitor which was written on the first side of a sheet of foolscap paper. Desiring shortly before his death to make an alteration in the disposition of his property, he called in the assistance of a neighbour, who wrote out a codicil on the third sheet of the foolscap, beginning, "The following alterations having been first made," and ending with an attestation clause in due form. The mark of the testator, however, and the signatures of the attesting witnesses, were written opposite the body of the will on the margin of the first page, the person who prepared the codicil being under the impression that as it was an alteration in the will it ought to be attested on the margin:—Held, that the codicil was not duly executed, and probate refused. *Hughes, In goods of*, 56 L. J., P. 71; 12 P. D. 107; 57 L. T. 495; 35 W. R. 568.

Writing below Signature.]—A testator, after signing his name to his will in the presence of two witnesses, added a clause to it, the writing

being squeezed into the space above and beside the signature. Immediately afterwards the witnesses signed their names:—Held, that he did not sign or acknowledge his signature to the will as containing such clause, and that probate should issue without it. *Arthur, In goods of*, L. R. 2 P. 273; 25 L. T. 274; 19 W. R. 1016.

In a testamentary paper executed by the deceased, the last sentence commenced immediately above his signature, and was continued in three short lines to the left of it, the two last lines being somewhat below the signature. This sentence was written before the deceased signed her name:—Held, that the execution was valid, and that the last sentence would be included in the probate. *Ainsworth, In goods of*, L. R. 2 P. 151; 23 L. T. 324.

A farmer wrote his will on a sheet of paper. The attestation clause was on the third page. At the foot of the page there were the words "Turn over," and on the fourth page there was a clause bearing date the day on which the will was executed and with the signature of the testator. The will was signed by the testator and subscribed by the witnesses on the third page, but before its execution the witness saw some writing on the fourth page. The will gave legacies and annuities of considerable amount, but the debts of the testator exhausted the personalty, and the only allusion to his real estate was contained in the writing on the fourth page:—Held, that the signature to the will which the witnesses attested was the signature on the third page, and therefore that the writing on the fourth page could not be included in the probate. *Dearle, In goods of*, 47 L. J., P. 45; 39 L. T. 93.

S. signed his name on five sheets of a testamentary paper which consisted of six sheets, the names of the attesting witnesses appeared on each of the five sheets; on the sixth appeared a testimonium and attestation clause, and the names of the witnesses, but not the signature of the deceased. The writing at the end of the fifth sheet broke off in the middle of a sentence, which was continued on the sixth sheet. The court refused to grant probate of the five sheets, as containing his last will and testament. *Sweetland* v. *Sweetland*, 4 Sw. & Tr. 6; 34 L. J., P. 42; 11 Jur. (N.S.) 182; 11 L. T. 749; 13 W. R. 504.

Testatrix left a will, which extended over to the third page of a sheet of foolscap. The signatures of herself and attesting witnesses were at the bottom of the first page, but she also placed her name at the end of the second page in their presence and before execution. The court granted probate of the first two pages. *Wray, In goods of*, 31 W. R. 476; 47 J. P. 279.

A testator two days before his death, being paralysed on one side and partly speechless, intimated to the two medical men in attendance on him his desire to make a will. They interpreted his wishes by signs and wrote them down on a card. He executed the document by making his mark, which however appeared in the middle of the writing, and they then put their initials as witnesses at the back:—Held, that the card constituted a valid testamentary paper duly witnessed, expressing the intentions of the deceased; but that it was not signed at the "foot or end" within the meaning of the statute, and was therefore not duly executed and not entitled to probate. *Margary* v. *Robinson*, 56 L. J., P. 42; 12 P. D. 8; 57 L. T. 281; 35 W. R. 350; 51 J. P. 407.

Acknowledgment of Signature—What Sufficient.]—Where a person has signed his name in the presence of witnesses at the end of several clauses of a dispositive character, apparently written at different times, the presumption is that he intended to give effect to the whole of what was written at the time he so made his signature. *Cattrall, In goods of*, 3 Sw. & Tr. 419; 33 L. J., P. 106; 10 Jur. (N.S.) 136.

A woman signed her will in the presence of one witness. On the entry of the second witness a person present directed him to sign his name under the testatrix's signature. He did so, and the second witness also subscribed the will. She was in the room, but said no word during the proceeding. The will was lying on the table open, and headed in large characters with the words, "This is the last will and testament of," &c. It also had a full and formal attestation clause:—Held, that she acknowledged her signature in the presence of two witnesses. *Inglesant* v. *Inglesant*, 43 L. J., P. 43; L. R. 3 P. 172; 30 L. T. 909; 22 W. R. 741.

A. requested B. to prepare a will for him, by which B. was appointed sole executor, and when prepared it was signed by A. in the presence of B. and two other persons. B. then sent for C. and D., and in A.'s hearing requested them to attest A.'s signature, which they did, and A. thanked them for their trouble:—Held, following *Inglesant* v. *Inglesant* (supra), that the signature had been duly acknowledged, and probate granted. *Bishop, In goods of*, 30 W. R. 567; 46 J. P. 392.

A testatrix produced a paper to A. and B., and saying, "This is my will," asked them to witness it. The will covered three pages of a sheet of paper. Her signature was at the foot of the third page. The witnesses subscribed their names on the fourth page, but did not see her signature or any part of the writing on the paper. The court, being satisfied that the signature of the testatrix was on the will at the time she produced it to the witnesses:—Held, that there had been a sufficient acknowledgment, and that the will was duly executed. *Janaway, In goods of*, 44 L. J., P. 6; 31 L. T. 800; 23 W. R. 385.

An intending testator's name was, by his direction, and in his presence, subscribed for him to a paper writing purporting to be his will, and two other persons, who were present when his name was so subscribed, but not when the direction was given, acted as attesting witnesses, and then the intending testator made a mark immediately over his name so subscribed for him:—Held, that there being no evidence that the subscribed name had been acknowledged as his signature by the intending testator in the presence of the attesting witnesses, and his mark having been made by him after the attestation of the witnesses, the execution was invalid. *Moore, In goods of*, Ir. R. 9 Eq. 609.

A signature made by some person, but not in the presence (though by the direction) of a testator, is not such signature as can be acknowledged by the testator under the Wills Act (7 Will. 4 & 1 Vict. c. 26), s. 9. *Kevil, In goods of*, Ir. R. 8 Eq. 244.

An intending testator "held a pen in his hand and put it to his name" (not written in his presence), "or placed on a mark" made on a will prepared for him by a solicitor; but no proof could be given whether any ink was in the pen or any visible trace made when he so held the

pen :—Held, though the will was properly attested, that the court could not presume a due execution. *Ib.*

The attesting witnesses to a will, which purported to be executed by mark, were asked in the testator's presence to sign the will. A mark was on the will when they signed, but there was no evidence that it was made by the testator, or that he knew the contents of the will, nor did he refer to it. The court pronounced against the will on the ground that the evidence failed to shew an acknowledgment of the testator's signature or that he knew and approved of its contents. *Morritt* v. *Douglass* or *Douglas*, 42 L. J., P. 10 ; L. R. 3 P. 1 ; 27 L. T. 591 ; 21 W. R. 162.

The mere circumstance of the deceased having called in two witnesses "to sign a paper for him" (which they did in his presence), but without any explanation of the nature of the instrument being made to them, or the witnesses being able to see if any signature or writing was upon it when they attested it :—Held, by the judicial committee of the privy council, affirming the judgment of the prerogative court, not to amount to an acknowledgment of the signature by the deceased so as to satisfy the provisions of 1 Vict. c. 26, s. 9, and probate refused to such paper. *Ilott* v. *Genge*, 4 Moore, P. C. 265.

A testatrix exhibited a codicil to her last will, which was entirely in her own handwriting, to one of the attesting witnesses, telling her she had something which required two witnesses. Subsequently, the second attesting witness having come into the room, was asked, either by the testatrix or by the other attesting witness in her presence, to sign it, and they both signed, but the testatrix did not tell them that it was a testamentary paper, nor did they know what sort of paper it was that they had attested. They did not recollect seeing the testatrix sign, but one of them was clear that her signature was there at the time they signed :—Held, that this was a sufficient acknowledgment by the testatrix of her signature, and that the codicil was entitled to probate. *Daintree* v. *Fasulo*, 57 L. J., P. 76 ; 13 P. D. 102 ; 58 L. T. 661—C. A. Affirming 52 J. P. 87.

—— **Blindness of Testator.**]—A testator who is so blind that he can do little more than distinguish night from day is capable of acknowledging his signature to his will. *King* v. *Berry*, Ir. R. 5 Eq. 309.

Presumption of due Execution—Evidence.]—If a will appears upon the face of it to have been properly executed, according to the requirements of the 7 Will. 4 & 1 Vict. c. 26, the presumption of law is that the testator duly acknowledged it. *Lloyd* v. *Roberts*, 12 Moore, P. C. 158.

The grant of probate to a will, which was entirely in the handwriting of the testator, an attorney, without break or crowding, with an attestation clause in its proper place, and attested by two witnesses, was opposed by the wife and daughter of the testator (they having been entirely excluded from any benefit under it), on the ground that it was written after the witnesses attested the will. One of the attesting witnesses was dead ; the other deposed that when he signed the will, with the exception of the testator's signature, and the signature of the other attesting witness, the paper was blank :—Held, from the appearance of the will, as well as the circumstance that the testator was a professional man, well acquainted with the necessity of a proper execution, and the presumption of law, that the will was written when attested, and had been duly acknowledged in the witnesses' presence, notwithstanding the testimony of the surviving attesting witness, who, in the opinion of the judicial committee, must have been mistaken or his memory failed him. *Ib.*

The legal presumption is in favour of a will with a perfect attestation clause, and to rebut it the court requires the strongest evidence. Therefore, where a solicitor drew his will himself with a perfect attestation clause, which appeared attested by two witnesses of humble rank, and on the will being propounded, after the lapse of seven years and a half from its date, one of the attesting witnesses swore, but not very positively, that the testator signed his name to the will before the witnesses, while the other witness swore that at the time he signed the will the testator's name was not signed to it, the court, not relying on the memory of the latter, acted on the presumption in favour of the due execution of the will and declared it well proved. *O'Meagher* v. *O'Meagher*, 11 L. R., Ir. 117.

When a testamentary paper is not in evidence, and all the persons present at an intended execution of it agree that it was not duly executed, the court cannot, on a mere suspicion to the contrary, decree probate of it. *Eckersley* v. *Platt*, 36 L. J., P. 7 ; L. R. 1 P. 281 ; 15 L. T. 327 ; 15 W. R. 232.

In a suit concerning the validity of a will the surrounding circumstances and the appearance of the document were in favour of its having been duly attested. The adverse evidence, viz. that of the two witnesses, who denied having attested in the presence of the testator, appeared to be of a doubtful character. The court acted on the presumption omnia rite esse acta, and pronounced for the will. *Bailey* v. *Frowan*, 19 W. R. 511.

If an attestation clause of a will more than thirty years old recites a compliance with the requisite ceremonies in respect of all the witnesses, it is enough, in order to make out a primâ facie case, to prove the death of all, and the handwriting of one of them ; because it will be presumed that everything that he thus declared by his attestation to have been done was rightly done. *Andrew* v. *Motley*, 12 C. B. (N.S.) 526 ; 32 L. J., C. P. 128.

Two persons' names appeared as attesting witnesses to a will, and the attorney who drew the will, and who was present during its execution, swore that these persons had duly signed the will as attesting witnesses, and other persons who knew their handwriting swore that the writing was theirs, but they themselves, though admitting a striking resemblance between the signatures to the will and other signatures of theirs produced, denied having signed the will, and swore that the signatures to it were forgeries. The court, being satisfied that the signatures were genuine notwithstanding the denial of the witnesses, admitted the will to probate. *Myers* v. *Gibson*, 14 W. R. 901.

Two attesting witnesses contradicted one another on the point that the deceased signed his name in their joint presence. The will concluded, "In witness whereof I place my signature in the presence of two witnesses" :—Held, that it was entitled to probate. *Creyreen* v. *Willoughby*, 6 Jur. (N.S.) 590.

When there is no formal attestation clause to a testamentary paper, and no affirmative evidence that at the time of execution the testator's name was on the paper, the mere production of it to witnesses with a request that they will sign it as a paper, is not in itself sufficient to justify the court in drawing the inference that it was already signed by the testator. *Fischer* v. *Popham*, 44 L. J., P. 47 ; L. R. 3 P. C. 246 ; 33 L. T. 231 ; 23 W. R. 683.

A testatrix in 1869 executed a will, and in 1871 executed a codicil appointing two fresh executors, but in other respects confirming the will. She afterwards wrote at the foot of the will "I declare this will to be null and void.—E. H., 28th of May, 1873." Underneath this were the words "Turn over," and on a blank page she made fresh testamentary dispositions, followed by her signature and the date, underneath which were the words "Witness my hand," and the signatures of two witnesses, but with no formal attestation clause. At the foot of the codicil of 1871 she wrote "Null and void, E. H." The signatures both to the will and to the codicil had lines drawn across them, but were still perfectly legible. The witnesses to the writing of 1873 swore that the testatrix asked them to sign their names, but did not sign her own in their presence, and that she did not say what the paper was. One witness did not remember whether her signature was already there. The other witness thought that it was, but that some of the other words had been added afterwards : —The court held that the later codicil was not proved to have been duly acknowledged, and granted probate of the will and first codicil. *Ib.*

On the death of the deceased a testamentary paper was found in his handwriting and with his signature at the foot or end. It had also an attestation clause and the names of two witnesses thereto. At the time of execution the deceased did not refer to the paper as a will, nor was there any evidence that the deceased's signature was on the paper at the time. The court refused, on motion, to grant probate of such paper as a codicil to the will of the deceased. *Swinford, In goods of*, 38 L. J., P. 38 ; L. R. 1 P. 630 ; 20 L. T. 87 ; 17 W. R. 536.

When one of the attesting witnesses to a will was dead, and it appeared that it would be difficult, if not impossible, to discover the other, and the only parties interested in the estate consented, the court granted probate of the will, though in the attestation clause it did not appear under what circumstances the attestation had been made. *Nicks, In goods of*, 34 L. J., P. 30.

A will, in the handwriting of the deceased, and having a full attestation clause, will be admitted to probate, although the attesting witnesses may not recollect whether it was signed or the signature acknowledged in their presence. *Holgate, In goods of*, 1 Sw. & Tr. 261 ; 29 L. J., P. 161 ; 5 Jur. (N.S.) 251.

When a will appears to be duly executed, and there is a complete attestation clause, the presumption omnia rite esse acta applies, and is not rebutted by the defective memory of the attesting witness. Where the attestation clause is incomplete, the presumption also applies, but with less force. *Vinnicombe* v. *Butler*, 3 Sw. & Tr. 580 ; 34 L. J., P. 18 ; 10 Jur. (N.S.) 1109 ; 13 W. R. 392.

If the attestation clause is informal, and the attesting witnesses identify their signatures and that of the testator, but have no recollection of the circumstances under which the will was executed, the presumption, in the absence of evidence to the contrary, is, that the will was duly executed. *Rees, In goods of*, 34 L. J., P. 56.

—— **Signature seen by attesting Witnesses.**] —When the attesting witnesses to a will duly executed on the face of it did not recollect having seen the testator's signature to the will when they subscribed their names as witnesses, the court held that it was at liberty to judge from the circumstances of the case, whether it was probable that the testator's name was on the will or not at the time of the attestation, and being of opinion that it was, pronounced for the will. *Gwillim* v. *Gwillim*, 3 Sw. & Tr. 200 ; 29 L. J., P. 31.

To constitute a sufficient acknowledgment, within s. 9 of the Wills Act, the witnesses must at the time of the acknowledgment see, or have the opportunity of seeing, the signature of the testator, and if such be not the case it is immaterial whether the signature be, in fact, there at the time of attestation, or whether the testator say that the paper to be attested is his will, or that his signature is inside the paper. *Hudson* v. *Parker* (1 Robert. 14) followed. *Gwillim* v. *Gwillim* (supra) and *Becket* v. *Howe* (infra) disapproved. *Gunstan, In goods of, Blake* v. *Blake*, 51 L. J., P. 36 ; 51 L. J., Ch. 377 ; 7 P. D. 102 ; 46 L. T. 641 ; 30 W. R. 505 —C. A.

A person asked two witnesses to put their mark to a paper, but did not tell them that it was his will, or make any statement in regard to it. Being illiterate, the witnesses could not say whether his signature was on the paper at the time, and there was no evidence on the point :— Held, an insufficient execution of the will. *Pearson* v. *Pearson*, 40 L. J., P. 53 ; L. R. 2 P. 451 ; 24 L. T. 917 ; 19 W. R. 1014.

The cases on execution by acknowledgment of a testator's signature reviewed. *Ib.*

When the signature of a testator is apparent on the will when it is presented to the witnesses for attestation, it is sufficient that it might be seen by them, whether they actually observed it or not. *Kelly* v. *Keatinge*, Ir. R. 5 Eq. 174.

The attesting witnesses were not present when the testator put his mark to his will ; but the testator, being asked in their presence, "Do you acknowledge this to be your last will and testament?" answered, "I do" :—Held, a sufficient acknowledgment of his signature *Ib.*

The mere circumstance of a testator having called in two witnesses "to sign a paper for him" (which they did in his presence), but without any explanation of the nature of the instrument being made to them, or the witnesses being able to see if any signature or writing was upon it when they attested it :—Held, not to amount to an acknowledgment of the signature of the testator, so as to satisfy the provisions of the 7 Will. 4 & 1 Vict. c. 26, s. 9. *Holt* v. *Genge*, 4 Moore, P. C. 265.

A codicil was signed by a deceased, who was ill in bed in one room, and attested by two witnesses in an opposite room, but who did not see her make or acknowledge her signature, or have any conversation with her respecting it. The deceased, the doors of both the rooms being open, might, by raising herself in bed, have seen the witnesses sign ; but there was no evidence that she did do so :—Held, to be a bad execution, on the grounds that she did not make or acknow-

ledge her signature in the presence of the witnesses, and that they did not attest in her presence. *Killick, In goods of*, 3 Sw. & Tr. 578; 34 L. J., P. 2; 10 Jur. (N.S.) 1083.

A testator requested one person to attend to his will and another to witness a paper. They both attended at the time and place appointed, when the testator produced a paper so folded that no writing on it was visible, and informed them that in consequence of his wife's death it was necessary to make a change in his affairs, and he asked them to sign their names to it, which they did. The testator did not sign in their presence, nor did they see his signature. The paper had an attestation clause upon it in his handwriting, but not quite in the ordinary form:—Held, that there had been a sufficient acknowledgment of the signature. *Beckett* v. *Howe*, 39 L. J., P. 1; L. R. 2 P. 1; 21 L. T. 400; 18 W. R. 75.

A. and B. subscribed a paper in the presence of and at the request of the testatrix, who had previously in their presence written something on it, but what, they did not know. She did not explain to them the nature of the paper; nor when they signed it did they see her signature, all the writing on the paper being concealed by a sheet of blotting-paper:—Held, a valid execution. *Smith* v. *Smith*, 35 L. J., P. 65; L. R. 1 P. 143; 12 Jur. (N.S.) 674; 14 L. T. 417; 14 W. R. 648.

By Soldiers and Sailors.]—*See* ante, col. 260.

See also cases under ATTESTATION, infra.

B. ATTESTATION.

See also preceding cases under SIGNATURE OF TESTATOR.

Attestation—Sufficiency of.]—Where a witness in fact attested a testator's signature, but the form of attestation described him as only attesting the signatures of two other witnesses (the attestation of one of whom was irregular), probate of the will was granted. *Mason* v. *Bishop*, 1 Cab. & E. 21.

A. having made his will in 1880, by which he gave the income of his property to his wife B., fell ill in 1887, and, being in anticipation of death, signed the following document:—"1887, March 1.—I give all my insurance money that is coming to me to my wife B. for her own use, as well as 200*l.* in the bank. This is my wish.—A., witness, C." This document was, at A.'s request, placed with his will, and remained there till his death in April, 1887. Evidence having been admitted as to the circumstances attending the execution of the document:—Held, that it was intended as a testamentary instrument, and, not having been properly attested according to the Wills Act, could not take effect as a will. *Hughes, In re*, 59 L. T. 586; 36 W. R. 821.—C. A.

The Wills Act, which permits acknowledgment of his signature by a testator, allows no such latitude in the case of an attesting witness. Where the testator acknowledged his signature to his will in the presence of two attesting witnesses, and one of the latter, who had previously signed the will in the testator's presence, after seeing him sign before the arrival of the second witness, traced over his signature with a dry pen, and the second witness then attested the will, all three being present at the time:—Held, that the will was not duly executed. *Horne* v. *Featherstone*, 73 L. T. 32.

Number of Witnesses.]—Will of lands made before the Statute of Frauds had but two witnesses, and the testator died after statute, yet the will being made before, held good. *Serjeant* v. *Puntis*, Pre. Ch. 77.

A., possessed of a term of five hundred years in B. acre, afterwards purchases the fee-simple in C.'s name, and devises B. acre to J. in fee; but the will is not attested by three witnesses: the term shall not pass, because attendant on and part of the inheritance. *Whitechurch* v. *Whitechurch*, 2 P. Wms. 236; Gilb. Eq. Rep. 168; 1 Stra. 619; 9 Mod. 124.

Devise of all lands and tenements in or near F., by a will attested by two witnesses only, where the testator had freehold, will not pass leasehold; contra, if he had only had leasehold. *Chapman* v. *Hart*, 1 Ves. 271.

Where real estate is charged with legacies generally, by will, duly attested, legacies may be revoked or charged by an unattested instrument. *Buckeridge* v. *Ingram*, 2 Ves. 665.

A trust is limited to A., his heirs and assigns, or to such as he or they may appoint; A. devises these lands by a will attested but by two witnesses; the will void, and shall not operate as an appointment. *Wagstaff* v. *Wagstaff*, 2 P. Wms. 258.

A rent is a tenement; and, therefore, cannot pass by will without three witnesses, if out of freehold: the word "tenement" being in the Statute of Frauds. *Habergham* v. *Vincent*, 2 Ves. 231; 4 Bro. C. C. 353.

Produce of real estates converted by will:—Held, to pass only where the will is attested by three witnesses to the will. *Sheddon* v. *Goodrich*, 8 Ves. 481.

Presence of Testator and Witnesses.]—The factum of a will held under the circumstances of the case to be sufficiently proved, though one of the subscribing witnesses deposed that he did not see all that the testator wrote, only the large initial of his christian name; and the other witness stated that she did not see what he wrote, but that he acknowledged the paper to be his will in their joint presence. *Cooper* v. *Bockett*, 4 Moore, P. C. 419; 10 Jur. 931.

The signature or acknowledgment of a testator must be made in the presence of two witnesses, present at the time, and they must, after he has so signed or so acknowledged, subscribe the will in his presence. *Hindmarsh* v. *Charlton*, 8 H. L. Cas. 160; 7 Jur. (N.S.) 611; 4 L. T. 125; 9 W. R. 521.

A will signed by the attesting witnesses in the same room where the testatrix lay in bed with the curtains closed, and her back to the attesting witnesses, who deposed to her utter inability to have turned herself so as to have drawn aside the curtains:—Held, not to have been signed by the witnesses in the presence of the testatrix. *Tribe* v. *Tribe*, 1 Rob. Ecc. Rep. 775.

A testatrix went to her attorney's office to execute her will; being an invalid, she executed it in her carriage, the witnesses attending her. After having seen the execution they returned to the office to subscribe it, and the carriage was put back to the window of the office, through which she might have seen what passed:—Held, that the will was well executed. *Casson* v. *Dade*, 1 Bro. C. C. 99; Dick. 586.

A witness, proving a will of land, swears that he subscribed it in the same room, and at the testator's request:—Held, good, though not said

"in the testator's presence." *Longford* v. *Eyre*. 1 P. Wms. 740.

A witness, to prove a will of land, ought to prove that the will was executed in his presence, and also in the presence of the two other witnesses, and that they subscribed in the presence of the testator. *Ib.*

Implication is, that witnesses to a will saw the testator execute, if so situated that they might have seen him; not where they were in an adjoining room, and could not. *Morrison* v. *Arnold*, 19 Ves. 671.

J. O., on the 13th June, 1825, made a will devising his real estate to E. O., and on the 25th November following executed another will, disposing of his personal estate merely, but containing a clause revoking all former wills, and attested by three witnesses in the following manner, viz. the testator told two of the witnesses that the document was his will, pointed out his name, and acknowledged the signature to be his, whereupon they subscribed and attested the will. Whilst the second witness was in the act of signing, the third witness accidentally came into the room, and was asked by the testator to become a witness, although he (the testator) said it was unnecessary. The testator then gave the witness to understand that it was his will, but did not point out his name, or acknowledge it to be his signature, to this witness, who might, however, have seen the name J. O. whilst in the act of signing the document:—Held, dissentiente Smith, B., that although conversant about personal property merely, it was a good will of revocation of the freehold. *Jones* v. *Ogle*, Sau. & Sc. 1.

Where the second witness was not present when the testator executed, and the first witness subscribed, although the testator and the former witness both acknowledged to the latter their subscriptions:—Held, an insufficient compliance with the Indian Will Act, which is in effect the same as the 1 Vict. c. 26, s. 9. *Casement* v. *Fulton*, 5 Moore, P. C. 130.

—— **Attestation while Testator is insensible.**]—If a testator is in a state of insensibility when his will is attested, the will is *not* duly executed although he is corporeally present. *Right* d. *Cater* v. *Price*, 1 Dougl. 241.

—— **Testator unable to see Witnesses sign.**]—Where the witnesses subscribed their names at a window, in a passage where they could only see a part of the bed on which the testator lay, and he could not, as he lay there, see them attest the will:—Held, not to be duly executed. *Clerk* v. *Ward*, 4 Bro. P. C. 71.

A testatrix signed a document in the presence of two witnesses, who twenty minutes afterwards subscribed the document in an adjoining room. The door was open, but the testatrix was not aware that they were signing:—Held, that the document was not duly executed. *Jenner* v. *Finch*, 49 L. J., P. 25; 5 P. D. 106; 42 L. T. 327; 28 W. R. 520.

A person executed his will by signing it in the presence of two witnesses, one of whom at once subscribed it in the same room. The deceased then noticing that the other witness was excited and nervous, suggested that the will should be taken into an adjoining room, which was done, and it was there signed by the second witness. There was evidence that the doors of the two rooms were open at the time, and that the deceased while in bed might have seen that part of the table in the adjoining room on which the will was lying when the witness signed her name:—Held, that the execution was valid. *Trimmell, In goods of*, 11 Jur. (N.S.) 248.

Where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, and the jury found that, from one part of the testator's room, a person, by inclining himself forwards with his head out at the door, might have seen the witnesses, but that the testator was not in such a situation in the room that he might, by so inclining, have seen them:—Held, that the will was not duly attested. *Doe* d. *Wright* v. *Manifold*, 1 M. & S. 294.

—— **Testator Blind.**]—It is not necessary to the validity of the execution of a will of lands by a blind man, that it should be read over to him in the presence of the attesting witnesses. *Longchamp* d. *Goodfellow* v. *Fish*, 2 Bos. & P. (N.R.) 415; 9 R. R. 670.

A testator who is so blind that he can do little more than distinguish night from day is capable of acknowledging his signature to his will. *Mullen, In goods of*, Ir. R. 5 Eq. 309.

Position of Signature.]—A testator wrote his will on two sheets of brief paper. He affixed his name to both sheets, but the attesting witnesses only signed the first sheet. The court ordered the will to be propounded. *Morris, In goods of*, 28 L. T. 745.

A will was written on a printed form by a testator's directions, and was contained partly on a first page and partly on a second. The attestation was at the bottom of the first page, and there was no attestation on the second page. The court excluded the second page from probate. *Birt, In goods of* (L. R. 2 P. 214), distinguished. *Mulen, In goods of*, 54 L. J., P. 91; 33 W. R. 825; 50 J. P. 262.

A party executed his will in the presence of two witnesses, who signed their names in his presence, one opposite the word "executors," the other opposite the word "witness." There was no attestation clause to the will. The deceased intended one of the witnesses to be his executor, and asked him to sign his name in that character. The court held, that such person did not sign the will exclusively as executor; but that he also intended by his signature to affirm that the deceased executed the will in his presence, and that consequently the execution was valid. *Griffiths* v. *Griffiths*, 41 L. J., P. 14; L. R. 2 P. 300; 25 L. T. 574; 20 W. R. 192.

A testator signed his name at the end of his will, on the tenth sheet, and placed his initials on the first nine sheets. Two out of three witnesses signed their names on the first nine sheets, but not on the tenth:—Held, that the operative signature of the testator was not duly attested, and the execution was incomplete. *Phipps* v. *Hale*, L. R. 3 P. 166; 22 W. R. 742.

In 1832, B. wrote a will, of which the last sentence concluded with his name. After his death, in 1859, the will was produced, with the words, "Witness, C. D., witness, E. F., April 11, 1838," written below the signature. On proof of the deaths of C. D. and E. F., and of their handwriting, the court admitted the will to probate as of the date of April 11, 1838. *Trott* v. *Skidmore*, 2 Sw. & Tr. 12; 29 L. J., P. 156; 6 Jur. (N.S.) 760; 2 L. T. 519; 8 W. R. 590.

A will was written on a lithographed form, and extended over the first and second sides of a

sheet of foolscap paper. The form contained attestation clauses at the foot of the first and second sides of the paper. The testatrix made a mark in the blank spaces left for the purpose in both such clauses. Two witnesses signed their names at the bottom of the first side only and before the testatrix made her mark in the attestation clause of the second side:—Held, that the only mark which could give validity to the will was on the second side, and that was not attested by the witnesses. *Dilkes, In goods of*, 43 L. J., P. 38; L. R. 3 P. 164; 30 L. T. 305; 22 W. R. 456.

A testator wrote a codicil to his will upon a sheet of foolscap paper, covering the first page and half the second. The signatures of the testator and attesting witnesses were on a separate paper, which was attached to the codicil by a string. The court being satisfied that the papers were so attached when the testator acknowledged his signature to the witnesses, and they attested it:—Held, that the instrument was duly executed. *Horsford, in goods of*, 44 L. J., P. 9; L. R. 3 P. 211; 31 L. T. 553; 23 W. R. 211.

A will was written on a lithographed form. The testator wrote his name in the blank space left in the attestation clause, but did not sign it in the ordinary place, which was filled by the signatures of the attesting witnesses. The latter did not remember any of the circumstances of the execution:—Held, that the will was duly executed and attested. *Harris, In goods of*, 23 W. R. 734.

Signatures of Attesting Witnesses in Margin only.]—Where the signatures of the attesting witnesses to a will appeared in the margin of the will opposite certain alterations and interlineations only, the court, being satisfied that the witnesses at the time they so wrote their names in the margin intended to attest the testator's signature, and the execution of the will being regular in all other respects, granted probate of the will. *Roberts* v. *Phillips*, per Lord Campbell, C.J. (4 El. & Bl. 450), followed. *Streatley, In goods of*, 60 L. J., P. 56; [1891] P. 172; 39 W. R. 432.

Two Papers.]—A will was written twice on different pieces of paper. The two documents were differently worded but were to the same effect. By mistake one of them was signed by the testator and the other by the two attesting witnesses:—Held, that the will was not duly attested. *Hatton, In goods of*, 50 L. J., P. 78; 6 P. D. 204; 30 W. R. 62; 46 J. P. 40.

Alterations.]—The clause appointing executors was written partly on the second and partly on the third side of a will. Subsequently the testator altered the clause, but his signature and those of the attesting witnesses appeared opposite only to the alterations which were made on the second side. The court granted probate of all the alterations. *Wilkinson, In goods of*, 6 P. D. 100; 29 W. R. 896; 45 J. P. 716.

Unattested alterations appearing in a will executed prior to the Wills Act (7 Will. 4 & 1 Vict. c. 26) coming into operation, will, in the absence of any evidence as to their date, be presumed to have been made before the act came into operation, and are therefore entitled to probate. *Streaker, In goods of*, 4 Sw. & Tr. 192; 28 L. J., P. 50.

In what Name Witness may Sign.]—An attesting witness must himself subscribe the will. It is not essential that a witness should sign his own name, provided it is clear that his subscription is intended as an act of attestation. *Duggins, In goods of*, 39 L. J., P. 24; 22 L. T. 182.

The name of A., an attesting witness to a will, was at his request subscribed by B., who was himself present at the execution:—Held, that as A. had not subscribed, and B.'s subscription was not intended as an act of attestation, the will was not duly executed. *Ib.*

One of the attesting witnesses, by the desire of the testator, subscribed her husband's name instead of her own to the attestation clause. The will appeared on the face of it to be duly executed:—Held, that as the attesting witness did not intend the subscription to the will to represent her own signature, the attestation was invalid, and the will could not be admitted to probate. *Pryor* v. *Pryor*, 29 L. J., P. 114.

S. having signed his will in the presence of a servant, the latter subscribed "Servant to Mr. Sperling," without any name. A solicitor, the other attesting witness, had directed him to sign as servant to Mr. Sperling:—Held, a sufficient attestation and subscription. *Sperling, In goods of*, 3 Sw. & Tr. 272; 33 L. J., P. 25; 9 Jur. (N.S.) 1205; 9 L. T. 348; 12 W. R. 354.

A will was signed by the deceased in the presence of two persons, one of whom subscribed it with his own name and the other with the name of her husband:—Held, that the will was not properly attested. *Leveringtun, In goods of*, 55 L. J., P. 62; 11 P. D. 80.

Form of Subscription.]—No particular form of subscription is required by 7 Will. 4 & 1 Vict. c. 26, s. 9. A mark will do, though the witness may be able to write; but whatever form the subscription may assume, it must be made animo testandi. *Enyon, In goods of*, 42 L. J., P. 52; L. R. 3 P. 92; 29 L. T. 45; 21 W. R. 856.

A person executed his will in the presence of two witnesses, one of whom also made a mark in attestation of his signature. The second witness then wrote the names of the testator and the witness opposite their respective marks and also the word "witness," but he did not subscribe his own name:—Held, that he did not by any word he wrote attest the signature of the testator, and that the execution was invalid. *Ib.*

The initials of attesting witnesses are a sufficient subscription; they are not required to sign their names. *Christian, In re*, 2 Rob. Ecc. Rep. 110.

Under 29 Car. 2, c. 3, s. 5, the making of a mark by an attesting witness is a sufficient subscription. *Doe* d. *Davis* v. *Davis*, 9 Q. B. 648; 16 L. J., Q. B. 97; 11 Jur. 182.

A will subscribed by two attesting witnesses, capable of writing, with marks, is sufficiently subscribed by them. *Amiss, In re*, 2 Rob. Rep. 116.

The subscription of an attesting witness to a will need not be placed at the foot of it; nor is any attesting clause necessary under 29 Car. 2, c. 3, s. 5. *Roberts* v. *Phillips*, 4 El. & Bl. 450; 24 L. J., Q. B. 171; 3 C. L. R. 513; 1 Jur. (N.S.) 444.

To make a valid subscription and attestation to a will there must be either the name of the witness, or some mark intended to represent it. A correction of an error in a previous writing of

his name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose. *Hindmarsh* v. *Charlton*, 8 H. L. Cas. 160; 7 Jur. (N.S.) 611; 4 L. T. 125; 9 W. R. 521.

A testator produced his will to A., and signed it in his presence. A., whose name consisted of four words, the first of which began with "F.," then, in the testator's presence, signed his own name, but by accident left his first initial letter uncrossed, so that it stood as if it was "T." He afterwards advised the testator that there ought to be two witnesses to the will, and in the afternoon of the same day, B. being present, the testator produced his will, and showed and acknowledged his signature in the presence of both A. and B. B. then wrote his name, and at his desire A. added the date, and then observed and corrected the first initial of his own name by crossing the T. and so making it F.:— Held, that the will was not duly attested. *Ib.*

Attestation by Marksman.]—Attestation of a devise by a mark good within the statute of frauds. *Harrison* v. *Harrison*, 8 Ves. 185.

Attestation of a devise by a mark good within the statute of frauds. *Addy* v. *Grix*, 8 Ves. 504. S. P., *Wright* v. *Wakeford*, 17 Ves. 459. *See* 15 R. R. 363, n.

Attestation of marksmen good under the Statute of Frauds. *Grayson* v. *Atkinson*, 2 Ves. 454; Dick. 158.

Form of attestation to a will by a marksman. *Wigan* v. *Rowland*, 10 Hare (App.) 18; 1 Eq. R. 213; 1 W. R. 383. And see *S. C.*, 11 Hare, 157; 17 Jur. 910.

Hand of Witness guided by another Person.]—The attesting witnesses, not being able to write, held the top of the pen while the writer of the will subscribed their names:—Held, that, as the witnesses took some share in the act of writing, the court could not determine on the more or less, and that the attestation and subscription were good. *Lewis* v. *Lewis*, 2 Sw. & Tr. 153; 4 L. T. 583. *S. C.* nom. *Lewis*, *In goods of*, 31 L. J., P. 153; 7 Jur. (N.S.) 688.

When the hand of one subscribing witness was guided by that of the other:—Held, a valid attestation. *Frith*, *In goods of*, 1 Sw. & Tr. 8; 27 L. J., P. 6; 4 Jur. (N.S.) 288; 6 W. R. 262.

An attesting witness, who was unable to read or write, signed his name at the foot of the attestation, his hand being guided by another person in making the signature:—Held, a sufficient subscription. *Harrison* v. *Elvin*, 3 Q. B. 117; 6 Jur. 849.

An attesting witness to a will being unable to write, instead of attesting by mark, procured another person to write her name, she holding the pen "while" her name was being written:—Held, a good attestation. *Bell* v. *Hughes*, 5 L. R., Ir. 407.

Intention of Witness—Tracing over Signature with Dry Pen.]—A testatrix executed her will in the presence of two witnesses, one of whom signed his name thereto; but the other, after writing his christian name, was unable, through feebleness, to complete his signature. Subsequently a third person was introduced, and the testatrix made her mark in the presence of such person and the witness who had signed his name. The latter traced his signature over with a dry pen, and the former signed his name:—Held, that the execution was invalid in the latter case by reason that the witnesses did not both attest and subscribe the signature of the testator; and in the former by reason that one witness had no intention, by writing his christian name only, to subscribe the will. *Maddock*, *In goods of*, 43 L. J., P. 29; L. R. 3 P. & M. 169; 30 L. T. 696; 22 W. R. 741. See also *Cunningham*, *In goods of*, ante, col. 306, and *Horne* v. *Featherstone*, supra.

Witnesses not Subscribing their Names in each other's Presence.]—It is not necessary that the attesting witnesses to a will or codicil should subscribe their names to the instrument in the presence of each other. *Sullivan* v. *Sullivan*, 3 L. R., Ir. 299.

Witnesses' Signatures at Different Times.]—The testator signed his will in the presence of his first witness, who attested it, and subsequently on the same day, in the presence of the second witness, the testator and first witness acknowledged their signatures when the second witness attested the will:—Held, that this was not a compliance with s. 9 of the Wills Act, and the will was not duly executed. *Moore* v. *King* (3 Curt. Ecc. 243) and *Hindmarsh* v. *Charlton* (supra) followed. *Wyatt* v. *Berry*, 62 L. J., P. 28; [1893] P. 5; 1 R. 462; 68 L. T. 416.

In the face of distinct and positive evidence to the contrary, the court cannot say that a will was duly executed because it appears to be so. The court can only pronounce for a will in such cases where there is any doubt about the recollection of the attesting witnesses. *Ib.*

Identification of Document.]—A codicil was duly executed by a testator and attested by two crosses—thus ×× —without the names of the marksmen being written; but one of the witnesses was only temporarily incapable of writing, and was now able to identify the document:—Held, that, the document being so identified by this witness, probate of it should be granted. *Garner*, *In goods of*, 1 L. R., Ir. 307. *See also cases* ante, cols. 280–1.

Subsequent Attested Codicil not referring to Previous Unattested Codicil.]—A testator made a will on 3rd January, 1878. On 20th December, 1879, he made a codicil which was attested by one witness only. On 1st March, 1880, he made a second codicil, described in the attestation clause as a codicil to his will, and which codicil was attested by two witnesses, but did not refer in any way to the first codicil. All three writings were on the same piece of paper:—Held, that the second codicil did not set up the first. *Spotten*, *In goods of*, 5 L. R., Ir. 403.

Of Interlineations by Initials.]—The initials of a testatrix and the attesting witnesses in the margin of the will opposite interlineations are sufficient to render the interlineations valid. *Blewitt*, *In goods of*, 49 L. J., P. 31; 5 P. D. 116; 42 L. T. 329; 28 W. R. 520; 44 J. P. 768.

On Separate Pieces of Paper attached by Paste or Wafers.]—A will was written on one side of a sheet of parchment. At the bottom, immediately at the foot or end of the will, a piece of paper bearing an impressed stamp was pasted before the execution, upon which the

names of the testator and of the attesting witnesses were afterwards written :—Held, that the will was duly executed. *Gausden, In goods of*, 2 Sw. & Tr. 362 ; 31 L. J., P. 53 ; 8 Jur. (N.S.) 180 ; 5 L. T. 767.

A will was written on one side of a half-sheet of paper, and concluded with the words, "In witness whereto I have hereunto set my hand and seal this 9th day of July, in the year as above written." A small space at the bottom of the page was left blank, and then followed a separate piece of paper attached by wafers to the half-sheet on which the will was written. The testator's signature, the attestation clause, and the signatures of the attesting witnesses were alone written on this separate paper :—Held, that the court could not grant probate of such a document. *Lambert, In goods of*, 31 L. J., P. 118 ; 8 Jur. (N.S.) 158 ; 7 L. T. 219.

Where the signatures of a testator and of the attesting witnesses were made, not on the paper on which the will was written, but on a piece of paper which had been attached to the paper on which the will was written :—Held, to be a good execution. *Cook* v. *Lambert*, 3 Sw. & Tr. 46 ; 32 L. J., P. 93 ; 9 Jur. (N.S.) 258 ; 8 L. T. 211 ; 11 W. R. 401.

A. wrote a codicil on the upper part of the first side of a half-sheet of foolscap paper doubled, and below he added the words, "For my signature and witnesses, see next side." On the fourth side, and on a line with these words, when the paper was opened, were the signatures of A. and of the attesting witnesses. The second, third, and (with the exception of the signatures) the fourth sides were blank. When the witnesses attested the signature of A., they saw no writing on the paper :—Held. that, notwithstanding the provisions of 15 & 16 Vict. c. 24, s. 1, the codicil was not duly executed. *Hammond, In goods of*, 3 Sw. & Tr. 90 ; 32 L. J., P. 200 ; 9 Jur. (N.S.) 581 ; 8 L. T. 516 ; 11 W. R. 639.

A. wrote her will on a sheet of letter paper, and concluded at the extreme end of the fourth side, leaving no space for her signature. The attestation clause and the signatures of A. and of the witnesses were written on a separate half-sheet of paper. This half-sheet was attached by three wafers to the bottom of the second side or page of the will. One of the attesting witnesses had died, and the other could give no account of the state of the papers at the time A. signed her name. No one else was present at that time :—Held, that on motion the court could not grant probate of this paper. *West, In goods of*, 32 L. J., P. 182 ; 9 Jur. (N.S.) 1158 ; 12 W. R. 89.

By Party Interested.]—A child of a residuary legatee is no witness to prove a will relating to the personal estate by the civil law, by which law only such will is determinable. *Thwaites* v. *Smith*, 1 P. Wms. 10.

One of the three witnesses to the will is a devisee of part of the land ; whether not a good witness, if he aliens the land without covenant or warranty, quære. *Baugh* v. *Holloway*, 1 P. Wms. 557.

Witness to a will, not interested at the execution and death of the testator, is competent though interested at his examination. *Brograve* v. *Winder*, 2 Ves. 634. *See* 20 R. R. 261.

Persons entitled under will cannot in any respect be witnesses to prove it. *Tucker* v. *Sanger*, M'Clel. 435 ; 13 Price, 119.

A legacy to a witness to a will relating to personal estate only is not void under 25 Geo. 2, c. 6. *Foster* v. *Banbury*, 3 Sim. 40.

The statute of the 25 Geo. 2, s. 6, does not extend to wills of personal estate only, and a legacy to a person who is an attesting witness to such a will is not void. *Emanuel* v. *Constable*, 3 Russ. 436 ; 5 L. J. (O.S.) Ch. 191.

Legacy to a subscribing witness to a will, though of personal property only, void under the statute 25 Geo. 2, c. 6, extending to all wills and codicils. *Lees* v. *Summersgill*, 17 Ves. 508.

A beneficiary under a will attested the will as a third witness, and deposed that he did so at the testator's especial request as a token of approval :—Held, that the attestation invalidated the bequest. *Cozens* v. *Crout*, 42 L. J., Ch. 840 ; 21 W. R. 781.

At the foot of a will signed by the testator and attested by two witnesses, there appeared subscribed beneath the signature of the testator the signature of D., who was the principal legatee and sole executrix. The court being satisfied by evidence that her signature had not been added with any intention of attesting the execution, ordered her signature to be excluded from the probate. *Murphy, In goods of*, Ir. R. 8 Eq. 300.

A will was executed in 1844 and had the name of the testator, his seal, the word "witness," and the names of two persons : J. T. G. and J. S. H. These names were the last marks on a third side of the sheet of paper on which the will was written. On the top of the fourth side were the words, "This last will and testament was signed in our presence, and in the presence of each other, by him. J. T. G., J. S. H., G. B." This last name was that of a person named as a legatee in the will :—Held, that this was not such an attestation of the will as to deprive G. B. of her right to the legacy. *Randfield* v. *Randfield*, 8 H. L. Cas. 226 ; 30 L. J., Ch. 177. Reversing 11 W. R. 847 ; 2 N. R. 309.

And the representatives of a legatee who had attested the cancellation of a will, and died before the period of distribution, will be excluded from participation under the will. *Gaskin* v. *Rogers*, L. R. 2 Eq. 284 ; 14 W. R. 707.

Where a will has been executed in the presence of two witnesses, and, in addition to their signatures, the signature of a third person, who is also residuary legatee, appears at the foot of the will, the court will receive evidence to explain why such signature was written, and if satisfied that it was not written with the intention to attest the signature of the deceased, it will order it to be omitted in the probate. *Sharman, In goods of*, 38 L. J., P. 47 ; L. R. 1 P. 661 ; 20 L. T. 683 ; 17 W. R. 687.

By a will made since 7 Will. 4 & 1 Vict. c. 26, lands and houses, after the deaths of the testator's niece S. A. and her husband J. A. (to whom life interests had been given), were directed "to be equally divided among the children" of S. A. and J. A. The will purported to be attested by three witnesses, two of whom were Thomas and Sarah, children of S. A. and J. A. :—Held, that the devise to the children, although it was a devise to them as tenants in common, was a devise to a class, so that the whole was to be taken by those who, after the testator's death, came within the limits of such class, and were capable of taking, and, therefore, the shares of Sarah and Thomas, who, as attesting witnesses, were themselves incapable

of taking, went to the other members of the class, and not to the heir-at-law of the testator. *Fell* v. *Biddulph*, 44 L. J., C. P. 402; L. R. 10 C. P. 701; 32 L. T. 864; 23 W. R. 913.

Where there is a joint tenancy under a will, and one of the joint tenants witnesses the will, the others take the whole. *S. C.* nom. *Young* v. *Davies*, 32 L. J., Ch. 372; 1 N. R. 419; 9 Jur. (N.S.) 399; 8 L. T. 80; 11 W. R. 452; 2 Dr. & Sm. 167.

B. made her will in the presence of C. and D., who subscribed to the same; subsequently E., an executor and legatee, at the request of the testatrix, signed his name, to signify, as suggested, his acceptance of the executorship. The court rejected a motion praying to omit E.'s name in the probate. *Forest, In goods of*, 2 Sw. & Tr. 334; 31 L. J., P. 200; 5 L. T. 689. S. P., *Hickman, In goods of*, 16 L. T. 435.

—— **Power to Solicitor Trustee to make Professional Charges.**]—A., being entitled to a life interest in a fund over which she had a testamentary power of appointment, borrowed, in 1871, from B. 350*l.* on the security of a covenant that 1,250*l.* should be paid one month after her death. She died in 1884, having by her will appointed executors, and directed payment of her debts, and also that C., one of her executors (a solicitor), should be entitled to charge and receive payment for all professional business to be done by him under the will. C. was one of the attesting witnesses. In an administration action by B. on behalf of himself and all other creditors, the estate being insolvent: —Held, that C., as an attesting witness, was prohibited by the Wills Act, s. 15, from receiving that which was not a debt of which payment could be enforced at law, but a beneficial gift, which could only be claimed by virtue of the direction in the will; and (semble) that even if he had not attested the will, the direction authorising him to charge for his professional services operated by way of bounty only, and, the estate being insolvent, could not take effect as against the creditors. *Barber, In re, Burgess* v. *Vinnicome*, 55 L. J., Ch. 373; 31 Ch. D. 665; 54 L. T. 375; 34 W. R. 395.

A testatrix appointed B. and P. (a solicitor) executors and trustees of her will, and declared that any trustee of her will who should be a solicitor should be entitled to charge for all business done in relation to the estate as if he had been a solicitor employed by the trustees. P. was one of the attesting witnesses:—Held, that P. was not entitled to any profit costs for business done by him in relation to the estate, for that the right to make professional charges could only be claimed under the will, and was a beneficial interest under it, from claiming which he, being an attesting witness, was precluded by the Wills Act (1 Vict. c. 26), s. 15. *Barber, In re* (31 Ch. D. 665), approved. *Pooley, In re*, 58 L. J., Ch. 1; 40 Ch. D. 1; 60 L. T. 73; 37 W. R. 17—C. A.

—— **Husband or Wife of Witness.**]—A wife was an attesting witness to a testamentary instrument by which a legacy was given to a church, "to be disposed of as her husband wished":—Held, that this gift was good, and did not fall within 7 Will. 4 & 1 Vict. c. 26, s. 15. *Cresswell* v. *Cresswell*, 37 L. J., Ch. 521; L. R. 6 Eq. 69; 18 L. T. 392; 16 W. R. 699.

Where a will was attested by two marksmen, and signed also by two other persons as witnesses: —Held, that the signatures of the two latter must be regarded as affixed likewise in attestation of the will, and not as merely verifying the attestation of the marksmen, and that the legacy to the wife of one of them failed. *Wigan* v. *Rowland*, 11 Hare, 157; 1 Eq. R. 213; 17 Jur. 910; 1 W. R. 383.

A mother by her will gave a bequest to her son. One of the two witnesses attesting the execution of the will was the wife of the son. By a subsequent codicil attested by two independent witnesses she confirmed her will:—Held, that the execution of this codicil was equivalent to a re-execution of the will; and since the codicil was attested by independent witnesses, the bequest to the son was valid. *Anderson* v. *Anderson*, 41 L. J., Ch. 247; L. R. 13 Eq. 381; 20 W. R. 313.

Where a widow, who took a life interest under her husband's will, had at his request signed her name under the names of the two attesting witnesses, but not with any intention of herself attesting the will, the court, on being satisfied that such of the children as were minors had been served with a notice of the motion through guardians duly nominated for the purpose, ordered her name to be omitted from the probate of the will. *Smith, In goods of*, 59 L. J., P. 5; 15 P. D. 2; 62 L. T. 183; 38 W. R. 384; 54 J. P. 199.

—— **Marriage of Devisee after Attestation to Attesting Witness.**]—Under the Wills Act (1 Vict. c. 26), s. 15, the marriage, after attestation of a will, of a devisee to the attesting witness, does not affect the validity of the devise. *Thorpe* v. *Bestwick*, 50 L. J., Q. B. 320; 6 Q. B. D. 311; 44 L. T. 180; 29 W. R. 631; 45 J. P. 440.

—— **Attestation of Codicil by Witness who takes Interest under the Will.**]—A bequest of a legacy is not void because the legatee attests a codicil which gives him nothing, nor does a residuary legatee of a share of a residue lose his title by attesting a codicil, which, by revoking legacies, indirectly benefits him by increasing the residue. *Gurney* v. *Gurney*, 3 Drew. 208; 3 Eq. R. 569; 24 L. J., Ch. 656; 1 Jur. (N.S.) 298; 3 W. R. 353.

Bequest by will, dated in 1849, of an annuity to A. Codicil revoking other legacies, and confirming the will, was signed by A. as an attesting witness:—Held, that the annuity given to him by the will was not thereby made void. *Tempest* v. *Tempest*, 2 Kay & J. 635.

A testator by his will gave bequests to his employés; one of the employés had attested the will and also two codicils that confirmed the will; another employé had attested the codicils, but not the will:—Held, that the former employé could not take the gift, but that the latter was not incapacitated from taking under the will. *Marcus, In re, Marcus* v. *Marcus*, 57 L. T. 399.

A devisee does not lose benefits given him by a will in consequence of his being an attesting witness to a codicil ratifying and confirming the will. *Denne* v. *Wood*, 4 L. J. (O.S.) Ch. 57.

A witness to a codicil being interested under the parol trust created by the will for objects specified in the will and codicils:—Held, that his interest under the codicil failed. *Fleetwood, In re, Sidgreaves* v. *Brewer*, 49 L. J., Ch. 514; 15 Ch. D. 594; 29 W. R. 45.

Acceleration of Interests.]—A testator devised and bequeathed all his real and personal estate to his wife for life, and after her death to be equally divided between such of his children as should be living at her death; and in case of any of the above-mentioned children dying before his wife leaving children, such children were to take their parent's share; and in the event of any of his daughters being married at his wife's decease, it was his will that such proportion as they might be entitled to should be left to them and their children exclusively and should in no way be controlled by their husbands. At the death of the testator's widow one of his daughters was living who had several children. Her husband was an attesting witness to the will, and consequently the gift to her was void under s. 15 of the Wills Act:—Held, that the daughter's children were not to be disappointed by her disability, but took an immediate interest in her share as tenants in common. *Clark, In re, Clark* v. *Randall*, 55 L. J., Ch. 89; 31 Ch. D. 72; 53 L. T. 591; 34 W. R. 70.

Gift by will of real and personal estate upon trust to convert and pay the income of the proceeds to A. for life, and after A.'s death to pay the capital and income thereof unto the child or children of A. in equal shares, with gifts over in case A. should die without leaving issue living at his death. The will had been attested by A.'s wife, so that the gift of a life interest to him was void under s. 15 of the Wills Act. There were no children of A.'s marriage. The personal estate was exhausted, and the trust funds represented real estate only:—Held, that until A. had a child the gifts upon the determination of A.'s life estate could not be accelerated, and that during the life of A. and so long as he had no children the income of the trust funds was undisposed of, and belonged to the heir-at-law, and could not be accumulated for the benefit of the persons contingently entitled in remainder. *Jull* v. *Jacobs* (3 Ch. D. 703) distinguished. *Hodgson* v. *Earl of Beetive* (1 H. & M. 376) and *Dumble, In re* (23 Ch. D. 360), explained. *Townsend, In re, Townsend* v. *Townsend*, 56 L. J., Ch. 227; 34 Ch. D. 357; 55 L. T. 674; 35 W. R. 153.

Attestation by Executor.]—Will held well attested, though one of subscribing witnesses was executor in trust under will. *Phipps* v. *Pilcher*, 1 Madd. 144.

Evidence of Attesting Witnesses.]—A. wrote out a draft will, which on his death was found completed, with the names of two attesting witnesses. On inquiry no such persons could be traced, and the writing of the names was sworn to be that of A. himself. The court granted administration of the goods of A., as having died intestate, without the parties interested under the draft will having been first cited to propound it. *Lee, In goods of*, 4 Jur. (N.S.) 790.

In ejectment by the heir-at-law against the devisee to prove the execution of the will, it is not necessary to call the subscribing witnesses. *Doe* d. *Stutsbury* v. *Smith*, 1 Esp. 391.

A testamentary paper, in the handwriting of a party, concluded as follows: "In witness of this I have set my hand this 14th day of January, 1858. Signed by the testatrix A., her last will in our presence." There was no other signature of the deceased at the end of the writing. The surviving attesting witness could give no distinct account of the state of the paper at the time of, or the circumstances attending, the execution, and there was no direct evidence on the former point. It was admitted to probate. *Torre, In goods of*, 8 Jur. (N.S.) 494.

—— **Attesting Witnesses unable to recollect the Execution.**]—A testator left a codicil entirely in his own handwriting, written on the third side of the sheet of foolscap the first side of which contained his will. There was an attestation clause in proper form, and the testator had signed his name at the foot of the codicil, but there being no more space on the sheet, the names of the attesting witnesses appeared at the bottom of the second page, opposite the attestation clause. The attesting witnesses acknowledged their signatures, but had no recollection of having signed the paper, nor of ever having seen it before:—Held, that the codicil was duly executed. *Woodhouse* v. *Balfour*, 13 P. D. 2; 57 L. J., P. 22; 58 L. T. 59; 36 W. R. 368; 52 J. P. 7.

—— **No Attestation Clause—Witnesses Dead—Difficulty in Proving Handwriting—Secondary Evidence.**]—The testator executed a holograph will in 1874, and died in 1886. There was no attestation clause to the will, and one of the witnesses predeceased the testator; the other died in 1887. The signature of one attesting witness appeared above that of the testator himself. The handwriting of the testator and of one witness to the will was proved by oral evidence and by comparison of samples of handwriting; but the only sample of writing of the other witness, apart from his signature on the will, was a signature in the register of his own marriage in the year 1822. Evidence was given to show that every possible effort had been made to prove the handwriting of this witness, and evidence was also given to show that the person who purported to have signed the will as a witness was the same who was married in 1822, and who purported to have signed the marriage register in that year. Evidence was also given to show that the two witnesses and the testator had lived together in the same institution at the date of the will, and that the testator had stated that the document in question was his will, and that the two persons whose names appeared upon it had witnessed it:—Held, that the will was entitled to probate, as there was sufficient to support the presumption of law Omnia rite esse acta, and the position of the signatures was covered by Lord St. Leonards' Act. *Byles* v. *Coe*, 74 L. T. 222.

—— **Evidence of both Attesting Witnesses—Omnia præsumuntur rite esse acta.**]—In a suit for revocation of probate on the ground of undue execution, both the attesting witnesses swore that the will was not signed by them in the testator's presence, but their evidence did not coincide upon other matters:—Held, that the presumption of law, Omnia præsumuntur rite esse acta, must prevail. The testator died in 1885, leaving a will appointing three of his sons (the plaintiff and defendants) executors. The will was drawn, from an earlier duly executed will, by a retired doctor, who had made wills for other poor persons in the locality, there being no solicitor within twelve or fourteen miles, and it was admittedly signed by the testator, with his mark, in the presence of the doctor, who had prepared it, the two attesting witnesses, and a nurse. Of these four persons, the attesting witnesses alone survived. The plaintiff,

soon after the funeral, expressed dissatisfaction with the will, and wrote several letters charging his mother and brothers with fraud and undue influence, and stating that the estate would be wasted in law, if the defendants insisted on upholding the will, probate of which was, however, granted in common form in 1886. Although the plaintiff took legal advice at that time, no active steps were taken to set aside the will until 1893. The evidence of the two attesting witnesses was in disagreement on many points, but upon the main point in contest they both agreed, namely, that they put their signatures to the will in another room to that in which the testator was, and out of sight of the testator. Their signatures and the mark of the testator appeared on the face of the will, and the attestation clause, which was on the back of the document, was admittedly written in another room and after the mark and signature had been affixed to the document. One of the attesting witnesses, a doctor, had made affidavits in 1886 in which he stated that the will was duly executed. The court refused to allow the evidence of the two attesting witnesses to rebut the presumption of law, and gave judgment for the defendants in favour of the will. *Dayman* v. *Dayman*, 71 L. T. 699.

—— **Both Witnesses Illiterate and Predeceasing Testator.**]—A holograph will, signed at foot by the testator, and containing an attestation clause, appeared attested by two marksmen, their names, as subscribed to the will, the attestation clause, and the words "mark—his," which appeared written above and below crosses opposite each of their names, were in the handwriting of the testator. At the date of the instrument, two persons of the names so subscribed as those of the attesting witnesses were in his employment; they were both illiterate, and both predeceased him. The document was found shortly after the testator's death in his house preserved amongst others of his papers. It purported to give all his property to his widow. He stated to her the night before his death that he had left her all he had—that everything was hers. It did not appear that any fourth person was present at the execution of the will, and no direct evidence of its due execution was given:—Held, that there were reasonable grounds for presuming that the will had been duly executed and attested pursuant to the provisions of the Wills Act, and sufficient to enable the court to pronounce in favour of its validity. *Clarke* v. *Clarke*, 5 L. R., Ir. 47—C. A.

—— **Rebutting Presumption by Parol Evidence.**]—Where a will appeared on the face of it to have been duly executed as prescribed by the Wills Act, and the attestation clause was in full accordance with ss. 9 and 10 of the statute, the court, nevertheless, gave effect to the parol evidence of the attesting witnesses, varying the terms of the attestation clause they had subscribed to:—Held, that the presumption of law, Omnia præsumuntur rite et solenniter esse acta, was rebutted by their evidence, and that the will had not been duly executed, and that it could not be admitted to probate. *Glover* v. *Smith*, 57 L. T. 60; 50 J. P. 456.

In 1878 the testator, who was a good man of business, but not a lawyer, wrote a holograph codicil upon the same paper as the will which he had made in 1868, and wrote at the end of it an attestation clause adapting that at the end of the will to the case of a codicil. He called the nurse into the schoolroom, and asked her and the nursery governess to "sign this paper." There was evidence that he took his own pen into the room. Both witnesses signed. At the trial, which took place between four and five years afterwards, the codicil was produced bearing the testator's signature, and both the attesting witnesses were examined. The governess deposed that she had designedly abstained from looking at any of the writing on the paper, and the nurse, it appeared, had been very nervous. Neither of them could say anything as to what writing was on the paper, nor as to whether the testator's signature was there when they signed, and both said that they did not see him sign. The president pronounced for the validity of the codicil:—Held, by Earl Selborne, L.C., that the reasonable conclusion was that the codicil was signed by the testator in the presence of the witnesses. *Wright* v. *Sanderson*, *Sanderson, In re*, 53 L. J., P. 49; 9 P. D. 149; 50 L. T. 769; 32 W. R. 560; 48 J. P. 180—C. A.

Held, by Cotton, L.J., that on the evidence he should have come to the contrary conclusion, but that the finding of the president, who had seen and heard the witnesses, ought not to be reversed. *Ib.*

Held, by Fry, L.J., that as the codicil ex facie appeared to be properly executed, and the presumption Omnia rite esse acta was strengthened by the conduct of the testator, which showed an anxious and intelligent desire to do everything regularly, that presumption was not rebutted by the evidence of the witnesses, who appeared to have been nervous and confused on the occasion of the attestation, and whose recollection of what took place was evidently imperfect. *Ib.* *And see* infra, col. 364.

—— **To show what included in Will at Time of Execution.**]—Oral and written declarations of a testator, whether made before or after the date of execution of a will, are admissible in evidence for the purpose of showing what were the constituent parts of the will at the time of execution. M. R. made and duly executed her last will on the 1st of August, 1872. On her death, in 1879, the will was found in an envelope in her writing-desk. It was contained in two sheets of notepaper stitched together bookwise. The will was all in the handwriting of the testatrix (with the exception of the attestation clause, which was filled in by one of the attesting witnesses), and, commencing with the first page of the outer sheet, it ran: "I appoint my nephews, R. J. G. and R. G. L., to be my joint executors to carry my will into effect. I appoint my nephew, R. J. G., to be my executor and sole residuary legatee.—M. R. And placed with my will the 1st day of August, 1872." The following page was a blank, and the will was continued on the inner sheet, which was paged 1, 2, 3, 4: "The last will and testament of me," &c., and concluded with the attestation clause on the fourth page. The next, the third page of the outer sheet, was a blank, and the last contained the indorsement, "The will of M. R., August 1, 1872." The attesting witnesses were unable to say what were the contents of the will, or whether it was contained in one or two sheets of paper:—Held, that declarations of intention by the testatrix before the execution of the will, and declarations by her subsequent to the execu-

tion, showing the belief that she had effected her intention, were admissible in evidence with the view of showing what were the constituent parts of the will at the time of its execution. *Gould* v. *Lakes*, 49 L. J., P. 59; 6 P. D. 1; 43 L. T. 382; 29 W. R. 155; 44 J. P. 698.

Compelling Attendance of Attesting Witness.]—An attesting witness had refused to make any affidavit as to the execution of a will. On application under the Probate Act of 1857 (20 & 21 Vict. c. 79), s. 29, on behalf of the widow, who was desirous of obtaining administration with the will annexed, it was ordered that she be at liberty to issue a subpœna ad testificandum against the attesting witness requiring him to attend before the court to be examined vivâ voce touching his knowledge of the will, and his having attested the same. *Dorgan, In goods of*, Ir. R. 8 Eq. 326.

When a will was without an attestation clause, and the attesting witnesses refused to make any affidavit as to the execution, the court issued a subpœna under 20 & 21 Vict. c. 77, s. 24, to compel their attendance before the court to be examined. *Hamer, In goods of*, 25 L. T. 951; 20 W. R. 303.

—— **Of Next of Kin—Examination as to Family.**]—The executor named in the will having determined to propound it, cited certain persons who were the next of kin to see proceedings. They appeared, and there being reason to believe that there were other next of kin, the court made an order upon them under 20 & 21 Vict. c. 77, s. 24, to attend before the registrar to be examined as to the state of the family. *Shepheard* v. *Beetham*, 41 L. J., P. 44; L. R. 2 P. 384.

Examination of Witnesses.]—When an order is made on a person having knowledge of testamentary papers to attend to be examined respecting them, the examination must be in open court, or upon interrogatories. *Laws, In goods of*, 41 L. J., P. 41; L. R. 2 P. 458; 26 L. T. 530; 20 W. R. 572.

On the trial of an issue as to three codicils, set up by and in favour of the claimant, in whose handwriting it was suggested they were, there being also an interlineation in the will in his favour, also suggested to be in his handwriting, the attesting witnesses to the first codicil denying their attestations, were allowed to be examined adversely; but evidence, by comparison of the claimant's handwriting and otherwise, was received with a view to show the probability of forgery of the attestations and of the codicils; and the jury was directed that they might find the forgery upon the circumstantial evidence alone, even against positive testimony of the attesting witnesses; that the onus was upon the party who set up alterations and codicils against an admitted will to satisfy the jury as to their genuineness; and that if the evidence left the jury in doubt on that question, they should find for the party who claimed under the will. *Cresswell* v. *Jackson*, 4 F. & F. 1.

—— **By Commission.**]—A will purported to have been executed in the presence of two attesting witnesses. One was abroad, and the other in England. The executors who propounded the will applied for a commission for the examination de bene esse of the second attesting witness, who was resident in London. The affidavit alleged no physical infirmity, but described him as an elderly person. The court ordered the commission to issue, but intimated that if it was proposed at the trial to read the evidence taken under it, strict proof of inability to produce the witness would be required. *M'Pherson* v. *Parnell*, 40 L. J., P. 30; 24 L. T. 742; 19 W. R. 784.

Affidavit of Attestation and Subscription.]—When an attestation clause is insufficient, the court will not dispense with the affidavit of the attesting witnesses as to due execution. *Latham, In goods of*, 33 L. J., P. 186; 10 Jur. (N.S.) 620.

An attestation clause executed abroad being insufficient, the court refused to grant probate without an affidavit by the attesting witnesses as to due execution, although it appeared from a certificate of the British consul, indorsed on the will, that the attesting witnesses had on oath proved due execution. *Ib.*

—— **Of Execution where Witnesses Unknown.**]—A testator left a will which concluded, "In the presence of the undersigned as witnesses on this the fifth day of June, 1871, I set my hand and signature." The testator's family had no personal knowledge of the persons who subscribed the will as attesting witnesses, and they had endeavoured, but in vain, to obtain intelligence of them. In these circumstances the court dispensed with an affidavit as to the due execution of the will, and decreed probate of it, the executrix, the only person who would be benefited by an intestacy, consenting to the grant. *Huw, In goods of*, 46 L. J., P. 39; 35 L. T. 909; 25 W. R. 273. And see *Benson* v. *Benson*, 21 L. T. 731.

Attesting Witness not to be found—Affidavit.]—In a suit for revocation of probate on the grounds of undue execution and incapacity, where it appeared that every effort had been made to find one of the attesting witnesses, but without success, the court allowed the affidavit made by him eight years before, at the time of proving the will at the district registry, to be admitted as evidence of execution and capacity. *Gornall* v. *Mason*, 56 L. J., P. 86; 12 P. D. 142; 57 L. T. 601; 35 W. R. 672; 51 J. P. 663.

Parol Evidence to prove Date.]—Parol evidence is admissible to prove that a will was executed on a date other than that which appears on the face of it. *Reffell* v. *Reffell*, 35 L. J., P. 121; L. R. 1 P. 139; 12 Jur. (N.S.) 910; 14 L. T. 705; 14 W. R. 647.

Presumption of Proper Execution.]—*See* ante, col. 343.

Evidence—Omnia esse rite acta—How rebutted.]—Where the evidence of the attesting witnesses directly negatives due execution, such evidence not being rebutted either by direct or circumstantial evidence, and the veracity of the witnesses is unimpeached, the court cannot by reason of a formal attestation clause, and on the presumption Omnia esse rite acta, pronounce for the will. *Croft* v. *Croft*, 4 Sw. & Tr. 10; 34 L. J., P. 44; 11 Jur. (N.S.) 183; 11 L. T. 781; 13 W. R. 526.

Where a will is written on several sheets of paper, and the last sheet only is duly executed,

although the attesting witnesses did not observe the others, the primâ facie presumption is that they all formed part of the will at the time of its execution; but where there is evidence from the provisions and structure of the will and other sources tending to rebut and confirm this presumption, the question must be decided upon that evidence. *Marsh* v. *Marsh*, 1 Sw. & Tr. 528; 30 L. J., P. 77; 6 Jur. (N.S.) 380.

A. made her will in 1842; at her death there appeared the names of three witnesses subscribed, but no attestation clause. The only surviving witness, whose name stood first of the three, stated that A. signed the will in his presence only; that he suggested the necessity of two witnesses, but could remember no particular circumstances:—Held, that the presumption of due execution was not rebutted by the evidence of the surviving witness. *Thomas, In goods of*, 1 Sw. & Tr. 255; 28 L. J., P. 33; 5 Jur. (N.S.) 104; 7 W. R. 270.

When a will appears on the face of it to have been duly attested, and surrounding circumstances imply that this was so, the contrary evidence of one attesting witness is not sufficient to rebut the presumption Omnia rite esse acta. *Wright* v. *Rogers*, 38 L. J., P. 67; L. R. 1 P. 678; 21 L. T. 156; 17 W. R. 833. *And see* supra, col. 361.

Rule as to Instruments more than Thirty Years Old.]—An unproved will, more than thirty years old, coming from the possession of one of the family of the testator, may be read without accounting for the subscribing witnesses, though the person producing it is not strictly entitled to the custody. *Doe* d. *Wildgoose* v. *Pearce*, 2 M. & Rob. 240.

A will being more than thirty years old, and attested by three witnesses:—Held, on production, that the fact of the attestation was sufficiently proved, although one witness was still alive and was not called. *Doe* d. *Spilsbury* v. *Burdett*, 4 A. & E. 1; 6 N. & M. 259; 6 L. J., K. B. 73.

A will was thirty years old from the date of execution; it came from the custody of the person in whose favour it was made:—Held, that this was sufficient evidence of the fact of due execution. *Orange* v. *Pickford*, 3 Drew. 463; 27 L. J., Ch. 808; 4 Jur. (N.S.) 649; 6 W. R. 738.

The application of the rule that an instrument more than thirty years old produced from the proper custody is admissible without further proof is not affected by circumstances which may lead to an inference that the instrument had been cancelled, the only question being whether the custody of the instrument is proper. *Andrew* v. *Motley*, 12 C. B. (N.S.) 514; 32 L. J., C. P. 128.

Want of Attestation—Effect.]—A will disposing of real and personal property, with a clause of attestation, but no witnesses, established as to the personal property. *Habberfield* v. *Browning*, 4 Ves. 200, n.

Where a testatrix made her will, disposing of real and personal property, and signed and sealed it, and a clause of attestation in the common form was subjoined, but to which there was no subscription of witnesses, and where the will was found at her death wrapped in an envelope, on which was written, "I signed and sealed my will to have it ready to be witnessed the first opportunity I could get proper persons":—Held, that the instrument, appearing to be incomplete (something more having been intended), was not a good will as to the personal property. But parol evidence admitted as to the circumstances of the papers, and as to the testatrix's intention. *Walker* v. *Walker*, 1 Mer. 503.

Money due on mortgage will pass by will unattested. *Hassell* v. *Tynte*, Amb. 320.

Trust of copyhold estate and copyhold surrendered to use of will pass by will unattested. *Tuffnell* v. *Page*, Dick. 76.

An unattested codicil (before the Wills Act) cannot be looked at for any purpose by the court, so far as it affects to devise realty, and no case of election is raised against the heir or devisee in consequence of such attempted devise; but if such codicil imposes a condition respecting the real estate on a bequest of personalty to the heir, he must perform it. *Louis* v. *Louis*, 3 N. R. 369; 10 L. T. 25.

Attestation Clause, but no Attestation.]—The presumption raised against the intended finality of a paper by the existence of an attestation clause without actual attestation:—Held, to be sufficiently rebutted by the evidence, particularly that of the testator having been told, with reference to the will of another person, that actual attestation was not necessary, the court observing upon the weight that was due, in such cases particularly, to the opinion of the judge below. *Stewart* v. *Stewart*, 2 Moore, P. C. 193.

Probate refused to a paper professing to dispose of a testator's real and personal property, and subjecting them both to the payment of his debts and funeral expenses, which was in the testator's handwriting, and signed and sealed by himself, but not attested, although an attestation clause was subjoined to it. The circumstance of a testator having subjected his real estate to the payment of his debts and funeral expenses, in a writing not attested so as to pass real estate, furnishes a strong, though not a completely irresistible, presumption against his final intention that that writing should be his last will. *Douglas* v. *Smith*, 3 Knapp, 1.

Probate granted of a paper written in ink, but dated and signed in pencil, with the addition, "In case of accident I sign this my will," having also an attestation clause unsigned, the facts pleaded in the allegation being sufficient to rebut the legal presumption against the paper. *Bateman* v. *Pennington*, 3 Moore, P. C. 223.

Attestation Clause where None Required.]—Where an attestation clause is not required, the mere circumstance that there is an attestation clause specifying certain things does not exclude evidence that other things were done besides those which are attested. *Warren* v. *Postlethwaite*, 2 Coll. C. C. 108; 14 L. J., Ch. 422; 9 Jur. 721.

V. REVOCATION.

a. PRINCIPLES AS TO.

In General.]—The same circumstances ought to be proved to have happened on part of testator, to show his intent of revoking will, in equity as in law, unless they were prevented by party interested. *Piggott* v. *Penrice*, 1 Comb. 250.

An executor may be admitted to prove the revocation of any legacy though he has proved the will. *Jervis* v. *Duke*, 1 Vern. 19.

The rule is the same as to revocation of a devise of lands and a revocation of a sum of money charged on lands: they must be revoked in the same manner. *Brudenell* v. *Boughton*, 2 Atk. 272.

There are virtual as well as express revocations, as by extinguishing or destroying the thing devised, which are out of the statute and remain as they did before. *Ib.*

A feoffment to the use of a testator and his heirs is a revocation. If a man charge his lands with a debt, and afterwards pays that debt, it is extinct, though there is no formal revocation. Lands charged with a portion by a will, and the same given by testator in his lifetime, is a virtual revocation, though no actual one. *Ib.*

In all cases where a man gives a personal legacy charged on a real estate, and the will is revoked, the legacies are gone, for when the land is meant only as a collateral security, if the thing secured be taken away, the security itself cannot subsist. *Ib.*

Where a particular estate is expressly devised, a contrary intent is not to be implied by subsequent words. *Popham* v. *Banfield*, 1 Salk. 236. *But see* as to this report of this case 1 Ves. 26. See *S. C.* nom. *Popham* v. *Bamfield*, 1 P. Wms. 54.

By Abandonment.]—A will is not revoked by mere abandonment; in order to operate as a revocation, there must be some unequivocal act of cancellation or obliteration by the testator himself, or by some person in his presence and by his direction. *Andrew* v. *Motley*, 12 C. B. (N.S.) 514; 32 L. J., C. P. 128.

By Act showing Intention to Revoke.]—At common law, a will might be revoked by any act of the testator which showed his intention, without the use of any words whatever. *Doe* d. *Reed* v. *Harris*, 2 N. & P. 615; 8 A. & E. 1; W., W. & D. 684; 7 L. J., Q. B. 76.

A testator duly executed his will by signing his name at the foot of each sheet, and at the end of the will. On his death it was found that he had written "Cancelled—Wm. B." across each signature, and at the end of a memorandum of a date subsequent to the date of the will, which, after declaring the will revoked, concluded—"I intend to make another will, whereupon I shall destroy this." This memorandum was signed by him, but not in the presence of witnesses. No other will could be found:—Held, that he had done no sufficient act in law to revoke his will. *Brewster, In goods of*, 29 L. J., P. 69; 6 Jur. (N.S.) 56.

—— **Parol Evidence of Intention of Testator.**]—If, upon the face of a testamentary document and the facts known to the testatrix at the time of its execution, it is doubtful whether the testatrix intended altogether to revoke a former will, the court will admit parol evidence to ascertain the intention. *Jenner* v. *Efinch*, 49 L. J., P. 25; 5 P. D. 106; 42 L. T. 327; 28 W. R. 520.

Mutual Wills.]—Mutual will can only be revoked by both jointly or by one separately, by giving notice of such revocation, and not at all after death of one party. *Dufour* v. *Pereira*, Dick. 419.

A. and his wife, who were British-born subjects, but who had been naturalised subjects of Denmark, and for several years previous and up to 1805 been domiciled in the Danish island of St. Croix, in that year came to England, where they continued domiciled till their respective deaths. In 1809 they made a joint will, whereby they bequeathed a sum of money invested in mortgage in St. Croix, and to which they were jointly entitled, in certain shares among their children and grandchildren, and appointed as executors a son and son-in-law, both Danish subjects, and domiciled in St. Croix. In 1814 A. made a separate will, expressly revoking all former wills, and bequeathing the money due on mortgage to his wife. She survived him, and, in 1822, also made a will disposing of the property:—Held, that the legatees under this will, and not those under the joint will, were entitled to the money. *Price* v. *Dewhurst*, 4 Myl. & C. 76; 8 L. J., Ch. 57; 2 Jur. 1006. Affirming 8 Sim. 279.

Testator by codicil in 1796, reciting that he had devised his real estate by his last will, dated 25th November, 1752, charged his real estates with his debts and legacies given by the codicil, and appointed executors; the bill was by devisees of the real estate under another will of 1756, one of whom was a legatee in the codicil, stating that the will of 1756 was executed in pursuance of an agreement to make mutual wills; that the testator, by the death of the other party, was bound, if not in law, in honour, and did not mean to revoke the will of 1756, and revive that of 1752; and praying that the will of 1756 and the codicil might be established, the trusts carried into execution, and the legacy paid; upon an issue directed the will of 1752 was established, evidence of mistake being rejected; on further directions to plaintiffs, relied on agreement, and offered evidence in support of it; the bill was dismissed, the lord chancellor being of opinion that the relief sought was inconsistent with the frame of the bill, and therefore could not be given under the general prayer; that the evidence ought not to be received; and that, upon the evidence, the agreement was uncertain and unfair, and therefore not to be executed. *Walpole* (*Lady*) v. *Orford* (*Lord*), 3 Ves. 402; 4 R. R. 38.

By the Roman-Dutch law, the mutual will of a husband and wife, notwithstanding its form, is to be read as the separate will of each. *Denyssen* v. *Mostert*, 41 L. J., P. C. 41; L. R. 4 P. C. 236; 20 W. R. 1017; 8 Moore, P. C. 502. And see *Dias* v. *De Livera*, 49 L. J., P. C. 26; 5 App. Cas. 123; 42 L. T. 267.

The dispositions of each spouse are to be treated as applicable to his or her half of the joint property. *Ib.*

Each is at liberty to revoke his or her part of the will during the co-testator's lifetime, with or without communication with the co-testator, and after the co-testator's death; but when a spouse who dies first had bequeathed any benefit in favour of the survivor, and has afterwards limited the disposal of the property in general after the death of such survivor, then such survivor, if he or she accepts such benefits, may not afterwards dispose of his or her share in any manner at variance with the will of the deceased spouse. *Ib.*

Revocation or Substitution.]—Testator gave 4,000*l.* to trustees upon trust for his two daughters at twenty-one, and directed that the legacy duty

due in respect thereof shall be paid by his executors out of the residue. By codicil reciting this bequest, and that he is desirous of increasing the same to 5,000*l.*, he revoked the gift of 4,000*l.*, and gave 5,000*l.* upon the same trust, &c. By a second codicil reciting the former, and that he is desirous of further increasing to 6,000*l.*, he revokes the gift of 5,000*l.*, and gives in lieu thereof 6,000*l.* upon the same trusts. This is not a revocation, but substitution in each instance, and the 6,000*l.* is therefore exempt from legacy duty. *Cooper* v. *Day*, 3 Mer. 154.

If a will is revoked by cancellation for the purpose of giving effect to different disposition, such revocation is ineffectual if the substituted dispositions are not effective. The rule of the English law, following that of the civil law, is this — Tunc prius testamentum rumpitur cum posterius perfectum est. *Ibbott* v. *Bell*, 34 Beav. 395.

Revocation of prior Will obtained by Fraud—Effect on later Will.]—A later will is not necessarily invalid, upon the ground, per se, that the revocation of a former will had been procured by fraud. *Longford* (*Earl*) v. *Purdon*, 1 L. R., Ir. 75.

Of Will exercising Power of Appointment.]—A widow, under the powers given her by her marriage settlement, executed a will in favour of B., without having executed any fresh settlement of the property included in her first marriage settlement: — Held, that she had a right to revoke the will so made by any of the methods prescribed by the Wills Act. *Hawkesley* v. *Barrow*, 35 L. J., P. 67; L. R. 1 P. 147; 14 L. T. 672; 14 W. R. 822.

Presumption of Revocation—Non-production of Will known to have been in Testator's Possession.] — The presumption of fact, that a will, known to have been in the testatrix's custody, and not forthcoming at her death, was destroyed by her animo revocandi, is a primâ facie presumption only, and may be rebutted by probable circumstances, among which declarations of unchanged affection and intention have much weight. *Patten* v. *Poulton*, 1 Sw. & Tr. 55; 27 L. J., P. 41; 4 Jur. (N.S.) 341; 6 W. R. 458.

E., in 1846, made a will, which he revoked by another will made in 1855. On his death the former will was found, but not the latter:— Held, that it must be presumed the deceased destroyed the missing will, animo revocandi. *Brown*, *In goods of*, 1 Sw. & Tr. 32; 27 L. J., P. 20; 4 Jur. (N.S.) 244.

A will was found after a testator's death, but parol evidence was given that he had executed a subsequent will, which contained a clause of revocation, and which remained in his custody until his death, and could not then be found, and that he had declared an intention to destroy it. The court pronounced for an intestacy. *Wood* v. *Wood*, 36 L. J., P. 34; L. R. 1 P. 309; 15 L. T. 593.

In 1856, a person duly executed a will, which remained in his custody and possession. In 1861, the draft of a new will was forwarded to him for perusal, but such will was never completed. A few months before his death, in conversation, he referred to the executed will as being still in existence, and at a later period expressed an intention to settle the terms of the new one; he died, however, without carrying out his intention. On his death the draft of the new will was found, but not the executed will: —Held, that as the executed will having been in his possession was not found on his death, the presumption arose that he had destroyed it animo revocandi; and that, as no evidence was forthcoming to rebut that presumption, he died intestate. *Mitcheson*, *In goods of*, 32 L. J., P. 202; 9 Jur. (N.S.) 360.

The presumption that a will in the testator's possession, and not forthcoming after his death, has been revoked, does not arise unless there is evidence to satisfy the court that it was not in existence at the time of his death. *Finch* v. *Finch*, 36 L. J., P. 78; L. R. 1 P. 371; 16 L. T. 268; 15 W. R. 797.

The only person present at the making of a will swore that it was not duly executed. The will was afterwards destroyed. Although there was reason to suspect that the will was duly executed notwithstanding the evidence, the court declined to pronounce on that mere suspicion for a will not in existence. *Eckersley* v. *Platt*, 36 L. J., P. 7; L. R. 1 P. 281; 15 L. T. 327; 15 W. R. 232.

The presumption that a will which was in the testator's custody until his death, and could not then be found, was destroyed by the testator with the intention of revoking it, must prevail unless it is rebutted by clear and satisfactory evidence. *Ib.*

A testator executed his will at his solicitor's office and took it away with him. It was never seen afterwards, and could not be found after his death in his repositories. He had made declarations inconsistent with his testamentary dispositions shortly before his death, but the court held, that he being the last custodian of the will, and it not being forthcoming, the presumption of revocation arose, and was not rebutted. *Homerton* v. *Hewett*, 25 L. T. 854.

When a will traced to the possession of the testator cannot be found after his death, and there is no evidence what has become of it, the presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but this presumption may be rebutted by parol evidence. *Sugden* v. *St. Leonards* (*Lord*), 45 L. J., P. 49; 1 P. D. 154; 34 L. T. 372; 24 W. R. 860—C. A.

The rule of law is, that if a will is traced to the possession of the deceased, and last seen there, and is not forthcoming on his death, it is presumed to have been destroyed by himself, and that presumption must prevail, unless there is sufficient evidence to repel it, and to raise a higher degree of probability to the contrary. The onus of proof in such cases lies upon the party propounding the will. *Welsh* v. *Phillips*, 1 Moore, P. C. 299.

When the substance of a will is propounded, the first point to be ascertained is whether such a will was duly executed. If that is established, the next point is, whether it was in existence at the death of the deceased. If it was not, then the primâ facie presumption that it was destroyed by the deceased, with intention to revoke, arises, which may be rebutted by further evidence. *Podmore* v. *Whatton*, 3 Sw. & Tr. 449; 33 L. J., P. 143; 10 Jur. (N.S.) 756; 10 L. T. 754; 13 W. R. 106.

A subsequent will (the contents of which were unknown) having remained in the custody of the testator, and not being forthcoming, the presumption of law was that it was destroyed

by him animo revocandi, and did not revoke a prior will uncancelled. *Cutto* v. *Gilbert*, 9 Moore, P. C. 131.

Duplicates — One in Testatrix's Possession missing.]—Where a will has been executed in duplicate, one only being retained by the testatrix, and such duplicate is not forthcoming after her decease, the presumption of law is that she destroyed it animo revocandi. The court, while doubting whether this presumption must necessarily arise on the bare fact of one of the duplicates having disappeared, and while suggesting that a stronger presumption was necessary in cases where a duplicate will was known to a testator or testatrix to be in existence, nevertheless felt bound by the authority of an unreported case of *Luxmoore* v. *Chambers*, and held, that the presumption of law must be upheld, that the will was duly revoked, and that the testatrix died intestate. *Jones* v. *Harding*, 58 L. T. 60 ; 52 J. P. 71.

—— **Will and Codicil — Codicil not forthcoming.**]—A testator made and duly executed a will and afterwards a codicil revoking certain portions of the will. Both documents were handed to him by his solicitor. They were in separate envelopes which were sealed up. On the testator's death the will only was found, with the seal of the envelope containing it broken :—Held, that, although the presumption of law must prevail as to the destruction of the codicil, probate could only be granted of such parts of the will as the codicil by its execution had not revoked. *Debac, In goods of*, 77 L. T. 374.

—— **Codicil — No Will.**] — See *Gardiner* v. *Courthope*, ante, col. 268.

—— **Non-Production of Memorandum referred to.**]—Where a codicil refers to two memorandums, and only one is found, effect must be given to that which is found ; for either the ordinary presumption must prevail that the missing paper was destroyed by the testator animo revocandi, or the principle must be applied that the apparent testamentary intentions of a testator are not to be disappointed merely because he made other dispositions of his property, which are unknown by reason of the testamentary paper which contained them not being forthcoming. *Dickinson* v. *Stidolph*, 11 C. B. (N.S.) 341.

—— **Mutilation.**]—*See* post, col. 424.

Rebuttal of—Statements made by Testator before Death.]—Where a will and a codicil (the drafts of which were produced) were proved to have been left by the attorney who drew them with the testator, after execution, but were not forthcoming after his death ; declarations of the testator to various members of his family, down to a few days before his death, expressive of his satisfaction at having settled his affairs, and intimating that his will was left with his attorney, are properly admitted, in order to rebut the presumption that the will and codicil had been destroyed by the testator animo revocandi. *Whiteley* v. *King*, 17 C. B. (N.S.) 756 ; 10 Jur. (N.S.) 1079 ; 11 L. T. 342 ; 13 W. R. 83.

—— **Subsequent Insanity of Testator.**]—The presumption that a will which was in the testator's custody up to the time of his death, and cannot be found after his death, was destroyed by him animo revocandi, does not apply where the testator became insane after the execution, and continued insane until his death. In such a case the burden of showing that the will was destroyed whilst he was of sound mind lies on the party setting up the revocation, and in the absence of evidence as to the date of the destruction the contents of the will are entitled to probate. *Sprigge* v. *Sprigge*, 38 L. J., P. 4 ; L. R. 1 P. 608 ; 19 L. T. 462 ; 17 W. R. 80.

—— **Other Circumstances.**]—L. duly executed a will, dated the 19th August, 1857, whereby her property was almost equally divided amongst her nephews and nieces. This will was left in her possession, and was not found at her death. On the day before the funeral, P., the deceased's maid, produced a document, dated the 3rd August, 1857, which she alleged to be the deceased's will. It was written in large awkward characters, and was very ill spelt. By it the nephews and nieces, with two exceptions, would have received 1*s.* each, and P. have been materially benefited. This paper was not propounded :—Held, that the presumption that a will left in the custody of a testator, and not found at his death, has been destroyed by the testator, was rebutted in this case, by reason of the suspicious conduct of the maid, as connected with the document dated the 3rd August, 1857. *Battyll* v. *Lyles*, 4 Jur. (N.S.) 718.

A. made her will in March, 1854, and a codicil in June, 1854, one of the legatees under the will having died since its execution. In May, 1856, she executed another codicil, among other things appointing one of the parties benefited by the codicil of 1854 to be executor, in the room of one appointed in the will. At her death in December, 1857, the will and second codicil were found in a tin box, at the Bank of England, in which she kept her papers ; but the first codicil, of which the testatrix took possession immediately after its execution, was nowhere to be found. On motion for probate of the draft of the first codicil, with the consent of the residuary legatees :—Held, that the primâ facie presumption of revocation was strengthened rather than rebutted by the circumstances, and probate of the draft was refused. *Shaw, In goods of*, 1 Sw. & Tr. 62.

A. executed a will in 1858, which at the time of his death, in December, 1860, was found in a box torn into several pieces. A woman, who cohabited with him for some years, deposed, that in August, 1860, at his request, she took the will from a box and gave it to him, and that he then tore it in pieces, and returned it to her, with directions to put the pieces behind the fire, but that the pieces were replaced in the box with his sanction. Her statement was confirmed by her brother-in-law, who pretended to have been present :—Held, that notwithstanding the direct evidence thus given, the incredibility of the story, the probabilities of the case, and the letters of the deceased, raised a counter-presumption that the will was not revoked by or with his knowledge. *Staines* v. *Stewart*, 2 Sw. & Tr. 320 ; 31 L. J., P. 10 ; 8 Jur. (N.S.) 440 ; 5 L. T. 457.

Burden of Proof.]—After the due execution of a will has been proved, the burden of proving that it was revoked lies upon those who set up the revocation, and, in the absence of evidence,

revocation will not be presumed. *Benson* v. *Benson*, 40 L. J., P. 1; L. R. 2 P. 172; 23 L. T. 709; 19 W. R. 190.

A will duly executed before the passing of the Wills Act, and remaining in the testator's custody until his death, after the passing of the act, was found with his signature crossed out. In the absence of evidence as to the date when the act of crossing out was done, the court refused to presume that it was before 1838, and therefore pronounced for the will. *Ib.*

The facts that the second will was last seen in the custody of the deceased, and could not be found, raised a presumption that he destroyed it, animo cancellandi, and cast on those seeking to establish the will the onus of rebutting that presumption. *Brown* v. *Brown*, 8 El. & Bl. 876; 27 L. J., Q. B. 173; 4 Jur. (N.S.) 163. See *Brown, In goods of*, 1 Sw. & Tr. 32; 27 L. J., P. 20; 4 Jur. (N.S.) 244.

A woman having duly executed her will, subsequently became insane. Shortly before her death, it was discovered that the will had been mutilated by her; but it was proved to have been in her custody for a short time, subsequent as well as prior to her insanity:—Held, that there being satisfactory evidence of the due execution of the will, the onus of showing that it had been mutilated by the testatrix when of sound mind, was upon the party alleging its revocation. *Harris* v. *Berrall*, 1 Sw. & Tr. 153; 7 W. R. 19.

b. METHODS OF.

1. **By Marriage.**

Marriage with Legatee.]—Marriage with a legatee was no revocation. *Ewbank* v. *Halliwell*, 2 Bro. C. C. 220.

Where a testator made a will in which he bequeathed all his property—including certain funds over which he had a power of appointment—to a lady whom he married subsequently to the execution of the said will:—Held, that having regard to s. 18 of the Wills Act, the subsequent marriage did not entirely revoke the will; and a grant of administration with the will annexed was made to the widow of the testator, limited to the property over which the testator had a power of appointment. *Russell, In goods of*, 59 L. J., P. 80; 15 P. D. 111; 62 L. T. 644.

Marriage followed by Change of Domicil.]—A testator being domiciled in Scotland, in anticipation of his marriage, which subsequently took place in Scotland, executed a deed of settlement, which he also intended should operate as his will. By the law of Scotland, such a document as a disposition of property at death would not be revoked by the marriage of the contracting parties. The testator after his marriage became domiciled in England:—Held, that as the settlement was valid by the law of domicil as a testamentary disposition at the time of execution, as also subsequently to the marriage and at the moment when the testator left the country, it continued valid notwithstanding the change of domicil. *Reid, In goods of*, 35 L. J., P. 43; L. R. 1 P. 74; 12 Jur. (N.S.) 300; 13 L. T. 680; 14 W. R. 316.

Void Marriage.]—A will is not revoked under 1 Vict. c. 26, s. 18, by a marriage which is absolutely void by the law of this country, and there is no distinction in such a case between a testator who is a natural-born subject and one who is a naturalised British subject. *Mette* v. *Mette*, 1 Sw. & Tr. 416; 28 L. J., P. 117; 7 W. R. 543.

Birth of Issue.]—Marriage, and the birth of a posthumous child, amounted to an implied revocation of a will of lands made before marriage. *Doe* d. *Lancashire* v. *Lancashire*, 5 Term Rep. 49; 2 R. R. 535.

But the birth of a child was not alone a revocation. *Sheppard* v. *Sheppard*, 5 Term Rep. 51, n.

A man married, and afterwards made his will and devised to his niece, and afterwards died, leaving his wife enceinte with a daughter, which was unknown to him:—Held, that the birth of the daughter was not a revocation of the will. *Doe* d. *White* v. *Barford*, 4 M. & S. 10.

Marriage and birth of child held revocation of will made prior to both. *Christopher* v. *Christopher*, Dick. 445.

Marriage of feme sole before statute of frauds, held revocation of will (4th Co. no cases since the statute). *Id.* 449.

Marriage and birth of a child revoked a will of personal estate. *Jackson* v. *Hurlock*, Amb. 494.

Marriage simply was not a revocation. *Id.* 495.

Subsequent marriage and having children, constructed a revocation of a will. *Cook* v. *Oakley*, 1 P. Wms. 304.

Since the decision in *Marston* v. *Roe* (8 A. & E. 14) the revocation of a will by marriage and birth of child was put on the footing not of presumed intention, but of a tacit condition attached to the will, and taking effect when the circumstance happens; a principle which would exclude that sort of evidence that the ecclesiastical courts in particular have been used to admit, as to the intention of the testator. But in this case, in which it was sought to exclude the revocation by the fact of a settlement of part of the property having been made upon the marriage, giving a provision to the wife and children, the court thought that even upon the footing of presumed intention, the presumption of revocation was not rebutted. *Israell* v. *Rodon*, 2 Moore, P. C. 51.

Marriage alone not a revocation of a will, as with the birth of a child it was. Exception where the will provided for children. *Wilkinson* v. *Adam*, 1 V. & B. 465; 12 R. R. 255.

Widower having son and devising away real estate; subsequent second marriage and birth of child:—Held, no revocation of devise. *Sheath* v. *York*, 1 V. & B. 390.

But where no heir a revocation might be implied. *Id.* 397.

Marriage and birth of child an implied revocation of a will of personal property. *Ib.*

Second marriage and birth of children, the wife and children provided for by settlement, and there being children by the former marriage, did not revoke the will made prior. *Ilchester (Earl), Ex parte*, 7 Ves. 348; 6 R. R. 138.

Whether a will was revoked by marriage and the birth of a child under particular circumstances, quære. *Baxter* v. *Dyer*, 5 Ves. 663.

A subsequent marriage and the birth of a child revoked a will; quære, as to the propriety of admitting evidence against the presumption. *Gibbons* v. *Gaunt*, 4 Ves. 848.

Marriage and the birth of a child:—Held, a revocation of a will of land. *Sprauge* v. *Stone*, Amb. 721.

Feme Sole — Surrender to Use of Will.]—Surrender by feme sole to use of will becomes void or suspended by marriage. *George* v. *Jew*, Amb. 628.

—— **Power to Dispose by Will.**] — Where power is given to a woman to dispose of estate by will, and she marries; semble, it is a suspension of the power, sed quære. *Rich* v. *Beaumont*, 6 Bro. P. C. 152.

Power of Appointment exercised by Will.]—A will made in the exercise of a power of appointment is not revoked by a subsequent marriage, when in default of appointment the property of which it disposes passes under the settlement containing the power, although the same persons would take under such settlement as would have taken in case of intestacy under the statute of distributions. *Fenwick, In goods of*, 36 L. J., P. 54; L. R. 1 P. 319; 16 L. T. 124.

A will made in the exercise of a power of appointment is not revoked by a subsequent marriage, when in the event of certain contingencies happening, the property thereby appointed will not in default of appointment pass to the persons who would have taken in case of intestacy under the statute of distributions. *Ib.*

A., under his marriage settlement, had in the event of his surviving B. (his wife), a power of appointing by deed or will amongst his children certain trust moneys, and in default of such appointment the moneys were to be equally divided amongst them. A. survived B., and by a will, executed in 1847, he, being then a widower, directed the then unappropriated portion of such moneys to be equally divided amongst his sons (a portion having been previously assigned to his daughter on her marriage). A., in 1855, contracted a second marriage, and died in 1858, without having executed any other will or any further appointment of the trust moneys:—Held, that the will of 1847, so far as it was an execution of the power of appointment, was not revoked by A.'s second marriage, though the same persons would take under the settlement, in default of appointment, as would have taken in case of an intestacy under the Statute of Distributions. *Fitzroy, In goods of*, 1 Sw. & Tr. 133; 6 W. R. 863.

A., by his will, gave a power to B. to dispose by will of property, which in default of appointment by her was to devolve on the person or persons who, at her decease, should be her next of kin. B., in pursuance of such power, executed a will in favour of C., whom she afterwards married, but who died in her lifetime:—Held, that B.'s will fell within the exception of the 7 Will. 4 & 1 Vict. c. 26, s. 18, and was therefore not revoked by her subsequent marriage. *M'Vicar, In goods of*, 38 L. J., P. 84; L. R. 1 P. 671; 20 L. T. 1013; 17 W. R. 832.

By a deed of settlement executed between a wife and her intended husband, property was conveyed to trustees to pay the income to the wife herself during her life, and if she predeceased her husband, then to him for life, if she should so appoint by will, but not otherwise, and if she did not so appoint, then it was to go to the issue of the marriage. The same day she made a will exercising her power of appointment in favour of her intended husband:—Held, that the will came within the exception of the 7 Will. 4 & 1 Vict. c. 26, s. 18, and was not revoked by the subsequent marriage. *Worthington, In goods of*, 25 L. T. 853; 20 W. R. 260.

A woman, being about to marry, enters into an agreement with the future husband (without seal or stamp), by which her property is settled upon the survivor for life, with power to the wife to dispose by will made after the marriage: she then immediately makes a will, by which she bequeaths her property to the intended husband absolutely, and afterwards (on the same day) she marries. The articles resting in agreement give the husband an equitable estate for life, but the will is revoked (not being protected by the power) by the subsequent marriage. *Hodsden* v. *Lloyd*, 2 Bro. C. C. 534.

Subsequent Will reviving prior.]—A testator executed a will and afterwards married. He subsequently executed a second will, and by it he revived and brought into force again the first will in the event of there being no child of the marriage living at the time of the death of his wife. The same executors were appointed in both wills. The testator died leaving surviving him his widow and one child. The court allowed the first will to be included in the probate of the second will. *Bangham, In goods of*, 45 L. J., P. 80; 1 P. D. 429; 24 W. R. 712.

A testator made his will in 1871. He married in 1872, and on the day of the marriage, but after the ceremony, he executed a codicil, by which he made provision for his wife, and revived his will. His wife predeceased him and on his death the will only was found among his papers. The court being satisfied that in destroying the codicil he had no intention of thereby revoking the will, decreed probate of both papers. *James* v. *Shrimpton*, 45 L. J., P. 85; 1 P. D. 431; 35 L. T. 428; 24 W. R. 740. *See also cases* post, col. 446.

Will made in Contemplation of Marriage.]—A., in 1828, made his will in contemplation of his intended marriage, providing for his intended wife and for the children of such marriage, and making his intended wife executrix:—Held, that the marriage which ensued, together with the birth of a child, operated as a total revocation of the will. *Cadywold, In goods of*, 1 Sw. & Tr. 34; 27 L. J., P. 36; 6 W. R. 375.

Settlement and Codicil made in Contemplation of Marriage.]—One devises real estates to certain uses; afterwards by deed he conveys it to the same uses until he marries, and then to new uses; after the deed and before marriage, he, by codicil, attested by three witnesses and directed to be annexed to his will, imposes a forfeiture upon persons disturbing his wife, and after the codicil marries: the settlement revokes the will, but the codicil sets it up again, and the new uses springing on the marriage do not revoke the codicil. The subsequent marriage is no revocation of will. *Jackson* v. *Hurlock*, Amb. 489; Eden, 263.

Mutual Wills.]—Mutual wills by two unmarried sisters under twenty-one; the marriage of one does not revoke the will of the other. *Hinckley* v. *Simmons*, 4 Ves. 160.

2. By other Wills, Codicils, or Writings.

a. *Revocation of Will by Will.*

Execution of Instrument Revoking Will.]—The Wills Act (7 Will. 4 & 1 Vict. c. 26), s. 20,

does not alter the law as to revocation of wills, except by requiring that the instrument of revocation shall be executed in the same manner as a will. *Baker* v. *Story*, 31 L. T. 631; 23 W. R. 147.

Revocation by Will.—A wife executed a will, in which, referring to a power to that effect given to her under her marriage settlement, she disposed of all her property in favour of her husband. She subsequently made a second will, in which she referred to the same power, and bequeathed the greater portion of the property affected by the settlement to certain persons. This will contained words revoking all former wills made by the testatrix:—Held, that the first will was revoked thereby. *Eustace, In goods of*, 43 L. J., P. 46; L. R. 3 P. 183; 30 L. T. 909; 22 W. R. 832.

A testator executed two wills, the first in England, and the second in Italy, where he was domiciled at the time of his death. The English will disposed of realty and personalty, and nominated an executor. The second, or Italian will, disposed of the personalty only, but contained a general revocatory clause:—Held, that the second will revoked the first, including the appointment of the executor. And the executor, who resisted revocation of the probate of it, granted to him in common form, was condemned in costs. *Cottrell* v. *Cottrell*, 41 L. J., P. 57; L. R. 2 P. 397; 26 L. T. 527; 20 W. R. 590.

One devised his personal estate to A., and the real estate to B., and after A.'s death, and the devisor having acquired other real property, some by devise and some by purchase, he made a second will, disposing by name of his after-acquired testamentary estate to C., and then added, "as to the rest of my real and personal estate, I intend to dispose of it by a codicil, hereafter to be made, to this my will"; this is no revocation of the first will, whether considering that he meant to include the same property therein devised, because it is a mere declaration of an intent to dispose of it in future: and non constat that such disposition would be inconsistent with the first will; nor is it any revocation, considering that he meant only to include his after-purchased property not before devised, and his personal estate, the bequest of which had lapsed by the death of A. *Thomas* d. *Jones* v. *Evans*, 2 East, 488.

Will sufficient to pass personal estate did not revoke a prior will of real estate made according to Statute of Frauds. *Limbery* or *Lunbury* v. *Mason*, 2 Comb. 451.

—— **By Revival of prior Will.**]—A. made a will in 1858, which he subsequently destroyed. After its destruction, he made a will containing a disposition of his property different from that contained in his former will, and dated January, 1859. These wills were prepared by different solicitors. In February, 1859, he applied to the solicitor who had prepared the will of 1858, and who was ignorant of the existence of the will of 1859, to prepare a codicil. The codicil on its face appeared to be a codicil to the will of 1858, and referred to the provisions of that will. The testator afterwards destroyed the codicil of February, 1859, with the intention of setting up the will of 1859, and died without making any further or other testamentary disposition:—Held, that he died intestate. *Newton* v. *Newton*, 12 Ir. Ch. R. 118.

—— **By Lost Will.**]—A. executed a will, and afterwards executed a second will, which he took away with him. On his death the earlier will was found, but the second will could not be found. The solicitor who prepared the second will gave evidence, from recollection, of its contents, which were inconsistent with the first will, and revoked it:—Held, that secondary evidence might be given of the contents of the last will, and that the evidence given sufficiently showed that it revoked the first will. *Brown* v. *Brown*, 8 El. & Bl. 876; 27 L. J., Q. B. 173; 4 Jur. (N.S.) 163. See *Brown, In goods of*, 1 Sw. & Tr. 32; 27 L. J., P. 20; 4 Jur. (N.S.) 244.

Declarations of a deceased that he has revoked a certain will, by a subsequent will, not forthcoming, cannot be admitted as evidence of revocation, neither can they as to revocation by any other means, as by burning, tearing, or by cancellation. *Staines* v. *Stewart*, 2 Sw. & Tr. 320; 31 L. J., P. 10; 8 Jur. (N.S.) 440; 5 L. T. 457.

A vague declaration that he had destroyed a will, not specifying by what means or for what purpose, is still more objectionable. *Ib.*

The testator made a will, in 1807, of his realty and personalty, in favour of his wife, for life, remainder to his daughter C. absolutely, having other daughters, but no son. After the will he had other children, and, by a codicil in 1824, reciting that in his will he had given his property to his brother D. R., on certain trusts, and had given a certain freehold for the benefit of his eldest son, he revoked that gift, and everything else in the will, and gave his freehold and other property to his wife and brother, upon the trusts declared in his will of the freehold given to the son, and gave a copyhold to his second son in the same manner as the freehold was given by the will to the eldest son, and in all other respects confirmed his will. The only will found was that of 1807. The court, holding that the first will became operative by the loss of the second, refused to declare an intestacy. *Rainier* v. *Rainier*, 1 Jur. 754.

—— **By Invalid Devise.**]—A husband made a will, devising his real estate to his wife absolutely; afterwards he executed another will giving his real estate to trustees upon trust after his wife's death for the Bristol General Hospital, and he devised to his trustees all the residue of his real estate, and "the proceeds which by any law to the contrary might not by that will pass to the hospital, fully relying upon my trustees to carry out my wishes and desires." The gift to the hospital was void, and the trustees claimed to take the real estate beneficially under the ultimate gift. The court held that they did not take beneficially. The question then arose as to whether the first will was revoked by the second:—Held, that the first will was revoked by the devises in the second, notwithstanding that these devises were invalid. *Baker* v. *Story*, 31 L. T. 631; 23 W. R. 147.

—— **By Invalid Will.**]—*See* post, col. 390.

General Revocatory Clause—Effect of.]—A general clause in a will revoking all former wills revokes a prior testamentary appointment. *Merritt, In goods of* (1 Sw. & Tr. 112), and *Joys, In goods of* (infra), considered. *Sotheran* v. *Dening*, 20 Ch. D. 99—C. A.

A married woman having a general power of appointment by will over real estate executed a will appointing the estate. After the death of

her husband she made another will revoking all former wills, and containing a general devise and bequest of all her real and personal estate. She afterwards made a third will, also revoking all former wills, and bequeathing her personal estate, but not devising or appointing her real estate. She had no real estate except that subject to her power of appointment:—Held, that the testamentary appointment under the first will was revoked by the second will, and the second will by the third, and that the real estate went as in default of appointment. *Ib.*

The testatrix duly executed a power of appointment under her father's will in the form of a "testamentary appointment." Some years later she made a will, and in it exercised fully all powers of appointment under her control, but did not refer in any way to the power of appointment she had under her father's will, or to her previous exercise of it in the "testamentary appointment" already made by her:—Held, that as the will contained a complete execution of all the powers at the deceased's disposal, that instrument revoked all preceding wills, and was therefore entitled to probate alone. *Tenney, In goods of*, 45 L. T. 78.

A married woman made a will in 1848, in execution of a power of appointment, and in 1857 made another in execution of another power of appointment. The latter will contained a general revocatory clause, but it did not refer to the will of 1848, or to the power in execution of which it was made, or to the property thereby appointed:—Held, that the will of 1848 was not revoked. *Joys, In goods of*, 4 Sw. & Tr. 214; 30 L. J., P. 169.

A married woman, having in a settlement a special power of appointment by will over real estate, executed a will during coverture in 1866, appointing the same. After the death of her husband she made three other wills. In the first and second she said: "I revoke all other wills," and in the third: "I . . . hereby revoke all wills, codicils, and other testamentary dispositions heretofore made by me, and declare this to be my last will and testament," and then disposed of all her estate, "including as well real estate as personal estate over which I have or shall have a general power of appointment," but she did not in any way exercise or affect to exercise the power in the settlement, nor did she refer to it, or to the property the subject of the power:—Held, that the testamentary appointment of 1866 was revoked. *Kingdon, In re, Wilkins* v. *Pryer*, 55 L. J., Ch. 598; 32 Ch. D. 604; 54 L. T. 753; 34 W. R. 634.

A general revocatory clause of "all former wills" leads to the inference that the deceased at that time intended to leave a subsisting will. *Marsh* v. *Marsh*, 1 Sw. & Tr. 528; 30 L. J., P. 77; 6 Jur. (N.S.) 380; 1 L. T. 523.

General revocatory words are not included in the expression, "any bequest of personal property described in a general manner," in 7 Will. 4 & 1 Vict. c. 26, s. 27, so that they can operate upon "any personal estate which the testator may have power to appoint in any manner." *Merritt, In goods of*, 1 Sw. & Tr. 112; 4 Jur. (N.S.) 1192. S. P., *Meredith, In goods of*, 29 L. J., P. 155.

A married woman, having duly executed a will, by which she disposed of stock over which she had a power of appointment, subsequently, with an intention of disposing of other stock held in trust for her under her marriage settlement, made and executed a second will, which concluded with a clause of revocation of all former wills. This last was not valid for the purposes intended, nor was it rendered valid by any consent on the part of her husband:—Held, that this last will could not, merely by its general revocatory clause, operate as an execution of the first-named power, and so revoke the will already made in execution of such power. *Ib.*

—— **Onus Probandi.**]—A testator executed a will in 1825, which was found uncancelled at his death, which event took place in 1853. In 1852, he executed another testamentary paper, the contents of which were wholly unknown, except the circumstance of the paper commencing with the words, "This is the last will and testament." This latter instrument was not forthcoming at his death, but there was no evidence of its destruction. The prerogative court held that the instrument, executed in 1852, was not to be considered as a codicil, but as a substantive will, which operated as a revocation of the prior will of 1825, and that under 7 Will. 4 & 1 Vict. c. 26, s. 22, the deceased must be considered to have died intestate, as the former will was not revived by the destruction of the latter:—Held, first that the onus probandi lies upon the party setting up the subsequent instrument as a revocation of the former will. *Cutto* v. *Gilbert*, 9 Moore, P. C. 131.

Held, secondly, that to establish a revocation of a former will relating to personalty, by a subsequent testamentary paper not forthcoming, by parol evidence of execution only, in the absence of any draft or instructions for such instrument, such evidence must be strong and conclusive as to its contents. *Ib.*

Held, thirdly, that the mere fact of such an instrument, commencing with the words, "This is my last will and testament," does not render it a revocatory instrument, as those words do not necessarily import that such instrument contained a different disposition of the property, and that to make it operate as a revocation of a former will, it must be proved that the contents of the latter instrument were different from the former. *Ib.*

Held, fourthly, that a subsequent will (the contents of which were unknown) having remained in the custody of the testator, and not forthcoming, the presumption of law was, that it was destroyed by him animo revocandi, and did not revoke a prior will uncancelled. *Ib.*

Observations on the report of the case of *Moore* v. *Moore* (1 Phillim. 375, 406). *Ib.*

When the revocation of an existing will is sought to be established by the proof of the execution of a subsequent will not forthcoming, the evidence should be clear and conclusive, not only as to the execution of such subsequent will, but also as to its contents. *Berthon* v. *Berthon*, 18 L. T. 301; 16 W. R. 673.

b. *Of Will by Codicil.*

In General.]—In interpreting a will and a codicil the general rule is, that the whole will takes effect so far as it is not inconsistent with the codicil. *Robertson* v. *Powell*, 2 H. & C. 762; 33 L. J., Ex. 34; 10 Jur. (N.S.) 442; 9 L. T. 543; 12 W. R. 623.

A codicil not to be presumed a revocation unless it distinctly appears. *Griffiths* v. *Grieve*, 1 Jac. & Walk. 31.

A codicil is never held to revoke a will further than is necessary to give effect to the intentions of the testator. *Young* v. *Hassard*, 1 Dr. & War. 638.

The intention to revoke in a codicil must be as clearly expressed as the intention to devise in the will, otherwise the codicil will not operate as revocation. A doubt, however reasonable, is not sufficient, if the two instruments are not absolutely inconsistent. *Pilsworth* v. *Mosse*, 14 Ir. Ch. R. 163.

If a devise in a will is clear, it is incumbent on the party who contends that it is not to take effect by reason of a revocation in the codicil, to show an intention to revoke equally clear with the original intention to devise. *Robertson* v. *Powell*, supra.

A testator devised nine houses to his son A. for life; and after his death, to his children who should attain a certain age; but in case all such children should die under that age, then to trustees to permit his three daughters, B., C. and D., to receive the rent during their lives, in equal shares; and after their decease, to their children in fee. He afterwards made a codicil in these words:—"I hereby revoke that part of my last will and testament whereby I give the nine houses unto my son and to his heirs; and my will is that my daughters C. and D. should enjoy them. I give and bequeath the freehold ground and houses to my daughters C. and D., equally and jointly between them, and to the survivor of them; and after their decease to their child or children equally; and if they should both die leaving no child or children, then the freeholds to go as ordered by my will." C. and D. died, leaving no child. A., the son, died, leaving a daughter, his only surviving child, who was born in the lifetime of the testator, and attained the required age; but A. had had another daughter born in the lifetime of the testator, who had married, and had a son, but both she and her son died in the lifetime of her father. The testator's daughter B. was also dead, but leaving two children:—Held, that notwithstanding the general words of the commencement of it, the codicil operated only as a partial revocation; that it operated as a revocation only so far as to effectuate the intention of the testator, as declared in the codicil, to prefer his daughters C. and D. and their children to his son A. and his children; that it operated nothing more; and that, failing the objects of the preference, the testator's declared intention was that the will should operate as if there had been no revocation; and therefore that the daughter of A. was entitled to a moiety of the houses. *Doe* d. *Evers* v. *Ward*, 21 L. J., Q. B. 145; 18 Q. B. 197; 16 Jur. 709.

A. bequeathed leasehold premises to his daughter M. for her life; and after her death to and amongst her lawful issue equally, share and share alike, with benefit of survivorship; and "in default of such issue," to his son G. for life; and after his death to his children equally, share and share alike, with benefit of survivorship. By a codicil, the testator recited that he had by his will bequeathed to his son G., after the decease of his, the testator's, daughter M., "and in default of her leaving lawful issue," the leasehold premises; and stated, that in case his son should not indemnify his estate from a debt incurred by the testator for the accommodation of his son, such bequest in the will in favour of the son should be revoked:—Held, that the codicil did not revoke the will, but showed the sense in which the testator used in the will the words "in default of such issue." *Darley* v. *Martin*, 13 C. B. 683; 22 L. J., C. P. 249; 17 Jur. 1125.

A testator executed a codicil to his last will, and by such codicil absolutely revoked and made void all bequests and dispositions in the will, and nominated executors, but did not in direct terms revoke the appointment of executors and guardians in the will:—Held, that the will was not revoked. *Howard, In goods of*, 38 L. J., P. 32; L. R. 1 P. 636; 20 L. T. 230.

When there is a clear and manifest intention to devise, it is incumbent on a party alleging a revocation by a codicil to prove that the intention to revoke was equally clear and manifest; if there was only a reasonable doubt, the first devise ought to stand. *Hearle* v. *Hicks*, 1 Cl. & F. 20. Affirming *S. C.* nom. *Doe* d. *Hearle* v. *Hicks*, 1 Y. & J. 470; 8 Bing. 475; 1 M. & Scott, 759.

A testator devised a copyhold messuage, called Plomer Hill House, with the appurtenances, to trustees for his wife for life, and subsequently, by one of several codicils, revoking several of the dispositions made by his will of all his freehold, copyhold, and personal estate, he instead of such dispositions devised all his freehold, copyhold, and personal estate to his daughter:—Held, that the devise of the estate to his wife for life was not affected by this codicil. *Ib.*

By a will a testator in one cause devised all real estate whatsoever in Ireland of or to which he should be seised or entitled (subject to a trust term to raise moneys in aid of the personalty for payment of debts and legacies) to H. for life, with remainders over, and in another, he left all personal estate whatsoever and wheresoever after payment of debts and legacies to H. absolutely. By a codicil he revoked "the bequest contained in my will of the residue of all my real and personal estates to my brother H.," and gave such residue to W. "absolutely":—Held, that the devise to H. of the Irish estate was revoked by the codicil. *Wallace* v. *Seymour*, Ir. R. 6 C. L. 219, 343; 20 W. R. 634—Ex. Ch.

A testator, having executed a will and codicil, signed a second codicil, in which he expressed a desire to cancel his will, and that a document which he described as a will of earlier date, and the first and second codicils, should together stand as his last will and testament. The only document executed at the earlier date was a settlement on his marriage, which was not of a testamentary character:—Held, that the revocation of the will was absolute, and not dependent on the incorporation of the settlement in the papers admitted to probate. *Gentry, In goods of*, 42 L. J., P. 49; L. R. 3 P. 80; 28 L. T. 480; 21 W. R. 888.

A testator, having bequeathed legacies to his daughters, and annuities by way of maintenance to them and to one of his sons, to whom he also devised real estate, made a codicil by which he purported to appoint amongst them, in full discharge of all claims which they could have upon his estate or assets, a sum of money which under his marriage settlement he had power to appoint amongst his younger children:—Held, that, irrespectively of the validity or effect of the codicil as an appointment, it did not operate to revoke the prior gifts in the will. *M'Dermot* v. *O'Conor*, Ir. R. 10 Eq. 352.

Devise to the children of A. :—Held, not to be revoked by an expression in a codicil, that they were not intended to take any beneficial interest under the will or codicil. *Cleoburey* v. *Beckett*, 14 Beav. 583.

A testator devised his real estate to his brother William for life, with remainder to his first and other sons in tail, with remainders over ; and he bequeathed his residuary personal estate between his nephews and nieces. By a codicil he revoked his will, so far only as it was altered by the codicil, and he gave to his nephews and nieces, except (as he said) his brother William's children, "who are not intended to take any beneficial interest under this will or this codicil," 1,000*l.* each :—Held, that the devise to the children of William was not revoked. *Ib.*

Devise of real estates to be sold, and the produce applied in the same manner as the residue of the personal estate. Codicil not executed so as to pass real estates, revoking the bequest of the residue, does not affect the will as to the real. *Gallini* v. *Noble*, 3 Mer. 691.

Case of revocation of will by codicil. *Fry* v. *Prentice*, 9 Jur. 894.

—— **By Invalid Gift—Codicil.**]—Testator by his will gave 850*l.* in legacies to different charitable institutions. By a codicil he revoked the before-mentioned legacies, and in lieu thereof gave to the treasurer of another charitable institution 1,000*l.* for the extension fund of such house of charity :—Held, that the house of charity being incapacitated under 9 Geo. 2. c. 36, from taking this gift for the extension fund, which involved the purchase of land and building thereon, the gifts to the charities mentioned in the will were absolutely revoked. 1 Kay & J. 665 ; 1 Jur. (N.S.) 917 ; 3 W. R. 616.

Appointment in Will—Invalid Appointment by Codicil.]—Testator by will, who said his estate would realise at least 10,000*l.*, wished 4,000*l.* to be invested on trust for his sister, A. P., for her life. At her death the principal might be divided between her husband, if surviving, and children as she might by will determine. After giving other legacies, the testator bequeathed the remainder to the children of J. F. A sum of 4,000*l.* was invested in consols and transferred into court. A. P. by will gave all the residue of her property, including the sum of 4,000*l.* left to her by the testator, and over which she had a disposing power, to her husband and children in equal terms. One son after the date of the will died, leaving two children, and by a codicil made afterwards, A. P. bequeathed the share which would have gone to him in trust for his children. On petition by the husband and surviving children for sale of the trust fund and payment of the proceeds to them :—Held, that the invalid appointment by the codicil did not operate as a revocation pro tanto of the gift by the will to the class, and that the husband and surviving children were entitled to the whole of the fund. *Duguid* v. *Fraser*, 55 L. J., Ch. 285 ; 31 Ch. D. 449 ; 54 L. T. 70 ; 34 W. R. 267.

A testator having a power by will to charge hereditaments with 7,000*l.*, to be divided amongst his children in such shares as he should by will appoint, and in default amongst them equally, by his will charged the hereditaments with the 7,000*l.*, and directed that 4,000*l.*, part thereof, should be paid to his younger son, and the remaining 3,000*l.* to his three daughters equally. By a codicil he revoked the appointment or charge of 7,000*l.* made by his will, and charged the same hereditaments with the payment of 7,000*l.* to the younger son alone :—Held, that though the appointment made by the codicil was invalid, the revocation nevertheless took effect. *Quinn* v. *Butler*, L. R. 6 Eq. 225.

See also, post, col. 390.

Revocation of Gifts "in favour of" Donee of Power.]—A testator by his will gave to his sister H. a life interest in a share of his residuary estate, and a special power of appointment by will over the capital of the share. By a codicil he revoked all devises and bequests whatsoever "in favour of" H. :—Held, that the power was revoked as well as the life interest. *Brough, In re, Currey* v. *Brough*, 57 L. J., Ch. 436 ; 38 Ch. D. 456 ; 58 L. T. 788 ; 36 W. R. 409.

By Destroyed Codicil.]—A. made a will in 1858, which he subsequently destroyed. After its destruction he made a will containing a disposition of his property different from that contained in his former will, and dated January, 1859. These wills were prepared by different solicitors. In February, 1859, he applied to the solicitor who had prepared the will of 1858, and who was ignorant of the existence of the will of 1859, to prepare a codicil. The codicil on its face appeared to be a codicil to the will of 1858, and referred to the provisions of that will. The testator afterwards destroyed the codicil of February, 1859, with the intention of setting up the will of 1859, and died without making any further or other testamentary disposition :—Held, that he died intestate. *Newton* v. *Newton*, 12 Ir. Ch. R. 118.

c. *Of Codicil by Codicil.*

In General.]—An aunt by her will gave shares in her residue to her nephew. By a codicil she revoked all devises and bequests to her nephew. By a second codicil she devised after-purchased property to the trustees of her will and confirmed her will :—Held, that the second codicil did not revoke the first, and that the after-purchased property went according to the will and first codicil together, and not according to the will alone. *Green* v. *Tribe*, 47 L. J., Ch. 783 ; 9 Ch. D. 231 ; 38 L. T. 914 ; 27 W. R. 39.

A prior codicil, operative in itself, is not revoked by a subsequent codicil which refers to the will by its date and confirms it without mentioning the prior codicil ; but a prior codicil inoperative in itself, will not be set up by such a subsequent codicil. *Ib.*

The words "I give, devise and bequeath to A. and B. all the residue of my real and personal estate whatsoever and wheresoever undisposed of by my will and this codicil thereto," revoked an intermediate codicil. *Hastings, In goods of*, 26 L. T. 715 ; 20 W. R. 616.

A testator made a will (dated before the Wills Act), by which he directed his residuary real estate to be sold and the proceeds to be divided (in the events which happened) among twelve persons, of whom A. and B. were two. He made a first codicil (dated after the Wills Act), by which he directed certain real estate acquired subsequently to the date of the will to be sold, and the proceeds divided in the same way as the proceeds of his other real estate. This codicil was attested by A. and B. He then made

another codicil, described as a codicil to his will of a certain date, but not referring to the prior codicil:—Held, that the second codicil did not operate as a republication of the first codicil; that the gifts to A. and B. of two twelfth shares of the proceeds of the property comprised in the first codicil failed; and that these shares fell into the residue, and were divisible between A. and B. and the other ten residuary legatees. *Burton* v. *Newbery*, 45 L. J., Ch. 202; 1 Ch. D. 234; 34 L. T. 15; 24 W. R. 388.

—— **Will and First Codicil by Second Codicil.**]—O. by his will devised and bequeathed the legal estate in all his real and personal property to L. and C., whom he nominated executors, on trust to pay certain annuities, and subject thereto to pay the income to F. for the life of A., and after the death of A. to transfer to F. all the testator's real and personal property absolutely, subject to the then existing annuities, and in case of the death of F. during the lifetime of A. without lawful issue, the testator devised and bequeathed all his real and personal property to J., his heirs and assigns for ever, subject to the said annuities. By a codicil to his will O. declared that if F. should die either in the lifetime of A. or after her death, without lawful issue, or making any disposition of the testator's real and personal property by will or deed, that then the same might be and become the property of J., his heirs and assigns for ever, subject to the annuities aforesaid. O. made a second codicil in the words following: "I, O., hereby, by way of further codicil to this my will, do hereby revoke and declare void the appointment of L. and C. as trustees and executors in the within will named, and do leave and bequeath all my said real, freehold and personal property to the within-named F., subject to the annuities and other conditions therein mentioned, and do hereby appoint and nominate the said F. as my sole executor and administrator." The testator made a third codicil, whereby he declared that the annuities in his will mentioned should be chargeable solely on his landed property of G., and that all his other property should be free from the same. The real estate of the testator consisted of the G. estate, held for lives renewable for ever, and limited to heirs. F. died in the lifetime of A. intestate, without having had issue, and without having made any disposition of the real or personal property comprised in the will. S. was his heiress-at-law:—Held, that the second codicil did not revoke the modifications made in the will by the first codicil; that, in the clause providing for the death of F. without lawful issue or making any disposition, in the first codicil, the word "or" should be read "and"; that the gift over was void; and that S. was absolutely entitled to the G. estate. *Stretton* v. *Fitzgerald*, 23 L. R., Ir. 466—C. A.

Codicil revoking Will does not revoke prior Codicil.]—A codicil revoking a will does not necessarily revoke a prior codicil. *Farrer* v. *St. Catharine's College, Cambridge*, 42 L. J., Ch. 809; L. R. 16 Eq. 19; 28 L. T. 800; 21 W. R. 643.

A testator made a will and two codicils, by none of which he gave anything to St. Catharine's College, and many years afterwards he made another codicil, describing it as a codicil to his last will; and thereby, after reciting that by his will he had bequeathed 1,000*l.* to St. Catharine's College, he confirmed the bequest, but in all other respects he revoked his will; and he gave to St. Catharine's College (in addition to the bequest of 1,000*l.*) 5,000*l.*, and appointed executors of his will and codicil:—Held, that the last codicil revoked the will of the testator, but not the codicils of prior date. *Ib.*

Implied Revocation of Intermediate Codicil.]—A testator by will gave legacies to three of his daughters, and devised and bequeathed his residuary real and personal estate upon trusts for his wife and children. By a first codicil in 1878 he revoked one of the legacies in his will and increased another, concluding, "In all other respects I confirm my said will." By a second codicil, after reciting that he was desirous of altering the residuary devise contained in his will, he made a specific devise, and in all other respects confirmed his will. He afterwards made a third codicil, by which, after referring to his will by date and reciting a promise to that effect, he directed his trustees to grant an underlease of a house to his daughter-in-law, and gave his wife a pecuniary legacy in addition to the benefit she derived under his said will, and concluded, "In all other respects I confirm my said will except as altered by a certain codicil made thereto in 1878, whereby I revoked a legacy to my daughter Mary":—Held, that the words of confirmation in the first and third codicils were to be read as meaning that the testator did not intend to alter his general testamentary dispositions further than in the specific way mentioned in those codicils; and that the devise in the second codicil being clear, no intention to revoke it had been shewn with sufficient clearness to enable the court to reject that devise. *Follett* v. *Pettman*, 52 L. J., Ch. 521; 23 Ch. D. 337; 48 L. T. 865; 31 W. R. 779.

The testator died leaving a duly executed will, dated the 20th October, 1888, and four duly executed codicils, dated respectively the 20th October, 1888, the 7th April, 1890, the 20th October, 1891, and the 22nd October, 1891. His three brothers were appointed executors and trustees in England, under the said will and codicils. By the third codicil the testator revoked the first and second codicils. The fourth codicil confirmed the testator's "will and former codicils." The executors now applied for probate of all five documents, or for directions as to which of these should be admitted to proof:—Held, that, as the third codicil was confirmed by the fourth, the revocation of codicils one and two remained good, and that accordingly probate should go in respect of the will and last two codicils only. *Carritt, In goods of*, 66 L. T. 379.

d. *Of Codicil by Revocation or Re-execution of Will.*

By Revocation of Will.]—T. M. B. having executed a codicil at the foot of his will, cut off his signature to the will. Upon proof that he thereby intended to revoke the codicil the court held that the codicil was also revoked. *Bleckley, In goods of*, 52 L. J., P. 102; 8 P. D. 169; 31 W. R. 171; 47 J. P. 663.

A. made a will and a codicil thereto which he retained in his own possession. He subsequently executed a second testamentary paper, which he also called a codicil, and this paper he gave to one of the legatees named therein. The will and first codicil were not forthcoming at his death:

—Held, that as the second codicil had not been revoked by any of the modes indicated by 7 Will. 4 & 1 Vict. c. 26, s. 20, it was entitled to proof. *Black* v. *Jobling*, 38 L. J., P. 74; L. R. 1 P. 685; 21 L. T. 298; 17 W. R. 1108.

A testamentary paper purporting to be a codicil to a will, but being substantially independent of it, is not necessarily revoked by the revocation of the will. *Ellice, In goods of*, 33 L. J., P. 27; 12 W. R. 353.

A testamentary paper in the form of a codicil to a will is not revoked by the revocation of the will. It can only be revoked by one of the modes indicated by the Wills Act (7 Will. 4 & 1 Vict. c. 26), s. 20. *Savage, In goods of*, 39 L. J., P. 25; L. R. 2 P. 78; 22 L. T. 375; 18 W. R. 766.

A person executed a will and codicil. In the latter she referred in several paragraphs to the dispositions contained in her will, and more particularly she bequeathed a legacy to be held under conditions stated in her will. She subsequently destroyed the will by burning it, but preserved the codicil:—Held, that as the codicil was not revoked by any of the methods prescribed by the 7 Will. 4 & 1 Vict. c. 26, s. 20, it must be admitted to probate. *Turner, In goods of*, L. R. 2 P. 403; 27 L. T. 322; 21 W. R. 38.

A codicil is primâ facie dependent on the will. Where a will and a codicil to it have been in existence, and the will has been subsequently destroyed by the testator, the burden of proof is on the party setting up the codicil, to shew that it was the intention of the testator that it should operate separately from the will, otherwise the presumption is, that by the destruction of the will the codicil was revoked. *Grimwood* v. *Cozens*, 2 Sw. & Tr. 364; 5 Jur. (N.S.) 497.

By Re-execution of Will.]—Where a testator made and duly executed a codicil to his last will, and afterwards re-executed the original will without referring in any way to the codicil:—Held, that although the original will contained a clause revoking "all other wills," &c., yet in the absence of any evidence of an intention to revoke the will, the inference from the wording of the attestation clause being that the will was re-executed for the purpose of giving effect to certain alterations that had been made in it, the codicil was not revoked by such re-execution. *Rawlings, In goods of*, 41 L. T. 559; 44 J. P. 60.

e. *By Duplicates.*

Principles.]—S. executed a will in 1776, and in 1778 he executed a copy of the will, and a codicil in duplicate on the same day. The object of the codicil was to provide for his youngest son, who was born in 1777. In 1808 S. died, leaving four sons him surviving. After his death the will of 1776, with the duplicate codicil annexed, was found in his portfolio, and the will executed in 1778, with the duplicate codicil annexed, in a box in the same room. The will and codicil in the portfolio contained erasures which diverted the limitation of certain estates from the younger sons to the eldest son. The altered will and codicil were proved by the executrix, and acted upon until the death of all the sons of S., except the youngest son, who, when his turn to inherit, according to the unaltered will, arrived, brought ejectment against the successor of the eldest son of S. The judge asked the jury whether the two wills, with the duplicate codicils annexed to each, formed the last will of S., and whether the erasures in the will and codicil in the portfolio were intended to be final or deliberative only; and he directed the jury, that if their opinion on these two questions was in the affirmative, then the cancellation of one part was the cancellation of the other part, and the passage uncancelled was the last will of S.:—Held, that the questions left to the jury, and the direction in point of law, were correct. *Doe* d. *Strickland* v. *Strickland*, 8 C. B. 724; 19 L. J., C. P. 89.

Where there are duplicates of a will, one in the custody of the testator and the other not, and the testator cancels that which is in his custody, it is an effectual cancelling of both. *Burtenshaw* v. *Gilbert*, Cowp. 52; Lofft, 465.

A testatrix executed a will in duplicate, and retained one copy herself, but placed the other in independent keeping. Subsequently she revoked the copy in her own possession, tearing off the signature. The court declined to grant probate on motion of the unmutilated paper which had remained out of her possession. *Slade, In goods of*, 20 L. T. 330.

Where there are duplicates of a will, and the testator cancels one of them only, and the other part is left entire, yet it is an effectual cancelling of the will. *Onions* v. *Tyrer*, 2 Vern. 742; Pre. Ch. 149; Gilb. Eq. R. 130; 1 P. Wms. 343.

Presumption that the cancellation of one duplicate of a will cancels the other, though both are in the testator's possession, and the cancelled instrument has been altered. In the two latter cases the presumption weaker. *Pemberton* v. *Pemberton*, 13 Ves. 310.

Evidence.]—The testator in 1891 executed a will in duplicate and retained both parts in his possession at the time, but, in the following year, he sent one part to the defendant, who, some time in 1893, tore it up by accident along with some other papers, but, finding he had done so, caused the pieces to be pasted together. No testamentary papers were found in the testator's repositories, but soon after his death, which occurred in July, 1895, a friend of the testator produced to his solicitors holograph copies of the will and of a document which purported to have been executed as a codicil to the will and to bear date 1892, and also an original holograph document duly executed and bearing date August 22, 1892, and described as "a second codicil to my will." The last document gave a legacy of 800*l.* among the children of the friend to whom the testator had sent it and in whose custody it had remained:—Held, that the will and first codicil had been revoked, and that the second codicil alone was entitled to probate. *Paige* v. *Brooks*, 75 L. T. 455.

Evidence of declarations of a testator is not admissible to prove that he executed his will in duplicate, nor to prove that he has destroyed one part with the intention of revoking the will. *Atkinson* v. *Morris*, 66 L. J., P. 17; [1897] P. 40; 75 L. T. 440; 45 W. R. 293—C. A.

f. *By Deeds and other Writings.*

By Deed.]—A will executed since the 7 Will. 4 & 1 Vict. c. 26, can only be revoked by ademption of the subject-matter of the will, or by a subsequent instrument, executed according to the requirements of the statute, or otherwise as therein prescribed. *Ford* v. *De Pontes, De*

Pontes v. *Kendall*, 30 Beav. 572; 31 L. J., Ch. 185; 8 Jur. (N.S.) 323; 5 L. T. 515; 10 W. R. 69.

Where, therefore, a married woman, having a power of appointment by will, duly executed that power by her last will, and subsequently executed two deeds, which also purported to exercise the power, but dealt differently with the property, and were not duly executed as testamentary instruments:—Held, first, that the will was a valid exercise of the power. *Ib.*

Held, secondly, that the will was not revoked by the deeds or either of them. *Ib.*

By Attested Writing.]—A testator duly executed his will. On the day of his death he wrote to his brother the following letter: "Enclosed I hand you an order to get my will from Mr. D., which please burn as soon as you receive it without reading it. I will leave you my share as a deed of gift, leaving it to your honour to pay out of it 100*l.* each to each of my two sisters, and 100*l.* to P." His signature was attested by two witnesses, and the paper was valid as a testamentary paper:—Held, that it was a writing declaring an intention to revoke, within 7 Will. 4 & 1 Vict. c. 26 (the Wills Act), s. 20, and that it revoked the will. *Durance, In goods of*, 41 L. J., P. 60; L. R. 2 P. 406; 26 L. T. 983; 20 W. R. 759.

At the foot of his will the deceased wrote a memorandum to the effect: "This will was cancelled this day"; and he duly executed such memorandum in the presence of two witnesses:—Held, that such memorandum was not a will or a codicil, but only a writing, which could not be admitted to probate. *Fraser, In goods of*, 39 L. J., P. 20; L. R. 2 P. 40; 21 L. T. 680; 18 W. R. 263.

A paper writing, signed by the executors and others, purporting to be an acknowledgment of what they understood to be the will of the testator, when he was unable to speak, although proved in the spiritual court as a testamentary paper, yet will not operate as a codicil in this court, and the bill claiming legacies under such an instrument will be dismissed. *Gowler* v. *Standerwick*, 2 Cox, 16.

By unattested Writing.]—An act inconsistent with will, though, by some accident independent of will, it fails of effect, is a revocation. *Ilchester (Earl), Ex parte*, 7 Ves. 370; 6 R. R. 138.

An express revocation, if only subservant to another purpose for which it is incompetent, shall not revoke. *Ib.*, 379.

Will may be revoked by an instrument not attested as would be required to give it effect. Any disposition that would, by the instrument, have completely put an end to that will, shall have that effect. The instrument becomes ineffectual by accident or circumstances dehors the will. *Ib.*, 374.

Where the act is valid for the whole purpose, but, by disability of person to take, or some matter dehors or subsequent to the will, it is ineffectual, it is a revocation. *Ib.*, 373.

Disposition, so made by will as to have legal effect, and afterwards another, by which the former would be revoked, but the other substituted, and it is evident that testator did not intend revocation for any other purpose than to give it effect, if the second instrument cannot have effect of disposition, it shall not be a revocation. Cited, *Ib.*, 372.

Testamentary appointment of guardian not revoked by a subsequent testamentary appointment not executed according to the Statute of Frauds, and not directly importing revocation. *Ib.*

By Invalid Will.]—An envelope containing a will and codicil properly executed, and also a subsequent will (all of real estate), not so executed, and bearing an indorsement relative to the first will and codicil erased, and, by fresh indorsement, specifying to contain the will of last date, as "the last will," &c.:—Held, that first will and codicil were not revoked thereby. *Grantley* v. *Garthwaite*, 2 Russ. 90.

Where a testamentary instrument incomplete as a will appears, on the face of it, to be intended as a substitution for a former complete will, the legacies given by the latter only shall take effect, notwithstanding both instruments are proved in the spiritual court. *Jackson* v. *Jackson*, 2 Cox, 35.

Devise of lands to A., and afterwards the devisor devised the same lands to B., a papist: both devises are void; for though the last is void as a will, yet it is good as a revocation. *Roper* v. *Constable*, 8 Vin. Abr. 141, note to pl. 2; 2 Eq. Abr. 771, pl. 8.

A domiciled Englishman married in 1822 an Englishwoman in England. In 1839, in consequence of differences, they separated, and a deed was executed, under which a power of appointment was given to the wife, which she executed by a will and codicil in 1854. A decree for a divorce, on the ground of adultery, was subsequently obtained by the wife in Scotland, and she shortly afterwards was married to a Frenchman in Scotland, and went to reside with him in France, where she died, having previously made a will in the words following: "I revoke all foregoing wills made by me up to this date, the 23rd day of June, 1856. Paris":—Held, that there was no revocation of the will and codicil of 1854. *Dolphin* v. *Robins*, 3 Macq. H. L. 563; 7 H. L. Cas. 390; 29 L. J., P. 11; 5 Jur. (N.S.) 1271; 7 W. R. 674.

By Invalid Codicil.]—A former will of land is cancelled, the testator supposing a later will by him made of the same land to the same effect was good. If that proves not to be duly executed, equity will set up the former will. *Onions* v. *Tyrer*, 2 Vern. 743; Gilb. Eq. Rep. 130; 1 P. Wms. 343.

A codicil revoked valid bequests in a will, and bequeathed the property to a fund which was being raised for the purpose of buying land for a charity:—Held, that although the gift by the codicil failed, the revocation nevertheless took effect. *Onions* v. *Tyrer* (ante, col. 388) distinguished. *Tupper* v. *Tupper*, 1 Kay & J. 665; 1 Jur. (N.S.) 917; 3 W. R. 616.

A testator, by a codicil to his will, imposed a condition respecting real estate of which he had, by his will, made a specific devise. The condition was to have effect upon the personalty bequeathed by the will. The codicil was unattested, but admitted to probate. This was before the 7 Will. 4 & 1 Vict. c. 26:—Held, that such codicil could not be looked at by the court in the construction of the will, so far as it affected the real estate. *Louis* v. *Louis*, 10 L. T. 825.

Testator, by his will, gave an annuity payable out of his freehold, copyhold and personal estate,

and, by a codicil not duly attested, revoked the annuity:—Held, that this was a subsisting charge upon the freeholds. *Mortimer* v. *West*, 2 Sim. 274; 27 R. R. 98. See *Smith* v. *Newboult*, 1 W. R. 230.

A testatrix left a will and a codicil prepared by her solicitor and duly executed, and a third paper purporting to be a second codicil. At her death there appeared at the foot of the will in her handwriting, "I declare this to be null and void," with her signature annexed. The first codicil also contained the words "null and void." The third codicil was in her writing; it contained no attestation clause, but two witnesses had signed it, who could say no more than that the paper had writing on it. They did not know that it was a will, nor could they say that her signature was on the paper:—Held, that the second codicil was not duly attested, and therefore that the will and first codicil remained unrevoked. *Fischer* v. *Popham*, 44 L. J., P. 47; L. R. 3 P. 246; 33 L. T. 231; 23 W. R. 683.

g. *Effect of Several Conflicting Wills, Clauses or Codicils.*

Two Wills of same Date.]—If will be made, and afterwards another will without cancelling the former, and either will is proved to be confirmed after the other will, the whole estate comprised in the will so last confirmed will go according to the limitations in that will. *Phipps* v. *Anglesey*, 7 Bro. P. C. 445.

If there are two inconsistent wills of the same date, neither of which can be proved to be last executed, they are both void by the common law of uncertainty, and will let in the heir-at-law, unless such wills are explained by some subsequent act of the testator, so as to reconcile such inconsistency. *Ib.*

If two wills appear, and the limitations in both are consistent, and they have both been confirmed by various codicils, the wills and codicils may be taken together as one testamentary disposition, and such construction made as that the limitations in both wills shall take place, to the disherison of the heir-at-law. *Ib.*

Two Wills of different Purport—No Revocatory Clause.]—G. H. made two wills. By the first of such wills he gave the whole of his real and personal estate and effects to his wife E. H., absolutely, and appointed her sole executrix thereof, and revoked all former wills. By the second will he gave his household furniture and effects and all moneys whatsoever deposited or invested to his wife for life, and after her decease to his wife's sister, M. B., absolutely, whom he also appointed joint executrix with his wife. The said will contained no disposition of the real estate or the residue of the personal estate, and no clause revocatory of previous wills. The court granted probate of both papers as together constituting the will of the testator, but before doing so required that notice of the application for such probate should be served on the heir-at-law. *Hartley, In goods of*, 50 L. J., P. 1; 29 W. R. 356.

When a later will does not expressly revoke an earlier one, and the two may stand together in several important matters, it lies on the party impugning the earlier will to prove the intention of the testator to revoke it by the later; and, in deciding such a question, conjecture or slight probabilities are not sufficient, and the words "this is my last will," are not entitled to any weight whatever. *Leslie* v. *Leslie*, Ir. R. 6 Eq. 332.

A mother bequeathed the residue of her estate, after payment of debts and certain legacies, to her daughter absolutely, and appointed her sole executrix. By a subsequent testamentary paper which purported to be her last will, but contained no revocatory clause or bequest of the residue, she gave all her estate to her daughter for life, and appointed her sole executrix, and then gave certain legacies payable after her daughter's decease:—Held, that as the second will did not dispose of the residue, it did not revoke the residuary bequest in the earlier will, and that both instruments were therefore entitled to probate. *Petchell, In goods of*, 43 L. J., P. 22; L. R. 3 P. 153; 30 L. T. 74; 22 W. R. 353.

A husband made a will, devising his real estate to his wife absolutely; afterwards he executed another will giving his real estate to trustees upon trust after his wife's death for the Bristol General Hospital, and he devised to his trustees all the residue of his real estate, and "the proceeds which by any law to the contrary might not by that will pass to the hospital, fully relying upon my trustees to carry out my wishes and desires." The gift to the hospital was void, and the trustees claimed to take the real estate beneficially under the ultimate gift. The court held that they did not take beneficially. The question then arose as to whether the first will was revoked by the second:—Held, that the first will was revoked by the devises in the second, notwithstanding that these devises were invalid. *Baker* v. *Story*, 31 L. T. 631; 23 W. R. 147.

If it can be collected from the language of the will, taken in connection with the facts with which it was used, that it was the intention of the testator to dispose of his property in a different manner to that in which he disposed of it by an earlier will, the earlier will will be revoked, and this although in some particulars the later will does not completely cover the whole subject-matter of the earlier will. *Dempsey* v. *Lawson*, 46 L. J., P. 23; 2 P. D. 98; 36 L. T. 515; 25 W. R. 629.

A person executed a will in 1858, by which she disposed of the whole of her property. In 1860 she executed another will, which commenced, "This is the last will and testament of me," &c. It varied and repeated several bequests given in the first will, appointed the same executors for England as in that document, but contained no residuary nor revocatory clauses:—Held, that, from the general tenor of the last will, it was clear that the testatrix did not intend the first will to remain in force, and that it therefore was revoked. *Ib.*

The doctrine that a will disposing of the whole property of a testator is ex necessitate a revocation in toto of a former will, also disposing of the whole, only applies where the dispositions are so inconsistent that the papers cannot stand together. *O'Leary* v. *Douglass*, 1 L. R., Ir. 45.

A will disposing of the whole of the testator's property will act as a revocation of a will disposing of a part only of the property of the testator. *Moorhouse* v. *Lord*, 10 H. L. Cas. 272; 1 N. R. 555; 32 L. J., Ch. 295; 9 Jur. (N.S.) 677; 8 L. T. 212; 11 W. R. 637.

If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the last-mentioned instrument is only revoked as to those parts where it is inconsistent, and both of the papers are entitled to probate. *Lemage* v. *Goodban*, 35 L. J., P. 28; L. R. 1 P. 57; 12 Jur. (N.S.) 32; 13 L. T. 508.

Where there are two testamentary papers, each professing in form to be the last of the deceased, the court, in determining whether one is or both are entitled to probate, must be guided by the consideration, not whether the testator intended them both together to form his will, but what dispositions of his property he designed to revoke or to retain. *Ib.*

A., by will, made in 1853, gave all his real and personal estate to B. and appointed B. sole executor, and by a subsequent will, which contained no clause of revocation, he gave two houses to C., and appointed C. sole executor:—Held, that the latter will was not inconsistent with the earlier, and therefore did not revoke it, and that B. and C. were entitled to probate of both instruments. *Geaves* v. *Price*, 3 Sw. & Tr. 71; 32 L. J., P. 113; 8 L. T. 610; 11 W. R. 809.

A testator, by his will, dated in June, 1881, gave all his property of every description to J. S., and appointed her sole executrix. In September, 1881, he executed another testamentary document, by which he gave, devised and bequeathed his share and interest in certain real property to his sister E. H., and appointed her sole executrix. The second will did not in terms revoke the first will. The second will was afterwards mutilated by the testator to such an extent as to revoke its effect entirely. The first will was, however, left intact. On the death of the testator J. S. applied for probate of the first will. It appeared that the whole estate of the testator was substantially represented by the realty, but that there was also personalty of a small amount, subject to debts:—Held, that, having regard to the provisions of s. 22 of the Wills Act, 1837, the second will in part revoked the first will, namely, as to the real estate of the testator; and that, therefore, the probate of the first will must be limited to the personal property of the testator, there being an intestacy as to his real estate. *Hodgkinson, In goods of*, 62 L. J., P. 116; [1893] P. 339; 69 L. T. 540—C. A.

The expression, "This is my last will and testament," does not operate as a revocation of a former will, without words to that effect, as regards real estate. A testator being entitled to a reversion in fee in copyhold property, which he had not surrendered to the use of his will, and being also entitled to certain freeholds in fee simple in possession, made a will in 1804, by which he affected to devise these copyholds and all other his freehold, leasehold and copyhold estates, to his wife for life, with remainder to his three younger children, Thomas, John and Eliza. In 1807 he made another will, commencing with the words, "This is the last will and testament of me," &c., and thereby, after reciting that on his death his eldest son, Edward, would become entitled to all his freehold estates, the testator gave all his real and personal estates to his wife for life, and after her death all his "property" and effects to all his children, except Edward, equally, share and share alike. The testator died in 1807, leaving his said four children, and also two others born since the date of the former will. In 1851 the reversion of the copyholds fell into possession:—Held, that, as there was freehold property upon which the general devise in the second will could operate, there was no ground for deciding that it revoked the intended devise of the copyholds by the former will:—Held, further, that it was impossible to consider the intention to devise the copyholds expressed in the first will to be a reason for supplying a surrender to the uses of the testator's will generally, and thus to make the general devise in the second will operate to pass the copyholds, by revoking the former will, except so far as it expressed that intention, because the intention expressed by the first will was to give all the copyholds to three only of the five objects to whom the general devise in the second will was made, and therefore that intention could not apply to the second will. *Freeman* v. *Freeman*, 1 Kay, 479; 2 Eq. R. 522. Affirmed, 5 De G. M. & G. 704; 23 L. J., Ch. 838; 2 W. R. 658.

A testator left three testamentary papers. The first disposed of the whole of his property. The second disposed of part only, and began with the words, "This is my last will and testament." The third, of the same date, and written on the same sheet of paper as the second, appointed executors in these terms: "Of this my will I appoint the said W. W. and C. S. executor and executrix":—Held, that, although there were no express words of revocation, and the deceased had disposed of part only of his property, the first will was revoked. *Plenty* v. *West*, 16 Beav. 173; 22 L. J., Ch. 185; 17 Jur. 9; 1 W. R. 3; 1 Robert. 264.

A testator left four testamentary instruments, duly executed. After the ecclesiastical court had held that the second and third alone were valid as to the personal estate, this court, on the certificate of the common pleas, decided that, as to the real estate, the last instrument alone constituted the last will. *Ib.*

A testamentary paper relating to real estate alone, commencing, "This is the last will and testament of me, relating to all my real estate whatsoever":—Held, totally to revoke a prior will. *Ib.*

Substitution.]—A testatrix, having made a formal will, subsequently executed a holograph will which did not contain residuary or revocation clauses, nor any powers for the administration of the estate, such as the first will did:—Held, that, as the second will disposed of all the property of the testatrix, it was to be taken to be in substitution for, and must be admitted to probate in exclusion of the first will. *Turnour, In goods of*, 56 L. T. 671; 50 J. P. 344.

A testator left two substantive wills, each disposing of his entire property. By the first, dated in 1838, he appointed executors, to one of whom he gave the residue of his estate. By the second will, dated in 1839, which contained no revocation of the prior one, he gave the whole of his property to his wife, with the exception of 5*l.*, but appointed no executors:—Held, that the second will operated as a revocation of the first will, and was alone entitled to probate. *Henfrey* v. *Henfrey*, 4 Moore, P. C. 29; 6 Jur. 355.

On construction of two wills, second held to be in substitution of first. *Hemming* v. *Gurrey*, 2 Sim. & S. 311. *See* 25 R. R. 209.

Inconsistent Clauses in same Will—Effect of.]—A testator devised different estates, consisting

of houses and land, to different devisees, some of whom were of his own name, to some in fee, and to others for life only; and, by a residuary clause, devised all the rest, residue and remainder of his messuages, lands, &c., not thereinbefore disposed of, to his wife, her heirs, executors, administrators and assigns, for ever. The following clauses were added by the testator, immediately before executing the will: "I do further give to my wife the house wherein I now live, also the cottage, and all the buildings, cattle and everything belonging to me in and about this house." I also entail my land to the Spencers' male heir, so long as one shall remain." The testator's own name was Spencer:—Held, that the devise to the wife of the residue was not affected by the subsequent specific devise, or the devise to the Spencers' male heir; that the devise of the residue, and the specific devise to the wife, were not inconsistent, and might both stand together; and that the clause as to the entail was either unintelligible or inapplicable to the property devised to the wife. *Doe* d. *Spencer* v. *Pedley*, 1 M. & W. 662; 1 Tyr. & G. 882; 5 L. J., Ex. 221.

A testator seised of freehold and copyhold property made his will, ordering, first, that his debts should be paid, and then devising to his wife for her life his house, croft and garden, part of the freehold, with remainder over. The will then proceeded: "Also I give unto my wife, her heirs and assigns, for ever, all my real and personal estate whatsoever and wheresoever unto me belonging, both freehold and copyhold, and now surrendered to uses of my will, and to have the same at my decease; but if my personal estate should not be sufficient to discharge my debts, then I charge my copyhold estate with the payment of the same." And he appointed his wife and others executors:—Held, that the latter clause of the will did not revoke the former, but gave the wife, in addition to her life estate in the freehold house, croft and garden, an estate in fee in the copyhold and the other freehold property, leaving untouched the remainder created by the first clause. *Roe* d. *Snape* v. *Nevill*, 11 Q. B. 466; 17 L. J., Q. B. 119.

Conflicting Wills and Codicils.] — Testator bequeathed a year's wages and 150*l.* to his servant, J. F. By a codicil he revoked those bequests, and gave J. F. an annuity in lieu of them. By a subsequent codicil he revoked every gift in his will bequeathed to J. F., his late outler, both the one year's wages and the further pecuniary legacy of 150*l.*:—Held, that the annuity given by the prior codicil was not revoked. *Pratt* v. *Pratt*, 14 Sim. 129; 8 Jur. 507.

A testator appointed A. B. and C. D. trustees and executors of his will. By a codicil he bequeathed to each of the trustees named in his will the sum of 5,000*l.*, on condition that he accepted the trusts thereof. By a subsequent codicil he revoked all that part of his will which related to C. D., and requested E. F. "to undertake and fulfil the same purposes and intentions, and on the same conditions for the effecting of which he had appointed the said C. D." By a subsequent codicil he revoked the appointment of A. B. and C. D. as trustees and executors, and all legacies to them, and he nominated E. F. executor and trustee thereof:—Held, that E. F. was entitled to the legacy of 5,000*l.* *Radburn* v. *Jervis*, 3 Beav. 450.

A testator bequeathed to A., B., C. and D., the sons and daughters of X., 500*l.* apiece. By a codicil he bequeathed 2,000*l.* to be divided between A., B. and C. By a further codicil he revoked and cancelled all the moneys bequeathed "to the sons and daughters of X.," in whatever will or codicil such sums might theretofore have been bequeathed, and, "in lieu thereof," he bequeathed 10,000*l.* "to the sons and daughters of X., to wit, A., B. and C.," to be divided equally between them:—Held, that the second codicil did not revoke the gift of 500*l.* made to D. by the will. *Barclay* v. *Maskelyne*, 5 Jur. (N.S.) 12.

A testator bequeathed to A. and B. 500*l.* stock apiece; he then gave his "particular residue," consisting of the residue of all his moneys and securities for money, but without including any portion which could not be bequeathed for charitable purposes, to trustees, upon charitable trusts; and he bequeathed his general residuary personal estate, including therein his particular residuary estate, if the trusts thereof should fail, to A. and B. By his first, second and third codicils he gave other stock and a sum of money to A. By his fourth codicil he revoked all the moneys bequeathed to A. and B., in whatever will or codicil such legacies might have been bequeathed, and in lieu gave stock to be divided between them:—Held, that the fourth codicil revoked the gifts of stock and money made by the will and preceding codicils to A. and B. respectively, but did not revoke the gift of the general residue contained in the will. *Ib.*

A testator, by his will, gave the residue of his personal estate to A., B. and C., to be equally divided between them. By a codicil he gave A. the arrears of rent due to him for his real estate, and the amount of any salary due to him, and also bequeathed to A. all his clothes and any other property, goods and articles belonging to him at the time of his death. By another codicil he revoked the bequest made to B. by his will:—Held, that the gift to A. by the first codicil was a general one, and that the words, "property, goods and articles," were not to be confined to articles ejusdem generis with clothes; and that consequently A. was entitled to two-thirds and C. to one-third of the residue. *Everall* v. *Browne*, 22 L. J., Ch. 376; 1 Sm. & G. 368; 1 W. R. 210, 226.

Testatrix, by her will, gave legacies of 200*l.* each to the seven children of J. B., and also other interests. By a first codicil she revoked the legacies of 200*l.* to the children of J. B., and all other gifts to them by the will, and in lieu thereof gave legacies of 200*l.* each to Samuel and four other of the children by name. She made a second codicil, simply "cancelling all legacies left on her will to the children of J. B." By a third codicil she revoked "the legacy of 200*l.* given by a previous codicil" to Samuel:—Held, that the other four legacies given by the first codicil were not revoked. *Bunny* v. *Bunny*, 3 Beav. 109; 9 L. J., Ch. 335; 4 Jur. 716.

A testator gave the income of his property to F. and two other persons successively for life, and on the death of the survivor he gave all his property to the eldest son then living of W., his executors, administrators and assigns. W. had three sons, of whom W. W. was the eldest. The testator by a codicil revoked so much of his will as related to W. W., and left F., on the death of the tenants for life, in the full enjoyment of all

his property :—Held, that the gift to F. in the codicil enlarged his life estate into absolute ownership, and being inconsistent with the gift to the eldest son of W., revoked it, whether the revocation of the gift to W. W. operated as a revocation of the gift to the "eldest son of W.," or not. *Wells* v. *Wells*, 17 Beav. 490 ; 23 L. J., Ch. 691 ; 17 Jur. 1020 ; 2 W. R. 6.

Testator by his will devised the lands of K., held for a term of years, to H. and J. Ryan, and the longest liver of them. He afterwards executed two codicils on the same day. In the first he did not mention K. by name ; but after directing two bonds to be given to his eldest son, "to create a fund to pay the rent of their lands of K.," he relinquished "a settlement made to J. Ryan, of an interest concern on this occasion, and desired that the entire interest and property arising out of this farm, after the demise and extinction of the present lease, be converted into one fund." By the other codicil he gave certain property to pay the head-rent of K. : —Held, that the bequest of K. to J. Ryan was not revoked by the codicils. *O'Shea* v. *Howley*, 1 Jo. & Lat. 391 ; 7 Ir. Eq. R. 56.

Testator by his will gave real estate, with various limitations, and also stock to his wife for life or widowhood, and after her death to the person who should be entitled to his residuary real estate, either as tenant for life or in tail male. By his first codicil he gave his residuary estate to his widow. By the fourth codicil he revoked the dispositions made of his real and personal estate ; and instead he gave his real and personal estate to his daughter ; remainder as to the same to his grandson and his heirs in strict entail, as in his will directed, but he was not to take possession till he should attain thirty-one, and, on failure of issue of his grandson, he ordered that his estate and effects should go and descend as by his will directed :—Held, that gift of the residuary property by the first codicil was not revoked by the fourth codicil, that the funded property did not fall into the residue, but was given for life to the daughter, remainder in strict settlement to the grandson for life, remainder to his eldest son. *Patch* v. *Graves*, 3 Drew. 348.

Testator devised all his real estate to his sister for life, remainder to her children as she should appoint : for want of appointment, to all her children and their heirs as tenants in common. His sister having two daughters, by a codicil, declared to be a codicil to his will, not then at hand, he gave one of them an annuity, and, directing his annuities to be paid out of his 3 per cent. stock, he charged them on his real estate in case of a deficiency, and, directing the residue of his personal estate to be invested in freehold lands and hereditaments, he recommended to his sister to settle and convey, or join with her husband in settling and conveying, all his estates and property which she might derive from him after his decease to the use of her two daughters for life, in such parts, shares and proportions as she would approve, with remainder to their respective issue, and cross-remainders, and the usual powers and clauses in strict settlement. The testator's sister died in his life, and her two daughters were co-heiresses. Some real estates were purchased between the executions of the will and codicil. As to the real estate, the will is not revoked, but is republished by the codicil, and the two nieces are entitled to all the real estates, and to those directed to be purchased as tenants in common in fee. *Meggison* v. *Moore*, 2 Ves. 630.

Effect of Several Instruments Taken Together.] —Testator, by his will, gave 500*l.* to A. and 1,000*l.* to B., to be paid within twelve calendar months after his wife's death. By a codicil of the same date he reduced those legacies to 300*l.* and 500*l.* respectively. Afterwards he formally republished his will. By a second codicil, after reciting the bequest in his will of 500*l.* to A., he revoked that bequest, and, in lieu of it, gave A. 300*l.*, to be paid at the same time as the revoked bequest was directed by his will. By a third codicil, after reciting that by his will he had given R. 3,000*l.*, he reduced that legacy to 2,000*l.*, and then directed that the 300*l.* given to A., as well as the 1,000*l.* given to B., should not be paid till twelve months after the death of his wife :—Held, taking all the instruments together, that B. was entitled to a legacy of 1,000*l.* *Grand* v. *Reeve*, 11 Sim. 66.

Construction of several testamentary papers, that some revoked others, probate having been granted of all. *Beauchamp* v. *Hardwicke* (*Earl*), 5 Ves. 280.

A testator, by his will, gave 3,000*l.* to his brother B. for life, with remainder, as to 1,000*l.*, to his wife for life ; remainder, as to the whole, to his children. He then gave 6,000*l.* to his sister S. for life, with remainder to her husband for life, remainder to her children ; and, after bequeathing 10*l.* a year to each of his two maid-servants for their lives, he gave all his real estate, and the residue of his personal estate, to his sister H. absolutely. By a testamentary paper, described as a codicil to his will, he left his brother B. an equal share of his effects with his sister, to have the interest for his life, with remainder to his children, subject to a life interest in 1,000*l.* to his wife, if living at his death ; and his sister S. was to have an equal share with his sister H. By a subsequent testamentary paper, also described as a codicil, he left his two maid-servants 10*l.* a year each for their lives, and nominated a person to act as trustee with the executors named in the will :—Held, upon the effect of all the testamentary papers taken together, that the will, though modified, was not wholly revoked by the first codicil. *Cookson* v. *Hancock*, 2 Myl. & C. 606 ; 6 L. J., Ch. 56. Affirming 1 Keen, 817.

Testator, by his will, gave all his property to his wife absolutely. By a subsequent incomplete testamentary paper he gave all his property to his wife and two other persons, in trust, to sell and pay the interest of the proceeds to his wife for her life, and after her decease to dispose of the principal to the purposes after mentioned. The testator then gave several legacies and annuities, and directed that, after the death and failure of issue of one of the annuitants, the annuity should be paid to his residuary legatee, but he did not name any. In another testamentary paper, the testator gave legacies and annuities to the legatees and annuitants named in the former paper, and also to other persons :—Held, that the three papers formed together the testator's will ; that the bequest to the wife, in the first paper, was not revoked, except so far as was necessary to provide for the legacies and annuities ; and that the legacies given by the second and third papers were single, and not cumulative. *Brine* v. *Ferrier*, 7 Sim. 549 ; 1 Myl. & Cr. 338.

Construction of a will and several very inaccurate codicils upon a disposition of the personal estate: as to the interest, whether absolute or for life; as to the extent, whether general or specific and exempt from debts. *Coxe* v. *Basset*, 3 Ves. 155.

—— **Of Gift of whole Estate.**]—Where a codicil contains an unbroken set of limitations not reconcilable with those in the will and exhausting the fee, it is to be inferred that the testator intended to dispose of the whole fee by the codicil, which he had otherwise disposed of by his will. *Daly* v. *Daly*, 2 Jo. & Lat. 752. *S. C.*, on rehearing, 8 Ir. Eq. R. 508.

Testator devised lands to the use of H. for life without impeachment of waste, remainder to trustees during his life to preserve, &c., remainder after his decease to trustees for a term of 500 years, upon trust to raise portions for his younger children, remainder to his first and other sons in tail male, with several remainders over. By a codicil to his will the testator revoked any bequest or devise to H. by any former will or codicil, and he devised the same lands to H. during his life, subject to an annuity which he had by deed charged thereon, remainder to M. during his life to preserve, &c., remainder to the first and other sons of H. in tail, remainder to M. D. in fee; and he directed that the codicil should be taken as part of his will. Semble, that the devise of the term of 500 years and the trusts thereof are revoked by the codicil. *Ib.*

A bequest of all the property that the testator might die possessed of:—Held, from expressions in a codicil of even date, to pass only a part of the testator's property. *Att.-Gen.* v. *Wiltshere*, 15 Sim. 37; 11 Jur. 792.

—— **Of Inconsistent Directions.**]—A testator directed that his trustees should stand possessed of all his freehold and copyhold estates, out of the rents and profits, but not by way of mortgage or sale, to discharge the mortgages and incumbrances affecting the same, and by a codicil directed that his trustees should out of such rents and profits (after the death of his wife) lay apart 5,000*l.* yearly, to form, with the interest, an accumulating sum for the purpose of discharging such mortgages:—Held, that the direction in the codicil was not a revocation of the direction in the will; and therefore that the trustees during the life of the wife should appropriate the whole of the rents and profits in discharging the mortgages. *Lovat* (*Lord*) v. *Leeds* (*Duchess*), 2 Dr. & Sm. 62. Affirmed, 7 L. T. 36.

A will, devising estates for life without impeachment of waste, not revoked by codicil directing the trustees to let, until tenant for life married, such leases under restrictions, one of which was that the lessees should not be unimpeachable of waste. *Lushington* v. *Boldero*, G. Cooper, 216; 14 R. R. 251.

Additional or Substituted Gift.]—A testator in his lifetime by bond secured to H. C. C. an annuity of 300*l.* for life, payable on the usual quarter-days, &c., and by his will confirmed it, and bequeathed a further annuity of 200*l.* payable in the same manner, it being his intention that she should receive an annuity of 500*l.* instead of 300*l.* By a codicil the testator directed his trustees to raise 500*l.* a year, and pay the same to H. C. C. during her life by quarterly payments:—Held, that the second annuity was not cumulative. *Radburn* v. *Jervis*, 3 Beav. 450.

Omission not Revocation.]—A testatrix, by her will, bequeathed money to trustees, upon trust, to accumulate for a period exceeding what the law allows, and to pay and divide the principal sum, interest and accumulations unto and amongst a certain class, with a power of advancement in favour of sons. By a codicil, after reciting that she had, by her will, bequeathed this sum upon trust to accumulate, and to pay and divide the same sum, and all accumulations thereof, in manner therein mentioned, she directed, that in lieu of the accumulation and disposition made thereof, by her will, the trustees should accumulate for twenty-one years after her decease, and should stand possessed of the principal money, interest and accumulations upon trust for such of the class as should be then living. The codicil did not repeat the power of advancement, but concluded by confirming the will in every particular in which the same was not thereby altered:—Held, that the power of advancement was a valid and subsisting power, and was not revoked by the codicil. *Hill* v. *Walker*, 4 Kay & J. 166.

Gift of Residue by both Will and Codicil.]—The gift of a residue which is totidem verbis the same in the first and fourth codicils, makes it manifest that the testator intended to substitute one in place of the other. *St. Albans* (*Duke*) v. *Beauclerk*, 2 Atk. 636. *And see* 1 Bro. C. C. 392.

A testator by his will gave the residue of his personal estate to his wife for her life, and after her decease to Sir C. E. D., absolutely; he subsequently, by a codicil which did not affect the gift of the residue, altered his will in some respects, and confirmed it in every other. Next day he made a second codicil, by which he gave some pecuniary and specific legacies, and concluded thus: "All the rest and residue of my property not hereinbefore (or by my will or any other codicil) disposed of, I give and bequeath to my nephew, C. P. Y., and to Sir C. E. D., their executors, administrators and assigns, after the death of my said dear wife, equally to be divided between them":—Held, that the above clause of the second codicil was a revocation of the gift by the will of the residue to Sir C. E. D., and that he was accordingly only entitled to an equal share thereof with C. P. Y. *Hardwick* (*Earl*) v. *Douglas*, 7 Cl. & F. 795; West, 555. Reversing *S. C.*, nom. *Douglas* v. *Leake*, 5 L. J., Ch. 25.

A testator bequeathed all the residue of the estate and effects, which at his death he should have power to dispose of, to trustees in trust for the separate use of a married woman for her life, with a general power of appointment over the capital of the fund, and a limitation (in default of appointment), in trust for such persons of her blood and kindred as would be entitled, under the Statute of Distributions, to her personal estate, if she had died unmarried. By a codicil he bequeathed an annuity and gave all his property, in houses or in the funds, or of any other sort, not disposed of by his will, and which had accumulated since the making thereof, in trust for the married woman and three other legatees, equally to be divided amongst them. There was, at the testator's death, no description

of property not disposed of by his will or accumulated since:—Held, that the beneficial title to the testator's property was not affected by the codicil, unless in the event of the married woman's death without having fully exercised her power, and without leaving any person of her blood and kindred living at her death. *Lee* v. *Delane*, 4 De G. & Sm. 1; 14 Jur. 861.

A testatrix gave to A. for life the interest of 300*l.*, or thereabouts, invested by her in the General Steam Navigation Company, and the interest of 200*l.*; and after A.'s death she gave the "said principal sum of 500*l.*" to A.'s children; and she directed that in case of her personal estate proving insufficient for the payment of her legacies such deficiency should be made up out of her real estate by sale or mortgage. By a codicil, she gave "all her personal estate" to B.:—Held, that the whole personal estate passed by the codicil; that the legacy of 300*l.* was specific, and was revoked by the codicil, and that the legacy of 200*l.* was not revoked, but remained charged on the real estate. *Kermode* v. *Macdonald*, 37 L. J., Ch. 879; L. R. 3 Ch. 584; 19 L. T. 179; 17 W. R. 4.

Testator bequeaths as follows:—"As to all that my leasehold house in L. and all my household goods and furniture there and at S., and as to all my plate, linen, china, pictures, live and dead stock, and all the residue of my goods, chattels, and personal estate, &c., I give and bequeath the same to A." By a codicil he revokes the bequest "of the residue" to A., and gives "the residue of his said personal estate" to B.; the gift of the general residue only, and not of the articles enumerated, is revoked by this codicil. *Clarke* v. *Butler*, 1 Mer. 304: 15 R. R. 118.

Effect of conflicting dispositions in a will and in a codicil of the same residuary personal estate. *Sanford* v. *Sanford*, 1 De G. & Sm. 67; 11 Jur. 322.

Testator, by will, distributed 7,300*l.* stock amongst several legatees, except 200*l.* surplus of the stock, which he directed to be applied in defraying any necessary expenses. By a codicil, dated two years after the will, at which time there was, by reason of certain erasures made in his will, a much larger surplus than 200*l.* stock, he left "the surplus of his money in funds," to be appropriated as his executors might think proper among the several legatees. By a subsequent codicil, dated a few days after the former, the testator, after bequeathing certain snuff-boxes, &c., and stating that there appeared "a surplus remaining after the legacies aforesaid were paid," begged his executor to distribute the same among the children of his son W. There was property of inconsiderable amount besides stock, to which the residuary bequest contained in the last codicil might be applied:—Held, that that bequest did not operate as a revocation of the bequest of the surplus of the funds contained in the second codicil. *Inglefield* v. *Coghlan*, 2 Coll. C. C. 247.

A testator directed his trustees and executors to pay his debts and funeral and testamentary expenses out of his personal estate, and if that should be insufficient, he charged them on his real estate; and he bequeathed all the rest and residue of his personal estate to his daughters. By a codicil, after making alterations in the dispositions of his real estate, he proceeded: "As to all moneys that may be left after my decease, I give and bequeath the same" upon the trusts therein mentioned:—Held, that the gift in the codicil was only a gift of the money which was in the testator's hands at his death; and that, subject to this exception, the residuary gift in the will remained in force. *Williams* v. *Williams*, 47 L. J., Ch. 857; 8 Ch. D. 789; 39 L. T. 180; 27 W. R. 100.

h. *Effect of Erroneous Assumption or Recital.*

Erroneous Assumption of Fact.]—Where a devise in a will is clear, it is incumbent on those who contend that it has been revoked by a codicil to shew that the intention to revoke is equally clear and free from doubt with the original intention to devise; for if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought to stand. *Barclay* v. *Maskelyne*, 1 Johns. 124; 28 L. J., Ch. 115; 4 Jur. (N.S.) 1293; 7 W. R. 43.

A bequest of specific chattels by will is revoked by a bequest simpliciter of the chattels by a codicil to another; but where the latter bequest is not made, but is prefaced by a recital shewing that it was founded on a misconception of the true effect of the will, the same result will not necessarily follow. *Ib.*

Thus where a will bequeathing specific chattels to A. (who was not personally known to the testator) was followed by a codicil reciting (erroneously) that by the will they were bequeathed to B. (who was uncle to A., and a personal friend of the testator), revoking that bequest on the ground that B. was lately dead, and testator's connection with his family thereby almost null, and bequeathing the same chattels to another family:—Held, that the bequest in the will was not revoked by the codicil. *Ib.*

The circumstance that it might reasonably be doubted whether, if the real effect of the will had been present to the testator's mind, he would not still have disposed of the property differently:—Held, not to affect this conclusion. *Ib.*

M., by will in 1734, before the Mortmain Act, devised particular lands and his personal estates to be laid out in land to charitable uses. By codicil, in 1736, after the act, M. declared, that if by the Mortmain Act his estates could not pass to those uses, he then devised them to B. By a second codicil in 1737, testator, reciting that he was advised his devise of the land to the charity was void, bequeathed his personal estate to the charity, and the real to B. Testator died in February, 1738. On a case stated to King's Bench, the judges certified that the estates were well devised to B. by the second codicil, and Lord Chancellor decreed the same to him accordingly. *Att.-Gen.* v. *Lloyd*, 3 Atk. 551; 1 Ves. 32.

Testatrix, by codicil, gave to A. the legacy given by her will to the children of B., "as I know not whether any of them are alive, and if they are well provided for, though they are living." B. is entitled; the construction being that, if they are living, they are well provided for. *Att.-Gen.* v. *Ward*, 3 Ves. 327.

Testator by his will gave legacies to A. and B., describing them as grandchildren of C., and their residence in A. By a codicil he revoked these legacies, giving as a reason that legatees were dead. The fact not being true, they were held entitled upon proof of identity. *Campbell* v. *French*, 3 Ves. 321; 4 R. R. 5.

A testator bequeathed the residue of his personal estate to his daughter, on trust for her maintenance and support until she attained twenty-one, or married with the consent of his trustees under that age, and, upon her attaining such age or her marriage, for her separate use, with remainder to her children, and, in case of her death without issue, then over. The testator afterwards declared by a codicil that, in consequence of a nervous debility, his daughter was unfit for the control of herself, and his will was that she should not marry, and in case of her marriage or death he gave the property he had bequeathed to her over to the same legatees in remainder:—Held, that the limitation over by the codicil, being in general restraint of marriage, was void as to the life interest of the daughter; that the court would not inquire into the fact of whether the testator was mistaken or not with reference to his daughter's health or capacity, quære. *Morley* v. *Rennoldson*, 2 Hare, 570; 12 L. J., Ch. 372; 7 Jur. 938.

A testator having by his will given 4,000*l.* to certain charitable institutions, made a codicil as follows: "Presuming and believing that the rental of my estate will produce 16,000*l.* a year, I give those institutions 4,000*l.* more." The income of the estate, however, was at his death much less than 16,000*l.* a year:—Held, that the testator's reason for the gift of the second 4,000*l.* being the supposed increase of his property, and the fact of such increase being incorrect, the gift of this 4,000*l.* failed. *Thomas* v. *Howell*, 43 L. J., Ch. 511.

A testator destroyed his will, believing that it had already been revoked by a later will, which was, in fact, invalid; and the only evidence of his object in destroying it was a declaration made at the time that it was no use to keep it, as he had another:—Held, that the will was not revoked. *Clarkson* v. *Clarkson*, 2 Sw. & Tr. 497; 31 L. J., P. 143; 6 L. T. 506; 10 W. R. 781.

—— **Of Law.**]—The destruction of a last will by burning or otherwise does not revive an earlier will; and therefore where a testatrix caused her last will to be destroyed by burning it, at the same time expressing a wish that the provisions of an earlier will (which had been in terms revoked by a clause in the said last will) should thereupon again become operative:—Held, to be only a conditional revocation of the last will, and that, as the condition was inoperative, the act of destruction was nugatory, and the last will was still valid and subsisting, and was entitled to probate. *Welch* v. *Gardner*, 51 J. P. 760.

Erroneous Recital.]—Testator, by codicil, revoked the legacy of 50*l.* bequeathed to his sister. The only legacy given to her was 100*l.* given by the will; as to the effect of the codicil, quære. *Carrington (Lord)* v. *Payne*, 5 Ves. 405; 5 R. R. 87.

Testator gave the interest of 2,000*l.* to G. S., and at his death to his children, and after making some other gifts, "the sum of 1,000*l.* to G. S., in addition to 1,000*l.* before mentioned":—Held, that the gift of 2,000*l.* was not cut down by the subsequent gift, and that the limitations affecting the first gift were not carried on to the subsequent gift, which was to G. S. absolutely. *Mann* v. *Fuller*, 1 Kay, 624; 2 Eq. R. 1085; 23 L. J., Ch. 543; 2 W. R. 510.

A testatrix by her will gives a legacy of 500*l.* to be invested, and the annual produce paid to E. H. for life, and after her death to J. H. absolutely. The testatrix then makes five codicils, by some of which she gave several legacies of the same amount to the same persons as she had previously given by other codicils anterior in date, expressing, in other instances of legacies given, that those legacies were in addition to those already given, but not using the words, "in addition to," where she gives the same sums to the same persons as before in a former codicil. E. H. dies before the testatrix, who, after the death of E. H., by a codicil to her will, declares that she revokes the legacy of 100*l.* given to J. H. Evidence is adduced to shew that the testatrix intended to cancel two of the codicils, supported by the fact that she calls her fourth codicil her third codicil, and also that she promised to settle 400*l.* on J. H. The will and all the codicils are proved, notwithstanding such evidence; and on the questions, whether the legacies given twice over were, in the second instance, substitutionary or cumulative, and whether the revocation as to the legacy called 100*l.* revoked the legacy of 500*l.* given to J. H.:—Held, that, the codicils being all admitted to probate, the legacies given twice over were cumulative and not substitutionary, and that the revocation of the legacy of 100*l.* meant to revoke the legacy of 500*l.* to the extent of 100*l.* only, and therefore J. H. was entitled to 400*l.* *Thurnall* v. *Rayner*, 4 W. R. 404.

A testator gave by will 3,000*l.* upon trust for A. and her children, and after the decease of A. without issue for the children of B. By a codicil of later date he recited that he had by his will given the 3,000*l.* to A. for life, with remainder to her children, and afterwards to B. for life, with remainder to his children; and revoked the will as to 2,000*l.*, part of the 3,000*l.*, from and after the devise to A. and her children, and instead of giving the 2,000*l.* to B. and his children, bequeathed the same to C.:—Held, that the erroneous recital in the codicil, that the 3,000*l.* was given to B. for life, did not amount to a gift of an estate in the 1,000*l.*, which remained unrevoked. *Smith, In re*, 2 John. & H. 594.

By the will the testator had also given 2,000*l.* to B. for life, with a gift over on insolvency:—Held, that if the codicil had been read as an implied gift of 1,000*l.* to B. for life, the gift over on insolvency would have attached to the 1,000*l.* as well as to the 2,000*l.* *Ib.*

A father left a legacy of 1,000*l.* to each of his two sons, H. and L., and his residuary estate between his two daughters. He subsequently executed a codicil: "Not being satisfied with the conduct of my eldest son, I hereby bequeath to him 300*l.* instead of 500*l.*, which I have bequeathed to my other children":—Held, that the codicil was inoperative, and that H. was entitled to 1,000*l.* only. *Armit* v. *Hipkins*, 28 L. T. 222; 21 W. R. 575.

The mere misrecital of a will by a codicil is inoperative, and will not modify the dispositions of the will; but an erroneous recital of a will, coupled with or followed by a clear indication of the testator's intention to make some modified or different disposition, inconsistent with the dispositions of the will, is operative to modify or alter the earlier gifts. *Margitson, In re*, *Haggard* v. *Haggard*, 48 L. T. 172; 31 W. R. 257.

A testator by his will gave to his daughter (in events which happened) an estate tail in his real property, and an absolute estate in his personal property. By a codicil, after reciting that his daughter would take an estate for life in his property, with remainder to her issue, he directed that the life estate should be for her separate use, that she should have a power of appointing a life estate to any husband who should survive her, and that if she should have more than one son, and her eldest son should inherit property from other sources of a certain value, then her second son should succeed to the property given by the will, with certain gifts over:—Held, that the estates given by the will were modified by the codicil, and that the daughter was entitled to a life estate only in the real and personal property of the testator, with remainder by implication to her eldest son absolutely, subject to the appointment by her of a life estate in favour of a husband, and to a shifting use in favour of a second son. *Ib.*

A testatrix, after giving certain legacies to the children of her deceased nephews and niece, gave the residue of her estate in equal moieties to two other nephews. By a codicil, after reciting that she bequeathed to her two nephews one-fifth of her estate, and had given the residue equally between the children of her deceased nephews and niece, she gave certain directions concerning the share of any of the said children who should not apply for it within a year:—Held, that the recital in the codicil was merely an erroneous reference to the will, and did not cut down the original residuary gift to the nephews, nor give the children of the deceased nephews and niece any greater interest than that which they took under the will. *Scarlett* v. *Thurlow*, 28 L. T. 583; 21 W. R. 728.

Testator directed his trustees to invest such a sum as would produce 40*l.* a year, and to pay the same to his daughter, and after her death to transfer the fund to his residuary legatees; and he gave 100*l.* to his daughter absolutely. By a codicil he revoked the sum of 1,200*l.* given to his daughter for her life, and gave her 500*l.* in lieu thereof:—Held, that as the 40*l.* a year was the only sum given to the daughter for life, it was revoked by the codicil. *Pilcher* v. *Hole*, 7 Sm. 208; 4 L. J., Ch. 50.

i. *Revocation of Legacies, Trusts, and Limitations.*

Legacy.]—A distinct gift by will is not to be revoked by a codicil, unless by direct words or necessary implication. Such implication will exist where the clear intention of the codicil is inconsistent with the particular gift, but not where the inconsistency existed to an equal degree in the will itself. *Butler* v. *Greenwood*, 22 Beav. 303.

A testator, by his will, gave a specific chattel to A. Afterwards, by a codicil, he gave a number of articles, and of a different kind, and of much less value, to B., and, in enumerating those articles, introduced an imperfectly written word, which might be supposed to designate the chattel previously given to A.:—Held, that the bequest to A. was not thereby revoked. *Goblet* v. *Beechey*, 2 Russ. & M. 624. Reversing 8 Sim. 24; 9 L. J. (O.S.) Ch. 200.

A testator, by will, gave B. 80*l.* per annum, long annuities, to 1860, and a deferred annuity "of 80*l.* from Christmas, 1859." By a codicil which did not mention B.'s name, he said, "I direct that my executors make my long annuities of 80*l.*, instead of 80*l.*, be only 30*l.* per annum, and a reversionary annuity purchased on her life 30*l.*, as I have lately expended money on her account":—Held, that B. was referred to, and that she was entitled to 30*l.* a year. *Ellis* v. *Bartrum*, 25 Beav. 107.

R., being in possession of mines and iron works, under leases of unequal duration, by will bequeathed 25,000*l.* to B., "as a capital for him to become partner with my executors of one-fourth share in the trade of all those works so long as the lease endures," with a devise to H. and his wife of residue of his estates, real and personal. By codicil testator gave to W. three-eighths of concern of iron works, "the partnership will stand at my death; W. three-eighths, H. three-eighths, B. two-eighths." After R.'s death, W., H. and B. carried on works for two years, selling iron manufactured not only from the produce of the mines, but from other sources:—Held, that codicil revoked residuary clause in favour of H.'s wife as to the trade, and that concern was a partnership in trade. *Crawshay* v. *Maule*, 1 Swanst. 495; 1 Wils. 181; 18 R. R. 126.

Devise.]—A testator, by a will made in 1832, devised his real estate to A. By a codicil he said, "I acknowledge B. to be my next of kin and heir-at-law of all my personal property":—Held, that the codicil revoked the devise to A., and B. took the estate absolutely. *Parker* v. *Nickson*, 9 Jur. (N.S.) 451; 7 L. T. 813; 11 W. R. 533.

The word "acknowledge" was sufficient to indicate an intention that the person named should be recognised as filling that character, which would entitle him by law to the whole of the real estate. *Ib.*

Testator devises to A. all his dividends on his South Sea annuities, and afterwards by codicil gives to C. an annuity for life, payable out of his South Sea annuities:—Held, not to be a revocation in toto, but both devises may stand consistently together. *Stone* v. *Evans*, 2 Atk. 86.

After a trifling specific bequest a testator gave his residuary real and personal estate for the benefit of his grand-daughter and her children. By a codicil, which he directed to be annexed to and taken as part of his will, he, in consideration of the faithful services of his servant R., gave and bequeathed to him the whole of his estate and all his household goods and furniture, linen, china, watches, and all other his personal property and effects, free from legacy duty; and confirmed his will in all other particulars:—Held, that the devise in the will of the real estate was not revoked by the codicil. *Molyneux* v. *Rowe*, 8 De G. M. & G. 368; 4 W. R. 539.

Contingent Gift.]—A legacy is given to M., with a contingent limitation over to N. in the event of M. dying without children. The legacy to M. is adeemed by a subsequent gift to M. in the lifetime of the testatrix, to which no limitation in favour of N. is attached. The legacy is not merely adeemed as to M., but also extinguished as to N. *Twining* v. *Powell*, 2 Coll. C. C. 262.

A testator, by his will, gave the income of shares in a bank to E., a married woman, for life, provided she were a widow at the time of

his death, or should become such afterwards, but during her widowhood only; and gave the income during the coverture of E. to P. He also gave P. 800*l.*, in case E. should become a widow, in lieu of the income of the shares. By a codicil, the testator revoked the gift of this income, and gave a portion of the income to E. for life, whether she were a widow at the time of his death or not, or should become such afterwards or not. At the time of the testator's death E. was under coverture:—Held, that P. was not entitled to the 800*l.* at the death of the testator, and would become entitled only in the event of E. becoming a widow. *Morrison* v. *Morrison*, 2 Y. & Coll. C. C. 652; 13 L. J., Ch. 68; 8 Jur. 304.

What Property Referred to.]—A., by will, bequeathed his ready money, and money out at interest at his decease, to trustees, upon trust to pay thereout legacies, and in the next place to pay, distribute, and divide all the remainder unto and between his nephews and nieces; but directed that in case of the death of any of his nephews or nieces before receiving their shares, then the share or shares of him, her, or them so dying should be paid to the survivors. By a codicil he gave to his wife all his real and personal estate and effects which he should be possessed of or entitled to at time of his decease, to hold the same during her life:—Held, that the bequest in the codicil did not include the ready money, &c., mentioned in the will. *Arrowsmith, In re*, 2 De G. F. & G. 474; 30 L. J., Ch. 148; 7 Jur. (N.S.) 9; 9 W. R. 258—C. A.

A., after giving legacies to charities and individuals, directed that the residue of moneys to arise by sale and conversion of his real and personal estate, after payment of debts and the legacies "herein" mentioned, should be divided between certain charities, and that such part of his estate as charities could not take should be first applied in payment of "legacies herein mentioned" not given to charities. By a codicil he revoked the residuary bequest, and varied the amounts of charitable legacies, and after payment of funeral expenses and legacies he might subsequently make gave the residue of his property to charities:—Held, on the construction of will and codicil as one instrument, that the direction in the will extended to the codicil, and that "property" must be cut down to "pure personalty." *Jauncey* v. *Att.-Gen.*, 3 Giff. 308; 8 Jur. (N.S.) 6; 5 L. T. 374; 10 W. R. 129.

A testator devised to his sister nine houses absolutely. He then bequeathed 4,000*l.* to trustees, upon trust, by a proper deed and declaration of trust, to provide stipends and annuities for aged persons, with a direction that such deed should contain rules for the management of the institution, and for regulating the age and conditions upon which persons should be admitted thereto; and he begged to point out to his sister, but not intending to impose any obligation whatever upon her, that the nouses which he had devised to her might be converted into eligible almshouses for the recipients of his bounty. He made a codicil, confirming his will in all respects, except such parts thereof "as relate to the building of almshouses, which part I hereby revoke, and desire that my executors may be released from carrying out the same, and the stipends and annuities connected therewith":—Held, that the bequest of the 4,000*l.* was revoked by the codicil. *Baldwin* v. *Baldwin*, 22 Beav. 419; 26 L. J., Ch. 121; 2 Jur. (N.S.) 773.

A testator gave seven cottages specifically described, together with other property, also specifically described. By a codicil he recited the gift by the will, referring in terms to the property described other than the seven cottages; he then revoked the gift of the property described in the recital, and gave the property "included in the hereinbefore-mentioned devise" in a different manner and upon other trusts:—Held, that the gift of the seven cottages was not revoked, but they passed under the devise upon the trusts named in the devise. *Hinchcliffe* v. *Hinchcliffe*, 2 Dr. & Sm. 96; 5 L. T. 660.

A testator bequeathed 12,000*l.* among his younger children, and his household furniture and live and dead stock to such of his daughters who should attain twenty-one, and other portions of his property, real and personal, to his children, and the residue of his property to his daughters. He made a codicil to his will, commencing thus: "Codicil to my will of the, &c. Four of my children having died since the execution of the will, I alter the disposition of my property as follows." He bequeathed 4,000*l.* each to his three surviving daughters; and in case of one dying unmarried, her portion to go to the survivors; but in the event of more than one dying unmarried, her portion to go among his sons, as he was of opinion that the sum of 6,000*l.* was a sufficient portion for any girl; and he bequeathed to his two surviving sons the remainder of his property in equal proportions, of whatever kind it might consist at the time of his death. He gave certain directions as to the management of mills which he held in partnership, devised his property over in the event of his sons dying without issue, and appointed executors of the codicil, as of "his last will and testament":—Held, that the bequest of the household furniture, &c., in the will was not revoked by the codicil. *Pilsworth* v. *Mosse*, 14 Ir. Ch. R. 163.

Testator drew two cheques on his banker in favour of two of his servants, and delivered them to the servants, with directions to present them after his death. About a year afterwards he made a testamentary instrument, by which, after giving legacies to different persons, and an annuity to each of the two servants, he bequeathed the residue of his personal estate to A. B., and revoked any former will or codicil by him made, and declared that instrument to be his last will. Three paper writings were admitted to probate as constituting together the testator's last will:—Held, that though the court of chancery was bound to consider the amounts of the cheques as legacies, they were revoked by the subsequent instrument. *Walsh* v. *Gladstone*, 13 Sim. 261. Affirmed, 1 Ph. 294; 13 L. J., Ch. 52; 7 Jur. 1143.

Effect of Trusts or Limitations subsequently Imposed.]—Where a will shews plainly that the original intention of a testator was to give a legatee an absolute interest in a legacy, a subsequent alteration of such bequest in a codicil will not vary the will to any greater extent than is plainly expressed on the face of the codicil. *Norman* v. *Kynaston*, 3 De G. F. & J. 29; 7 Jur. (N.S.) 129; 3 L. T. 826; 9 W. R. 259. Affirming 29 Beav. 96; 30 L. J., Ch. 189.

A testatrix by her will desired that all her fortune should be divided between R. N. and A. K. By a codicil, after stating that A. K. was dead, she expressed her desire that her fortune should be divided between R. N. and T. K., adding these words: "For the use of their children, and when they come of age to have settled upon them, share and share alike." R. N. died after the testatrix, never having had any children:—Held, that the absolute gift of the moiety to him was not revoked; it was only limited to the extent that a beneficial interest was given to his children which afterwards failed. *Ib.*

Bequest, by codicil, that dividends only of legacies which had been bequeathed by will should not be paid to legatees, and that the legacies should not be paid to them, leaving the principal not further disposed of, is equivalent to gift of the corpus, and is a gift of the principal. *Richards* v. *Richards*, 9 Price, 219; 23 R. R. 665.

Testator gave 4,000*l.* to his granddaughter and directed his executors to pay it to her on her attaining twenty-one, and to apply the interest of it for her maintenance during her minority. By a codicil he directed that his granddaughter should have only the interest of 2,000*l.* for her maintenance until she attained twenty-three, and that the interest of the other 2,000*l.* should be accumulated, and that, on her attaining twenty-three, his executors should have the whole settled upon her for life, and, after her death, to her child or children, in equal proportions, so that no husband of hers might spend it. The granddaughter attained twenty-three, and died without having had a child, and without the executors having made any settlement of the legacy:—Held, that the gift in the will was an absolute gift, and that, in the events that had happened, it was not affected by the codicil. *Bell* v. *Jackson*, 1 Sim. (N.S.) 547.

A testatrix having a son and two daughters, gave 6,000*l.* 3 per cent. stock to her son for life, remainder as to one moiety of it to eldest male child living at her decease, and as to the other moiety to his other children. She also gave 6,000*l.* like stock to her daughters for their respective lives in equal shares, remainder to their children, and she further gave a sum of bank stock to her three children in equal shares during their lives, and the share of each was at his or her death to revert to their issue in equal shares. Subsequently she made a codicil, in which she desired that her grandchildren's shares of these two stocks should be settled upon them for their lives and afterwards upon their children:—Held, that by the operation of the codicil the moiety of 3,000*l.* 3 per cent. stock, which by the will was given absolutely to the eldest male child of the testatrix's son living at her death, was well limited to that male child for life, with remainder to her children; that as to all the other bequests the attempt to extend the limitations to great-grandchildren was ineffectual, and that the absolute interests given by the will to the grandchildren were not destroyed or restricted by the codicil. *Arnold* v. *Congreve*, 1 Russ. & M. 209; Taml. 347; 8 L. J. (o.s.) Ch. 88; 31 R. R. 106.

—— **Of Two Residuary Gifts in the Same Instrument.**]—A testator, possessed of considerable real and personal estate, primarily charged the real estate with the payment of certain annuities to his wife, his two daughters, and his son, and desired that his trustees should, during the lives of his wife and daughters, accumulate the rents of his real estate for the purposes of his will, and on their deaths devised those estates over. He also bequeathed a sum of 3,000*l.* 3½ per cent. stock to the trustees upon trust, out of the interest and dividends to pay an annuity of 105*l.* to his youngest daughter for her life, and upon trust as to the principal, in case she married with the consent of the trustees, for her issue; but if she married without such consent, then as to 1,000*l.* upon trust as she should appoint; and as to the remaining 2,000*l.*, that it should form part of the testator's estate, to be applied as he should direct. The testator also directed that, in case the annuities given to his wife and daughters and son should be unpaid for four months after due, the trustees should, "out of the accumulation of the moneys in their possession, exclusive of the sum of 3,000*l.* so left to his youngest daughter, and which he directed should be left untouched for the purposes of his will, pay and assist in discharging the annuities so in arrear, and should, out of the moneys which should next come to their possession, replace the sums" so advanced. And he directed that the trustees should, after first paying those annuities and the several legacies charged upon one of his real estates, invest the rents of that estate in government stock, and pay thereout to his grandchildren living at his death 300*l.* each, and any deficiency in those legacies he desired should be made good out of his other real estates. And all his other property, of what nature soever, including a policy of insurance, he devised and bequeathed to his trustees to invest for the purposes of his will. And as to the proceeds of that policy and the remainder of his personal property invested, or to be invested, as well as the overplus of his income not thereby disposed of, excepting the sum of 3,000*l.* left as above to his youngest daughter, and excepting such parts of his personal property as might be necessary to be applied in payment of the annuities and legacies bequeathed by him, he directed that it should remain invested during the lives of his wife and daughters, and until his grandchildren should attain twenty-one or marriage, and be paid to those grandchildren in equal shares at twenty-one or marriage, with interest at 5 per cent., to commence from one year after his death. Then came a clause directing that any surplus which should remain after satisfying the several purposes of the will should be applied by the trustees in payment, or assisting in payment, of a sum of 5,000*l.*, charged by settlement on one of his real estates for the younger children of his late son J.; and in case such surplus should be more than sufficient to discharge that sum, then the surplus to be paid to such younger children in equal shares on attaining twenty-one or marriage, subject, however, to the payment and discharge of all and every the sums and charges thereinbefore charged and created on said general fund by the will:—Held, that the annuity of 105*l.* given to the testator's youngest daughter was not reduced by the stat. 7 & 8 Vict. c. 5, which lowered the rate of interest upon 3½ per cent. Government stock to 3¼ per cent.; and that the trustees should make up any deficiency arising in the dividends of the sum of 3,000*l.* out of the accumulated fund; held, also, that the residuary bequest to the grandchildren generally of the testator was inconsistent with the residuary bequest to the younger children of his son J.,

and, therefore, that the latter bequest must prevail. *Fitzpatrick* v. *Knaresborough*, Ir. R. 13 Eq. 338.

A., after many pecuniary and other specific bequests, proceeded, "The remainder of my property I leave to my sister S.," then, after a few legacies, "I appoint my two sisters, S. and O., my executrixes and residuary legatees of this my last will":—Held, that the gift of the remainder of her property to S. was not revoked, and that the appointment of S. and O. residuary legatees only gave them any legacies which had lapsed. *Jessop, In re*, 11 Ir. Ch. R. 424.

A testator bequeathed his residue in trust for his sisters and their issue, and he afterwards, by the same instrument, appointed his wife "his residuary legatee":—Held, that the latter clause did not revoke the former. *Davis* v. *Bennet*, 30 Beav. 226.

A residuary bequest following upon a gift of the remainder of an estate does not operate to defeat the gift of the remainder, the word "residue" meaning anything or nothing, as the event may prove. *Kilvington* v. *Parker*, 21 W. R. 121.

When, therefore, a testator gave the remainder of his property to three legatees after satisfying certain legacies and annuities, and made his son legatee of the residue, the respective amounts answering the annuities for the lives of the annuitants went to the legatees in remainder, and not to the residuary legatee upon the deaths of the several annuitants. *Ib.*

A testator, after directing the payment of his debts and giving certain specific legacies as to the rest, residue, and remainder of his real and personal estate, devised and bequeathed the same to trustees upon trust to pay a certain pecuniary legacy, and as to the remainder of his real and personal estate upon trust for conversion, and after making an elaborate disposition of his property in favour of his sons and daughters and his granddaughter, the testator, as to all the rest, residue, and remainder of his real and personal estate, gave, devised, and bequeathed the same to all his sons and daughters and his granddaughter, or the survivors of them, their heirs and assigns, share and share alike, as tenants in common:—Held, that the gift of the residue contained in the last clause of the will did not operate to extinguish the previous disposition made by the testator, but to dispose of such interest as was left undisposed of by the previous disposition. *Kilvington* v. *Parker*, supra, followed. *Bristow* v. *Masefield*, 52 L. J., Ch. 27; 31 W. R. 88.

Gift to Individuals or Class—Subsequent Alteration.]—By a will specific and pecuniary legacies were given to several legatees by name, and the testator gave all the residue of his personal estate to all the before-mentioned pecuniary legatees, with certain exceptions, to be divided between them in proportion to their pecuniary legacies. By a codicil, after reciting the death of one of the pecuniary legatees, the testator bequeathed the legacy given to her by the will to B.:—Held, that there was an intestacy as to the share of the residue given by the will to the deceased legatee. *Gibson's Trust, In re*, 2 J. & H. 656; 31 L. J., Ch. 231.

Bequest of residue to the children of A., the children of B., to C., to the children of D., and to E., in equal shares. Revocation by codicil of the gifts to C. and to the children of A., with a declaration that they should not be residuary legatees:—Held, that the gift of residue was to the residuary legatees as a class, notwithstanding that some of the individuals to take were named; and that the effect of the will and codicil, taken together, was to give all the residue to the legatees whose bequests were not revoked. *Clark* v. *Phillips*, 17 Jur. 886.

Will to be read as if Name of Legatee omitted.]—A testatrix by her will bequeathed her watch to her granddaughter M. and her brooch to her granddaughter J.; and, after giving certain pecuniary legacies, bequeathed to M. a legacy of 200*l.* A codicil made by the testatrix three years later, after reciting the legacies of the watch and brooch, continued as follows:—"Now I hereby revoke and make void the said legacies and bequests in my said will contained in favour of the said M. and J., and declare that my said will shall be read and construed in all respects as if the names of the said M. and J. had not been inserted therein, and in all other respects I confirm my said will":—Held, that the legacy of 200*l.* was not revoked by the codicil. *Percival, In re, Boote* v. *Dutton*, 59 L. T. 21—C. A.

Testator, by a will made since the statute 1 Vict. c. 26, bequeathed the residue of his personal estate and certain freehold and leasehold estates in equal shares to L., M., N., O. and P.; in a subsequent part of his will he bequeathed to H. one-half of the legacy named to each of the other legatees, that is to say, one-half what his brother M. ought to receive. By a codicil the testator declared as follows: "I revoke all that part written in my former will which leaves a legacy to H., written in my will on the thirty-second and thirty-third lines":—Held, that by force of this revocation the will was to be read as if the gift to H. were not in it; consequently, that such revocation enured to the benefit of the other devisees and legatees. *Harris* v. *Davis*, 1 Coll. C. C. 416; 9 Jur. 269.

Trusts or Limitations—Total Revocation of.]—By a will a testator bequeathed stock to his granddaughters absolutely. By a codicil he revoked the bequest, and directed his trustees to hold the stock for his granddaughters for life, with remainder to their issue:—Held, that this was a total revocation of the first gift, and the issue having failed, that the stock fell into the residue. *Nevill* v. *Boddam*, 28 Beav. 554.

Several legacies given to R. J. by name, and a bequest to E. I. and S. C. for their lives, and to the survivor of them, and after the decease of the survivor equally among all the children of E. I. and S. C. living at that time, to be vested at twenty-one, or on death before leaving issue. Codicil revoking all the legacies, bequests, and benefits, in and by the will given to R. J. therein named, in lieu whereof the testator gave to R. J. 1,000*l.* 2 per cents. R. J. was the only issue of E. J. and S. C.:—Held, that the gift to him as such issue was revoked by the codicil. *Cotterell* v. *Sanderson*, 1 Jur. 474.

Testator devised his estates at S. and H. to trustees, in trust, if there should be only one son of D. who should attain twenty-one, for that son, and in case there should be two or more such sons, in trust for the second of them, and gave all the residue of his estates to trustees in trust to sell. He afterwards erased, and by

codicil declared that he intended to erase the direction to sell only; he then gave all his estates to the son of D. who should first attain twenty-one, and change his name to E. D., at death of testator, had a son who was still an infant, and afterwards had another son:—Held, the codicil revoked the devise of the S. and H. estates, and also the devise of the residues of his estates to the trustees, and that D.'s eldest son took under this codicil an immediate vested interest, both in the estates of which the testator was seised at the date of his will, and those he afterwards purchased, and consequently was entitled to the rents during his infancy. *Duffield* v. *Elwes*, 2 Sim. & S. 544; 4 L. J. (O.S.) Ch. 189. *See* 25 R. R. 266. *See this case on appeal*, 3 Bli. (N.S.) 260.

Revocation of both Intermediate Estate and Remainder.]—The testator bequeathed the residue of his personal estate to his daughter upon trust for her maintenance and support, until she attained twenty-one, or married with the consent of his trustees under that age, and upon her attaining such age or her marriage, for her separate use, with remainder to her children; and in case of her death, without issue, he bequeathed the same to certain legatees in remainder. The testator afterwards declared by a codicil, that, in consequence of a nervous debility, his daughter was unfit for the control of herself, and his will was that she should not marry; and in case of her marriage or death, he gave the property he had bequeathed to her over to the same legatees in remainder. The limitation over by the codicil, being void as to the life interest of the daughter, as being in general restraint of marriage, quære, whether the interest in remainder bequeathed to the children of the daughter by the will was revoked by the codicil. *Morley* v. *Rennoldson*, 2 Hare, 570; 12 L. J., Ch. 372; 7 Jur. 938.

A will reciting that the testator was entitled to a remainder in fee, expectant on the death of his wife, he devised the same, after the death of his wife, to his son W. for life, and after his decease to the child or children of W.; and for default of such issue to his own heirs. By a codicil he retracted the devise to W., and gave to his wife and grandchildren (issue of his son J.) what he originally allotted to W.:—Held, that the remainder in fee passed by the codicil to the wife and grandchildren. *Madden* v. *Kirwan*, Ir. R. 7 Eq. 570.

Semble, the gift in the will to the children of W. was revoked by the codicil. *Ib.*

A testator gave to his eight nephews and nieces, naming them, provided that if any of them should die in his lifetime without leaving children; or, as to the nephews, should survive him and die under twenty-one, without leaving children; or, as to the nieces, should survive him and die under twenty-one, without having been married, the share of each of them so dying, as well original as accruing, should go to the survivor and survivors, other and others. The testator revoked the trust created as regarded two of his nephews, A. and B. A. had attained twenty-one, survived the testator, and was living. B. attained twenty-one and died, living the testator:—Held, that the limitations over of their shares were revoked, and that they went to the heir-at-law and next of kin. *Boulcott* v. *Boulcott*, 2 Drew. 25; 23 L. J., Ch. 57; 18 Jur. 231; 2 Eq. Rep. 457; 2 W. R. 52.

Testator, by his will, devised his messuages, tenements, &c., called P., to J. L., for life, with remainders to his first and other sons in tail; and he devised his messuages, tenements and lands, known by the name of C., to J. P., for life, with remainder to his first and other sons in tail; and, in subsequent parts of his will, he mentioned the estate as his P. and C. estate. By a codicil, after reciting that he had given the P. estate to J. L., he revoked the said P. estate, and gave it to J. P.; and, after further reciting that he had given the said C. estate in his will to J. P., he revoked the said bequest, and gave the said C. estate to J. L.:—Held, that the limitations in the will of the two estates were revoked, and that J. P. took P. in fee; and J. L., C. in fee. *Phillips* v. *Allen*, 7 Sim. 446.

A testatrix having, by her will, devised two different properties among her nephews successively for life, remainder to their issue in strict settlement, making A. the head of one set of the limitations, and B. of the other, by a codicil reciting that she had made devises to A. and B. respectively, and that she wished to make them change places as to the properties so devised, revoked "the said bequests by my will made to the said A. and B. respectively," and left and bequeathed "the property and provision by my said will devised to the said A. to B., his heirs, executors, administrators and assigns," and in like manner "as to A. and his heirs, &c.," with respect to the property devised by the will to B.:—Held, that the codicil revoked all the limitations in the will subsequently to A. and B.'s estates respectively, and vested the respective properties in A. and B. absolutely. *Murray* v. *Johnston*, 2 Con. & L. 104; 3 Dr. & War. 143.

—— **Of Power of Appointment.**]—A testator, by his will, gave his real estates to his wife for life, and, after her death, he directed them to be sold, and one moiety of the proceeds to be paid to his wife's relations as she should appoint, and, in default of appointment, to her next of kin, and the other moiety to his own next of kin. By a codicil he expressed his will that his real estate should be sold at any time, either before or after his wife's death; the interest of the share bequeathed to his own relations after his wife's death to be paid to her, and the other moiety devised by his will to be paid to his wife for her own use:—Held, that the power of appointment given by the will was revoked by the codicil, and that the wife took an absolute interest in one moiety of the proceeds of the testator's real estate. *Ankers* v. *Sandford*, 4 Jur. 817.

—— **Of special Power of Sale by Inconsistent Devise.**]—Power given by will and codicil to sell to certain persons at a fixed price, revoked by a subsequent codicil devising the premises to trustees to be sold for the payment of debts, and subject thereto upon the limitations of the will. *Bridges* v. *Rice*, 1 Jac. & Walk. 74.

Whether power in a will to sell several estates to certain persons at a fixed price, is entirely revoked by a codicil devising one of the estates to different uses, quære. *Ib.*

Partial Revocation — Of Trust declared by Reference.]—A testator, in the case of an event which happened after his death, directed a freehold estate to be sold, and the produce applied upon the trusts, intents and purposes afterwards

expressed in his will, as to his residuary personal estate; by a codicil he revoked the gift in his will of his residuary personal estate, and made a new disposition of it. The produce of the freehold estate is not thereby affected, but passes upon the trusts, intents and purposes which were expressed in the will as to the residuary personal estate. *Francis* v. *Collier*, 4 Russ. 331.

A testator gave to each of his daughters a legacy of 1,500*l.*, and also gave a legacy of 6,500*l.* upon trusts to each of them and her children, and in the event of any of the daughters dying without issue, or, having children, they should die without attaining a vested interest, he directed that the 6,500*l.* legacy of each of such last-mentioned daughters should go over to the other daughters and their children, in equal shares per stirpes, their respective shares to be held upon the same trusts for them and their respective children as were declared concerning their original legacies of 6,500*l.* Afterwards, on the marriage of E., one of his daughters, he settled on her by deed 8,000*l.* By a codicil reciting the gift of the two sets of legacies and the advance of the 8,000*l.*, and that the testator intended it to be in satisfaction of the two legacies of 1,500*l.* and 6,500*l.*, bequeathed to or for her benefit as aforesaid, he revoked the legacies of 1,500*l.* and 6,500*l.*, in and by his will given and bequeathed "to or for the benefit" of his daughter A., "and otherwise as in the will" was mentioned:—Held (reversing 3 Jur. (N.S.) 151; 5 W. R. 329), that the codicil revoked only the original legacies of 6,500*l.* and 1,500*l.* to E. and her children, and not their contingent interest under the gift over of the other 6,500*l.* legacies. *Agnew* v. *Pope*, 1 De G. & J. 49; 3 Jur. (N.S.) 625; 5 W. R. 512.

Held, also, that though the trusts of the accruing shares in favour of E. and her children were declared only by reference to the trusts of their original legacy, the revocation of the original legacy did not invalidate the declaration of the trusts of the accruing shares. *Ib.*

—— **Of Gift of Income, not of Corpus.**]—A testator, by will, bequeathed the sum of 6,000*l.* to trustees upon trust to pay the income to his widow for life, for the maintenance of herself and two infant children, and, after her death, he gave the corpus to the children on their attaining twenty-one. One of the children having died in the testator's lifetime, he made a codicil to his will, by which, after reciting the gift of 6,000*l.* to have been intended as a provision for his widow, and to enable her to support the infants, he revoked "the said legacy," and bequeathed to his trustees the sum of 4,000*l.*, the income of which he directed to be paid to his wife for the support of herself and the surviving infant child:—Held, that the revocation by the codicil of the 6,000*l.* given by the will was confined to the income of the widow, and that the gift of the corpus of the 6,000*l.* was not affected by the codicil. *Stocks* v. *Hammond*, 2 N. R. 307.

The will also contained a power to the executors to make a specific appropriation of any investments of the testator to the extent of 6,000*l.* for the purpose of answering the annuity given to the widow. The codicil which substituted the 4,000*l.* for the 6,000*l.* did not repeat or contain any reference to this power:—Held, that the power must be deemed to be revoked, and that consequently the widow was not entitled to have the income of bank shares of the value of 6,000*l.* belonging to the testator at the time of his death, and yielding a large rate of interest, specifically appropriated for her benefit. *Ib.*

—— **Of Shares, not of Manner of Gift.**]—A testator gave real and personal estate to trustees to pay the rents and dividends and interest to his father and mother for their lives in succession, and then to E. D. and her issue equally, after the determination of the previous estates; with remainder, in default of such issue, or if they died under twenty-one, as to one-half part of the realty, and residue of the personalty, amongst the sons and daughters of his uncle L. living at the testator's death, and the issue of such as were then dead. And as to the remaining half of the rents and dividends and interest to his aunt for life, remainder to her daughter E. for life, and after the death of the survivor to the children of E. then living, and the issue of such as were dead, with benefit of survivorship. By a codicil the testator revoked the ultimate distribution of the residue directed by the will, and instead of dividing it into two parts, gave it to all his cousins equally, E. taking as one. The testator's uncle had seven children, and five predeceased the testator:—Held, that the codicil was a revocation of the shares, not the manner in which they were given; and that the property was divisible into fifths—two to the surviving children of L., and the others to E., and the issue of the deceased children of L. *Leicestor* v. *Wood*, 15 W. R. 308.

A testatrix gave her residuary personal estate to trustees in trust as to one-fourth for her granddaughter A., and as to the remaining three-fourths in trust for the children of her daughter B., with certain after limitations. Afterwards, by an informal codicil, she desired her will to be altered, so that instead of her granddaughter A. receiving one-fourth part of the trust estate, such estate should be equally divided between A. and the children "now born or hereafter to be born" of her daughter B. The will directed the trustees to hold the residuary personal estate in the proportions above mentioned on certain trusts in favour of A. and the children of B., with certain limitations over:—Held, that the codicil merely altered the proportions and did not affect the trusts and limitations. *Armitage* v. *Ashton*, 20 L. T. 102.

—— **Of Intermediate Estate, not of Remainder.**]—A. by his will devised certain lands to B. and his heirs, in trust for the use of his son R. for life, remainder to be to preserve contingent remainders, remainder to the first and other sons of R. in tail male, with remainders over. A., by a codicil, reciting that by his will he had devised these lands to R. and his heirs on the trust therein mentioned, proceeded thus: "I do hereby revoke that part of my will whereby I devised the said lands unto my son R.; and I hereby devise, &c., the said lands unto my sons W. and R. and to the survivors of them, and the heirs of such survivor, upon certain trusts thereinafter mentioned, and to and for no other use, &c., whatever; and I do hereby ratify and confirm my said will in all its parts, save so far as it has been revoked and altered by this present codicil, which is to be taken as part of my said will." The trusts of the codicil did not exhaust the fee, and were such as might be satisfied during the life of R.:—Held, that the life estate of R. alone was completely revoked, and that, subject to the new trusts, the remainder to his sons in tail was unaffected by the codicil. *Fitzmaurice* v. *Sadlier*, Ir. R. 12 Eq.

544. Reversing on this point, 12 Ir. Eq. R. 136. And see *S. C.*, 9 Ir. Eq. R. 595.

The rules limiting the extent of revocations effected by codicils considered. *Ib.*

A testator gave the dividends of a sum of stock to his son A., and after his death he gave the capital to A.'s children on their attaining twenty-one; and after giving other legacies in similar terms to his other sons and daughters, he gave the dividends of his residuary personal estate, after his wife's death, to his seven children, "or such of them as should be entitled thereto," during their several and respective lives, to be divided between them in the proportions which the yearly dividends thereinbefore specifically bequeathed to them respectively bore to one another; and after the deceases of the said children, he gave the capital between the children of all his seven children equally on their attaining twenty-one. By a codicil, the testator, after reciting the gift of the dividends to his son A., revoked "the said legacy," and gave him the dividends of a similar sum:—Held, first, that the codicil revoked only the life interest given to A., and that his children were entitled to the larger legacy under the terms of the original will; secondly, that the difference of interest of these legacies during A.'s life and the difference of the interest of the shares of the residue, which was reduced in like proportion, fell into the income of the residue; thirdly, that in the case of children of the testator dying either before or after the widow the surviving children were entitled to the income of the shares of the deceased children until the death of the last survivor. *Alt* v. *Gregory*, 8 De G. M. & G. 221; 2 Jur. (N.S.) 577; 4 W. R. 436.

A testator gave to trustees for the benefit of his wife "as concerning my mansion-house, land, and premises called O., now in my occupation, to permit her to reside in and occupy the same so long as she shall think proper," with conditions as to residence, and from and after her decease to his son for his own absolute use. By a codicil he recited that he had pulled down the mansion-house, offices, and buildings, called O., and was erecting another mansion-house, and he directed that his trustees should hold the new mansion-house on the like trusts as by his will were expressed and declared of and concerning his mansion called O., and in all other respects he confirmed his will:—Held, that the codicil was, pro tanto, a revocation of the will, and the gift over of the estate at O. to his son took effect on the testator's death. *Poore* v. *Wright*, 3 L. T. 773.

Devise and bequest of real and personal estate to a person for life, with limitations over. By a codicil reciting the devise and bequest, and also the limitations over, the devises and bequests were revoked "so far as related to the tenant for life"; but "estates," both real and personal, out of which the interest of the tenant for life was carved, were directed to sink into the residue:—Held, that this was a revocation of the interest of the tenant for life only. *Ives* v. *Ives*, 4 Y. & Coll. 34; 4 Jur. 265.

A testatrix gave all her personal estate to her sisters Mary, Sarah, and Ann upon trust to invest and pay the income to her said sisters in equal shares during their lives, with benefit of survivorship, and after the death of the survivor, in case any of her nephews D. W. S. and R. O. S. and her niece M. A. S. should be then living, she gave her personal estate to T. R. and J. upon trust to transfer the sums invested as aforesaid, and all interest unto the said D. W. S., R. O. S., and M. A. S. in equal shares and proportions; and if but one of them should be then living, then the whole of such principal sums, &c., to be paid or assigned to such one, his or her executors, administrators, and assigns absolutely. But in case of the death of the testatrix's said nephews and niece, leaving either of her said sisters surviving, the testatrix gave and bequeathed all the said principal sums, &c., and all other her estate unto the survivor of her said sisters absolutely. The testatrix made a codicil, whereby she requested "all names of T. R., J., and of D. W. S., R. O. S., and M. A. S., and any other of her friends except her three sisters, to be considered the same as if omitted from her will":—Held, that the omission of these names did not strike out the gift of the capital to the surviving sister, who took absolutely. *Stephenson* v. *Stephenson*, 56 L. T. 75—C. A. Affirming, 54 L. J., Ch. 928.

A testator bequeathed his residuary estate upon trusts for the benefit of his children, and as to the sons' shares he directed that one moiety should be held absolutely, and that the other moiety should be settled. By a codicil the testator revoked every devise and bequest to or in favour of his son S.:—Held, a revocation of the interest of the children of S. in the settled moiety. *Tabor* v. *Prentice*, 52 L. T. 85; 32 W. R. 872.

—— **Of Charge on Realty not of Charge on Personalty.**]—A testatrix having by her will blended the proceeds of her real and personal estate into one fund, and having made a charge not exceeding 5,000*l.* on such mixed fund in favour of A., subsequently by codicil devises her real estate to A. in fee simple, freed and discharged from all her debts, liabilities, and engagements, and also from any charges created by her said will, if any. On the question whether the exoneration of the real estate devised to A. by the codicil threw the burthen of the whole charge of 5,000*l.* upon the residuary personal estate:—Held, that it did. *Tatlock* v. *Jenkins*, Kay, 654; 23 L. J., Ch. 767; 18 Jur. 891.

—— **Of General Power of Appointment not of Discretionary Power to Trustees.**]—A testator directed his trustees to stand possessed of a sum of money upon trusts in favour of his son and his son's wife and children, with a power to the son, on failure of issue, to appoint the fund by will or codicil. He also gave the trustees a discretionary power to give the fund to his son, discharged of all the trusts. By a codicil he revoked the power given to the son, and directed that after the son's death, and on the failure of issue, the fund should go to the son's wife for life, and after her death form part of the testator's residuary estate:—Held, that the discretionary power given by the will to the trustees was not revoked by the codicil. *Butler* v. *Greenwood*, 22 Beav. 303.

—— **Personalty Settled on Trusts of Realty—Uses of Realty Modified.**]—Devise of real estates to trustees and their heirs, upon trust to convey upon certain trusts, and subject thereto to several natural sons successively in strict settlement. The testator also gave the residue of his personal estate upon trust to be laid out in land to be settled to the same uses, &c. A codicil, revoking so much of the

will as directed the settlement of his said estate upon his sons, and varying the order of limitations to his heirs, was considered as confined to that object, operating by way of substitution only, not as a revocation of the devise, and therefore extending to the estates to be purchased with the personal estate. *Carrington (Lord)* v. *Payne*, 5 Ves. 404; 5 R. R. 87.

Testator devised real estate to A. in tail male, remainder over, and gave a sum of money in trust to be laid out in land to be settled to the same uses; by codicil he devised the same real estate to B. and his heirs, and gave everything that he had given by his will to A. in as ample a manner to B.: B. is tenant in fee of the real estate, and is entitled to have the money paid to him. *Younge* v. *Combe*, 4 Ves. 101.

A testator devised his freehold estates to certain uses. The will contained a name and arms clause and powers of leasing and sale and exchange. He then devised his copyhold and leasehold estates upon trusts to correspond with the uses declared of the freeholds. By a codicil to his will he varied the uses declared concerning the freeholds, but made no mention of the copyholds and leaseholds. He directed that the codicil should be taken as a part of and added to his will. All the circumstances of the case rendered it exceedingly inconvenient that the copyholds and leaseholds should devolve in a different way from the freeholds:—Held, that the trusts of the copyholds and leaseholds declared by the will were not revoked by the codicil, and that the copyholds and leaseholds passed according to the trusts declared by the will, and the freeholds according to the uses declared by the codicil. *Martineau* v. *Briggs*, 45 L. J., Ch. 674; 33 L. T. 283; 23 W. R. 899—H. L.

Held, that though it was in the highest degree probable that the testator intended the copyholds and leaseholds to go with the freeholds, and it was productive of great inconvenience that they should not do so, yet as there were no words in the codicil to give effect to such intention, the court could not supply them, and the copyholds and leaseholds must go as originally declared by the will. *Ib.*

A testator after devising his H. Lodge estate to his cousin H. for life, then to H.'s wife for life, and then to their children successively in tail, and in default of issue to his cousin F. absolutely, or on the happening of a certain event, to his cousin S. absolutely, gave his household goods and other things in and about H. Lodge to trustees to permit the same to be held and enjoyed as heirlooms by the person or persons who for the time being should be entitled to H. Lodge under the devise thereinbefore contained, but so as the same should not vest in any tenant by purchase who should die under twenty-one without leaving issue. The testator then gave to the trustees a sum of 20,000*l.* upon trust to invest for the benefit of the person or persons for the time entitled to the H. Lodge estate, or as near thereto as the different nature of real and personal estate would admit, and so as the income only be paid to the tenant for life of such estate, and so that no person or persons becoming entitled to the H. Lodge estate as tenant in tail should be entitled to an absolute interest in the fund until the age of twenty-one or dying under that age leaving issue. Power was given to grant leases of the estate, which might include the heirlooms. By a codicil the testator gave the H. Lodge estate to his cousin H., and his wife and their children, and after them to the son of C. L. absolutely, and if he should die under age to another son, if any, and then to F. "as before," or on the happening of a certain event to S. and issue. After mentioning other properties, the testator said "20,000*l.* to trustees—the same as will," and except as therein intimated he confirmed his said will. There was no reference in the codicil to the heirlooms. The cousin H. and his wife died without issue. C. L. had one son, who had attained the age of twenty-one years, and on his behalf a petition was presented claiming the heirlooms and the 20,000*l.* absolutely:—Held, that, notwithstanding the expression "under the devise hereinbefore contained," there was a governing intention shown in the will that the chattels and the legacy of 20,000*l.* should go with the H. Lodge estate; and that although the devolution of the H. Lodge estate was altered by the codicil there was no revocation of such governing intention; and that the court would give effect to that intention by declaring the petitioner entitled to the chattels and legacy. *Carrington (Lord)* v. *Payne* (supra) followed. *Martineau* v. *Briggs* (supra) distinguished. *Towry, In re, Dallas* v. *Towry* or *Law*, 58 L. J., Ch. 593; 41 Ch. D. 64; 60 L. T. 715; 37 W. R. 417—C. A.

A testator devised his freehold estates to certain uses, and provided that any person becoming entitled thereto should take and use his name and arms. He then devised his copyhold estates (upon which stood his principal mansion house) and his leasehold estates to trustees, to be held by them upon trusts, as far as the nature of the several estates would allow, to correspond with the uses before declared as to his freehold estates. Subsequently, by a codicil, which he stated was to be taken as part of, and added to, his will, he altered the uses declared in his will as to his freehold estates, and declared that the proviso respecting the use of his name and arms should follow the new limitations. No mention was made in the codicil of the copyhold and leasehold estates:—Held, that though it was probable, from the circumstances, that he intended his copyhold and leasehold estates to follow the limitations of his freeholds as declared in the codicil, still, as there were no words therein which effected it, the court would not supply them, and that the copyhold and leasehold estates passed according to the trusts originally declared in the will. *Langdale* v. *Briggs, Ex parte Bacon*, 8 De G. M. & G. 391; 26 L. J., Ch. 27; 2 Jur. (N.S.) 982; 4 W. R. 703.

A testator devised freeholds in Dorsetshire upon certain trusts, and bequeathed 3,000*l.* to his trustees to purchase lands in Dorsetshire to be held upon the same trusts. By a codicil he revoked the devise of his freeholds, and declared other trusts, without alluding to the 3,000*l.*:—Held, that there was no implied revocation of the bequest of 3,000*l.*, which would pass under the will as if no codicil had been made. *Bridges* v. *Strachan*, 8 Ch. D. 558; 38 L. T. 502; 26 W. R. 691.

k. *Revocation of Offices.*

Of one of several Offices.]—On a devise to three upon certain trusts, and giving the guardianship to the trustees and his wife, who were to maintain, &c., out of the trust property, the testator afterwards, by codicil reciting their

appointment as executors and trustees of his will, revoked the appointment of two, and substituted two others to act as trustees and executors with the others:—Held, that this did not revoke the original appointment of the two so removed to act as guardians. *Park, In re*, 14 Sim. 89; 13 L. J., Ch. 369; 8 Jur. 372.

A testator appointed his wife sole executrix, and he made her and A. trustees. By a codicil he revoked the appointment of his wife as an executrix, on the ground that "the duties were too arduous for a lady," and he appointed A., B. and C. "executors in trust of his will." By another codicil he referred to his having revoked the executorship, and to having appointed A., B. and C. executors:—Held, that the revocation was confined to the office of executrix only. *Graham* v. *Graham*, 16 Beav. 550; 22 L. J., Ch. 937; 17 Jur. 569.

A testatrix by her will appointed A. and B. executors and trustees thereof. By a codicil, she revoked the appointment of A. as executor, and appointed C. executor, and gave to C. "all the powers and authorities to enable him to carry out the trusts of her will as were given by the will to A." The testatrix thereby also declared her intention to be, that the codicil should only "affect the appointment of A. as executor of her will":—Held, that B. and C. were executors, and A., B. and C. trustees of the will. *Worley* v. *Worley*, 18 Beav. 58; 2 W. R. 216.

The testator appointed A., B. and C. his executors and trustees, and devised and bequeathed to them his real and personal estate in trust. By a codicil, he desired that A., named in his will as "executor," be no longer such, and he nominated D. to succeed him; but he made no alteration in the devise:—Held, that A. still remained a trustee of the will. *Cartwright* v. *Shepheard*, 17 Beav. 301.

The testator appointed A., B. and C. to be trustees and executors. He revoked the appointment of C. as executor and trustee by his first codicil. By a second codicil he revoked the appointment of B. and C. as executors, but ratified his will, except as altered thereby:—Held, that the first codicil was not revoked, and that C. was not a trustee. *Ib.*

The testator appointed his widow and two other persons guardians of his children. By a codicil, he "left their care, charge, and education" to his widow:—Held, that the appointment by the will of guardians was not revoked by the codicil. *Hare* v. *Hare*, 5 Beav. 629; 12 L. J., Ch. 344; 7 Jur. 336.

—— **Of Appointment of Executors — By Codicil.**]—A testator, by his will, appointed A. and B. executors, and, by a codicil, he appointed his wife sole executrix of his will:—Held, that the appointment of the executors by the will was revoked. *Lowe, In goods of*, 3 Sw. & Tr. 478; 33 L. J., P. 155.

A testator by his will, dated the 9th December, 1857, made several dispositions of his property, and appointed executors. He subsequently executed a codicil, by which he altered two bequests in his will, and gave directions that his executors should not require the payment of a debt of 50*l*. The codicil commenced, "This is a codicil to my last will, dated the 9th of December, 1857," and concluded, "And in all other respects I revoke my will." The word "revoke" was inadvertently written by the solicitor who prepared the codicil instead of "confirm," and was inconsistent with the expressed intentions of the deceased. On an application by the executors named in the will for probate of the will and codicil, the court declined to act on the assumption that the testator intended to "confirm" his will, but granted probate on the ground that the direction in the codicil, that the executors should not require payment of the debt, implied that their office was to continue. *Davy, In goods of*, 29 L. J., P. 161.

A. appointed W. and B. trustees, and, besides other instructions, directed them to pay his debts, funeral and testamentary expenses, and the legacies bequeathed by the will, or to be bequeathed by any codicil thereto. In a subsequent part of his will he appointed the same individuals executors. In a codicil to his will, after stating that he had appointed B. one of the trustees under his will, he continued, "It is my will and desire to substitute in his stead and place T. Now I do hereby, by this my codicil, nominate and appoint T. to be one of the trustees of my will and codicils in the place and stead of B., to act with and in conjunction with W.; and I hereby give T. the same powers and authorities as I have throughout my will given to and reposed in B., in the same and as full and ample a manner as if the name of T. had throughout my will been inserted in the place of the name of B.":—Held, that the appointment of B. as executor was revoked. *Barrett* v. *Wilkins*, 5 Jur. (N.S.) 687.

A testatrix appointed A. trustee, with power to convert the residue of her estate into money, and after payment of her debts and personal expenses, to dispose of the property in accordance with the directions given in such will, and she also appointed him executor. By a codicil to the will, she revoked that part of her will which gave the property in trust to A., and in lieu of him appointed her nephews B. and C., and providing C. should not be in England his brother D. to act in his capacity. She also revoked the appointment of A. as executor, and in his place appointed B. and C. B. renounced probate of the will of the deceased; C. at the time of her death was not in England:—Held, that D. was an executor according to the tenor of the will, but that power must be reserved to make a grant to C. in case he should return to this country. *Goodworth, In goods of*, 37 L. J., P. 49.

H. by his will appointed A. and B. trustees, executors, and guardians of his three minor children. He subsequently executed two codicils. By the first he revoked all the dispositions in favour of his son, and in all other respects confirmed his will. By the second he absolutely revoked and made void all bequests and dispositions in his will, and bequeathed all his property to C., his housekeeper, whom, with D. and E., he also appointed executor. The court granted probate of the three papers to C. and E., power being reserved to A. and B., the executors named in the will, to come in if entitled and prove. *Howard, In goods of*, 38 L. J., P. 32; L. R. 1 P. 636; 20 L. T. 230.

—— **By Second Will.**]—A testator executed a will in 1856, whereof he appointed W. H. B. and P. B. executors. He executed another will in 1860, referring to and confirming the previous will, whereof he appointed W. H. B. and M. J. B. "sole" executors. Probate was granted of both papers, as together containing his last will, to W. H. B. and M. J. B. (excluding P. B.), the

court being of opinion that the use of the word "sole" in the will of 1860 indicated an intention to revoke the appointment of executors contained in the earlier will. *Baily, In goods of*, L. R. 1 P. 628; 20 L. T. 278; 17 W. R. 401.

In February, 1859, L. executed a testamentary paper, whereof he appointed W. L., E. K., and J. W. executors. In October, 1860, he made another testamentary paper, disposing in a different manner of his personal property, but not affecting realty, which was dealt with by the first paper; of the second paper he appointed the same W. L. and T. D. executors:—Held, that the second appointment of executors was no revocation of the first appointment, and that, as the bare nomination of executors entitles a paper to probate, leave should be reserved, on the second set of executors taking probate of the two papers, as together containing his last will, to the first set of executors to come in and prove. *Leese, In goods of*, 2 Sw. & Tr. 442; 31 L. J., P. 169; 5 L. T. 848.

Where a testatrix executed two wills partially consistent and partially inconsistent, by the first will disposing of property over which she had a power of appointment, bequeathing legacies and the residue, and appointing W. H. and J. H. executors, and by the second will, which contained no revocatory clause, bequeathing specific legacies, disposing of the residue, and appointing the said J. H. and two other persons executors, the court granted probate to J. H. of the two instruments, so far as they were not inconsistent, reserving power to W. H. and the two other executors appointed in the second will to come in and take probate. *Budd, In goods of*, 3 Sw. & Tr. 196.

—— **By cutting off Attestation from Will.**]—A testator made his will, appointing two executors. Subsequently he became dissatisfied with one of them, and shortly before his death he cut from the will his own signature and those of the attesting witnesses, with the presumed intention of revoking the appointment of the obnoxious executor:—Held, that the court could not look at the intention, such acts always amounting to a revocation. *Marshall, In goods of*, 17 W. R. 687.

—— **Whether of Office or Estate.**]—Testator gave the residue of his personal estate to his niece, and appointed her executrix. By a codicil he appointed A. and B. his residuary legatees and executors:—Held, that though power to prove the will and codicil was reserved to the niece, the gift of the residue to her was wholly revoked. *Evans* v. *Evans*, 17 Sim. 107; 14 Jur. 383.

A testator devised real estates to two trustees. By a codicil he appointed another person to be a trustee and executor of his will, in the place of one of the two trustees whom he did not wish to act as executor, in consequence of his being an interested party in the disposal of his estate:—Held, that the codicil was a revocation of the devise to the displaced trustees, as well as of the office. *Hough's Will, In re*, 4 De G. & Sm. 371; 20 L. J., Ch. 422; 15 Jur. 943.

A testator, having bequeathed 2,000*l.* to G., and appointed him executor and trustee, made a codicil whereby he revoked his appointment as executor and trustee, and nominated T. in his stead, and directed that the will, and a codicil previously executed, should be received and construed "as if the name of T. had been inserted in the place and stead of that of G.":—Held, that the legacies were not revoked, it appearing on the construction of the will and codicil that they were not gifts to G. virtute officii. *Bunbury's Trusts, In re*, Ir. R. 10 Eq. 408.

A legacy given to the testator's trustees and executors as a mark of his respect for them:—Held, not revoked by a codicil appointing other trustees in their room, and giving a legacy of equal amount to the newly appointed trustees and executors in similar language. *Burgess* v. *Burgess*, 1 Coll. C. C. 367; 8 Jur. 660.

A devise of lands to trustees, who are afterwards changed by a codicil, is not revoked by the codicil; but the new trustees shall stand seised upon the trusts of the will, although the word "heirs" is made use of in the codicil. *Acherley* v. *Vernon*, 3 Bro. P. C. 85; 9 Mod. 68; 1 P. Wms. 733; Comyn. 381; 2 Eq. Abr. 209.

Testator, by his will, directed that his trade should be carried on by his daughter and others, as trustees, for ten years, when the concern should be closed, the property sold, the produce invested in the funds, and the funds held in trust as to one moiety for the benefit of the daughter and her children, and as to the other moiety for the benefit of the children of his brother. By a codicil the testator revoked that part of his will which empowered his trustees to sell his effects, and instead thereof he authorised his daughter to take possession of all furniture, stock in trade, and every description of property found on his (the testator's) premises, to be disposed of at her discretion:—Held, that the effect of the codicil was not to alter the enjoyment of the property, but only to constitute the daughter sole trustee under the will. *Newman* v. *Lade*, 1 Y. & C. C. C. 680.

A testator devised all his real property to his youngest son and his heirs, but if he should die unmarried, then to his sisters and their heirs. By a codicil, he declared that he left in trust to his executors the whole of the property of every description which he had willed to his youngest son:—Held, that the beneficial disposition made by the will was not revoked, but that the executors took subject to the trusts thereby declared. *Froggatt* v. *Wardell*, 3 De G. & Sm. 685; 14 Jur. 1101.

Testator gave the residue of his estate to two trustees in trust, out of the produce, to invest 4,000*l.* in the funds in trust for his granddaughter for her life, and after her death for her children, and on failure of children he directed that the capital should fall into the residue. By a codicil reciting that he had, by his will, given to the two trustees, in trust, for his granddaughter 4,000*l.* 5 per cents. standing in his name, and that he was desirous that such trust should be executed by three persons, he appointed another person to be a co-trustee and guardian of his granddaughter jointly with the two named in his will, and he directed that his said trustees should transfer the said stock to his granddaughter free from all deductions:—Held, that the testator did not intend to give 4,000*l.* stock to his granddaughter absolutely, but merely that the trusts declared by his will of the 4,000*l.* should be performed by three persons instead of two. *Barry* v. *Crundall*, 7 Sim. 430; 4 L. J., Ch. 264.

3. By Destruction or Mutilation.

By Tearing.]—In 1879, after the decease of W., who had made his will in 1863, there was found among his papers a portion of it torn off, and

containing (besides the date as of 1863 and the signature duly attested) only the words, "and appointed the said William Domville Handcock to be executor of this my will"; and at the foot, in the handwriting of the deceased, "as some circumstances have changed":—Held, that W. must be taken to have revoked his will, and accordingly, that the mutilated document could not be admitted to probate. *White, In goods of*, 3 L. R., Ir. 413.

If a testator tears off that which he has made a substantial, though by law it is not an essential, portion of his will, such tearing is a sufficient tearing within 7 Will. 4 & 1 Vict. c. 26, s. 20. *Williams* v. *Tyley*, Johns. 530; 5 Jur. (N.S.) 35; 7 W. R. 116.

Therefore, where a will concluded with a testimonium as follows: "In witness whereof I have to this my last will and testament, contained in five sheets of paper, to the first four sheets thereof set my hand, and to the last sheet thereof my hand and seal," and was executed in the manner described in the testimonium, and the testator subsequently tore off the signatures to the first four sheets with the intention to revoke:—Held, that such tearing revoked the will. *Ib.*

A paper writing, inclosed in a half sheet of foolscap paper, and indorsed in the handwriting of the deceased, "Will of Major J. S.," was found with other papers in a locked drawer. It had been cut in two pieces immediately above the signatures of the deceased and the attesting witnesses, but both pieces were preserved:—Held, that the court could not grant probate of such a document. *Simpson, In goods of*, 5 Jur. (N.S.) 1366.

A. having an intention to make a new will, and thereby to revoke a legacy contained in his then existing will, requested this last to be brought to him. As soon as he had it in his hand, he tore it as it was doubled, from the edges, very nearly through, so that only a small portion of each sheet, where it was doubled, held the two parts together. He stopped, however, on being reminded that a party whom he wished to benefit would lose everything if he destroyed that will and did not make another, and dropped the paper on the floor. With his knowledge it was taken from thence, and carried upstairs. He frequently expressed an intention to make a new will, but did not do so:—Held, that it was not necessary, to constitute a revocation by tearing, that the testator should rend the will into more pieces than it originally consisted of, but in order to make the act effectual he must have intended that which he actually did of itself to have the effect of revocation, without more. *Elms* v. *Elms*, 1 Sw. & Tr. 155; 27 L. J., P. 96; 4 Jur. (N.S.) 765; 6 W. R. 864.

A testatrix executed a will which revoked an earlier will. Two years subsequently, while alone in her bed-room, she destroyed such will, and immediately afterwards told her daughter that she had done so with the intention that the earlier will might take effect:—Held, that the destruction of the instrument under the circumstances amounted to an absolute revocation. *Weston, In goods of*, 38 L. J., P. 53; L. R. 1 P. 633; 20 L. T. 330.

By Tearing off Seal.]—A person having made his will, executed under seal, and published and attested as a sealed instrument, afterwards, for the purpose of revoking it, tore off the seal, and with it part of a word:—Held, that the act of tearing off the seal was sufficient, and that the will was thereby revoked. *Price* v. *Price*, 3 H. & N. 341; 27 L. J., Ex. 409; 6 W. R. 597.

Mutilation.]—The will of a testatrix was found after her death with the signature and attestation clause cut off and folded inside the will. There was no other evidence of intention:—Held, that this was a sufficient evidence of an animus revocandi. *Maynesi* or *Maynes* v. *Hazleton*, 44 L. T. 586; 45 J. P. 816.

G. duly executed a will on six or eight detached sheets of paper. At the time of execution he subscribed his name at the foot of each sheet, in the presence of the attesting witnesses, who thereupon also subscribed in his presence each sheet. On his death, two of the middle sheets of the will were found among his papers, and there was no trace of the remaining sheets. On motion to decree letters of administration with these sheets annexed as the will of G.:—Held, that the signatures at the end of the will, being the only ones that satisfied the 7 Will. 4 & 1 Vict. c. 26, having been destroyed, the will must be presumed to have been revoked. *Gullan* or *Gullon, In goods of*, 1 Sw. & Tr. 23; 27 L. J., P. 15; 4 Jur. (N.S.) 196; 6 W. R. 307.

Seven days before his death, A. caused a will to be prepared for him; it was left in the custody of his mother. The day before his death he took possession of it at his own request. After his death it was found in his bed, with the signature and attested clause torn off:—Held, that there was a presumptive revocation of it. *Lewis, In goods of*, 1 Sw. & Tr. 31; 27 L. J., P. 31; 4 Jur. (N.S.) 243.

Partial Revocation — Probate granted in Mutilated State.]—A testatrix, having duly executed her will, proceeded some time afterwards to cut out, with a pair of scissors, the name of one P., who was named as an executor therein, wherever the said P.'s name appeared in the document. She stated to one or more persons that she had "cut P. out of her will," her alleged reason being on account of some disagreement which had arisen between the said P. and his wife, who was a daughter of the testatrix:—Held, that the will was only partially revoked, and that it was entitled to probate in the state in which it was found upon the death of the testatrix. *Leach, In goods of*, 63 L. T. 111.

The testatrix duly executed her last will. At some date subsequently she added something in writing at the foot of the will. She afterwards appeared to have cut off this addition, and, in doing this, cut through the name of one of the attesting witnesses. Sufficient, however, remained for the name to be still legible. There was also a piece cut out in the margin of the will. The signature of the testatrix and all the other material parts of the will remained intact. The court, upon motion, admitted the document to proof in its mutilated form. *Taylor, In goods of*, 63 L. T. 230.

Revocation of Appointment of Executors.]—A testator by his will appointed two executors, with the usual directions as to payment of debts, &c. He also appointed the same persons trustees, with directions to pay the income arising from his property to his wife and his only son in equal shares during her life or widowhood, and after her death or remarriage the whole estate was bequeathed to the son absolutely. There were

also alternative trusts in the case of the son dying in the wife's lifetime, either unmarried or married leaving children. After his death the will was found with the clause appointing executors cut out of it, and there was evidence of declarations by the testator that he had cut it out with a pair of scissors, with the intention of cutting out the name of one of the executors. The wife died in the lifetime of the testator, and in the events which had happened at his death, the son was the only person entitled to the estate :—Held, that the appointment of executors was revoked by the mutilation of the will; that the trustees were not executors according to the tenor; and that the son was entitled to a grant of administration with the will annexed. *Maley. In goods of*, 56 L. J., P. 112; 12 P. D. 134; 57 L. T. 500; 35 W. R. 764; 51 J. P. 423.

By Cutting out Signature.]—H. executed a will by signing her name at the foot of the first five sheets, and at the end. The testimonium clause stated that she had done so. A codicil was also executed, which was written at the foot, and on the back of the last sheet of the will. Subsequently the deceased cut off her signature at the bottom of the five sheets, and drew a pen through the name at the end, adding the words, "Cancelled, A. D. H.—15th September, 1857." There was evidence that she intended by the act done to revoke her will, and to preserve the codicil :—Held, that the deceased had cut off a substantial part of the will and had torn it in a manner sufficient to satisfy the statute. *Harris, In goods of*, 3 Sw. & Tr. 485; 33 L. J., P. 181; 10 Jur. (N.S.) 684; 11 L. T. 276.

Scratching out of Signatures.]—A will which after execution had remained in the custody of deceased was found in her repositories after her death with her own signature and the signatures of the attesting witnesses scratched out as with a knife :—Held, that there was a revocation within the requirements of s. 20 of the Wills Act. *Morton, In goods of*, 56 L. J., P. 96; 12 P. D. 141; 57 L. T. 501; 35 W. R. 735; 51 J. P. 680.

A testator two days before his death, being paralysed on one side and partly speechless, intimated to the two medical men in attendance on him his desire to make a will. They interpreted his wishes by signs and wrote them down on a card. He executed the document by making his mark, which however appeared in the middle of the writing, and they then put their initials as witnesses at the back. Subsequently, after a conversation with one of the testator's relatives, they returned to his room, and telling him that they had taken on themselves more responsibility than they ought to have taken, and that what they had written must be regarded as a memorandum, they erased their initials at the back. The testator seemed to acquiesce in this, but the card was found after his death in a handbag which he kept near his bed, and there was evidence that he had shown it to the lady whom he intended it to benefit, telling her it was for her, and wished her to take it :—Held, that what passed at the erasure of the witnesses' initials did not amount to a revocation. *Margary* v. *Robinson*, 56 L. J., P. 42; 12 P. D. 8; 57 L. T. 281; 35 W. R. 350; 51 J. P. 407.

Testator's Signature still Legible—Witnesses' Signatures Struck through.]—A will, which after execution had remained in the custody of the deceased, was found after his death with the attesting witnesses' signatures struck through with a pen, and the testator's signature apparently scratched with a knife but still legible :—Held, that there was no revocation within the requirements of s. 20 of the Wills Act. *Godfrey, In goods of*, 1 R. 484; 69 L. T. 22.

At A.'s death his will and codicil were found in this condition—the names of the attesting witnesses and the attestation clauses were torn away from the last sheet of the will and the foot of the codicil, but his signature remained intact both at the end of the will and codicil, and at the foot of each sheet of the will. Certain lines and parts of lines in the will were also struck through with blue ink :—Held, that the act of tearing was sufficient to revoke the will, when combined with the presumption, arising from the circumstances, that it was strongly against A.'s intention that this will should stand. *Abraham* v. *Joseph*, 5 Jur. (N.S.) 179.

A person, besides a will, left a second testamentary paper, to which his signature was attached. The place, however, in which the names of the attesting witnesses should have appeared was scratched over with a pen and ink, so that no letter of a name could be deciphered :—Held, that this latter paper was revoked. *James, In goods of*, 7 Jur. (N.S.) 52.

Cutting off Name of Attesting Witness, but Piece Preserved.]—Testator cut from the will the portion of the document on which the name and address of the second attesting witness were written. The excised part was also mutilated, but the name and address of the witness remained legible upon it, and it was found with the will in the testator's writing-desk. The court being satisfied that the name had not been removed animo revocandi, decreed probate of the instrument. *Wheeler, In goods of*, 49 L. J., P. 29; 42 L. T. 60; 28 W. R. 476; 44 J. P. 285.

—— **Names of Witnesses Essential.**]—Semble, that the names of the attesting witnesses are an essential part of the will, and that their removal from the will animo revocandi will render it inoperative. *Ib.*

Striking out Words of Limitation.]—J. E. made a will, in which he devised his house, lands and tenements to his mother, "Elizabeth E., her heirs and assigns for ever": he afterwards struck his pen through the words, "her heirs and assigns for ever" :—Held, that this was, under the 6th section of the Statute of Frauds (29 Car. 2, c. 3), a valid revocation, by obliteration, of a clause in his will; the mother took only an estate for life. *Swinton* v. *Bailey*, 48 L. J., Ex. 57; 4 App. Cas. 70; 39 L. T. 581; 27 W. R. 293—H. L. (E.)

The 6th section of the statute was satisfied by this act of obliteration of the words in question, which amounted to an actual revocation, and not a mere alteration. *Ib.*

The word "clause" in the first portion of the section may properly be read "part." *Ib.*

Per Lord Penzance: "Devise" in the statute means a disposition of lands, in writing, and when the statute says the testator may revoke any "clause thereof," it means any intelligible portion of the devise, whether the effect is to increase the beneficial interest of the taker or the reverse. *Ib.*

Abandonment not Destruction.]—A testator drew his pen through the lines of various parts of his will, wrote on the back of it "This is revoked," and threw it among a heap of waste papers in his sitting-room. A servant took it up and put it on a table in the kitchen. It remained lying about in the kitchen till the testator's death seven or eight years afterwards, and was then found uninjured:—Held, that the will was not revoked, the words "or otherwise destroyed" in 7 Will. 4 & 1 Vict. c. 26 (Wills Act, 1837), s. 20, not being satisfied, as, whatever the testator intended, the will had not been actually injured. *Cheese* v. *Lovejoy*, *Harris, In re*, 46 L. J., P. 66; 2 P. D. 251; 37 L. T. 294; 25 W. R. 853—C. A.

Partial Cancellation—Presumption.]—Where a will was written in ink, and formally executed, and the testator afterwards drew a line in pencil through a clause in the will:—Held, that the erasure in pencil raised no presumption of revocation, and that without other explanation it was properly regarded not as a revocation of the clause, but as merely deliberative, or indicative of some future and incomplete purpose. *Francis* v. *Grover*, 5 Hare, 39; 15 L. J., Ch. 99; 10 Jur. 280.

Testator directed his executors to pay an annuity to his sister ——, the wife of Francis Betley, or to such persons as the said Elizabeth Betley should appoint, to the intent that the same might be for the separate use of the said E. Betley, and the receipt of the said —— to be a sufficient discharge. The testator, after executing his will, drew his pen through his sister's name in those places where blanks are left:—Held, that the bequest was not revoked. *Martins* v. *Gardiner*, 8 Sim. 73; 5 L. J., Ch. 305.

—— **Proof in Fac-simile.**]—Where a will, on the face of it, had been executed in 1858, and subscribed by two legatees named in it as witnesses, and was re-executed in 1860, and attested by different witnesses, and after the death of the testatrix, was found, with the first attestation clause and the names of the witnesses to it cancelled; but there was no evidence to show the date of the cancellation:—The court refused to exclude the part cancelled from probate, and directed the probate to go in fac-simile. *Smith, In goods of*, 3 Sw. & Tr. 589; 34 L. J., P. 19; 10 Jur. (N.S.) 1243; 11 L. T. 684.

R. executed his will and a codicil thereto in the presence of three witnesses, two of whom subscribed their names as such to both instruments. Immediately afterwards, before any person had left the room, R., having been informed that one of such subscribed witnesses would forfeit her interest under the will, ordered her name to be struck through, and the third witness to sign the will and codicil, which was done:—Held, that the court could not allow the probate to issue with the omission of the name struck through, but might permit it to be taken in fac-simile. *Raine, In goods of*, 34 L. J., P. 125; 11 Jur. (N.S.) 587.

Presumption as to Date of Mutilation, &c.]—The same principles apply to mutilations as to alterations and interlineations, so that if no evidence can be given as to the time at which they were made, it will be presumed that they were made after the execution of the document in which they appear, and, if there is a subsequent testamentary paper to that, after the execution of such testamentary paper. *Christmas* v. *Whingates*, 3 Sw. & Tr. 81; 32 L. J., P. 73; 9 Jur. (N.S.) 283; 8 L. T. 801; 11 W. R. 371.

Animus revocandi.]—A testator being led to believe by a friend that his will was invalid, tore it and told his wife to put it in the fire. The fire had not been lighted, but the wife placed the pieces in the grate. A few minutes afterwards the testator bethought himself that his friend might possibly be wrong, and he took the pieces from the grate and preserved them:—Held, that there had been no revocation, the act of tearing not having been accompanied by the animus revocandi; and probate was granted of the will as contained in the pieces. *Giles* v. *Warren*, 41 L. J., P. 59; L. R. 2 P. 401; 26 L. T. 780; 20 W. R. 827.

Where a will of which the testator has the custody is found mutilated after his death, the presumption is, that the mutilation was the act of the testator, done animo revocandi. *Dallow, In goods of*, 31 L. J., P. 128.

A testator, having duly executed his will, subsequently, when suffering under an attack of delirium tremens, tore it in pieces. The pieces were preserved, and on his recovery he was informed of what he had done, and he answered he must have been mad when he did the act, and that he would make a fresh will, which intention he did not carry out:—Held, that the will was not revoked. *Brunt* v. *Brunt*, L. R. 3 P. 37; 28 L. T. 368; 21 W. R. 392.

A will was found, the signature to which had been cut out, but gummed on to its former place. The will had been in the custody of the testator up to the time of his death. Declarations of the testator made subsequently to the date of the will were proved of an intention to benefit his wife by will. No other will was forthcoming:—Held, that the presumption that the testator had cut out the signature animo revocandi was not rebutted, and that the gumming on the signature in its original place did not revive the will. *Bell* v. *Fothergill*, L. R. 2 P. 148; 23 L. T. 323; 18 W. R. 1040.

On the death of a party a will was found in an iron chest, in which he kept important papers. It had been written on the first side of seven sheets of brief-paper, and had been signed by the deceased and witnesses on each sheet and at the end. The first seven or eight lines had been cut and torn off, but in other respects the will was complete:—Held, that from the mere cutting or tearing off the beginning of the will without other circumstances, it could not be inferred that the testator intended to revoke the whole will, and that it must be admitted to probate in its incomplete state. *Woodward, In goods of*, 40 L. J., P. 17; L. R. 2 P. 206; 24 L. T. 40; 19 W. R. 448.

—— **"Writing declaring an Intention to Revoke."**]—The testator had obliterated the whole of a codicil, including his signature, by thick black marks, and at the foot of it had written the words, signed by himself and attested by two witnesses: "We are witnesses of the erasure of the above":—Held, that the codicil was revoked, for the words above mentioned were "a writing declaring an intention to revoke" it within s. 20 of the Wills Act. *Gosling, In goods of*, 55 L. J., P. 27; 11 P. D. 79; 34 W. R. 492; 50 J. P. 263.

—— **Mistake.**]—Where a testator by misinformation as to the effect of a subsequent deed, settling his property in his lifetime, had been induced to revoke his will by cancellation, the court refused to grant probate of a copy on motion, but compelled the parties to propound in solemn form. *James, In goods of*, 19 L. T. 610.

—— **Will Destroyed in Presence of Testatrix, but without her Direction or Authority—Ratification.**]—Where a testatrix showed her will to her sister-in-law, and the latter in her presence, but without her direction or authority, and contrary to her wishes, first tore and then burnt the will, but the testatrix subsequently, though pressed to do so, refused to make another will, saying that "she could not bring her mind to it, and it must remain as it was":—Held, that there was not sufficient evidence of a subsequent ratification by the testatrix of the wrongful act, so as to make it a destruction of the will "in her presence and by her direction," within the meaning of s. 20 of the Wills Act, and that probate ought to be granted of the original will as contained in the affidavit of the executor. *Mills* v. *Hillward*, 59 L. J., P. 23; 15 P. D. 20; 61 L. T. 651.

Quære, whether any subsequent ratification can constitute a revocation of a will within the meaning of s. 20 of the Wills Act, where such will has been destroyed, not only without any direction or authority from the testator, but also contrary to his wishes. *Ib.*

Destruction—Incorporated Document—Testamentary Intention.]—Because part of the will of a testator fails by reason of some legal objection to it, it is not, therefore, to be regarded as struck out of the will for all purposes. Although, so far as the law intervenes, a clause may be inoperative, it may still be read with a view to ascertaining the general testamentary intention. A testator, who died in May, 1886, by his will, dated in December, 1871, disposed of all his property in favour of his children, and declared that whereas he had advanced, or might advance, for the benefit of his children, certain sums towards their advancement in life or for their benefit, and all which sums respectively would appear and be mentioned in a book marked "A," and signed by him, every sum of money appearing or mentioned in such book to have been so advanced or paid on account of any child should be taken in or towards satisfaction of such child's share, and brought into hotchpot. In January, 1886, the testator tore from the book marked "A" several leaves, upon which entries of such advances had been written, and directed them to be burnt in his presence, and wrote on the book, the cover of which was preserved, a memorandum, stating that the book had been destroyed by him. It appeared that some of the sums advanced had been advanced before the date of the will, and others subsequently. An originating summons was taken out for the purpose of determining the effect of the above clause:—Held, that the book would probably have been admitted to probate if it had contained writing; and that if a document formed part of a will it was liable to revocation in the same manner as the will itself:—Held, therefore, that, as the book had been destroyed by the testator, no sum advanced by him, whether before or after the date of the will, could be brought into hotchpot. *Coyte, In re, Coyte* v. *Coyte*, 56 L. T. 510.

Before 7 Will. 4 & 1 Vict. c. 26.]—A slight tearing of a will, and throwing it on the fire, with a deliberate intent to consume it, by the testator, though it fell off and was preserved by a bystander, without his consent or knowledge, was a sufficient revocation. *Bibb* d. *Mole* v. *Thomas*, 2 W. Bl. 1043.

The mere act of cancelling a will was no revocation unless done animo revocandi. *Burtenshaw* v. *Gilbert*, Cowp. 52; Lofft, 465.

A testator, having quarrelled with one of the devisees named in his will, began to tear it in a fit of passion, with the intention of destroying it, and having tore it into four pieces, he was prevented from proceeding further, partly through the efforts of a bystander, and partly by the entreaties of a devisee; he afterwards became calm; and having put by the several pieces, expressed his satisfaction that no material part of the writing had been injured, and that it was no worse:—Held, that it was properly left to the jury to say whether he had completely finished all that he intended to do for the purpose of destroying the will; and the jury having found that he had not, the court refused to disturb the verdict. *Doe* d. *Perkes* v. *Perkes*, 3 B. & Ald. 489; 22 R. R. 458.

To cancel a will by burning, some part of the body of the will must be burnt. A mere intent, though the will was thrown on the fire, was not sufficient. *Doe* d. *Read* v. *Harris*, 1 N. & P. 405; 6 A. & E. 209; W. W. & D. 106; 6 L. J., K. B. 84.

Evidence.]—A will, which had remained in the custody of the testator since the time of its execution, was not forthcoming at his death. A draft was propounded, and evidence of declaration was admitted to show an intention to adhere to the will. On the other side evidence was offered to show that the testator did not intend to leave his property in the manner in which it was disposed of by his will, and that he had destroyed it by burning it:—Held, that such declarations were admissible, not as evidence of destruction, but of intention not to adhere to the will. *Keen* v. *Keen*, 42 L. J., P. 61; L. R. 3 P. 105; 29 L. T. 247.

In order to revoke a will under s. 20 of the Wills Act, there must be a positive act of destruction, together with an intention to revoke. No symbolical act of destruction is sufficient. *Cheese* v. *Lovejoy*, *Harris, In re*, supra.

The words of s. 20, "otherwise destroying," must be construed as intending some mode of destruction ejusdem generis with the preceding words, not an act which is not a destroying in the primary sense of the word. *Ib.*

Striking through words with a pen, unless initialed as required by s. 21, is not valid, and the will stands as though the alterations had not been made. *Ib.*

4. Dependent Relative Revocation.

Generally.]—In order to establish a case of dependent relative revocation, it must be shown by the evidence of disinterested witnesses that the act of destruction of a will was referable wholly and solely to an intention to set up some other testamentary paper. *Eckersley* v. *Platt*, 36 L. J., P. 7; L. R. 1 P. 281; 15 L. T. 327; 15 W. R. 232.

A will destroyed by the testator, on the supposition that he had substituted another for it, will be valid, and probate of a copy of it will be granted, if the latter will is not duly executed. *Scott* v. *Scott*, 1 Sw. & Tr. 258; 5 Jur. (N.S.) 298.

A testatrix duly executed a will in 1855, and in 1862 she signed another will, being a copy of the former one, with the exception of bequests to a niece, but which was not duly attested. In 1864 she cut out the names of the attesting witnesses to the earlier will, in the presence of a fellow-servant. Both documents were retained in her possession until her death:—Held, that the doctrine of dependent relative revocation applied, and that the will of 1855 was entitled to probate. *Middleton, In goods of*, 3 Sw. & Tr. 583; 34 L. J., P. 16; 10 Jur. (N.S.) 1109; 11 L. T. 684.

The court will not apply the doctrine of dependent relative revocation to a case where the testator has destroyed a will through a mistaken notion of the legal effect of its destruction, if it is satisfied that he intended entirely to revoke that will. *Dickinson* v. *Swatman*, 4 Sw. & Tr. 205.

A testator executed a will bequeathing a number of legacies, the amounts of which were stated in words, and afterwards erased some of those words and inserted others, the alterations being unattested; and he also cut out a portion of the will:—Held, first, that the doctrine of dependent relative revocation applying, the substituted words should be struck out, and the original amounts stand part of the will. *Nelson, In goods of*, Ir. R. 6 Eq. 569.

Held, secondly, that where no words were substituted, the original words, where apparent, but not otherwise, should be admitted to probate. *Ib.*

Held, thirdly, that the part cut out should be rejected. *Ib.*

A testatrix, having her will in her hand, dictated the alterations she desired to be made in the first part of it to a friend, who wrote them down. Feeling unwell, she desired her friend to stop there, and then tore off and burnt so much of her will as had been covered by the memorandum written at her dictation. This memorandum, together with the rest of the will, which contained the residuary clause and the signatures of the testatrix and witnesses and the attestation clause intact, was placed in a desk by her and locked up, and she believed when she did so that these papers constituted a new will, and were not merely instructions for such a will:—Held, that it was a case of dependent relative revocation, a revocation dependent upon the papers locked up constituting a new will, and probate was granted of the original will as contained in the portion which remained and the draft of the part which was destroyed. *Dancer* v. *Crabb*, 42 L. J., P. 53; L. R. 3 P. 98; 28 L. T. 914.

The court will not apply the principle of dependent relative revocation except there is proof of the actual destruction of the instrument. *Homerton* v. *Hewitt*, 25 L. T. 854.

A., having a will and a codicil, cut off the last page of the will, on which were the names of A. and the witnesses, and desired B. to burn the page so cut off. A. then made some alterations in the remaining pages of the will; desired B. to write out a new will, and send for A.'s solicitor. B. wrote the new will, but did not burn the part cut off, as A. knew. A. died before executing the new will:—Held, that the former will was entitled to probate, there being no intention to revoke, except in connection with the completion of a new will. *Cockayne, In goods of*, Deane, Ecc. Rep. 177; 2 Jur. (N.S.) 454; 4 W. R. 555.

Where Condition Unfulfilled.]—A testator executed a will in 1864, revoking all former wills. In 1865 he destroyed this will, with an intention, expressed at the time, that he wished to substitute for it a will of 1862, which he held in his hand:—Held, that the act of destruction by the testator was referable solely to his intention to validate the will of 1862, and that act being conditional, and the condition being unfulfilled, there was no revocation. *Powell* v. *Powell*, 35 L. J., P. 100; L. R. 1 P. 209; 14 L. T. 800.

Any alterations, though in a will made before the 1 Vict. c. 26, must by s. 21, in order to take effect as dispositions of the property, be attested in the manner pointed out by the act; and where there were obliterations of part, and such alterations made with a view of substituting the new provisions, it was:—Held, that, the intention of the testator being only to revoke conditionally, the will should be admitted to probate as it stood before the alteration. *Brooke* v. *Kent*, 3 Moore, P. C. 334.

Evidence.]—The principle of dependent relative revocation applies to the case where a testator has so entirely erased the name of a legatee that it is no longer apparent, and has substituted another name for it. The court will receive evidence to show what the original name was, and restore it to the probate if satisfied that the testator only revoked the first bequest on the supposition that he had effectually substituted a new legatee. *McCabe, In goods of*, 42 L. J., P. 79; L. R. 3 P. 94; 29 L. T. 249.

5. By Alteration of Estate or Interest Devised.

By Bankruptcy.]—Devise of real estate was not revoked by bankruptcy. Distinction in that respect between bankruptcy and disseisin. *Charman* v. *Charman*, 14 Ves. 580.

By Conveyance.]—Though conveyance for particular purpose will necessarily operate as a revocation of will no further than the particular purpose; yet, if the conveyance goes beyond what the particular purpose requires, it will be a revocation. *Vawser* v. *Jeffery*, 2 Swanst. 272.

So a conveyance of whole estate though for a partial purpose. *Id.* 274.

Where a man has an equitable interest in fee in an estate, and devises it, and makes a subsequent conveyance of the legal estate "to the same uses," it is no revocation. *Parsons* v. *Freeman*, 3 Atk. 749.

Lease and release of estate, subsequent to will, is a revocation thereof. *Pollen* v. *Huband*, 1 Eq. Abr. 412.

Suppose a will is made according to form, and afterwards the lands sold and conveyed to others, though the form of revocation the statute prescribes is not pursued, yet it is a virtual revocation. *Brudenell* v. *Boughton*, 2 Atk. 272.

E., by will, orders his estate to be sold, and the produce to be divided. He afterwards sells the estate; this is a revocation of the will. *Arnold* v. *Arnold*, Bro. C. C. 401; Dick. 645.

A., being seised in fee of an estate subject to a term for raising 5,000*l.* for B., made a devise, in general terms, sufficient to comprise the estate.

Afterwards, part of it was sold, for the remainder of the term, for 7,600*l.*, under a decree for raising the 5,000*l.*; and A. sold the reversion to the purchaser for a further sum; and an assignment and conveyance were made to complete the sales. The 5,000*l.* was paid to B. out of the 7,600*l.*; but the surplus remained in court until long after A.'s death:—Held, that as an excessive sale had been made under the decree, the surplus retained the character of real estate, and that, notwithstanding the assignment and conveyance, the devise remained unrevoked with respect to it. *Jermy* v. *Preston*, 13 Sim. 356.

Although the owner in fee of lands which had been sold to a corporation had made a will sufficient to pass personal estate:—Held, that the words of the will being vague and unequivocal, there was not sufficient evidence of an intention to elect that the produce of such lands should pass as personal estate. *Cramer, Ex parte, Stewart's Estate, In re*, 1 Sm. & G. 32; 22 L. J., Ch. 369; 16 Jur. 1063; 1 W. R. 17.

Testatrix devised all her freehold messuages, &c., in S. to trustees, in trust to sell and stand possessed of the proceeds in trust for A., and gave the residue of her personal estate to the trustees, in trust for B. After the date of her will, she sold the houses, and conveyed them to the purchaser, and he deposited the conveyance and title-deeds thereof with her, to secure part of the purchase-money:—Held, that the security and the money due on it did not pass, under 7 Will. 4 and 1 Vict. c. 27, s. 23, to the trustees in trust for A., but to the trustees in trust for B. *Moor* v. *Raisbeck*, 12 Sim. 123.

—— **To Use of Testator in Fee.**]—A., seised in tail of the lands of K., and other lands, suffered a recovery of those lands, in 1834, and by will, dated in 1832, devised them. In 1836 A. borrowed money on a mortgage of K., and a collateral judgment. On that occasion a disentailing deed of all the lands was executed and inrolled, by which A. conveyed all the lands to the use of himself and his heirs:—Held, that the deed was a total revocation of the will. *Power* v. *Power*, 9 Ir. Ch. R. 178.

A feoffment to the use of a testator and his heirs is a revocation. *Brudenell* v. *Boughton*, 2 Atk. 272.

The ultimate limitation of the use in a settlement to raise a sum of money within twelve months, and if the money was not raised then the deed to be void, was to A. in fee. After the expiration of the twelve months A. made his will, devising all his estates. And, after the execution of the will, A. and B. revoked the uses of the settlement, and limited the use to A. in fee. The deed revoking the uses of the settlement operates as a revocation of the will. The will was made before, and the deed of revocation after, the 1 Vict. c. 26:—Held, that the deed revoking the uses of the settlement operates as a revocation of the will. The reversion in fee, of which the devisor was seised at the time of his decease, did not pass by his will. *Langford (Lord)* v. *Little*, 2 Jo. & Lat. 613.

—— **To Trustee.**]—Devise of fee-farm rents revoked in equity, as well as at law, by subsequent conveyance to trustee, operating as an alteration of estate beyond mere purpose of securing a mortgage; but on account of laches of plaintiffs, the heirs-at-law, court would not give relief farther than by retaining bill, with liberty to bring action, &c., to give an opportunity of taking the opinion of a court of law upon the question whether there is a revocation at law, or whether court of law will presume republication from the long possession, leaving open the question whether the plaintiffs are entitled to any account, and how far back. *Harmood* v. *Oglander*, 6 Ves. 199.

—— **To Bar Dower.**]—Devise by the testator, who died in 1821, of all his estates whatsoever, or which he had contracted to purchase, held not to be revoked pro tanto by a subsequent reconveyance to uses to bar dower of real estates mortgaged by the testator prior to the date of his will, nor by a subsequent conveyance to such uses of real estates for the purchase of which the testator had contracted before the date of the will. *Plowden* v. *Hyde*, 2 De G. M. & G. 684; 21 L. J., Ch. 796; 16 Jur. 823.

—— **To Pay Debts.**]—A conveyance of an estate to trustees upon trust to sell for payment of debts is not a revocation of a prior will, because it declares that the surplus moneys arising from the sale shall be personal estate of the testator; but if it have the further purpose to provide an annuity for the separate use of the wife, until the sale, it will be a revocation, because the wife will be entitled to the annuity after the death of the husband, if the sale do not take place in his lifetime. *Hodges* v. *Green*, 3 Russ. 28; 6 L. J. (o.s.) Ch. 33.

A. devises lands to trustees to pay his debts, and then to pay his wife 200*l.* per annum for her life. Testator lived several years, and his debts increased from 2,500*l.* to 10,000*l.*, for 8,000*l.* whereof his said trustees were bound. A., the testator, by deed and fine, conveys his lands to his said trustees to sell, to pay his debts, and the surplus to him and his heirs, and his wife joins in the fine and conveyance. Whether this is a revocation of the wife's 200*l.* per annum, or whether she shall have the 200*l.* a year out of the surplus of the money after the debts paid, quære. Decreed for the wife. *Vernon* v. *Jones*, 2 Vern. 241; Pre. Ch. 32; 2 Freem. 117.

By Imperfect Conveyance.]—Revocation of a will by a conveyance never completed. *Cave* v. *Holford*, 3 Ves. 653.

A feoffment in fee, executed after a will, is a revocation, even if there was no livery. *Sparrow* v. *Hardcastle*, 3 Atk. 803.

Imperfect conveyance may, as evidence of intent, operate as a revocation. *Vawser* v. *Jeffery*, 3 Russ. 479; 7 L. J. (o.s.) Ch. 38. *See this case*, 16 Ves. 519.

By Inoperative Conveyance.]—A deed obtained by fraud is not a revocation of a prior will. *Hawes* v. *Wyatt*, 3 Bro. C. C. 156. Reversing, 2 Cox, 263.

Grant by a husband to his wife in his lifetime will not revoke his will, giving everything from her. *Beard* v. *Beard*, 3 Atk. 72.

A deed executed under circumstances which render it void in equity, and not at law, is a revocation of a prior will. *Simpson* v. *Walker*, 5 Sim. 1.

A testatrix devised real estates, and, by a subsequent deed, attested by two witnesses, she conveyed them on other trusts:—Held, that the deed (assuming it to be void as turpis contractus) was not such a "writing declaring an intention

to revoke" the will, as is required by 7 Will. 4 & 1 Vict. c. 26, s. 20, and therefore that the will operated on such estate and interest as she possessed in the property at her death. *Ford* v. *De Pontès*, 30 Beav. 572; 31 L. J., Ch. 185; 8 Jur. (N.S.) 323; 5 L. T. 515; 10 W. R. 69.

Revocation of a devise by an exchange, though the land, after the death of the devisor, was restored to his heir, under an arrangement in consequence of a defect discovered in the title of the other party to the exchange. *Att.-Gen.* v. *Vigor*, 8 Ves. 256.

Disseisin and remitter by entry, no revocation of will. *Id.* 282.

By Settlement.]—Where a feoffment was made to the same uses with those of a preceding will, it was held a revocation, and the rule of revocation of wills is the same in equity as at law. *Abney* v. *Miller*, 2 Atk. 593.

By marriage articles the husband covenanted to convey to the use of himself for life, remainder in trust to secure an annuity to his wife for life, in bar of dower; remainder to trustees for years to raise portions; remainder to the sons and daughters successively in tail, remainder to his own right heirs. Afterwards he devised, upon condition that he should have no issue; and, after the will, he, in pursuance of the articles, conveyed to trustees and their heirs to the uses and trusts of the articles; the will is not revoked. *Williams* v. *Owens*, 2 Ves. 594.

The rules as to revocation applied to legal estates are, in equity, applied to equitable estates. *Ib.*

Where a devised estate is differently modified there is a revocation; otherwise where the testator remains with the same estate and interest, and subject to the same means of disposition, though changed as to the legal or equitable quality. *Id.* 599.

Articles to settle estates of husband subject to certain uses and trusts on first and other sons in tail male; remainder to husband in fee. The husband, confirming the articles, devised the same estates, in case he should die without issue male, or on failure of issue male in life of wife; and by a subsequent settlement in performance of articles conveyed to trustees (after certain uses and trusts) to the use of his first and other sons in tail male; remainder to himself in fee. The whole fee being conveyed, and some of the purposes being inconsistent with the will and the articles, the will is revoked as to the settled estate. *Chandos* (*Duke*) v. *Brydges*, 7 Bro. P. C. 505. Affirming, 2 Ves. 417, 430.

Settlement of personal estate upon a second marriage, upon trust to pay such persons, &c., as the settlor shall by deed or will appoint, and in default thereof to his issue. Construction upon the whole, that it was to operate unless a subsequent instrument should be executed: a prior will, therefore, revoked. *Leigh* v. *Norbury*, 13 Ves. 340.

One devises to his wife six messuages, and the rest of his real estate equally to his two daughters in fee, and afterwards, on the marriage of his eldest daughter, he covenants to settle one moiety on her and her husband; the devise of the six houses shall be good, and subsist out of the remaining moiety. *Rider* v. *Wager*, 2 P. Wms. 332.

A. has two daughters, B. and C., and devises one moiety of his real and personal estate to B., the other moiety of his real and personal estate to C.; and afterwards, A., in consideration of marriage, covenants to settle a moiety of his real estate upon the husband that marries B.; the husband shall have one moiety by the settlement, and the wife the moiety of the other moiety by the will. *Ib.*

A. devises lands, in trust to permit his daughter S. to receive the rents until her marriage, or death; and in case she should marry with the consent of trustees, then to convey the premises to her and her heirs; but if she died before marriage, or married without such consent, then to convey to other persons. S. afterwards marries, with the consent of her father, who settles part of the lands on her and her husband, and dies. This settlement is no revocation of the will as to the devise of the other lands to S. *Clarke* v. *Berkeley*, 2 Vern. 720.

A testator devised all his estates to trustees and their heirs to the use of L. for life, without impeachment of waste, with remainder to his sons successively in tail male. By a codicil he revoked in part the disposition made by his will, and devised part of his estates to trustees, their executors, administrators and assigns, during the life of a married woman, without impeachment of waste, upon trust to permit her to receive the rents, issues and profits for her life for her separate use, with restraint upon anticipation, and divers remainders over. Subsequently the testator conveyed the hereditaments by deed to the use of a trustee during the life of the same woman, upon trust to permit her to receive the rents and profits for life for her separate use without anticipation, with remainders over. Neither the trustee nor the lady herself was made by that instrument dispunishable for waste:—Held, that the life estates given by the codicil were revoked by the settlement, and that the life tenants were impeachable of waste under the latter instrument. *Lowndes* v. *Norton*, 33 L. J., Ch. 583; 11 L. T. 290; 4 N. R. 452—L.JJ.

A., in 1830, devised her real estate in trust for the benefit of her brothers and their daughters. In 1837, and subsequently, A. mortgaged the same estate; and in 1844 she conveyed the equity of redemption to the mortgagee, in trust, after payment of the interest upon the mortgages, to pay the surplus rents to W. for life, with remainder to A., or as she should appoint. A. died in September, 1846, and her executrix subsequently paid off the mortgage debts out of A.'s personal estate:—Held, that the conveyance of 1844 was a revocation of the devise. *Briggs* v. *Watt*, 2 Jur. (N.S.) 1041; 4 W. R. 786.

By Covenant to Surrender Copyholds.]—A testator, having devised freeholds and copyholds to the same persons, afterwards executed a settlement in contemplation of his marriage, by which he bargained and sold the freeholds to trustees and their heirs, to the use of himself during his life; and after his death to the intent that the wife might receive annually a rent-charge, which was secured by powers of distress and entry, and by a term of years; and subject to the rent-charge and the term, to the use of the settlor, his heirs and assigns; and he covenanted to surrender the copyholds to the uses of the settlement; the marriage was solemnised, and the testator died, leaving his wife surviving, without having surrendered the copyholds to the uses of the settlement. The covenant to surrender did not operate as an entire revocation of the devise of

the copyholds, but was a revocation only so far as the particular purposes of the settlement required. *Vawser* v. *Jeffery*, 3 Russ. 479; 7 L. J. (O.S.) Ch. 38.

A covenant to surrender copyhold previously devised is a revocation of the will in equity, if the surrender would have been a revocation at law. *S. C.*, 2 Swan. 268.

By Contract to Sell.]—One devises land, and afterwards articles for a valuable consideration to sell or settle the premises: this in equity is revocation of the will. *Cotter* v. *Layer*, 2 P. Wms. 624; Mos. 277.

Articles to sell a devised estate are a revocation in equity, but not at law. *Williams* v. *Owens*, 2 Ves. 601.

Lands devised, and afterwards contracted to be sold, become personal estate. *Mayer* v. *Gowland*, Dick. 563.

Revocation by contract to sell a devised estate. *Rawlins* v. *Burgis*, 2 V. & B. 382. S. P., *Knollys* v. *Alcock*, 7 Ves. 558.

A testator devised all his real estates to his children equally, and afterwards entered into contracts for the sale of his estates, but died before they were completed. The purchasers afterwards abandoned their contracts, because they were unable to procure a conveyance from some of the devisees who were infants:—Held, that, though the contracts were properly abandoned, the will was revoked as to the premises therein comprised. *Tebbott* v. *Voules*, 6 Sim. 40.

Revocation of a devise by a contract for sale, though rescinded after the devisor's death. *Bennett* v. *Tankerville* (*Earl*), 19 Ves. 171.

A binding and valid contract for the sale of lands devised is, in equity, as much a revocation as a conveyance would be at law. *Id.* 178.

The subject of an intended provision on marriage being disposed of by will, made after 1 Vict. c. 26 came into operation, and before the offer to settle, forms no objection to its being carried into execution; a contract to sell being a revocation pro tanto, as much now as before, though its effect on the estate of the devisee may be doubtful. *Greene* v. *Cramer*, 2 Con. & L. 54. *S. C.*, nom. *Saunders* v. *Cramer*, 3 Dr. & War. 87; Ir. R. 5 Eq. 12.

Quære, whether the devisee of an estate which the testator subsequently contracts to sell is entitled to the purchase-money. *Ib.*

A testator, by will, gave and bequeathed to trustees his "leasehold estates and securities for money." Prior to the date of the will he was owner of leasehold property, but at the date of the will he had contracted to sell it, the purchasers, until completion, becoming his tenants at an agreed rent:—Held, that the leaseholds contracted to be sold did not pass by the will to the trustees. *Goold* v. *Teague*, 5 Jur. (N.S.) 116; 7 W. R. 84.

A testator contracted to sell lands which he had devised with stipulations as to easements by reference to a plan, which was lost, and had never been stamped. The purchasers paid the deposit and entered into possession on the footing of the contract; but before any conveyance was executed, or any further payment made, they became bankrupts. Their assignees elected not to complete the contract, and the property was sold under the bankruptcy, on the petition of the testator, as having a lien for the unpaid purchase-money. He bought it back at the sale for less than the amount due to him, and proved for the difference. On his dying without altering or republishing his will:—Held, that the will was revoked by the contract, and set up again by its abandonment. *Andrew* v. *Andrew*, 8 De G. M. & G. 336; 25 L. J., Ch. 779; 2 Jur. (N.S.) 719; 4 W. R. 161. Affirming, 3 Sm. & G. 130.

Under his marriage settlement, A. had power to appoint the reversion in fee of the settled estates, and the trustees had a power of sale, with his consent. He, by his will, appointed it to trustees, to sell and stand possessed of the produce in trust for a class; and he gave all his real and personal estate, "not thereinbefore specifically disposed of, to his widow." Subsequently the trustees, with A.'s consent, sold the estate; but at his death the conveyance had not been executed by one of the trustees, and the purchase-money had not been received:—Held (notwithstanding the 7 Will. 4 & 1 Vict. c. 26, ss. 19, 23), that the gift to the class was inoperative, and that the purchase-money passed, under the residuary gift, to the widow. *Gale* v. *Gale*, 21 Beav. 349.

A testatrix devised a real estate, and afterwards sold it. The purchase was not completed until after her death:—Held, that the purchase-money belonged to the personal representatives, and not to the devisees of the testatrix, notwithstanding her lien on the estate for the purchase-money and the 1 Vict. c. 26, s. 23. *Farrar* v. *Winterton* (*Earl*), 5 Beav. 1; 6 Jur. 204.

Devise of land and subsequent contract for sale to a railway company, with compensation for severance and death of testator before completion and conveyance:—Held, first, that the purchase-money belonged to the testator's personal representatives, and not to the devisee of the land. Secondly, that the compensation money for severance went in the same way. Thirdly, that the company must pay all the costs except those occasioned by litigation between adverse claimants. *Manchester and Southport Ry., In re*, 19 Beav. 365.

When a testator had specifically devised certain lands, but such lands were contracted to be sold in his lifetime, so that the devise was adeemed:—Held, that the rents received between his death and the conveyance of the property passed to the devisee. *Watts* v. *Watts*, 43 L. J., Ch. 77; 29 L. T. 671.

Effect of Direction in Codicil to sell Real Estate specifically devised by Will.]—C. by will devised his estate at Worcester Park to F. C. for life, and after his death to his eldest son, and if F. C. should die under twenty-seven intestate and without issue, he directed that the said estate should be sold by his executors, and the proceeds should form part of his residuary estate. And he appointed A. B. and D. executors. By a codicil the testator appointed the said A. and D. executors, revoked previous appointments, and directed his executors to sell and dispose of his estate at Worcester Park:—Held, that the codicil did not deprive F. C. and his son of the beneficial interest given them by the will. *Chifferiel, In re, Chifferiel* v. *Watson*, 73 L. T. 53.

Devise by Purchaser after Contract to Purchase — Subsequent Conveyance.]—Devise of the equitable fee, under a contract to purchase, revoked by the conveyance to a trustee and his heirs to such uses as the devisor should appoint

by deed, with two witnesses, or will, with remainder to him for life; to the trustee for the life of the devisor, to bar dower, and to the devisor in fee. *Rawlins* v. *Burgis*, 2 V. & B. 382.

Distinction between intention to revoke and alteration of estate as the ground of revocation of a will. *Id.* 386.

Revocation by feoffment to such uses as the devisor shall appoint, with remainder to himself in fee. *Ib.*

In cases of contract for land before, but executed after making a will of land, the subsequent execution is not a revocation; the legal interest coming in esse afterwards, would not pass by the will at law, but in equity is bound by the prior devise of the equitable interest. *Perry* v. *Phelips*, 1 Ves. 255.

Purchasing the reversion in fee, after a devise of the life estate, was a revocation pro tanto, and descends upon the heir. *Galton* v. *Hancock*, 2 Atk. 425; Ridgw. 301.

Where a written agreement for the purchase of an estate has been executed, the purchaser has the estate in equity, and it will pass by his will, which will not be revoked by the subsequent conveyance. *Rose* v. *Cunynghame*, 10 Ves. 554.

If A., being entitled to estate under a contract to purchase, devise it to B., and afterwards takes a conveyance of the estate to himself and C., though only in trust for himself as to C. and for the purpose of barring dower, it is a revocation of the devise; but secus if he had taken a conveyance simply to himself alone. *Ward* v. *Moore*, 4 Madd. 368.

A., the cestui que trust, devised to B., and then directed her trustees to make new conveyances to other trustees to her and her heirs, and died without new publication:—Held, a revocation. *Id.* 276.

By a written contract for the purchase of an estate, it was stipulated that the conveyance should be made to the purchaser, his heirs, appointees, or assigns. The purchaser immediately afterwards made a devise of the estate, and subsequently took a conveyance of it to himself and his heirs, to the usual uses to bar dower:—Held, that the devisee could not make such a title as a purchaser would be bound to accept, inasmuch as all the existing authorities show that the devise was revoked by the subsequent conveyance. *Bullin* v. *Fletcher*, 2 Myl. & Cr. 432; 6 L. J., Ch. 140. Affirming, 1 Keen, 369.

A party, having contracted to purchase the fee-simple of an estate from a person who was at that time only tenant for life of the same, devised such estate in fee; afterwards the vendor, having acquired the fee, conveyed the same to a trustee for the testator:—Held, that nothing passed by the will. *Duckle* v. *Baines*, 8 Sim. 525; 6 L. J., Ch. 327; 1 Jur. 670.

A devise by a will made before 1838 (1 Vict. c. 26, ss. 24, 34) of all the real estates of which the testator then was or at the time of his death should be seised to his heir-at-law, if the testator acquired real estates subsequent to the date of his will, puts the heir to his election. *Schroder* v. *Schroder*, 1 Kay, 578; 2 Eq. Rep. 895; 23 L. J., Ch. 916. Affirmed, 18 Jur. 987; 3 Eq. R. 97; 3 W. R. 55—L. C.

So, also, would such a devise by a testator, who died before 1834 (3 & 4 Will. 4, c. 106, s. 3), from the mere intention thereby shown to give the heir property under the will, notwithstanding that he would take nothing in fact under the will, but by his better title as heir. *Ib.*

In such a case the testator, subsequently to the making of his will, contracted to buy a certain freehold estate, and then made a codicil directing the executors and trustees of his will to complete the purchase, and hold the estate upon the trusts of the will, which were partly in favour of the heir, and then the testator took a conveyance of the same estate to uses to bar dower in his own favour:—Held, that the devise by the codicil was revoked, and that the heir must elect. *Ib.*

By Fine or Recovery.]—Testator makes a feoffment after will to the use of himself in fee, or suffers a recovery; it is a revocation. *Cave* v. *Holford*, 3 Ves. 664.

A. devises use of furniture, &c., at B. to his wife for life, on consideration of her residing there. He afterwards suffers a recovery of estate, and, dying without republishing will, the estate descends to heir-at-law:—Held, that wife was entitled to use of furniture, &c., discharged of condition of residence. *Darley* v. *Langworthy*, 3 Bro. P. C. 359; Ambl. 653.

A recovery suffered of lands devised by will previously made is a revocation of such will as to the lands. *Ib.*

Tenant in tail male, remainder to himself in fee, devises his lands to J., and then suffers a recovery to the use of himself in fee, and dies without issue male; this is a revocation of the will. *Marwood* v. *Turner*, 3 P. Wms. 163.

Semble, the doctrine of election ought not to be applied to the case of a revocation by a recovery merely. *Tennant* v. *Tennant*, Ll. & G. t. Plunk. 516.

By Lease.]—A demise of lease for years to the same person to whom the fee is devised, and which commences in the life of the devisor, is no revocation of the fee. *Villiers* v. *Villiers*, 2 Atk. 72.

A man devises land in fee, and then makes a lease for years of the same land. The lease, if not made to the devisee, is a revocation at law pro tanto only. *Perkins* v. *Walker*, 1 Vern. 97.

A. devises lands to his son B. for ninety-nine years, determinable upon three lives, and charges the same with an annuity of 40*l.* to his daughter M. The testator afterwards devised these lands to S. for ninety-nine years, determinable on three other lives, reserving a yearly rent of 50*l.*:—Held, that the demise was a revocation of the devise, but not of the annuity, there being rent enough reserved to satisfy it. *Parker* v. *Lamb*, 3 Bro. P. C. 12; 2 Vern. 495.

Lease for years or life is a revocation of a will pro tanto only. *Cave* v. *Holford*, supra.

By Mortgage.]—Lands devised to one in fee, and afterwards mortgaged to the same person, is a revocation in toto; but if mortgaged to a stranger, a revocation quoad the mortgage only. *Harkness* v. *Bayley*, Pre. Ch. 514.

A. devises lands and then makes a mortgage thereof in fee. This is a revocation in law, but otherwise in equity. *Hall* v. *Dench*, 1 Vern. 329.

One by deed and fine mortgages; this is a revocation of a will only pro tanto. *Rider* v. *Wager*, 2 P. Wms. 334.

A. devised lands to his executor for payment of his scheduled debts, remainder over; afterwards he mortgaged part of the lands, and paid most of the scheduled debts; this mortgage was held no revocation, but the decree was after-

wards reversed, without prejudice to the heir-at-law. *Barnardiston* v. *Carter*, 8 Vin. Abr. 147, pl. 25.

A. devised lands, and afterwards mortgaged them for years, and then levied a fine sur conusance de droit come ceo, &c., and not a fine sur concessit: this will be a revocation; but if there had been a fine sur concessit, it would have revoked only pro tanto. *Anon.*, 8 Vin. Abr. 136, pl. 10.

Power of assignment of a mortgage, and the loan increased after the will, is a revocation only pro tanto of the will. *Jackson* v. *Parker*, Ambl. 687.

A mortgage in fee after a devise of the estate is, in law, a total revocation; in equity, pro tanto only. *Casborne* v. *Scarfe*, 1 Atk. 606. S. P., *Williams* v. *Owens*, 2 Ves. 601.

If lands devised are conveyed for a principal purpose as a mortgage or payment of debts, it is a revocation pro tanto only. *Brydges* v. *Chandos* (*Duke*), 2 Ves. 417.

By a mortgage in fee of a devised estate, or a conveyance in fee for payment of debts, the will is revoked pro tanto only. *Temple* (*Earl*) v. *Chandos* (*Duke*), 3 Ves. 685.

A devise not revoked by a mortgage in fee to the devisee. *Baxter* v. *Dyer*, 5 Ves. 656.

Mortgage to devisee, after making of will, is no revocation. *Peach* v. *Phillips*, Dick. 538.

No instance of a revocation of a will at law being held not a revocation in equity where the partial, particular purpose was not for charges or incumbrances, or to pay debts. *Harmood* v. *Oglander*, 8 Ves. 126. Reversing as to this point, 6 Ves. 221.

Devise of fee-farm rents revoked in equity as well as at law, by subsequent conveyance to trustees, operating as an alteration of estate beyond mere purpose of securing a mortgage; but, on account of laches of plaintiffs, the heirs-at-law, court would not give relief further than by retaining bill, with liberty to bring action, &c., to give an opportunity of taking opinion of court of law whether there is a revocation at law, or whether court of law will presume a republication from long possession; leaving it open whether plaintiffs are entitled to any account, and for how far back. *S. C.*, 6 Ves. 199.

Wherever the whole legal estate is conveyed, whether for a partial or general purpose, with the single exception of the case of partition, a court of law has nothing to do with the purpose, but is to see whether the interest remains the same in the devisor as at the date of the will; if not, whether the purpose is partial or general, by way of charge or not, it is a revocation at law. *Id.* 218.

Mortgage in fee, after a devise, is a revocation pro tanto only. *Tucker* v. *Thurston*, 17 Ves. 134.

After will, testator mortgaged estate in fee, with proviso, in case of repayment, to reconvey to testator, or to such person, or for such estate, and to such lawful trusts, &c., as testator by deed, &c., should appoint, &c. Such conveyance operates as a revocation of the will pro tanto only. *Brain* v. *Brain*, 6 Madd. 221.

A remainderman in fee joined with his mother, the tenant for life, in a mortgage in fee, by which it was provided that if the remainderman, his heirs, executors, &c., should repay the sum borrowed on a certain day, the mortgagee, his heirs or assigns, should reconvey the estates to the person or persons for the time being entitled to the reversion and inheritance of the estates, and his, her, or their heirs or assigns, or unto such other person or persons, and in such other manner and form, as he, she, or they should direct or appoint:—Held, that a devise of the estates previously made by the remainderman was not revoked by the mortgage. *Youde* v. *Jones*, 14 Sim. 162.

A testator mortgaged an estate in fee; he afterwards paid off the mortgage money, and the estate was reconveyed to him to uses to bar dower. Shortly afterwards the testator again mortgaged this estate, and the proviso upon redemption was, that the estate should be reconveyed to the testator, his heirs, appointees, or assigns, or to such other person or persons to such uses and in such manner as he or they should direct. Subsequently the testator made his will, and devised all his messuages, lands, tenements, and hereditaments, and all other his real estate whatsoever, or which he had contracted to purchase, or to which he or any person in trust for him was seised or entitled for any estate of freehold and inheritance, or, if freehold only, in possession, reversion, remainder, or expectancy, or which he had power to dispose of by his will, to a trustee to certain uses and upon certain trusts therein mentioned. Afterwards the testator paid off the mortgage, and took a reconveyance of the estate to the common uses to bar dower. Previously to the date of the will the testator had contracted to purchase another estate, which was subsequently conveyed to him to uses to bar dower:—Held, that the will was revoked as to the mortgaged estate, and the estate contracted to be purchased before the date of the will, by the reconveyance of the mortgaged estate and the conveyance of the purchased estate to uses to bar dower. *Plowden* v. *Hyde*, 2 Sim. (N.S.) 171; 21 L. J., Ch. 329; 16 Jur. 512; but this was reversed as to the purchased estates per Lords Justices, *S. C.*, 16 Jur. 823.

Devise by Mortgagee—Subsequent Purchase of Equity of Redemption.]—W., in 1824, became mortgagee in fee of Blackacre. The form of the conveyance was to him on trust to sell, and out of the proceeds to retain the debt, and pay the surplus, if any, to the mortgagor. In February, 1826, he made his will, whereby he devised all his real estate (except mortgage and trust estate) and all his personal estate to trustees, upon trust for Y. and H. He also devised to the same trustees all his mortgage estates upon trust, on payment of the moneys due, to convey the same to the person who should be entitled to the equity of redemption, and directed the moneys to form part of his personal estate. In March, 1826, the mortgagor of Blackacre became bankrupt, and in June, 1826, W. contracted with the assignees in bankruptcy for the purchase of the equity of redemption. The purchase-money was paid by W., but no conveyance from the assignees was ever executed. In October, 1826, W. died, leaving Y. and C. his co-heirs. C. by deed renounced to the trustees of the will all claim under the contract of June, 1826. The trustees under the will entered into receipt of the rents of Blackacre, and administered the same as part of the testator's estate until 1869. Y. then claimed the right to a conveyance of one moiety of Blackacre as co-heir of W.:—Held, that the purchase of the equity of redemption by the testator revoked

the devise by his will, not only of the beneficial interest, but of the legal estate in the mortgaged property; that no dry legal estate in Blackacre was remaining in the trustees of the will at the testator's death; that the mortgaged estate had by the contract ceased to be a mortgage, and had become a new absolute interest; and that Blackacre was undisposed of by the will. *Yardley* v. *Holland*, L. R. 20 Eq. 428; 33 L. T. 301.

Held, also, that the claim of Y. as co-heir against the trustees had become barred by the Statute of Limitations. *Ib.*

Mortgaged estates in fee will not pass by a general devise of all lands, tenements, and hereditaments, though the equity of redemption is afterwards foreclosed or released. *Strode* v. *Russel*, 2 Vern. 624.

By Partition.]—Partition is not revocation of will. *Swift* v. *Roberts*, Ambl. 618; 3 Burr. 1488; 1 W. Bl. 467.

Partition of estate subsequently to devise is no revocation thereof. *Ward* v. *Moore*, 4 Madd. 372.

Partition is no revocation of a devise; otherwise if the object extends further, even merely to a power of appointment. *Brydges* v. *Chandos (Duke)*, 2 Ves. 429. And see *Rawlins* v. *Burgis*, 2 V. & B. 386.

Fine for the mere purpose of a partition is no revocation even at law. *Williams* v. *Owen*, 2 Ves. 600.

The ground upon which a partition does not revoke a devise. If the object is to do anything beyond mere partition, it is a revocation. *Att.-Gen.* v. *Vigor*, 8 Ves. 281.

Distinction as to the effect of a partition upon a devise. If the conveyance goes no further, the devise is not revoked, as it is if one takes the divided estate, with a power of appointment. *Maundrell* v. *Maundrell*, 10 Ves. 256; 7 R. R. 393.

A., having the legal estate in leaseholds, and being beneficially entitled to one-third of them in right of his late wife, and as to another third having, under the will of B., whose executor he was, a life interest in it, with a power to appoint among his children, makes a will, giving one-half of his two-thirds to one daughter, and the other half to another daughter. He subsequently joins with the beneficial owner of the other third in a deed of partition whereby the leaseholds are assigned in trust as to one-third for A. as administrator to his wife, and as to another third for A. as executor of B.:—Held, that the will was not revoked. *Woodhouse* v. *Okill*, 8 Sim. 115; 5 L. J., Ch. 326.

A testator devised his moiety of an estate, and then made partition with his co-tenant; on this the estate was conveyed to a trustee, as to one part to the use of the testator in fee; and a mortgage term created by the co-tenant in his moiety was assigned to attend the inheritance:—Held, that this is not a revocation of the will. *Barton* v. *Cranall*, Tam. 164; 7 L. J. (o.s.) Ch. 188.

The effect of revocation in equity, produced by an agreement for partition, in such a manner as to deprive the testatrix in equity of any interest in the estate devised; and the devisee disappointed has no right to compensation from heir. *Knollys* v. *Alcock*, 7 Ves. 558.

Mere partition, whether by compulsion or agreement, is not a revocation of a will; but the slightest addition as a power of appointment, prior to the limitation of the uses, is sufficient. *Id.* 564.

Agreement for a partition established against a conveyance, and against a devise, it operating as a revocation, by depriving the testatrix of all interest in the estate devised. *S. C.*, 5 Ves. 648.

Joint tenant devised his moiety, and afterwards the jointure was severed; nothing passed by the will. *Swift* v. *Roberts*, Ambl. 617; 3 Burr. 1488; 1 W. Bl. 467.

Partition is not revocation. *Id.* 618.

A. and B. were tenants in common of lands in fee; A. devised his moiety in fee, after which A. and B. made partition by deed and fine, declaring the uses as to one moiety in severalty to B. in fee:—Held, that the will of B. was not revoked by the deed and fine levied in pursuance thereof. *Luther* v. *Kidby* or *Kirby*, 8 Vin. Abr. 148, pl. 30; 3 P. Wms. 169, n.

A testatrix before the Wills Act devised an estate, to which were attached various rights of pasturage and common rights over certain lands. By a subsequent deed she, in conjunction with the other persons entitled, conveyed these rights, and the lands subject to them, to trustees, on trust to allot the same among the several grantors, according to their interests. The trustees afterwards reconveyed to the testatrix a portion of the allotted lands:—Held, that the conveyance by her to the trustees revoked the devise as to such lands. *Grant* v. *Bridger*, 36 L. J., Ch. 377; L. R. 3 Eq. 347; 15 W. R. 610.

VI. REVIVAL AND REPUBLICATION.

a. General Principles.

No Revival of Will that has ceased to exist.]—There can be no revival of a will which has ceased to have both a physical and legal existence. *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342; 31 L. J., P. 49; 8 Jur. (N.S.) 391; 5 L. T. 719.

Subsequent Will reviving Prior.]—A testator executed a will and afterwards married. He subsequently executed a second will, and by it he revived and brought into force again the first will in the event of there being no child of the marriage living at the time of the death of his wife. The same executors were appointed in both wills. The testator died, leaving surviving him his widow and one child. The court allowed the first will to be included in the probate of the second. *Baugham, In goods of*, 45 L. J., P. 80; 1 P. D. 429; 24 W. R. 712.

By gumming in Signature Cut out.]—A will was found, the signature to which had been cut out, but gummed on to its former place:—Held, that the presumption was that the testator had cut out the signature animo revocandi, and that the gumming on the signature in its original place did not revive the will. *Bell* v. *Fothergill*, L. R. 2 P. 148; 23 L. T. 323; 18 W. R. 1040.

By Destruction of Later Will.]—A. made a will in 1826, and another in 1851, inconsistent with the former. Before his death he burned the second will animo cancellandi, accompanying the act with declarations which showed that he supposed that the will of 1826 had thereby been revived:—Held, first, that the earlier will was not revived, as, though made before 7 Will. 4 & 1 Vict. c. 26, it could only be revived in the way pointed out by that statute, and not by declarations of the testator. *Dickinson* v. *Swatman*, 30 L. J., P. 84; 6 Jur. (N.S.) 831.

Held, secondly, that the doctrine of dependent relative revocation did not apply to the burning of the later will, but that it was absolutely revoked. *Ib.*

By Revocation of Revoking Will.—Like as with statutes, the revoking a will which has revoked a former one revives the first. *Harwood* v. *Goodright*, Lofft. 576.

The execution of a second will is a revocation of the first, and cancelling the second afterwards does not set up the first again. *Hellier, Ex parte*, 3 Atk. 798. *But see* 1 Ves. 495.

By Reference — Sufficiency.] — The revised statutes of Nova Scotia, fifth series, c. 89, provide that "no will or codicil shall be revived otherwise than by a codicil executed in the manner hereinbefore required, and showing an intention to revive the same":—Held, that the mere reference to the document intended to be dealt with, whether will or codicil, by its date is not sufficient. It is necessary to look to the context, and to anything else in the document which may explain whether the intention of the testator was to confine the action of the testamentary disposition to the document of that date, or to extend it to something more. *McLeod* v. *McNab*, 60 L. J., P. C. 70; [1891] A. C. 471; 65 L. T. 266—P. C.

A testator executed a will in 1867, and two codicils to it in 1869 and 1874. In 1875 he made another will, by which he expressly revoked all previous wills and testamentary papers. Subsequently his two sisters, who were benefited by the codicil of 1874 and the will of 1875, died; and he made another codicil in 1881, disposing of the property which he had left to them—which he described as a codicil to his last will and testament—and which began in these words: "Whereas my two sisters named in my codicil, dated May 12, 1874, are both since dead," &c.:—Held, that the reference to the codicil did not revive it, and it was therefore excluded from probate. *Dennis, In goods of*, [1891] P. 326.

Of Will Revoked in Error.]—A former will of land is cancelled, the testator supposing a later will by him made of the same land to the same effect to be good. If that proves not to be duly executed, equity will set up the former will. *Onions* v. *Tyrer*, 2 Vern. 743; Pre. Ch. 459; Gilb. Eq. Rep. 130; 1 P. Wms. 343.

Of Will of Married Woman.]—The object of s. 34 of the Wills Act is to get rid of republication as a method of conferring testamentary validity even as regards a will made before the date of the act, and not to extend its operation to wills made since the act. Therefore the will of a married woman, made in 1869, with the assent of her husband, was held not to be revived by republication after his death, and whatever support, authority, or efficacy the will might have derived from the husband's concurrence was extinguished by his death. *Noble* v. *Willock* or *Phelps*, 40 L. J., P. 60; L. R. 2 P. 276; 25 L. T. 65; 19 W. R. 1115.

Republication before 7 Will. 4 & 1 Vict. c. 26.]—Testator saying his will was in a box in his study amounted to a republication. *Alford* v. *Earle*, 2 Vern. 209; Nels. Ch. Rep. 162.

To make a republication there must be animus republicandi; and therefore when testator was looking for a paper, and person assisting him took up his will by mistake, testator said, "That is my will," not meaning to republish it:—Held, not a republication. *Abney* v. *Miller*, 2 Atk. 599.

A testatrix gave an ultimate remainder in fee of all her lands to trustees, in trust for J., in fee. By a codicil, which she directed to form part of the will, she devised these lands (which were acquired subsequently to the date of the will), together with her other estates, to trustees for J. for life, and after J.'s decease for his child or children living at the time of her decease, instead of the devise contained in the will; but did not in the codicil dispose of the ultimate remainder in fee. The trustees named in the codicil were not the same as those in the will:—Held, that the codicil operated as a republication of the will, and was not a revocation of it; that the subsequently-acquired land, therefore, passed both by the will and codicil, and the ultimate remainder in fee was in J. *Doe* d. *Murch* v. *Marchant*, 6 Man. & G. 813; 7 Scott (N.R.) 644; 13 L. J., C. P. 59; 8 Jur. 21.

A testator, in February, 1837, devised all his lands in B. to two trustees, to the use of Y. for life, with remainders over; he also bequeathed to the same trustees and Y. sums of money on certain trusts and appointed them executors; and he gave to the three legacies of 100*l.* each for their trouble in the execution of his will. By a codicil dated in February, 1838 (after the 7 Will. 4 & 1 Vict. c. 26 came into operation), after reciting the devises and bequests contained in his will, and that he had since determined to appoint C. an additional trustee for the purposes in his will mentioned, he gave and devised all his messuages, lands, &c., described in and devised by his will, and also the several sums of money therein mentioned, to C., his heirs, executors, &c., upon the trusts in the will mentioned, and nominated him one of his executors; and directed and declared that it should be read and construed in the same manner, and have the same operation and effect, as if C. had been named a trustee and an executor with the other trustees, and bequeathed to him a legacy of 100*l.*; and in all other respects the testator ratified and confirmed his will:—Held, that the will was republished by the codicil, and passed real estates purchased by the testator after the date of the will and of the codicil. *Doe* d. *York* v. *Walker*, 12 M. & W. 591; 13 L. J., Ex. 153.

Where a testatrix devised all her estate to L. E. for life, and to his sons and daughters successively in strict tail, and L. E. and his only son died in the lifetime of the testatrix; but he left a daughter, E. E., of whose birth she knew nothing; and she thereupon made a codicil in which she recited her former will, and that L. E. had died without leaving any issue, and then devised over:—Held, that as this codicil was made in ignorance of the existence of E. E., it was only a conditional revocation. Some time after making the codicil, the testatrix was made acquainted with the existence of E. E., but made no further testamentary disposition:—Held, that this did not set up the codicil; for having been once revoked, it could only be republished according to the Statute of Frauds. *Doe* d. *Evans* v. *Evans*, 2 P. & D. 378; 10 A. & E. 228; 8 L. J., Q. B. 284.

A testator devised lands to his wife for life, and after certain other devises introduced a residuary clause in favour of his wife in fee. He

afterwards purchased other lands, and then made a codicil, whereby, after reciting that he had made a will disposing of all he was then possessed of, he ratified and confirmed the will; he then gave his wife a life estate in part of his newly-purchased estates, and devised the other part in a manner that could not take effect:—Held, that the effect of the codicil was to make the residuary clause in favour of the wife applicable to the after-purchased lands. *Goodtitle* d. *David* v. *Williams*, 10 B. & C. 895; 8 L. J. (O.S.) K. B. 326.

A testator, by will executed in 1824, made a general devise of all the residue of his real estate not otherwise disposed of, whether in possession, reversion, remainder or expectancy, to T. and the heirs of his body. By a codicil, made in 1834, he revoked that devise, and devised all his real estate not otherwise disposed of by his will or codicil, to trustees for T. for life, and at T.'s decease, if he should have lawful issue, to T.'s heirs, and, in default, to the testator's own right heirs. Subsequently to the date of this codicil, and in 1835, the testator acquired by purchase other real estate. In 1836 he executed another codicil, by which he altered the devises contained in the will and codicil, but made no mention of the estate acquired in 1835. This codicil contained these passages: "And whereas by my will or codicil, or one of them, I did give and bequeath all my real estate, not specifically otherwise disposed of, to trustees, the remainder in trust for my son T., now I revoke and annul such part of my bequest as relates to my own right heirs, and leave and bequeath the same real estate, in the event of my son's death without issue, to all the children of J. T. and of my nephew, J. H., and of my daughter H., who shall be then living, share and share alike, as tenants in common":—Held, that the last codicil did not amount to a republication of the will and former codicil, so as to pass the real estate subsequently acquired, but was confined to the dispositions of the estate he was seised of at the date of the will, and that the testator died intestate as to the after-acquired real estate. *Hughes* v. *Hosking*, 11 Moore, P. C. 1; 4 W. R. 755.

By Subsequent Testamentary Instrument.]—A married woman having a power of appointment made a will whereby she appointed the property subject to the power and all other, if any, property over which she had any power of disposition. After her husband's death she signed, in the presence of two witnesses, a paper which contained no reference to her will, but merely stated that certain specific property was a present to X. Y., and after her death this paper was admitted to probate together with her will:—Held, that this subsequent testamentary instrument did not constitute a republication of the will, and that the testatrix was intestate as to her property (not being separate property or within the power) other than that portion of it specifically mentioned in the instrument. *Rowley* v. *Eyton* (2 Mer. 128; 16 R. R. 157) explained. *Smith, In re, Bilke* v. *Roper*, 60 L. J., Ch. 57; 45 Ch. D. 632; 63 L. T. 448; 39 W. R. 93.

B. BY CODICIL.

1. In General.

Republication—Extent.]—A codicil does not for all purposes republish a will, so as to make it speak at the time of the testator's death. *Stilwell* v. *Mellersh*, 20 L. J., Ch. 356.

Though a codicil for certain purposes confirms a will, and brings it down to the date of the codicil, it does not necessarily make the will operate as if it had been originally made at the date of the codicil. *Hopwood* v. *Hopwood*, 7 H. L. Cas. 728; 5 Jur. (N.S.) 897.

Although republication of a will brings down the will to the date of such republication for certain purposes, it does not of necessity alter the construction of the will. The date of the will may still be a factor for determining the construction of the will. *Mountcashell* v. *Smyth*, [1895] 1 Ir. R. 346—C. A.

—— **When Intermediate Codicils Included.**]—A codicil, which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil. *Burton* v. *Newbery*, 45 L. J., Ch. 202; 1 Ch. D. 234; 34 L. T. 15; 24 W. R. 388.

A testator made a will (dated before the Wills Act), by which he directed his residuary real estate to be sold and the proceeds to be divided (in the events which happened) among twelve persons, of whom A. and B. were two. He made a first codicil (dated after the Wills Act), by which he directed certain real estate acquired subsequently to the date of the will to be sold, and the proceeds divided in the same way as the proceeds of his other real estate. This codicil was attested by A. and B. He then made another codicil, described as a codicil to his will of a certain date, but not referring to the prior codicil:—Held, that the second codicil did not operate as a republication of the first codicil: that the gifts to A. and B. of two twelfth shares of the proceeds of the property comprised in the first codicil failed; and that these shares fell into the residue, and were divisible between A. and B. and the other ten residuary legatees. *Ib.*

When a testator by a codicil confirms his will, the will, together with all previous codicils, is taken to be confirmed. *Green* v. *Tribe*, 47 L. J., Ch. 783; 9 Ch. D. 231; 38 L. T. 914; 27 W. R. 39.

Where a prior codicil has a proper force of its own, the mere fact that a testator in a subsequent codicil describes the will by reference to its original date is not sufficient to exclude the inference that the will referred to is the will as modified by the prior codicil. *Ib.*

—— **Invalid Gift made Valid.**]—A testatrix gave a share of her residuary real and personal estate to B., and one of the attesting witnesses to the will was B.'s wife. By a codicil, which was attested by other witnesses, the testatrix, after a direction to her executors to allow an extended time for payment of a debt to her from one of her legatees, confirmed her will in other respects:—Held, that the duly-attested codicil had the effect of republishing and incorporating the will, so as to render the gift to B. valid, notwithstanding attestation of the will by his wife. *Anderson* v. *Anderson*, 41 L. J., Ch. 247; L. R. 13 Eq. 381; 26 L. T. 12; 20 W. R. 313.

—— **Unattested Codicil Included.**]—Testator, having estates in Jamaica and England, by his will directed his English estates to be sold, and 10,000*l.* to be paid out of the produce to the

plaintiff. He afterwards sold his English estates, and, by an unattested codicil, recited that he had so done, and directed that, notwithstanding, the 10,000*l.* should be paid to the plaintiff, and charged all his estates with the payment thereof. he then made another codicil, which was duly attested, and in which he referred to his will and ratified and confirmed all the provisions and bequests which he had thereby made in the plaintiff's favour:—Held, that the Jamaica estates were liable to the payment of the 10,000*l.* *Gordon* v. *Reay* (*Lord*), 5 Sim. 274.

——**Where Will before, Codicil after, Statute.**]—Bequest of personalty by will dated prior to 9 Geo. 2, c. 36, to be laid out in lands for a charity. It is afterwards confirmed by a codicil dated after the statute; the codicil operates as a new will, and the devise is void. *Att-Gen.* v. *Heartwell*, Ambl. 451.

A will dated before the change of currency, by the 6 Geo. 4, c. 79, and a codicil dated subsequently, was held such a republication of the will that the legacies were deemed bequeathed in British currency, although the codicil merely appointed new executors. *Hamilton* v. *Carroll*, 1 Ir. R. Eq. 175.

The testator, by a will made before the Wills Act (7 Will. 4 & 1 Vict. c. 26) came into operation, bequeathed a share of his residuary estate to one of his sons, who was also thereby made one of the devisees in trust and executors of the estate; the son died after the Wills Act came into operation, leaving issue, and after his death the testator made a codicil to his will altering a bequest to another child, but in other respects confirming his will:—Held, that the gift to the son did not lapse, but that the same, so far as it was real estate, descended to the heir-at-law of the son, and so far as it was personal to his executrix, under a will made before the Wills Act came into operation; and that, under the 34th section of the Wills Act, the effect of the republication of the will by the codicil was the same as if the testator had at the date of the codicil made a will in the words of the will so republished. *Winter* v. *Winter*, 5 Hare, 306.

Revival—Of Revoked Will.]—The testator made a will on the 13th of March, 1876, and a second will on the 29th of April, 1876, by which he revoked the former will, and made some changes in the disposition of his property, and a codicil, dated the 9th of June, 1880, commencing thus: "I make and publish this codicil to my will, dated 13th March, 1876. I cancel the gift of 400*l.*, willed to my son, W. J., having paid him that amount since I made said will":—Held, that the codicil revived the first will, and that the three documents should be admitted to probate. *Edge, In goods of*, 9 L. R., Ir. 516.

A testator executed a will in 1866, and a codicil to it in May, 1871. In November, 1871, he executed a will which revoked all previous testamentary papers. In 1872 he executed a paper which was headed: "This is a codicil to the will of R., dated May, 1866." It concluded with the appointment of the son as executor of the will and codicil, and the attestation clause commenced: "Codicil to the will of R., dated May, 1866, in presence of, &c.":—Held, that the only intention to be gathered from the words of the codicil was that the testator intended to revive the will of 1866, but not the codicil of May, 1871. *Reynolds, In goods of* 42 L. J., P. 20; L. R. 3 P. 35; 28 L. T. 144; 21 W. R. 512.

A testator made his will in 1871. He married in 1872, and on the day of the marriage, but after the ceremony, he executed a codicil by which he made provision for his wife and revived his will. The codicil was destroyed, but the court, being satisfied that he had no intention of thereby revoking his will, decreed probate of both papers. *James* v. *Shrimpton*, 45 L. J., P. 85; 1 P. D. 431; 35 L. T. 428; 24 W. R. 740.

The testator made a will on the 5th February, 1886, and a codicil thereto on the 30th September, 1886, both of which were prepared by the same solicitor. On the 7th October, 1887, he made a second will, prepared by another solicitor, making additional disposition of the property, and not referring to the first will. On the 17th March, 1888, he made a second codicil to his first will, prepared by the first solicitor, and not referring to the second will. In 1890 he made two codicils to his second will, prepared by the second solicitor, making further alterations in the disposition of his property:—Held, that the second will was revived, and should, with the codicils to it, be admitted to probate. *Courtenay, In goods of*, 27 L. R., Ir. 507.

L. left two wills, each of which disposed of his whole property; he also executed a codicil, which referred to the earlier will by its date and by its contents, and confirmed it. In the instructions for the codicil he merely expressed a wish to make a certain bequest, and in no way made mention of any will. The codicil was prepared by the attorney who had drawn the first will, and who at the time was entirely ignorant that any subsequent will had been executed. The codicil was not read over to the testator before he signed it:—Held, that the codicil revived the first executed will. *Lewis, In goods of*, 7 Jur. (N.S.) 220.

The testator died at Calcutta in April, 1888. By a will made in 1873, he appointed three persons (two of whom had since died) to be his executors, and after disposing of all his property, appointed his wife "during her widowhood, and, after her death, his trustees therein named and the survivors or survivor of them, guardians of my infant children for the time being." In 1878 he executed a holograph will, at the foot or end of the will of 1873, in these terms: "I hereby revoke the above will in its entirety, declaring all its provisions null and void, and constitute my wife the sole heiress and executrix of any property I may die possessed of." In 1882 the testator executed a further testamentary document, as follows: "I declare this to be a codicil to my last will. I hereby confirm my said will in all respects, and particularly the appointment therein of my wife as guardian of my infant children, and I hereby appoint my sister, L. C. Griffith, guardian of my infant children after the death of my said wife." The widow now moved the court for directions:—Held, that the word "confirm" in the codicil, coupled with the reference to the guardianship of the infant children, no mention of which was made in the revocative second will, was sufficient to revive the earlier will of 1873 as against the second will of 1878, and that probate should go of the will of 1873 and the codicil of 1882, as together constituting the true last wishes of the deceased. *Van Cutsem, In goods of*, 63 L. T. 252.

—— **Mistake.**] — Two inconsistent wills; a codicil referring to the first by date, as the last will, cancels the intermediate will, and evidence of mistake cannot be admitted. *Crosbie* v. *Macdonal*, 4 Ves. 610; 4 R. R. 301.

The testatrix, forgetting the existence of a will and codicil duly executed by her in 1885, or under a misapprehension as to the legal effect thereof upon an earlier will and codicil, executed, in 1889, "a second codicil" to the earlier will and codicil, which she thereby purported to "ratify and confirm." The solicitors who drew the first will and codicil and the last codicil knew nothing of the existence or execution of the intermediate will and codicil until after the death:—Held, that the first will and codicil were not revived by the last codicil. *Turner, In goods of*, 64 L. T. 805.

The testatrix executed a will in 1889, and early in 1892 instructed S., a solicitor, to prepare a codicil thereto. The draft was prepared, but taken away by the testatrix, and never executed. In May, 1892, she executed another will without the knowledge of S., revoking the will of 1889. In 1893 S. was instructed by the testatrix to prepare a codicil to "her will." S., knowing nothing of will of May, 1892, prepared codicil purporting to be codicil to will of 1889, and to confirm that will. Such codicil was duly executed:—Held, that the wills of 1889 and 1892 and the codicil of 1893 must be admitted to probate, and that it must be left to a court of construction (if necessary) to determine their meaning. *Chilcott, In goods of*, 66 L. J., P. 108; [1897] P. 223; 77 L. T. 372; 46 W. R. 32.

—— **Of Part only of Will.**]—All codicils are part of the will; therefore, a codicil merely for particular purpose, as to change an executor, and confirming the will in all other respects, does not revive a part of the will revoked by a former codicil. *Crosbie* v. *Macdonal*, supra.

—— **Of Adeemed Bequest.**]—S. R. directed his executors to place out 1,000*l.* at interest, and to apply the interest for the maintenance, &c., of his grandson, empowering them to pay part of the principal as an apprentice fee, and the residue to be transferred to him at twenty-one. Testator put his grandson apprentice, and paid 126*l.* with him; a year after testator made a codicil to his will, and gave him a legacy of 1,000*l.* The question whether paying the apprentice fee was an ademption pro tanto:—Held, that as the 1,000*l.* was not given for that purpose alone, the codicil was a confirmation of the legacy, and a republication of the will. *Roome* v. *Roome*, 3 Atk. 181.

An adeemed bequest is not set up again by a subsequent confirmation of the will. *Cowper* v. *Mantell*, 22 Beav. 223; 2 Jur. (N.S.) 745; 4 W. R. 500.

The confirmation of a will by a codicil does not revive a legacy adeemed in the interval between the will and codicil. *Montague* v. *Montague*, 15 Beav. 565.

—— **By Revocation of Substituted Gift.**]—Gift to an executor of 100*l.*; gift by a codicil of 500*l.* in substitution thereof, then that gift revoked; the prior gift of the 100*l.* is not set up again. *Boulcott* v. *Boulcott*, 2 Drew. 25; 2 Eq. Rep. 457; 23 L. J., Ch. 57; 18 Jur. 231; 2 W. R. 52.

2. Form of Codicil.

Where Expressed to Ratify Will.]—A codicil attested by three witnesses, and ratifying a will, amounts to a republication of that will, and both ought to be considered together as one will. *Acherley* v. *Vernon*, 3 Bro. P. C. 91; 1 Comyn, 381; 9 Mod. 68; 1 P. Wms. 783; 2 Eq. Abr. 209.

Where not Expressed to Ratify.]—By the addition of a codicil everything is set up in the will not altered by the codicil; and though the codicil has no date, yet if it appear by evidence to have been executed subsequently to an act which might amount to a revocation, it will operate as a republication. *Carte* v. *Carte*, Ridgw. 210; Ambl. 28; 3 Atk. 174.

T. made a will giving a life interest in his property to his wife, Sarah. She died, and he subsequently married B. On the day before his death he told an attendant that he wished the name of Martha (his present wife) to be substituted for it, and requested her to write a memorandum on his will to carry out his wishes. The attendant thereupon wrote a memorandum upon the will, which was duly executed. The memorandum did not, in direct terms, refer to the will:—Held, that the memorandum operated as a codicil to the will so as to revive the will. *Terrible, In goods of*, 1 Sw. & Tr. 140; 6 W. R. 816.

When Conditional.]—A codicil conditioned to take effect only upon an event which does not happen republishes a will, and is on that ground entitled to probate. *Da Silva, In goods of*, 2 Sw. & Tr. 315; 30 L. J., P. 171; 5 L. T. 140.

Intention to Revive.]—A codicil may, by referring in adequate terms to a revoked will, revive that will, if it is in existence, but the codicil must "shew an intention to revive the same." *Steele, In goods of*, 37 L. J., P. 72, n.; L. R. 1 P. 575; 19 L. T. 91; 17 W. R. 15.

In order to satisfy those words the intention must appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the court with reasonable certainty the existence of the intention. *Ib.*

Since the passing of 7 Will. 4 & 1 Vict. c. 26, a will cannot be revived by mere implication. *Ib.*

References in codicils to revoked wills by their dates are insufficient to revive them, there being no evidence on the faces of such codicils of an intention to revive the wills so referred to. *Ib.*

A codicil referring by date only to a revoked will does not revive the will. *Ince, In goods of*, 46 L. J., P. 30; 2 P. D. 111; 36 L. T. 519; 25 W. R. 396.

A testatrix made a will on the 26th of January, 1876, and added a codicil thereto on the 21st of February following. On the 18th of January, 1877, she executed a new will, by which she revoked all previous wills, and on the same day executed also a codicil to the will. The documents were prepared in a hurry, and an erroneous reference to the will was given in the codicil, which purported to be a codicil to

'her last will, dated the 26th of January, 1876." The court being satisfied that she had no intention of reviving the will of January, 1876, and that the reference to it was a mistake, decreed probate of the will and codicil of February, 1877. *Ib.*

Evidence of Intention—Annexation.]—Making a codicil, and annexing it to the will:—Held, no republication of the will. *Hutton* v. *Simpson*, 2 Vern. 722; Pre. Ch. 439; Gilb. Eq. Rep. 115, 120.

Codicil does not operate as a republication of a will unless it is annexed to it, or the contents shew the intention. *Att.-Gen.* v. *Downing*, Ambl. 573.

Every codicil properly attested is a republication of the will. Sed quære. *Gibson* v. *Rogers*, Ambl. 97; 4 Ves. 288, n.

Republication of will by codicil does not require any precise form, nor need it be annexed to, or indorsed on, the will. *Potter* v. *Potter*, 1 Ves. 442.

Since the Statute of Frauds, annexation of a codicil to a will not admissible evidence of republication, because parol. *Barnes* v. *Crowe*, 1 Ves. 495; 3 Bro. C. C. 2; 2 R. R. 154. *But see* 3 Atk. 798.

The physical annexation (by a piece of tape) of a duly-executed codicil of later date to testamentary papers duly executed, but not revoked, is no ground for inferring the intention to revive, required by the statute. *Marsh* v. *Marsh*, 1 Sw. & Tr. 528; 30 L. J., P. 77; 6 Jur. (N.S.) 380; 1 L. T. 523.

3. Effect on After-acquired Property.

Principles.]—A codicil, republishing a will, makes the will speak as from the date of the codicil, for the purpose of passing after-purchased lands; but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. *Powys* v. *Mansfield*, 3 Myl. & Cr. 359; 7 L. J., Ch. 9; 1 Jur. 861. *And see S. C.*, 6 Sim. 528; 5 L. J., Ch. 153.

Where a codicil in its dispositive part is applicable solely and expressly to the property previously devised by the will, it has not the effect of republishing that will, so as to carry after-purchased property, notwithstanding a more general intent indicated in its recital. *Monypenny* v. *Bristow*, 2 Russ. & M. 117; 1 L. J., Ch. 88.

A married woman appointed and devised "all the manors and hereditaments which she had power to appoint or devise." After her husband's death she confirmed the will by a codicil:—Held, that her property not included in the power did not pass. *Du Hourmelin* v. *Sheldon*, 19 Beav. 234; 2 W. R. 639.

Lands subsequently Purchased.]—Lands purchased after the date of a will held to pass by codicil made subsequently to their purchase, the codicil containing no expressions limiting the effect of the devise to lands comprised in the will. *Yarnold* v. *Wallis*, 4 Y. & Coll. 160; 10 L. J., Ex. Eq. 5.

Codicil with three witnesses, though relating only to a personal estate, expressing no intention as to republication of will, is a republication; and therefore, will containing a general devise, lands purchased in the interval pass. *Pigot* v. *Waller*, 7 Ves. 98.

Lands, purchased after a general devise, pass under it, republication being implied from a codicil concerning personalty, referring to the will, directed to be taken as part of it, and attested by three witnesses. *Barnes* v. *Crowe*, 1 Ves. 486; 4 Bro. C. C. 2; 2 R. R. 154.

Testator, by will, charges all his estates with payment of debts, and makes his son residuary devisee; afterwards purchases copyholds which are duly surrendered to the use of his will, and by codicil devises those copyholds to his son in fee; the codicil held a republication of the will, so as to subject those copyholds to the payment of debts. *Rowley* v. *Eyton*, 2 Mer. 128; 16 R. R. 151.

A testator devised all his freehold and leasehold property whatsoever, of which he was or might be seised or possessed at the time of his decease, upon certain trusts. He subsequently made three codicils, altering the names of his trustees, and devising all his said property described as by the will. He had acquired one estate after the date of his will and first codicil, but before the second codicil:—Held, that this estate passed under the words of the will and codicils. *Bridge* v. *Yates*, 14 L. J., Ch. 426.

Testator devised all his real estate to his sister for life, remainder to her children as she should appoint; for want of appointment, to all her children and their heirs, as tenants in common. His sister having two daughters, by a codicil, declared to be a codicil to his will, not then at hand; he gave one of them an annuity; and directing his annuities to be paid out of 3 per cent. stock, he charged them on his real estate, in case of a deficiency, and directing the residue of his personal estate to be invested in freehold lands and hereditaments, he recommended to his sister to settle and convey, or join with her husband in settling and conveying, all his estates and property which she might derive from him after his decease, to the use of her two daughters for life, in such parts, shares and proportions as she should approve, with remainder to their respective issue and cross remainders, and the usual powers and clauses in strict settlement. The testator's sister died in his life, and her two daughters were his co-heiresses. Some real estates were purchased between the executions of the will and codicil; as to the real estate the will is not revoked, but is republished by the codicil; and the two nieces are entitled to all the real estates, and to those directed to be purchased, as tenants in common in fee. *Meggison* v. *Moore*, 2 Ves. 630.

Estate contracted for after general devise will pass by republication, and must be paid out of personal estate. *Broome* v. *Monck*, 10 Ves. 605; 8 R. R. 48.

Testator by his will devises all his freehold and copyhold manors, &c., and real estate whatever upon certain trusts; and gives to the same trustees a sum of 35,000*l.* to lay out in the purchase of lands, to be settled upon the same trusts. He afterwards contracts for the purchase of several estates; and, by a codicil, specifying some of the estates which he had so contracted to purchase, devises them to the same trustees, upon the trusts of his will; and directs that the purchase-moneys shall be taken as part of the 35,000*l.*, confirming his will in all other respects. The codicil amounts to a republication of the will, so as to pass not only the estates therein specified, but all the estates contracted to be purchased between the dates of the will and codicil. *Hulme* v. *Heygate*, 1 Mer. 285.

Renewed Lease.]—One devises a lease to his daughter, and afterwards renews the lease, and afterwards adds a codicil to his will; whether the renewal of the lease is a revocation, and whether the adding a codicil to his will is a republication, quære. *Alford* v. *Earle*, 2 Vern. 209; Nels. Ch. Rep. 162.

Renewal of a prebendal lease is an ademption of a bequest of it; but a codicil to the will, though to pass after-purchased property, is a republication of the will, and the lease shall pass by republication. *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291.

A. held a church lease, of which nine months remained unexpired; he made his will in sickness, and devised all his interest in such lands to B.: A., recovering, renewed his lease, and republished his will:—Resolved, the renewed lease passed by the republication. *Anon.*, 2 Freem. 116.

Where testator, after making his will, surrendered college lease, and took a new lease:—Held, a revocation, and that a republication of the will would not alter the case, the very thing itself being entirely annihilated. *Abney* v. *Miller*, 2 Atk. 599.

Property falling in after Death of Testator.]—A testator, before 1837, devised two freehold messuages to his wife, who predeceased him, for her life, and after her death to E. in fee, to whom he also gave certain legacies. Afterwards, by settlement on the marriage of E., he conveyed the same two messuages to the use of E.'s husband for life, remainder to E. for life, remainder to certain uses which did not take effect, with ultimate remainder to his own right heirs. Afterwards, by codicil (also before the Wills Act), reciting the provision made for E. by the settlement, he revoked the legacies, and in other respects, except as therein mentioned, confirmed his will. By the death of E. and her husband (after the testator), leaving no issue, the ultimate remainder to the testator's right heirs took effect in possession:—Held, that the specific devise in the will was revived by the codicil, and passed the reacquired fee. *Harvey* v. *Lloyd*, 38 L. J., Ch. 634; 17 W. R. 990.

Where Codicil made for Particular Purpose only.]—A codicil which concerns only personal legacies will not amount to republication of the will, so as to pass lands purchased after the making of the will. *Strode* v. *Russel*, 2 Vern. 625; 3 Ch. Rep. 169.

A testator, by will executed in 1824, made a general devise of all the residue of his real estate not otherwise disposed of, whether in possession, reversion, remainder, or expectancy, to T. and the heirs of his body. By a codicil, made in 1834, he revoked that devise, and devised all his real estate, "not otherwise disposed of" by his will or codicil, to trustees in trust for T. for life, and at T.'s decease, if he should have lawful issue, to T.'s heirs, and, in default, to the testator's own right heirs. Subsequently to the date of this codicil, and in 1835, the testator acquired by purchase other real estate. In 1836 he executed another codicil, by which he altered the devises contained in the will and codicil, but made no mention of the estate acquired in 1835. This codicil contained these passages: "And whereas by my will or codicil, or one of them, I did give and bequeath all my real estate, not specifically otherwise disposed of, to trustees, the remainder in trust for my son, T., now I hereby revoke and annul such part of my bequest as relates to my own right heirs, and hereby leave and bequeath the same real estate, in the event of my son's death without issue, to all the children of J. T. and of my nephew, J. H., and of my daughter, H., who shall be then living, share and share alike, as tenants in common":—Held, that the last codicil did not amount to a republication of the will and former codicil, so as to pass the real estate subsequently acquired, but was confined to the dispositions of the estate he was seised of at the date of the will, and that the testator died intestate as to the after-acquired real estate. *Hughes* v. *Hosking*, 11 Moore, P. C. 1; 4 W. R. 755.

A testator devised to his wife, who died in his lifetime, certain estates, subject to certain bequests; and also all other his freehold, copyhold, and leasehold estates whatsoever not before otherwise disposed of. By a codicil, after reciting the devise to his wife, he, in case she should die before him, gave and devised all his said estates to trustees upon certain trusts:—Held, that the codicil was not a republication of the will, so as to pass estates purchased between the date of the will and the codicil. *Smith* v. *Dearmer*, 3 Y. & J. 280.

A married lady, having, under her settlement, freehold property settled to her separate use, and power to dispose of it by will, exercised that power by devising a certain part of the property to A. for life, with remainder to her nephew; and gave all the other freehold tenements which she had in any wise power to dispose of to her nephew for life, with remainder to his children. She afterwards purchased some leasehold tenements out of her separate property, and had them assigned to M., in trust, as she should by deed, will, or codicil, appoint; and, in exercise of that power, she, by a codicil, bequeathed the leaseholds to her nephew, and confirmed her will. Some time afterwards she purchased the reversion in fee of the leaseholds, and had it conveyed to N., in trust as she should by deed or will appoint. She then made another codicil, in exercise expressly of the power reserved to her by the settlement and of all other powers, and thereby, after reciting the specific devise made by her will, she gave the property which was the subject of that devise to A. in fee:—Held, that the second codicil did not republish the will, and, therefore, that the reversion in fee in the leaseholds did not pass by the residuary devise in the will, but the testatrix died intestate as to it. *Jowett* v. *Board*, 16 Sim. 352; 18 L. J., Ch. 53; 12 Jur. 933.

M. D., by a codicil to her will, duly attested to pass real estate, revoked an annuity given by her will; and, after reciting that one of the trustees named in her will was dead, she revoked the estates and powers given by her will to such deceased trustee, and devised the same to a new trustee, thereby placing the new trustee in the place and stead of the deceased trustee, as trustee for the purposes of her said will. She then gave a legacy to the new trustee, in consideration of his taking on himself the trusts thereby in him reposed, and she revoked a legacy given to the deceased trustee:—Held, on a rehearing, that this codicil did not operate as a republication of the testatrix's will, so as to pass an estate purchased between the date of the will and the date of the codicil. *Hughes* v. *Turner*, 3 Myl. & K. 666; 4 L. J., Ch. 141.

A testator, by his will, made a general devise of his lands to A. and B., upon trust for sale; he then purchased other lands, and afterwards by a codicil he revoked the appointment, devise, and gift, in the said will contained, so far as regarded B., and appointed C. to be a trustee, to act in conjunction with A. in the place of B.:—Held, that the after-acquired lands did not pass. *Ashley* v. *Waugh*, 9 L. J., Ch. 31; 4 Jur. 572.

A codicil appointing a new executor:—Held, a republication of the will, and to give to the latter the effect of passing after-acquired lands. *Earl's Trusts, In re*, 4 K. & J. 673.

The cases on this subject reconciled. *Ib.*

VII. PROBATE AND LETTERS OF ADMINISTRATION.

A. Jurisdiction of Court.

Letters of Administration—In general.]—The court has, as a general rule, no jurisdiction to grant letters of administration unless the deceased leaves personal property in this country. *Evans* v. *Burrell*, 4 Sw. & Tr. 185; 28 L. J., P. 82.

—— **No further Grant until existing Grant revoked.**]—Where there is an existing grant of administration, the court cannot make a second grant. *Hornbuckle, In goods of*, 59 L. J., P. 78; 15 P. D. 149; 63 L. T. 464; 39 W. R. 80.

—— **Proceeds of Realty.**]—The proceeds of real property sold under the Settled Estates Acts, and not yet converted into realty, have not become personal property in respect of which letters of administration can be granted. *Lloyd, In goods of*, 53 L. J., P. 48; 9 P. D. 65; 32 W. R. 724; 48 J. P. 456.

—— **Domicil.**]—The administration of the personal estate of a deceased person belongs to the court of the country where he was domiciled at his death. *Enohin* v. *Wylie*, 10 H. L. Cas. 1; 31 L. J., Ch. 402; 8 Jur. (N.S.) 897; 6 L. T. 263; 10 W. R. 467.

In the administration, in an English court, of property bequeathed by a testator domiciled in France, the interest payable on legacies given by the will is governed by the law of the country in which the estate is being administered. *Hamilton* v. *Dallas*, 38 L. T. 215; 26 W. R. 326.

—— **Jurisdiction of Judge of Domicil.**]—All questions of testacy or intestacy belong to the judge of the domicil. *Enohin* v. *Wylie*, supra.

—— **Duty of Judge of Domicil.**]—It is the right and duty of that judge to constitute the personal representative of the deceased. *Ib.*

To the court of the domicil belong the interpretation and construction of the will, and to determine who are the next of kin or heirs of the personal estate of the testator. *Ib.*

Effect of Judgment of Court of Domicil.]—The judgment of the court of the domicil of a deceased party at time of death is binding on the court of a foreign country in all questions as to the succession and title to personal property, whether under testacy or intestacy, where the same questions between the same parties are in issue in the foreign court which have been decided by the court of the domicil. *Doglioni* v. *Crispin*, 35 L. J., P. 129; L. R. 1 H. L. 391; 15 L. T. 44. Affirming 11 W. R. 853.

Over Will of Sovereign.]—The probate court has no jurisdiction to inquire into the validity or invalidity of a will of a sovereign of the realm. *Geo. III., In goods of*, 3 Sw. & Tr. 199; 32 L. J., P. 15; 8 Jur. (N.S.) 1134; 11 W. R. 190.

Foreigner—Limited to Chattels Real.]—A French subject domiciled and resident in France, by his will, executed as required by the 1 Vict. c. 26 (but not made and executed as required for the validity thereof by the law of France), bequeathed his personal estate in England and Ireland to trustees, whom he also named executors, and he gave and devised leaseholds for years in Cork, in Ireland, and all other his real estate and chattels real in England and Ireland to the same trustees:—Held, that the will was valid as to the chattels real, but invalid as to the personal property of the testator, other than the chattels real, and so far as it purported to appoint executors, or to revoke any prior testamentary disposition of personal property other than chattels real, and the court granted to the trustees in that character alone administration cum test. ann. limited to the chattels real in Ireland. *De Fogassieras* v. *Duport*, 11 L. R., Ir. 123.

Power of Crown.]—The right to goods belonging to persons dying intestate, without leaving husband or widow, and without kindred, as bona vacantia, has from the earliest times been vested in the king, in right of his crown. *Dyke* v. *Walford*, 5 Moore, P. C. 434; 12 Jur. 839.

Former Power of Ordinary.]—The church never had at any time in this country, by law, any beneficial interest in the property of intestates, but merely the right or duty of jurisdiction and administration, and the right of possession for the latter purposes. *Ib.*

The ordinary, when acting officially, had no private or personal discretion respecting the granting of administration. *Canterbury (Archbishop)* v. *House*, Cowp. 140; Lofft, 622.

Prerogative.]—To an action on a deed, by an administrator under a prerogative administration from the archbishop of Canterbury, it is no answer that the intestate died abroad, and that, at the time of his death, the deed was in Ireland, and was bonum notabile to be administered in Ireland. *Whyte* v. *Rose*, 2 G. & D. 312; 3 Q. B. 493; 11 L. J., Ex. 457—Ex. Ch.

Where a mortgage deed in the form prescribed by 3 Geo. 4, c. 126, s. 81, assigned the tolls and toll-houses of a turnpike road to hold for the residue of the term for which the tolls were granted, unless the mortgage with interest were sooner repaid:—Held, that the mortgage was bonum notabile where the road and toll-houses were situate, and not where the deed was at the time of the death of the mortgagee. *Reg.* v. *Balby and Worksop Turnpike Road Trustees*, 1 B. C. C. 134; 22 L. J., Q. B. 164; 17 Jur. 734; 1 W. R. 150.

Where there are bona notabilia in a peculiar, and also in other parts of the diocese of the archbishop, a prerogative administration is not absolutely void, and will therefore be considered valid at law, until set aside by proceedings in the ecclesiastical court. *Lysons* v. *Barrow*, 2 Bing. (N.C.) 486; 2 Scott, 721; 1 Hodges, 390; 5 L. J., C. P. 102.

Stock and money in the funds are, for the purpose of probate and administration, within

the province of Canterbury, having no defined locality. *Rex* v. *Capper*, 5 Price, 217; 19 R. R. 568.

—— **Judicial Committee.**]—Subsequently to the order in council made upon the appeal reversing the sentence of the prerogative court, a will, dated March, 1851, was discovered, and application was made to the judicial committee for probate. Such application refused, as the original suit being concluded, the jurisdiction of the judicial committee was exhausted, but the committee intimated that if a petition was presented to her majesty to refer the matter specially to them, they would entertain the application. Upon such petition being presented, and referred, the committee revoked the probate of the will of 1825, and granted probate of the will of 1851. *Cutto* v. *Gilbert*, 9 Moore, P. C. 131.

—— **Pleading.**]—To a declaration by the executor of R., covenantee of a deed, the defendant, after setting out the letters testamentary, pleaded that R. died in the parish of L., and that at the time of his death he resided there, and had the deed there; that the parish is a royal peculiar, and out of the jurisdiction of the archbishop of Canterbury, by reason whereof the proving of the will and the granting of probate of all the goods of R., in respect of the debt, of right belonged and appertained to the Queen and not to the archbishop; that the will was never proved before, nor were the letters testamentary ever granted by the Queen; that the letters testamentary produced, and granted by the archbishop, were of no effect against the defendant in respect of the debt; and save as aforesaid, by the granting of these letters testamentary, the plaintiff never was executor of the will of R.:—Held, that the plea was in bar of the action altogether, and not in bar of the further maintenance. *Euston* v. *Carter*, 1 L. M. & P. 222; 5 Ex. 8; 19 L. J., Ex. 173.

Diocesan.]—Action on a policy of insurance under seal, whereby three of the directors of the company did order, direct, and appoint that, if the insured should die, the capital stock and funds of the company should stand charged and be liable to pay to his executors, administrators, and assigns, within three calendar months after his decease should be certified, 500*l*. The insured died in the diocese of Exeter, and the policy was in that diocese at the time of his death:—Held, that a probate from the diocesan court of Exeter was sufficient to enable the executors to recover on the policy, though the directors resided, and all the stock and funds of the company were situate, in the diocese of London. *Gurney* v. *Rawlins*, 2 M. & W. 87; 2 Gale, 235; 6 L. J., Ex. 7.

An act for making a navigable canal provided that the shares were to be deemed personal estate, and to be transferable as such; the canal passed through parishes in the diocese of Worcester, and other parishes in the diocese of Lichfield and Coventry; the transfers of shares in the canal were filed at the public office of the company, in the diocese of Lichfield and Coventry, where the dividends were also paid and books of account kept:—Held, that the right of a shareholder to a share of the profits, being personal profits, might be considered as locally situate in the diocese of Lichfield and Coventry, for the purposes of probate; and that a probate granted by the consistorial court of the bishop of that diocese was sufficient. *Horne, Ex parte*, 7 B. & C. 632.

In an action by an administrator, the court, in the absence of any allegation upon the subject, will assume that the debt for which the action is brought is bonum notabile in the place where administration is granted. *Huthwaite* v. *Phaire*, 1 Man. & G. 159; 1 Scott (N.R.) 43; 8 D. P. C. 541; 9 L. J., C. P. 259.

Probate granted by the court of the archdeacon of Sudbury, to whom the bishop had granted full power to prove the wills of all persons deceased within the archdeaconry, was good, when the testator died within the archdeaconry; although he was possessed of a term of years in lands lying within another archdeaconry in the same diocese. *Rex* v. *Yonge*, 5 M. & S. 119.

Action by an administratrix upon a promissory note given to intestate, averring that administration of all and singular the goods of the intestate was duly granted by the bishop of C. Plea, that the plaintiff was not nor ever had been administratrix of all and singular the goods of the intestate, modo et formâ. Proof of the letters of administration as described in the declaration, and that the intestate, at the time of his death, had bona notabilia in another diocese in a different province, but no evidence of the place of the defendant's residence at the time of the intestate's death was given:—Held, first, that the letters of administration were not void, but passed to the plaintiff all the goods of the intestate within the diocese; secondly, that the only issue joined was, whether administration was duly granted by the bishop, and that the question whether the defendant at the time of the intestate's death resided within the diocese, was not parcel of that issue; and thirdly, that if the defendant relied on the fact of his residence within a different diocese, he was bound to plead it specially. *Stokes* v. *Bate*, 8 D. & R. 247; 5 B. & C. 491; 4 L. J. (O.S.) K. B. 221.

A person whose residence and property were in the diocese of Gloucester went on temporary business to Bristol, and on the way met with an accident, in consequence of which he was taken to the Bristol Infirmary, and died there (and within the diocese of Bristol) a few days after. Probate of his will was granted by the bishop of Gloucester:—Held, that the probate was regular, for the testator died in itinere, and this was a case within the principle of canon 92, Jac. 1, which provided, that, when a man dies on a journey, the goods which he hath about him shall not cause his testament or administration to be liable to the prerogative court. *Doe* d. *Allen* v. *Ovens*, 2 B. & Ad. 423; 9 L. J. (O.S.) K. B. 223.

A grant in a chain of executorship by a diocesan court in general terms, and not limited to property within its jurisdiction, is valid under 20 & 21 Vict. c. 77, s. 87, and entitles the personal representatives of an original testator claiming under such grant to a transfer of stock standing in the Bank of England books in the name of the original testator. *Tucker, In goods of*, 2 Sw. & Tr. 123; 3 L. T. 557; 9 W. R. 420.

Of Court of Probate—Foundation of.]—The foundation of the jurisdiction of the court of probate is, that there are assets of the deceased to be distributed within its jurisdiction. Therefore, the court refused to grant administration to an officer whose domicil was Ireland, but who died in India, and whose only assets were some property in India and a sum of money in the

hands of the secretary of state for war. *Roche, In goods of*, infra, observed on. *Butson, In goods of*, 9 L. R., Ir. 21.

Letters of administration granted in the Irish probate registry, limited to a certain fund, were presented in the principal probate registry in England to be resealed. They had attached to them a certificate from the inland revenue office, that the deceased had no personal estate within the jurisdiction of the English probate court to be affected by the administration; and from the registrar of the Irish probate court, that a bond had been given sufficient in amount to cover the property to which the said administration was limited:—Held, that the requirements of the statutes 20 & 21 Vict. c. 79, and 21 & 22 Vict. c. 95, had not been complied with, and the letters of administration could not be resealed. *Roche, In goods of*, 7 Jur. (N.S.) 784.

—— **Validity of Execution — Questions of Construction where adjudicated upon.**]—Where a question of the valid execution of a power arises upon a will already before the court of probate, that question will be then determined without any inquiry before a court of construction. *Phillips* v. *Jenkins*, 44 L. T. 281.

—— **When de facto Executor.**] — Where there is an executor de facto the court has no power to grant letters of administration with the will annexed. *Delacour, In goods of*, Ir. R. 9 Eq. 86.

—— **Validity of Will as to Realty.**]—The court has no jurisdiction under 20 & 21 Vict. c. 77, s. 61, to determine the validity of a will in respect of realty, unless the same will which regulates the disposition of the personalty also regulates that of the realty. *Campbell* v. *Lucy*, 40 L. J., P. 22; L. R. 2 P. 209; 24 L. T. 231; 19 W. R. 568.

A domiciled Scotchman, entitled to personalty and also to realty in England, executed a will and two codicils affecting the realty, all valid by the law of Scotland, but the will only valid by the law of England. The executors propounded this will and codicils, and cited the coheiresses-at-law to see proceedings:—Held, that as the disposition of the realty in England was regulated by the will only, and that of the personalty by the will and codicils, the court had no jurisdiction to make a decree binding on the realty in England. *Ib.*

—— **To inquire whether Judgment of Court of Domicil is in conformity with the Law of the Country where it was Pronounced.**]—A suit was instituted in the court of probate, respecting the succession to the personal estate of a person, who was domiciled abroad at the time of his death:—Held, that a judgment of the court of the domicil is binding and conclusive as to any question raised in the courts of the nationality between the same parties and in relation to the same succession. The court of probate has no jurisdiction to inquire whether such a judgment is in conformity with the law of the country where it was pronounced. *Doglioni* v. *Crispin*, supra, col. 459.

—— **To Compromise.**]—In sanctioning arrangements between parties to probate causes, the court acts upon the statement of counsel that the compromise is expedient, but it does not by such sanction thereby intend to bind infants or any other persons. *Norman* v. *Strains*, 50 L. J., P. 39; 6 P. D. 219; 45 L. T. 191; 29 W. R. 744.

—— **Effect of Judicature Acts.**]—The judicature acts do not alter the jurisdiction of the court of probate in non-contentious matters. *Tomlinson, In goods of*, 50 L. J., P. 74; 6 P. D. 209; 30 W. R. 61.

—— **Injunction to restrain Parting or Dealing with Property.**]—Proceedings had been taken in the chancery division to set aside a devise to the defendant on the ground that the execution of the will had been procured by his fraud, and such proceedings had ended in his favour. The plaintiff then commenced an action for revocation of probate. The property in dispute had been deposited at a bank pending the chancery action, and the bankers informed the plaintiff that they should hand it over to the defendant within a week, if not restrained by a competent authority. The plaintiff was unable to effect service of notice of application for the appointment of an administrator pendente lite. On the ex parte application of the plaintiff, the court granted an injunction restraining the bank from parting with the property pending the probate suit. *Meluish* v. *Milton*, 24 W. R. 679.

The defendant, who claimed to be the lawful widow of an intestate, possessed herself of his personal estate, and was alleged to have sold a portion of the property. The plaintiff claimed the grant of administration as next of kin, and denied that the defendant was married to the deceased. On an ex parte application of the plaintiff, after issue of a writ of summons but before service, the court granted an injunction restraining the defendant from disposing of or removing any of the estate of the intestate until further order of the court. *Brand* v. *Mitson*, 45 L. J., P. 41; 34 L. T. 854; 24 W. R. 524.

The court of probate, as a division of the high court of justice, has vested in it the jurisdiction formerly exercised by the high court of chancery, and therefore may, under the 17 & 18 Vict. c. 104, s. 65, direct an order to issue prohibiting the dealing in any share of a ship for a time and on conditions to be named therein, and the registrar of shipping, on being served with such order, or an official copy thereof, must obey the same. *Nicholas* v. *Dracachis*, 45 L. J., P. 45; 1 P. D. 72; 24 W. R. 461.

—— **Jurisdiction of Court to restrain Action in Foreign Court to propound later Will.**]—A testatrix who was married to a foreigner, and resided abroad, left a will dated 1865, which by compromise was admitted to probate in common form in the probate court. Subsequently the husband took proceedings before the foreign tribunal to establish a later will dated 1872, whereupon the executor of the prior will propounded it in solemn form, and applied to the court to restrain the husband from proceeding with the foreign suit:—Held, that the court would not grant the application. *Dawkins* v. *Simonetti*, 44 J. P. 816. Affirmed in C. A., 29 W. R. 228.

—— **To what Property Probate extends.**]—Before granting probate of the will of a married woman it is only necessary for the court to be satisfied that she had a power, or some separate

estate; and it need not necessarily ascertain or determine what that separate estate is, or to what effects the probate is to extend; but as under s. 24, sub-s. 7, of the Judicature Act, 1873, the court has power to determine all matters in controversy between the parties in any cause or matter, the court should, unless it can be more conveniently determined elsewhere, decide to what effects the probate is to extend. *Tharp, In goods of, Tharp* v. *M'Donald*, 3 P. D. 76; 38 L. T. 867; 26 W. R. 770—C. A.

To enable the probate division finally to conclude the parties as to what property the probate is to be granted to, there should be a claim in the pleadings for a declaration to that effect. *Ib.*

—— **To direct Set-off for Costs.**]—It is a common practice of the court to award each party a portion of the costs of a cause at the final hearing; and the court has jurisdiction to direct a set-off of costs awarded by the court itself as between two parties. *Magrath* v. *Magrath*, Ir. R. 10 Eq. 155.

Probate of Will Abroad—Probate of Codicil.]—If a will has been proved abroad, probate of the codicils, if any, must be granted by the court which granted probate of the will. *Miller, In goods of*, 52 L. J., P. 93; 8 P. D. 167; 31 W. R. 956.

Erasures—Extrinsic Evidence—Restoration of Words erased.]—Where erasures in a will are found after the death of a testator, the court can hear evidence to shew under what circumstances they were made, and on proof of their having been made after the execution of the will, may order the original words to be restored. *Sturton* v. *Whellock*, 52 L. J., P. 29; 48 L. T. 237; 31 W. R. 382; 47 J. P. 232.

Subpœna to lodge Testamentary Paper—Service out of the Jurisdiction.]—The probate division has no jurisdiction in matters where an action or suit is not pending to order service out of the jurisdiction of a subpœna on a person resident in England to bring into a probate registry a testamentary paper. *Ambrose, In goods of*, [1894] 1 Ir. R. 310—C. A.

Compromise—Terms to be Filed in Register—No Provision to make Terms a Rule of Court—Motion.]—Where a suit has been compromised by an agreement to stay on terms to be filed, but there is no provision that they shall be made a rule of court, the court has no jurisdiction to make the terms a rule of court or to enforce them on motion. *Graves* v. *Graves*, 1 R. 485; 69 L. T. 420.

Registrar—Jurisdiction of—Suit for Revocation—Order for Trial at Assizes.]—The registrar, in a suit for revocation of probate, has no power to order the venue to be changed, and to direct that the suit be removed from this court to be tried at the assizes. *Lancaster* v. *Brook*, 58 L. J., P. 67; 14 P. D. 80; 60 L. T. 680; 37 W. R. 768; 53 J. P. 343.

Jurisdiction of Court of Chancery.]—After probate of a will of personalty has been granted, the chancery division has no jurisdiction to entertain a suit to set aside testamentary dispositions on the ground of fraud in obtaining the execution of the will, the probate division having exclusive jurisdiction in the matter. *Melvish* v. *Milton*, 45 L. J., Ch. 836; 3 Ch. D. 27; 35 L. T. 82; 24 W. R. 892—C. A.

A plaintiff claiming a share of leaseholds, partly in the occupation of the defendant, under an alleged will, which he charged was being fraudulently suppressed by him, brought an action claiming partition of sale, and to have the will established and directions given for probate. The defendant denied all knowledge of the will:—Held, first, that before the plaintiff could obtain any relief upon the will it must first be proved, or probate must be admitted by the defendant. *Pinney* v. *Hunt*, 6 Ch. D. 98; 26 W. R. 69.

Held, secondly, that a judge in the chancery division had, under the Judicature Act, jurisdiction to grant probate, but that it would not be using a sound discretion to exercise the jurisdiction; and the action was accordingly ordered to stand over for probate proceedings to be taken in the probate division. *Ib.*

The court of chancery has no jurisdiction to determine on the validity of a will of personal estate, and in all cases in which parties apply to that court for its construction of a will, or payment of legacies under a will, the court proceeds only on the foundation of a will proved in a court of competent jurisdiction. The court, however, will interfere for the protection of property, pendente lite for probate and letters of administration, and it exercises with great caution and sparingly jurisdiction in cases of fraud practised in obtaining probate, and in the spoliation of wills. *Ryves* v. *Wellington (Duke)*, 9 Beav. 579; 15 L. J., Ch. 461. See *Allen* v. *M'Pherson*, 1 H. L. Cas. 191.

The prerogative court, putting a construction on a will, made a grant of letters of administration to K. The court of chancery held that construction to be wrong, and that W. was entitled, K. appealed to the house of lords. W. applied for the grant to be to him in accordance with the decree of the court of chancery:—Held, that the proceeding in chancery was in the nature of an appeal from the prerogative court, and that its decision must prevail, and the grant was decreed to W. *Warren* v. *Kelson* 1 Sw. & Tr. 290; 28 L. J., P. 122; 5 Jur. (N.S.) 415; 7 W. R. 348.

A woman, married in 1878, made her will in 1882, while still under coverture, purporting to dispose of separate property. The husband did not assent to the making of the will. The testatrix died in 1888, and her executor applied for probate. The husband opposed on various grounds, but he chiefly relied on his plea that his late wife had no separate property. After argument, the court admitted evidence on this point, and thereupon finding that she had, pronounced for the will with costs. It was thereupon urged that the court must go further, and decide of what the separate property of the testatrix consisted, and the proper destination of such property:—Held, that these were especially questions for the chancery division, and that this court, having no machinery for arriving at a proper decision upon them, should decline to entertain them. *Harding* v. *Sutton*, 59 L. T. 838.

—— **Of County Court.**]—After a cause has been transferred to a county court, the probate court has no power to make an order as to the costs incurred before the transfer. The judge of the county court has power to make an order as to

such costs. *Macleur* v. *Macleur*, 37 L. J., P. 68; L. R. 1 P. 604.

—— **Value of Estate.**]—In estimating the value of the real estate to which a person was entitled at the time of his death, for the purpose of deciding whether the county court has jurisdiction, charges upon such estate cannot be taken into consideration. *Davies* v. *Brecknell*, 40 L. J., P. 15; L. R. 2 P. 177; 23 L. T. 569; 19 W. R. 136.

For the purpose of determining whether a case comes within the jurisdiction of the county court, the court cannot inquire into the charges on the real estate where the beneficial interest has been sworn over 200*l*. *Ib.*

If the estate is of the value of 300*l*., but the value of the deceased's interest in it is reduced by a mortgage to less than 300*l*., the county court has no jurisdiction. *Ib.*

The county court has no jurisdiction over a probate suit where the deceased died seised or beneficially entitled to real estate of the value of 300*l*., although the persons interested in the realty have not been cited. *Thomas* v. *Nurse*, 39 L. J., P. 80; 18 W. R. 471.

—— **Sending to.**]—When proceedings have been commenced in the court of probate, the court will receive evidence from both sides as to the state of the property, and the place of abode of the deceased, before it determines whether or not it will send the cause to the county court. *Slater* v. *Alvey*, L. R. 2 P. 154; 23 L. T. 324; 18 W. R. 1103.

B. To whom Granted.

1. **Executors.**

According to Tenor of Will.]—When the whole personal property is left to a trustee on trust for a specific purpose, and no executor is named in the will, such trustee is not entitled to probate as executor according to the tenor. *Jones, In goods of*, 2 Sw. & Tr. 155; 31 L. J., P. 199; 4 L. T. 477.

A testatrix concluded her will thus: "I must beg A. to appoint some one to see this my will executed":—Held, that A. might appoint himself. *Ryder, In goods of*, 2 Sw. & Tr. 127; 31 L. J., P. 215; 7 Jur. (N.S.) 196; 3 L. T. 756.

A testator by his will said, "I appoint R. H. P. and J. E. W.," but did not state in what capacity he appointed them. He also bequeathed legacies to "each of my executors," and gave to his "said executors" the residue of his property, with certain directions as to it. The court held upon motion that by the words of the will R. H. P. and J. E. W. were appointed executors, and granted probate to them accordingly. *Bradley, In goods of*, 52 L. J., P. 101; 8 P. D. 215; 47 J. P. 825.

A testator bequeathed certain things to be paid by "his executors hereinafter named," but there were no executors named, except in a clause which followed his signature:—Held, that probate must go without the clause. *Dallow, In goods of*, 35 L. J., P. 81; L. R. 1 P. 189; 12 Jur. (N.S.) 492; 14 L. T. 573; 14 W. R. 902.

A testatrix executed a will containing these words: "I leave the sum of one sovereign each to the executor and witness of my will for their trouble to see that everything is justly divided," but not naming any executor. Beneath the signature of the testatrix and opposite the names of the attesting witnesses were the words "executors and witnesses":—Held, that there was no appointment of executors. *Woods, In goods of*, 37 L. J., P. 23; L. R. 1 P. 556; 17 L. T. 583; 16 W. R. 407.

A will contained the following clause: "I appoint E. H. my sole trustee, and he is to be paid as an attorney, the same as if he were not a trustee to this my last will and testament." There were debts to be paid, but the only duties created by the will were those which would devolve upon a trustee:—Held, that E. H. was not executor according to the tenor of the will. *Lowry, In goods of*, 43 L. J., P. 34; L. R. 3 P. 157; 30 L. T. 695; 22 W. R. 352.

A testator made a will in which were these words: "This is to cancel all former wills and to leave all in the hands of my mother and wife, jointly or separately, and they are in no way to be interfered with." No executors were named. The court granted probate to the mother and wife as executors according to the tenor. *Glasson, In goods of*, 22 W. R. 845.

A mother, by her will, appointed her daughter, who was under age, sole executor and universal intromitter with her movable means and estate, and certain persons trustees for the daughter until she was of legal age. In a subsequent part of the will she directed the trustees, in case her daughter died before coming of age, to divide the residue of her property in a particular way. The court refused to grant probate of the will to the trustees as executors according to the tenor thereof, but ordered that administration with the will annexed should issue to them under the Probate Act, s. 73, by reason that the testatrix had not appointed by her will an executor competent to take probate. *Stewart* or *Stuart, In goods of*, 44 L. J., P. 37; L. R. 3 P. 244; 33 L. T. 72; 23 W. R. 683.

A testatrix nominated no executor, but the will contained these words: "W., who holds the policy of my life assurance, will, I am sure, act for me in this, and I beg him to pay himself, if he needs it, for his trouble":—Held, that W. was executor according to the tenor. *Tracy, In goods of*, 31 L. T. 801; 23 W. R. 385.

A sister executed a will, which contained a clause to the effect, "I appoint my sister S. B. my executrix, only requesting that my nephews F. P. and J. A. B. will kindly act for and with this dear sister":—Held, that F. P. and J. A. B. were executors according to the tenor of the will. *Brown, In goods of*, 46 L. J., P. 31; 2 P. D. 110; 36 L. T. 519; 25 W. R. 431.

A. duly executed his will, and appointed B. and C. trustees, guardians, and executors in as many distinct paragraphs or clauses. Subsequently he scored out the name of B. wherever it appeared in the will, and inserted that of D.; but the alterations in the guardian and executorship clauses were not attested. By the last clause in the will C. and D. were authorised to give receipts for any moneys paid or transferred to them "by virtue of this my will." The court, holding that an executor of a will is either expressly nominated or appointed according to the tenor, declined to look at the construction of the instrument with the view of determining whether D. was executor as well as trustee, and ordered probate to go with the unattested alterations. *Gaussen, In goods of*, 17 L. T. 354; 16 W. R. 212.

To constitute a person "executor according to the tenor," there must be a trust to administer

the estate generally by him. *Boardman* v. *Stanley*, Ir. R. 6 Eq. 590.

Or words importing a general power to receive and pay what is due to and from the estate. *Jones. In goods of*, supra.

Where a testator appointed "trustees and executors" of his will and by codicil cancelled "the appointment of trust" and appointed other persons in their stead: the trustees and executors appointed by will having renounced or being unable to act, the court refused to grant probate as executors according to the tenor, to the persons substituted by the codicil, but made a grant to them of administration with the will annexed. *Hartley, In goods of*, 11 R. 592.

—— **Instructions to Receive and Divide Estate.**]—Unless the court can gather from the words of a will that a person named trustee therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor. *Purchard, In goods of*, 41 L. J., P. 25; L. R. 2 P. 369; 26 L. T. 526; 20 W. R. 446.

A will contained this clause: "I wish P. A. C. to act as trustee to the estate." Nothing was conveyed to him as trustee, and no duty whatever was cast upon him:—Held, that he was not executor according to the tenor. *Ib.*

In order to constitute one an executor according to the tenor of a will it must appear, on a reasonable construction thereof, that the testator intended that he should collect his assets, pay his debts and funeral expenses, and discharge the legacies contained in such will. *Adamson, In goods of*, L. R. 3 P. 253.

A testator gave to W. F. B. and H. H. W. all his real and personal estate, to apply the same "after payment of debts" to the payment of legacies. The court granted probate to W. F. B. and H. H. W. as executors according to the tenor. *Bell, In goods of*, 4 P. D. 85; 40 L. T. 659.

A direction to an individual to receive the property and divide it, constitutes him an executor according to the tenor of the will. *Saunders, In goods of*, 35 L. J., P. 26; L. R. 1 P. 16; 11 Jur. (N.S.) 1027; 13 L. T. 411; 14 W. R. 148.

B., after a direction that his debts and funeral expenses should be paid, bequeathed to certain persons the whole of his property, in trust that they should, as soon as might be after his death, convert into money, get in, and receive the personal estate, and divide it as therein directed, except certain furniture which he bequeathed to his daughter:—Held, that the trustees were also executors according to the tenor of the will. *Baylis, In goods of*, 35 L. J., P. 15; L. R. 1 P. 21; 11 Jur. (N.S.) 1028; 13 L. T. 446.

M. duly executed a testamentary paper in the form of a letter, beginning, "My dear Eliza," and containing full information as to the amount of her property, with full directions as to how she wished it to be disposed of, and concluding with these words: "I know of nothing else, my dear Eliza, to trouble you with, and trust that this will not involve you in much." The court decreed probate of the paper writing to E., as executrix according to the tenor. *Manly, In goods of*, 3 Sw. & Tr. 56; 31 L. J., P. 198; 8 Jur. (N.S.) 493; 7 L. T. 200.

In a codicil, A. ordered certain personal ornaments to be transmitted "to the executor B., in England, to whom the proceeds of the sale" (of her property at Jerusalem) "are to be likewise remitted, and with the amount B. is directed to pay 50*l.* due to C., and the residue equally between" the deceased's two unmarried sisters:—Held, that B. was executor according to the tenor of the codicil. *Cooper, In goods of*, 8 Jur. (N.S.) 394.

A testator left his property, after payment of his debts and funeral expenses, to certain persons, and constituted and appointed A. and B. to be his trustees, with full power to dispose of all his property, and convert the same into money, to be invested in government funds for the purposes above stated:—Held, that they were executors according to the tenor of the will. *Chappell, In goods of*, 37 L. J., P. 32; 17 L. T. 618; 16 W. R. 488.

A. appointed B. and C. trustees to dispose of his effects as they thought fit, and to receive his life assurance for the benefit of his two sons:—Held, that they were executors according to the tenor. *Gale, In goods of*, 18 L. T. 696; 16 W. R. 942.

—— **Trustee.**]—Directions to get in the estate of the testator, and to distribute it in a certain manner after the payment of all funeral and other expenses:—Held, sufficient to constitute a trustee an executor according to the tenor. *Lush, In goods of*, 57 L. J., P. 23; 13 P. D. 20; 58 L. T. 684; 36 W. R. 847; 52 J. P. 199.

A testator bequeathed all he died possessed of "to my two children, subject to the following limitations:—I wish to appoint N., K. and C. my trustees for the objects of this my will, everything I have to be vested in them." The will then declared the trusts of the property to be so vested in the trustees. The trustees were not connected with the ascertainment or realisation of the assets, but were, for the greater part, connected with property to be retained and held by the trustees for the use of the cestui que trusts. The will concluded by giving certain directions as to the testator's burial:—Held, that N., K. and C. were entitled to probate as executors according to the tenor. A direction to pay the testator's debts is not indispensable to the appointment of an executor according to the tenor. *M'Cane, In goods of*, 21 L. R., Ir. 1—C. A.

A testator bequeathed a part of his household furniture to his wife, and all his personal property (and real, if any), consisting of books, &c., money in bank, together with all household furniture possessed by him before marriage, or purchased by him subsequently, to three trustees, upon trust as to the said furniture for his son A. (or if he should not be alive at the testator's death, for M.), to pay over to A. 1,000*l.*, and to invest the remainder of the testator's money upon other specified trusts, and he gave directions as to his funeral not addressed to the trustees:—Held, that the trustees were not executors according to the tenor. *Gray, In goods of*, 21 L. R., Ir. 249—C. A.

In a will there was a bequest of all property to three trustees upon trust, first to manage the same as they might think best for those interested, but to invest no part of the same except upon securities within the United Kingdom; secondly and thirdly, to pay the annual proceeds and capital of the property on specified trusts:—Held, that the trustees were executors according to the tenor. *Hamilton, In goods of*, 17 L. R., Ir. 277.

Where a testator, who had made his will without legal assistance, had neither by his will nor codicils made any direct appointment of executors, but had appointed four persons as his trustees, and had bequeathed to them the residue of his estate in trust for division, and authorised them to receive debts due to his estate and give a receipt for the same; and the will contained directions to "my executors" to pay his debts and funeral and testamentary expenses, and as to the disposition of various portions of his estate, and the word "executors" occurred frequently, and the language of the will showed generally that the testator intended the four persons named as trustees to act as his executors, and had referred to them sometimes as "trustees" and sometimes as "executors," in either case meaning the same four persons:—Held, that the persons so named were entitled to take probate of the will as "executors according to the tenor." *Melville, In goods of*, or *Leven and Melville (Earl), In goods of*, 59 L. J., P. 35; 15 P. D. 22.

A testatrix appointed A. and B. "trustees" of her will, and expressed her wish that they should pay her funeral and other debts:—Held, that A. and B. were thereby constituted executors according to the tenor, and entitled to probate. *Wilkinson, In goods of*, 61 L. J., P. 134; [1892] P. 227; 67 L. T. 328.

Trustees nominated by a testator "to carry out this will," and "for the due execution of this my will":—Held, to be thereby constituted executors according to the tenor and entitled to probate. *Russell, In goods of*, or *Laird, In goods of*, 62 L. J., P. 15; [1892] P. 380; 1 R. 456; 67 L. T. 504.

As a general rule, when in a will there is a direction to pay debts, though no person is nominated to pay them, and all the personal estate is bequeathed to a person by name, the court will grant probate of the will to such person as "executor according to the tenor." Where, in such a will, there was a bequest to the testatrix's executor, in case he should act as such, the court made the grant of probate without prejudice to any questions arising as to the right to the legacy. *Tandy, In goods of*, 27 L. R., Ir. 114.

Where the court can gather from the words of a will that a person named therein is required to pay the debts, and generally to administer the estate, it will grant probate to such person, as executor according to the tenor. *Bluett, In goods of*, 15 L. R., Ir. 140.

See also *Maley, In goods of*, ante, col. 426-7.

—— **To Pay specific Debt only.**]—Where a testator bequeathed all his property to trustees, with directions to pay a specific debt, certain legacies, and to deal with the residue, but the will did not contain any general direction as to payment of debts:—Held, that the trustees were not entited to probate of the will as executors according to the tenor, but that they were entitled to administration with the will annexed. *Armstrong, In goods of*, 59 L. J., P. 23; 62 L. T. 184; 54 J. P. 200.

—— **Out of Particular Fund.**]—A direction to a person to pay debts or funeral expenses, not out of the general estate, but out of a particular fund, will not constitute him executor according to the tenor. *Toomy, In goods of*, 3 Sw. & Tr. 562; 34 L. J., P. 3; 13 W. R. 106.

H. executed a will, in which was a clause as follows: "I give and bequeath to A. B. and C. D., administrators and assigns, and to be disposed of by them as trustees, all funeral expenses and others to be paid, and afterwards the residue of my personal estate to be paid to, &c.":—Held, that A. B. and C. D. were not executors according to the tenor of the will. *Heaton, In goods of*, 7 Jur. (N.S.) 832.

—— **To Pay Funeral Expenses only.**]—A mere direction to a legatee to pay the funeral expenses out of his legacy will not make him an executor according to the tenor of the will. *Smith, In goods of*, 34 L. J., P. 15; 10 Jur. (N.S.) 1084.

—— **Trustees to Carry out Will.**]—A testator made his will, bearing date the 3rd of January, 1878, by which he appointed W. S. and T. K. trustees to carry out his will; and he also appointed his two sons W. and G. trustees of his estate, with full power to carry out the contents of his will; and if they should not agree, the two trustees previously appointed to set them right:—Held, that W. S. and T. K. were named as executors, and that W. and G. were executors according to the tenor, and that probate might go to the four jointly. *Spotten, In goods of*, 5 L. R., Ir. 403.

Where a testator does not appoint an executor in his will, but names two persons whom he would wish to see that the intentions of his will are carried out, as far as consistent with law and equity, the court will declare them entitled to probate as executors according to the tenor, even though they do not take any beneficial interest under the will. *Archdall, In goods of*, 5 L. R., Ir. 618.

A testator by the first clause of his will directed his debts and funeral and testamentary expenses to be paid, and then gave all his personal estate to certain persons on trust to convert into money, get in and receive it in such manner as they should deem expedient, and to divide the proceeds amongst his children, with the exception of some furniture, which he gave to one of his daughters:—Held, that the trustees were executors according to the tenor. *Baylis, In goods of*, supra, col. 469.

A testator, after giving some specific legacies, bequeathed the residue of his property to three trustees upon trust to sell, and pay the costs and expenses of the sale, his funeral expenses and debts, and some pecuniary legacies, and directed that all the residue of the money remaining in their hands should be divided between his three daughters, or the issue of any of them who should die in his lifetime:—Held, that the trustees were not executors according to the tenor. *Love, In goods of*, 7 L. R., Ir. 178.

—— **Mere Execution of Power.**]—A married woman who, under a deed of settlement, had a power of appointment by will over a fund, executed a will in which she directed the trustees of her marriage settlement to distribute her property in a particular way in accordance with the terms of such settlement, and gave them all the necessary powers of sale and mortgage the more effectually to carry her will into execution:—Held, that the will was the mere execution of a power for the distribution of the funds already in the hands of the trustees, who, in such distribution, would still act under the

settlement, and that they were not executors according to the tenor of the will. *Fraser, In goods of*, 40 L. J., P. 9; L. R. 2 P. 183; 24 L. T. 72; 19 W. R. 333.

—— **Interpretation of Words relating to Appointment.**]—L., who died domiciled in Portugal, made a will, containing an appointment (substitutional) of four executors in Portugal, and another appointment (also substitutional) of four executors in England. The plaintiff, who was named as an executor in both appointments, was resident in Portugal:—The court held, that the words "in Portugal" and "in England" were equivalent to "for Portugal" and "for England." *Velho* v. *Leite*, 3 Sw. & Tr. 456; 33 L. J., P. 107.

A will, after a legacy to B., contained a gift of other legacies to S., with directions to the latter concerning the testatrix's funeral, and concluded with these words: "I appoint him, my brother B., executor of this my last will":—Held, that the word "with" should be understood as interposed between the words "him" and "my"; and that as well S. as B. was entitled to probate. *Boardman* v. *Stanley*, Ir. R. 6 Eq. 590.

—— **Security.**]—The testatrix, by her will, desired two persons whom she named to "carry out these my wishes," and for their trouble they were each to take a legacy of nineteen guineas. "After these and all other claims" had been met, they were to deal with the residue in manner set forth in the will:—Held, that they were executors according to the tenor, and that it lay upon the persons asking that the executors should give security to shew a reason why this should be done. *Allaw, In goods of*, 66 L. T. 382.

Character of Executor.]—The court cannot pass over an executor by reason of his bad character only; he must also be resident out of the United Kingdom at the time of the death of the testator, in which case it may make a grant of administration, under 20 & 21 Vict. c. 77, s. 73, to some other person with such limitations as it may think fit. *Samson, In goods of*, 42 L. J., P. 59; L. R. 3 P. 48; 28 L. T. 478; 21 W. R. 568.

Executor Bankrupt and Abroad.]—A sole executor named in a will during the lifetime of the testator left England under an assumed name, after selling all his effects to his landlord, and was subsequently adjudicated bankrupt:—Held, that administration with the will annexed should be granted to the testator's widow under s. 73 of the Probate Act, 1857, and the citation of the absent executor was dispensed with. *Crawshay, In goods of*, 62 L. J., P. 91; [1893] P. 108; 1 R. 477; 68 L. T. 260; 41 W. R. 303.

Executrix and Sole Legatee not to be found.]—Where a sole executrix and legatee—being the illegitimate daughter of the testatrix—had not been heard of for forty years, the court granted administration with the will annexed to the representative of the next of kin of the testatrix, on proof that the executrix had been cited by advertisement, and that the solicitor to the treasury did not intend to apply for administration to her estate, and subject to administration to the next of kin being taken out. *Ley, In goods of*, 61 L. J., P. 110; [1892] P. 6; 65 L. T. 762.

Two Executors—Disappearance of One—Subsequent Death of Executor who had obtained Grant.]—A testator died, leaving two executors surviving him, one of whom obtained probate, leave being reserved to the other executor to come in and prove. The executor who had obtained probate died, leaving a will and executors thereof. The other executor had disappeared, and had not been heard of for fourteen years. The court refused to grant administration with the will annexed to the daughter and sole next of kin of the deceased testator—although the executors of the deceased executor consented to the application—without citing the missing executor, but gave leave for such missing executor to be cited by advertisement. *Noddings* v. *Noddings* (2 Sw. & Tr. 15), as explained by the errata and corrigenda at the beginning and end of the volume, followed. *Reid, In goods of*, 65 L. J., P. 60; [1896] P. 129; 74 L. T. 462.

Renunciation of one Executor — Substitutionary Appointment.]—The testatrix, by her will, appointed as her executors and trustees three persons, C., T. and S., and if either of these should decline to act, she appointed "in their place B. or F. executors and trustees then to act." After the death of the testatrix, S. renounced probate, and nothing could be ascertained as to the whereabouts or existence of F. The court granted probate of the will to C., T. and B. *Bradford, In goods of*, 72 L. T. 267.

Identity of Executor—Evidence.]—A testator by his will appointed four executors, one of whom was described as "my nephew, G. A." It appeared that there were two persons named "G. A."—one an illegitimate son of the testator's sister, the other the legitimate son of the testator's brother. The testator also nominated as another of his executors "my nephew E. A.," and it appeared that E. A. was his illegitimate grandnephew, the son of his illegitimate nephew. He further described as "my niece" a person who was his illegitimate niece:—Held, that the language of the will shewed that the testator applied the description of nephew and niece to legitimate and illegitimate relatives indiscriminately; and that the court was therefore entitled to admit extrinsic evidence for the purpose of shewing that the illegitimate and not the legitimate nephew was intended by the will. *Ashton, In goods of*, 61 L. J., P. 85; [1892] P. 83; 67 L. T. 325.

More than one Instrument.]—A person left two wills, containing different and inconsistent dispositions of his property. The first will appointed an executor, and the second did not revoke that appointment, and appointed no fresh executor, and contained no general words of revocation. With the consent of all parties probate of both wills, as together containing the last will of the deceased, was granted to the executor named in the first will. *Griffith, In goods of*, L. R. 2 P. 457; 26 L. T. 780; 20 W. R. 495.

A testator executed a will and codicil, the latter referring to the former by its date. The name of the executor appointed by the will was written on an erasure. The court admitted the declaration of the testator as to the person he had appointed executor, made before the execution of the codicil, and granted probate of the will and codicil to such executor. *Sykes, In*

goods of, 42 L. J., P. 17 ; L. R. 3 P. 26 ; 28 L. T. 142 ; 21 W. R. 416.

A testator, by a will fully disposing of his property, bequeathed various legacies, appointed executors, and named a residuary legatee ; and afterwards made another will, beginning, "This is my last will," repeating some of the legacies in the same words, altering others, and making additional ones, but naming no executor or residuary legatee :—Held, that the two documents were to be taken together as his last will and testament. *Leslie* v. *Leslie*, Ir. R. 6 Eq. 332.

A testator left two testamentary papers, in the earlier of which was an appointment of executors. In the later one he disposed of his whole property in a manner at variance with the dispositions made in the earlier paper, but no executors were appointed, nor was the previous appointment revoked. The court included both papers in the probate. *Lewis, In goods of*, 25 L. T. 510 ; 19 W. R. 1038.

A testator executed two wills, one limited to property vested in him as trustee, the other dealing with his own real and personal estate. The court directed that both wills should be included in one probate, but that the probate should be issued in duplicate. *Claus, In goods of*, 31 W. R. 924 ; 47 J. P. 663.

A testator made two wills. By the first, which disposed of all his property, he appointed his wife executrix. By the second, which disposed of part of his property, and did not revoke the first, he appointed S. his executor :—Held, that the widow was entitled to probate of both instruments, leave being reserved to S. to come in and prove. *Andrew, In goods of*, 42 L. J., P. 38 ; 28 L. T. 238 ; 21 W. R. 391.

A person dying domiciled in England having made two wills in England, one relating exclusively to property in Peru, and the other to property in England, and appointing executors of both wills :—Held, that the executor of the English will, who was also one of the executors of the Peru will, was entitled to probate of both instruments. *Winter, In goods of*, 4 Sw. & Tr. 204.

—— **Name of Executor to Will not in Codicil.**]—When some of the executors named in a will are omitted in a codicil, they should not be excluded from probate, unless either their appointment has been expressly revoked, or the terms of the appointment make it inconsistent that all should be recognised as executors. *Lloyd, In goods of*, Ir. R. 6 Eq. 348.

Therefore, where a will named A., B., C. and D. as executors, and a codicil appointed A. and B. only, proceeding to confirm the will "in all other respects, save as altered by this codicil," A., B., C. and D. were all held to be entitled to probate. *Ib.*

—— **Codicil Found—Supplemental Probate.**]—Where, after probate granted, a codicil is found which does not affect the appointment of the executors, the proper course is to apply for a supplemental probate. *Garner, In goods of*, 1 L. R. Ir. 307.

Joint Will disposing of Foreign Assets—Subsequent Will disposing of Property in Ireland.]—A. and B. made a joint will, disposing of property in the United States of America, and appointed executors. B. afterwards made a will, referring to and recognising the joint will, and disposing of property in Ireland, and appointing other executors. The court refused to the executors of B.'s will probate of that will alone, but granted them probate of both wills, reserving the right of the executors of the joint will. *Fletcher, In goods of*, 11 L. R., Ir. 359.

Executor's Executor.]—The case of an executor's executor is within the spirit of 38 Geo. 3, c. 87, s. 1, and 21 & 22 Vict. c. 95, s. 18. *Grant, In goods of*, 45 L. J., P. 88 ; 1 P. D. 435 ; 24 W. R. 929.

M. B., the testatrix, by her will appointed her friend C. S. to be her sole executor, but, in case the said C. S. should predecease her, or should die before having fully performed his functions as executor, then she appointed her son A. B. to be sole executor of her will. C. S. survived the testatrix, and took probate of her will, but died in 1873, before having completed his functions as executor, leaving a will, which was duly proved by his executors. A. B. survived the testatrix, but predeceased C. S. :—Held, that the chain of representation to M. B.'s estate was not broken, and that her legal personal representatives were the executors of her deceased executor C. S., who were entitled to administration with the will annexed, in respect of the unadministered portion of her estate. *Bond, In goods of*, 70 L. T. 813 ; 58 J. P. 529.

——**When out of Jurisdiction.**]—The executor's executor being out of the jurisdiction, the court granted administration with will annexed to the nominee of parties interested, limited to a particular fund. *Grant, In goods of*, supra.

The words "at the expiration of twelve months from the death of the testator," in s. 1 of 38 Geo. 3, c. 87, when compared with the words given in the form of affidavit in the second section, and of the grant of administration, must be held to mean at or after the expiration of that period. *Ruddy, In goods of*, 41 L. J., P. 63 ; L. R. 2 P. 330 ; 25 L. T. 950 ; 20 W. R. 319.

When the applicant is the residuary legatee, whose interest is undetermined, the grant will be made under 38 Geo. 3, c. 87, but where a particular sum is set aside for and actually payable to the applicant, the grant can be made under 21 & 22 Vict. c. 95, s. 18. *Ib.*

The court will make a limited grant to the personal representative of a legatee, the executor being out of the jurisdiction, though the legatee only is mentioned in 38 Geo. 3, c. 87. *Collier, In goods of*, 2 Sw. & Tr. 444 ; 31 L. J., P. 63 ; 5 L. T. 849.

The executor being out of the jurisdiction, the court made a grant of administration with the will annexed, to the father and guardian of infant legatees, limited to the interest of those legatees in the unadministered estate, under 38 Geo. 3, c. 87, 20 & 21 Vict. c. 77, s. 74, and 21 & 22 Vict. c. 95, s. 18. *Hampson, In goods of*, 35 L. J., P. 1 ; L. R. 1 P. 1 ; 11 Jur. (N.S.) 304.

Probate of the will of C. had been granted by a peculiar court to his executor, who was now abroad, and supposed to be in Australia. C., at the time of his death, had assets out of the jurisdiction of that peculiar. A motion to grant letters of administration with the will annexed to the residuary legatee of C. was refused. *Cooper, In goods of*, 1 Sw. & Tr. 66.

Of Married Women.]—A married woman made a will, appointing executors, and died in the

lifetime of her husband, who by deed confirmed the will, and consented to the same being proved. The court granted to the executors administration with the will annexed. *Isaacs, In goods of*, 31 L. J., P. 158.

—— Husband's Assent to Probate of Will of Married Woman.]—A will was made by a married woman who appointed her husband one of the executors. He assented to the making of the will, and after her death expressed his intention to take probate, but died before doing so:—Held, that he had assented to the probate. *Cooper, In goods of*, 50 L. J., P. 41; 6 P. D. 34; 44 L. T. 111; 29 W. R. 444; 45 J. P. 472.

The court will not make a general grant of probate to the executors named in a will of a married woman; but where the husband, or if dead his representative, assents thereto, it will make to them a general grant of administration with the will annexed. *Reay, In goods of*, 4 Sw. & Tr. 215; 31 L. J., P. 154; 8 Jur. (N.S.) 596.

Feme Covert Executrix—Husband objecting to Probate—Grant to Attorney.]—A married woman having been appointed sole executrix of a will and universal legatee, her husband objected to her taking probate. The court, under s. 73 of 20 & 21 Vict. c. 77, made the grant to her attorney:—Quære, whether a husband has an absolute right to object to his wife's taking probate of a will of which she is executrix. *Clerke* v. *Clerke*, 50 L. J., P. 69, 78; 6 P. D. 103; 29 W. R. 823; 45 J. P. 588.

Executors surviving, or not appearing on being cited.]—When an executor to whom power has been reserved survives his acting co-executor, and does not appear to a citation, the grant will go as if his name had never appeared in the will, and the executors, if any, of the acting executor will be the representatives of the original testator. *Neddiugs, In goods of*, 2 Sw. & Tr. 15; 3 L. T. 178; 9 W. R. 40.

But on the death of an executor, without having either renounced or taken probate, the executor of the survivor of two acting executors becomes the personal representative of the original deceased. *Lorimer, In goods of*, 2 Sw. & Tr. 471; 31 L. J., P. 189; 6 L. T. 612; 10 W. R. 809.

B., surviving executor of A., died in Australia; his executors proved his will in that colony, in which alone he had any property:—Held, that no administration with the will annexed of the unadministered property of A. could be granted before the executors of B. had been first cited to shew cause to the contrary. *Fleming, In goods of*, 6 Jur. (N.S.) 486.

In 1859 the presumption arose that A., who had not been heard of for seven years, was dead, but there were no circumstances from which the date of his death could be inferred. In 1857 his father, who would have been entitled to administration had he survived A., died intestate, and no administration was taken out to him. It being uncertain whether A. or his father survived, the court granted administration of the effects of A. to his sister without requiring administration to the father to be taken out. *Peck, In goods of*, 2 Sw. & Tr. 507; 29 L. J., P. 95.

Intermeddling Executor—Failure to take Probate—Citation—Disobedience—Peremptory Order.]—An intermeddling executor is bound to prove, and where, after he has been cited, he has still failed to prove, a peremptory order will be made against him, upon motion, calling upon him to take probate within a certain time. *Lister, In goods of*, 70 L. T. 812; 58 J. P. 481.

K., who was priest of the parish where a deceased testatrix lived, and another clergyman, were appointed executors. K. attended the deceased as her clergyman on her death-bed, and at the time, or shortly afterwards, was handed (as he stated, for safe keeping) by W., a sister of the deceased, a bank deposit receipt in the joint names of herself and the deceased. He did not before this know of his appointment as executor. W. also gave him certain moneys, assets of the deceased. He deducted therefrom a sum to pay for the funeral office celebrated by him, and a legacy or gift for masses, &c., contained in the will, which he stated W. directed him to keep for these purposes. After these deductions the assets were returned to W., who distributed them to the legatees at a meeting held for the purpose in the vestry of the chapel of which K. was parish priest, and at which meeting K. and the other clergyman named as executor were present. K. refused to take out probate of the will:—Held, that K. had interfered with the assets of the deceased in such a way that he could not repudiate the office of executor, and that he was therefore bound to extract probate. *Hanlon, In goods of*, [1894] 1 Ir. R. 551.

Renunciation by Executor after intermeddling—Consent of Parties.]—There is no absolute rule that an executor who has intermeddled with the assets of a testator will not be allowed to renounce in a proper case; thus, where an executor had only intermeddled so far as was necessary to protect the assets, and desired to renounce, on the ground of his relationship with the next of kin, who were opposing the will, and the parties interested under the will consented, the court gave liberty to renounce. *Fitzpatrick, In goods of*, 29 L. R., Ir. 328.

Sole or Joint.]—D., on 3rd January, 1853, devised and bequeathed all his real and personal estate to P., and appointed him "sole executor of this my will." In March, 1862, by a paper purporting to be his last will, he devised and bequeathed two houses as described, and their appurtenances, to G., and made G. "sole executor of this my will":—Held, that the two executors were jointly entitled to probate of both papers. *Geaves* v. *Price*, 3 Sw. & Tr. 71; 32 L. J., P. 113; 8 L. T. 610; 11 W. R. 809.

A testator appointed his wife and his son "whole and sole executrix":—Held, that they were entitled jointly to probate of his will. *Court, In goods of*, 2 Sw. & Tr. 485; 31 L. J., P. 61; 8 Jur. (N.S.) 142; 6 L. T. 658; 10 W. R. 809.

P. appointed C. and D. "executors of my will in India," and W. "sole executrix of my will in England." On an exemplification of probate granted in Calcutta to C. being sent home, probate was granted in the principal registry to W., as one of the executors of the will, reserving power of making a similar grant to the other executors in the will. The Bank of England objected to the reservation of this power, but the court refused, on motion on behalf of W., to direct the probate to be altered. *Pulman, In goods of*, 3 Sw. & Tr. 269; 33 L. J., P. 20; 9 Jur. (N.S.) 1204; 9 L. T. 347; 12 W. R. 60.

For Limited Objects.]—W. made a will in England in 1861, and appointed B. and C.

executors. In May, 1862, being in India, he made a codicil, and on the 9th of June executed a paper whereby he appointed E. and F. "my executors in this country." The court held, that the context of the paper giving the testator's reasons for the appointment of E. and F. shewed that he did not mean them to have any power over his property in England, and granted probate to B. and C., without reserving power to E. and F. *Wallich, In goods of*, 3 Sw. & Tr. 423; 33 L. J., P. 87; 9 L. T. 809.

B. appointed each of his sons, when he came of age, to be an executor of his will, "so far as respects any residuary real and personal estate, and the aggregate fund forming my general estate":—Held, that the sons, on coming of age, were entitled to probate, limited, as far as possible, in the words used by the testator, due regard being had to the fact that such probate could not affect the real estate. *Barnes, In goods of*, 7 Jur. (N.S.) 195.

Convicted of Felony.]—An executor who, after his testator's death, is convicted of felony is, nevertheless, entitled to probate. *Smethurst* v. *Tomlin*, 2 Sw. & Tr. 143; 30 L. J., P. 269; 7 Jur. (N.S.) 763; 4 L. T. 712.

See also EXECUTOR AND ADMINISTRATOR.

2. Administrators.

To Administrator of Executor.]—Where A. died, having appointed B. executor of his will, and he proved the will, and died leaving part of the estate unadministered, the court made a grant de bonis non (with the will annexed) to the administrator of B., the parties entitled in priority being abroad and difficult to be found; but required that security should be given to the amount of their share of the property. *Hicks, In goods of*, 39 L. J., P. 27; 22 L. T. 553; 18 W. R. 471.

To Administrators with Will Annexed.]—An administrator with the will annexed cannot be forced to take out administration with a later will annexed when the first administration is revoked, although he has intermeddled with the estate. *Davis, In goods of*, 4 Sw. & Tr. 213; 29 L. J., P. 72.

A mother, by her will, appointed her daughter, who was under age, sole executor and universal intromitter with her movable means and estate, and certain persons trustees for the daughter until she was of legal age. In a subsequent part of the will she directed the trustees, in case her daughter died before coming of age, to divide the residue of her property in a particular way. The court refused to grant probate of the will to the trustees as executors according to the tenor thereof, but ordered that administration with the will annexed should issue to them under the Probate Act, s. 73, by reason that the testatrix had not appointed by her will an executor competent to take probate. *Stewart* or *Stuart, In goods of*, 44 L. J., P. 37; L. R. 3 P. 244; 33 L. T. 72; 23 W. R. 683.

A testator, after making several specific bequests, "ordered the management of all the rest to John Smith and Judy"; there not being in the will any other words indicative of an appointment of an executor or of a bequest of residue:—Held, that John Smith and Judy had been constituted, not executors according to the tenor, but residuary legatees, and were entitled, not to probate, but to administration with the will annexed. *Smith* v. *Kerrane, Kerrane, In goods of*, Ir. R. 11 Eq. 447.

Where there is an executor de facto the court has no power to grant letters of administration with the will annexed. *Delacour, In goods of*, Ir. R. 9 Eq. 86.

A person died possessed of real and personal estate. By his will he gave the income derivable from his estate and effects to A. for life, and continued, "The whole after her decease goes to my legal heirs and theirs for ever":—Held, that, on the true construction of the words "my legal heirs and theirs for ever," the heir-at-law took as residuary legatee of the personalty as well as realty, and was, therefore, entitled in that character to a grant of administration with the will annexed. *Dixon, In goods of, Todhunter* v. *Thompson*, 47 L. J., P. 57; 4 P. D. 81; 39 L. T. 234; 26 W. R. 883.

And see cases, post, col. 499.

Bankruptcy of Administrator.]—An administrator became bankrupt, and in his capacity as administrator proved for a debt owing by him to the intestate's estate. A dividend became payable to the estate, but in the meantime the administrator became bankrupt again, and left the country. The court refused to recall the letters of administration granted to him and to make a fresh grant to his creditor's assignee. *Hammond, In goods of*, 30 L. T. 76; 22 W. R. 353.

Administrator pendente lite.]—A married woman, under a power given to her to that effect, duly executed a will. Her husband, by his will, made her universal legatee and sole executrix. She survived him, but did not take probate of his will, or re-execute her own. Litigation having arisen on the question whether the wife's executors were entitled to a limited or a general grant of probate, the court appointed an administrator pendente lite to the estate of the husband, as well as one to her estate. *Dawes, In goods of*, L. R. 2 P. 147; 23 L. T. 397.

A party executed a will and two codicils, and by the will he appointed executors. A suit was instituted to try the validity of the second codicil only, such codicil in no way affecting the appointment of executors. The court refused to appoint an administrator pendente lite. *Mortimer* v. *Paull*, 39 L. J., P. 47; L. R. 2 P. 85; 22 L. T. 631; 18 W. R. 901.

Executors could not enforce in the court of chancery an agreement to purchase made with their testator, in consequence of an appeal to the house of lords as to the validity of the will being still undecided, and their consequent inability to shew a sufficient title to the property. The court, on motion by the executors, and all parties consenting, rescinded the order by which it had delivered out probate to the executors, and issued to them in its place a grant of administration pendente lite. *Wright* v. *Rogers*, 40 L. J., P. 8; L. R. 2 P. 179; 23 L. T. 569; 19 W. R. 192.

Administration pendente lite was granted to the defendant in a suit, the plaintiff not opposing. *De Chatelain* v. *Pontigny*, 1 Sw. & Tr. 34; 27 L. J., P. 18; 6 W. R. 409.

The court will follow the practice of the court of chancery in appointing receivers, and will appoint an administrator pending suit where a bonâ fide suit is pending, irrespectively of the property being in particular danger. *Bellew* v. *Bellew*, 4 Sw. & Tr. 58; 34 L. J., P. 125; 11 Jur. (N.S.) 588; 13 L. T. 247.

In appointing an administrator pendente lite

the court cannot, except with the consent of all interested parties, give him special powers to pay an annuity, by way of maintenance, to one of the residuary legatees who is also one of the next of kin. *Whittle* v. *Keats*, 35 L. J., P. 54.

Where an estate was insolvent and the subject of a suit for administration in chancery, but which was suspended by the death of the administratrix, and could not be proceeded with without the appointment of an administrator, and the children of the deceased were all minors except one, and he was in New Zealand, and the solicitors for the family intimated that none of the children, or any one on their behalf, would take out administration, the court, on an application to grant administration to a creditor, who had proved his debt in the administration suit, declined to grant administration until the children should be cited, and the particulars of the debt, as well as of the estate of the deceased, brought before the court by affidavit. *Bradley, In goods of*, 14 W. R. 409.

Where the estate of a deceased consists of his share of a business which he was carrying on in partnership at the time of his death, and which is continued to be carried on by the surviving partner, the court will not appoint an administrator pendente lite against the wish of the surviving partner, unless a strong case is made that he is dealing improperly with the business. *Horrell* v. *Witts*, 35 L. J., P. 55; L. R. 1 P. 103; 12 Jur. (N.S.) 673; 14 L. T. 137; 14 W. R. 515.

The court ordered, in granting administration pendente lite, that the administrator should not remove certain diamonds which were deposited in the Bank of England by the executors after the death of the testatrix. *Smith* v. *Tebbitt*, 16 L. T. 96.

Concurrent suits were pending between the same parties in the court of chancery and court of probate, and the former had appointed a receiver of the personal estate of the deceased. The court at first refused to appoint an administrator pendente lite, but afterwards, being satisfied that no conflict of jurisdictions would arise, and that the justice of the case required the order, appointed the receiver of the court of chancery also administrator pendente lite at the instance of the creditors of the deceased, with the view of enabling them to obtain speedy payment of their debts. *Tichborne* v. *Tichborne* and *Tichborne, In goods of*, 38 L. J., P. 55, 70; L. R. 1 P. 730; 20 L. T. 820, 1015; 17 W. R. 832.

Under s. 70 the court has power to appoint an administrator even though the application is made by a third person not party to the suit. *Ib.*

The powers of an administrator pendente lite cease when a final judgment has been given. *Wieland* v. *Bird*, 63 L. J., P. 162; [1894] P. 262; 6 R. 574; 71 L. T. 267.

See also cases post, col. 538.

—— **On giving Security.**]—An administrator pendente lite was appointed on his giving security to the amount of one year's income of the property, his administration to be under the direction of the court. The court directed that he should not discharge claims on the estate until they had passed before the registrar. *Charlton* v. *Hindmarsh*, 1 Sw. & Tr. 519; 2 L. T. 24; 8 W. R. 259.

—— **On Administrator's Affidavit that it was for the Good of the Estate.**]—In an interest suit between the Queen's proctor and a person asserting himself to be lawful nephew of a deceased intestate, the court appointed the person who had been made receiver in respect of the same estates in proceedings in chancery to be administrator pendente lite on his affidavit that the estates in certain particulars would be benefited by being dealt with by a person clothed with such authority, and on consent of the parties to the suit. *Her Majesty's Procurator-General* v. *Williams*, 2 Sw. & Tr. 353; 5 L. T. 765.

Application by Creditor not Party to the Suit.]—Where the parties to a testamentary suit took no steps to bring it to trial, and an action had been commenced in the chancery division in which a receiver had been appointed, this court, on the application of a creditor not a party to the testamentary suit, appointed an administrator pendente lite. *Evans, In goods of*, 60 L. J., P. 18; 15 P. D. 215; 63 L. T. 254.

Representative of Deceased Next of Kin.]—W. died intestate, leaving a sister and several nephews and nieces, children of a deceased brother and sisters, his next of kin. The surviving sister died, and her administrator applied for a grant of administration of the goods of W.:—Held, that he was not entitled to administration without citing the nephews and nieces. *Walker, In goods of*, 11 L. R., Ir. 360.

Receivers of Real Estate.]—Before a receiver of real estate will be appointed by the court, it is necessary that it should appear, on affidavit, that the heir-at-law or the devisee, or other person having or pretending interest in the real estate, has been cited. *Purday* v. *Field*, 3 Sw. & Tr. 576; 33 L. J., P. 73; 12 W. R. 1088.

The court has no power to appoint a receiver unless the validity of the will by which real estate is affected is in dispute. It therefore refused to appoint a receiver when the only question was as to the person who was appointed executor in the will. *Grant* v. *Grant*, 38 L. J., P. 55; L. R. 1 P. 654; 20 L. T. 684.

To an Administrator in a Chancery Suit.]—On an application in the probate division by a defendant in a chancery suit for a grant of letters of administration to the estate of the plaintiff in that suit with a view to wind up the chancery suit:—Held, that an affidavit by the parties interested in the estate and assenting to such a course is necessary. *Richardson, In goods of*, 35 L. T. 767.

Held, also, that even with an affidavit before the court no order can be made without first a certificate under the hand of the judge in the chancery division before whom the suit is pending, which shall state that the course proposed is a proper one under the circumstances. *Ib.*

—— **Sale ordered in Chancery after Appointment.**]—An administrator pendente lite having been appointed by the court of probate, a suit was instituted in the court of chancery to administer the estate of the deceased, and an order was made in such suit upon the administrator to sell certain property for the purpose of raising a fund to pay the debts due from the deceased's estate. The court of probate refused to interfere and stop the sale so ordered by the court of chancery. *Tichborne* v. *Tichborne*, 39 L. J., P. 22; L. R. 2 P. 41; 22 L. T. 42.

When Unnecessary — Estates Abroad.]—An administrator of C. in India recovered judgment against M. in an action in Calcutta. M. died, and his estate was being administered in England :—Held, that it was not necessary for the administrator to take out administration in England to C.'s estate. *Macnicol, In re, Macnicol* v. *Macnicol*, L. R. 19 Eq. 81 ; 31 L. T. 566 ; 23 W. R. 67.

When Executor Insane or Abroad.]—Where one executor was insane, and the other was a seafaring man engaged on a voyage to the East Indies, the court passed them both over and made a grant of administration with the will annexed to a third person. *Lewis, In goods of*, 25 L. T. 510 ; 19 W. R. 1038.

d. In Cases of Husbands and Wives.

To Widow or Next of Kin of Deceased Husband.]—The next of kin and heir to the real estate of the intestate contested the right to administration with the widow, on the ground of her want of interest through the insolvency of the personal estate. There was no distinct denial of the insolvency by the widow, but the evidence to prove it was not very conclusive. The court refused to depart from the practice of preferring the widow, and made the grant accordingly. *Peat* v. *Peat*, 25 L. T. 108 ; 19 W. R. 856.

A person died intestate, leaving a widow and several minor children by a former wife. During his lifetime he had been assisted in his business by his brother. On the other hand, his widow, to whom he had been married but a short time, was entirely unacquainted with its management. These circumstances were held not to be sufficient to authorise the court to grant a joint administration to the widow and to the brother as guardian of the minor children. *Richards, In goods of*, 40 L. J., P. 29 ; L. R. 2 P. 216 ; 24 L. T. 142 ; 19 W. R. 443.

A testator appointed an executor, and bequeathed the residue of his personal estate to A. The testator and A. were lost in the same ship, and there was nothing to shew who was the survivor. The executor renounced :—Held, that as the bequest to A. did not take effect, and therefore was not transmissible to his personal representative, the widow of the testator was entitled to administration with the will annexed. *Carmichael, In goods of*, 4 Sw. & Tr. 224 ; 32 L. J., P. 70 ; 11 W. R. 462.

A testator, having in one clause of his will left all his personal property to his wife absolutely, by a subsequent clause gave her only a life interest therein. Under these circumstances a special grant was ordered to issue, which, after reciting the two clauses, should authorise the widow to take administration as the party named in them. *Westropp, In goods of*, 5 Jur. (N.S.) 1318.

A soldier, whilst stationed at the Cape of Good Hope, was married to A., and he being still resident in that colony, such marriage was dissolved by a properly-constituted court there, by reason of A.'s adultery. This decree was made before the Divorce Act (20 & 21 Vict. c. 85). He subsequently, still serving with his regiment in the same colony, was married to B., and this last marriage, by the law of the Cape of Good Hope, was a valid marriage :—Held, that B. was entitled to administration of his goods upon his death as his lawful widow and relict. *Argent* v. *Argent*, 4 Sw. & Tr. 52 ; 34 L. J., P. 133 ; 11 Jur. (N.S.) 864 ; 12 L. T. 768.

When Widow passed over.]—The court will not, at any rate without notice, pass over the widow, who has been legally separated from her husband by reason of her cruelty, in granting administration to his estate. *Ihler, In goods of*, 42 L. J., P. 18 ; L. R. 3 P. 50 ; 28 L. T. 479 ; 21 W. R. 550.

The court is precluded by 21 Hen. 8, c. 5, s. 3, from making a joint grant of administration to a widow and one of the persons entitled in distribution, even with the consent of the next of kin, and of all the other persons entitled in distribution, and 20 & 21 Vict. c. 77, s. 73, does not enlarge the power of the court in such a case. *Browning, In goods of*, 2 Sw. & Tr. 634 ; 31 L. J., P. 161 ; 7 L. T. 217 ; 10 W. R. 96.

An intestate left a widow and two children surviving. He had been separated for some time before his death from the widow, and she had been convicted of felony, and was leading a life of prostitution. The court passed her over, and made a grant to the son. *Boddan, In goods of*, 28 L. T. 368.

For sufficient cause, e.g. the misconduct of a widow in having eloped from her husband and lived in adultery, the court will grant administration to the next of kin in preference to the widow. *Anderson, In goods of*, 3 Sw. & Tr. 489 ; 33 L. J., P. 149 ; 11 L. T. 21.

The testator died, leaving a widow, but no issue. He bequeathed a policy of insurance for 100*l.* to his sister for her separate use, but appointed no executor. Such policy of insurance comprised almost the whole of the personal estate of the testator, and there were charges of adultery against the widow. The court, in the exercise of its discretion, without going into the allegations against the widow, made a grant of letters of administration with the will annexed to the sister of the deceased, as the person having the larger interest, but ordered that the widow should have her costs out of the estate. *Homan, In goods of*, 52 L. J., P. 94 ; 31 W. R. 955.

An intestate was a clerk in the treasurer's office of a corporation. The borough treasurer had admitted that he had been guilty of embezzling a large sum of money belonging to the corporation, and it was also suggested that money was due from the deceased to the corporation :—Held, that there were no special circumstances within 20 & 21 Vict. c. 77, s. 73, to justify the court in passing over the widow and granting administration of the estate to a third person. *Wells* v. *Brook*, 25 W. R. 463.

J. B. died, leaving her husband G. B. and several children her surviving. G. B. remarried, and died without administering the effects of his first wife. Letters of administration of the effects of G. B. were granted to a creditor, who renounced all right to administer the effects of J. B. :—Held, that the children of J. B. were, and not the widow of G. B. was, entitled to the grant of administration of the effects of J. B. *Bell, In goods of*, 1 Sw. & Tr. 288 ; 29 L. J., P. 162 ; 5 Jur. (N.S.) 473 ; 7 W. R. 349.

Where a testator assigned his property on trust, to take effect on his death, for his widow and children, the court, in favour of the intention, granted administration, passing over the widow, who was first entitled to the trustee. *Cosnahan, In goods of*, 35 L. J., P. 76 ; L. R. 1 P. 183 ; 14 L. T. 337 ; 14 W. R. 969.

The court, being of opinion that the widow of the deceased testator was hostile to the next of kin, and that she was going abroad for some time, passed her over, notwithstanding her opposition, and made a grant to a son of the testator by a former marriage, under s. 73 of the Probate Act. *Shirley, In goods of*, 66 L. T. 590.

Husband.]—A husband is entitled to take out administration, in right of the wife, to her next of kin, deceased intestate, and her renunciation in favour of a third person, e.g. a creditor of the deceased, will not deprive the husband of his right. *Haynes* v. *Matthews*, 1 Sw. & Tr. 460; 8 W. R. 76.

Though the ecclesiastical courts are bound by the statute to grant administration to the next of kin of a wife, yet that does not bind the right in equity; for a surviving husband has her whole right vested in him at the time of her death, and her whole property belongs to him.

Though a husband died before he took out administration to his wife's estate, it shall go to his representatives, for it is vested in him at her death; but had the wife survived, her chose in action not reduced into the husband's possession, would have survived to her. *Elliot* v. *Collier*, 3 Atk. 526.

Quære, whether a husband who, by a deed of separation, has resigned all claim to the property of his wife, is thereby excluded upon her death, in his lifetime, from taking any interest as her representative. In such a case the court will not grant administration to the next of kin of the wife unless the husband is cited. *Oranmore (Lord), In goods of*, 30 L. J., P. 183.

The next of kin of a married woman are not at liberty to question her husband's right to administer to her estate on the ground of the nullity of the marriage by reason of the impotence of the husband. *A.* v. *B.*, L. R. 1 P. 559; 17 W. R. 14.

A married woman was the only legatee of a will which contained no appointment of an executor. Her husband refused to consent to her taking the grant of administration with the will annexed, or to join the bond. The property being left to her separate use, the court made the grant to her attorney without the husband's consent. *Warren, In goods of*, 37 L. J., P. 12; L. R. 1 P. 538.

Rule 50, 1862, which directs that no person who renounces probate or administration in one character shall be permitted to take representation to the deceased in another, does not apply to the husband of a residuary legatee who signs a renunciation, executed by his wife, merely to signify his assent to her act. As a creditor he may take administration notwithstanding his signature to such a document. *Biggs, In goods of*, 37 L. J., P. 79; L. R. 1 P. 595.

A married woman, with her husband's assent, made a will. After her death, her husband took the property bequeathed to him by the will, and at his death the will was found amongst his papers. The court granted probate of the will to the executors upon the ground that the husband after his wife's death had continued his consent. *Child, In goods of*, 16 W. R. 407.

A. died leaving all the property over which she had power of appointment to B., who was married and resident in America. B.'s husband came to England and applied for a grant of administration with the will annexed. The court, before making the grant, required that B.'s consent should first be obtained. *Williams, In goods of*, 17 L. T. 518.

—— **Where Executor Named.**] — Where a married woman dies leaving a duly executed will and appointing an executor, if the executor survive the testatrix, although no property pass under the will, the executor must take probate, and an application by the husband for administration must be refused. *Dodsworth, In goods of*, 73 L. T. 315.

—— **Where no Executor Named.**]—Where a feme covert has a power to dispose of her estate by will, the writing she leaves ought first to be propounded as a will in the spiritual court; and if no executor is appointed, they will grant administration to the husband with the will annexed. *Ross* v. *Ewer*, 3 Atk. 160.

—— **Of Administratrix.**]—A creditor's administration of the personal estate and effects of B. was granted to C., a feme sole. C. subsequently intermarried with D., and died six weeks afterwards, leaving part of the estate of B. unadministered, and the debt in respect of which she had obtained the grant still owing. The court held that D. had not reduced his wife's chose in action in the debt into possession by merely taking possession of that part of B.'s estate which he found in her hands, and refused to make to him a grant de bonis non of the goods of B. until he had first taken out administration to his wife. *Risdon, In goods of*, 38 L. J., P. 40; L. R. 1 P. 637; 20 L. T. 330; 17 W. R. 576.

When Husband passed over.] — Where the estate of a testatrix, who had been deserted by her husband, consisted almost entirely of a share in a partnership business, and no executor or residuary legatee was appointed, the court granted administration under s. 73 with the will annexed to a son, and dispensed with the citation of the husband. *Shoosmith, In goods of*, 63 L. J., P. 64; [1894] P. 23; 6 R. 567; 70 L. T. 809.

Where the husband of a deceased intestate had left her and resided apart from her for some years before her death, the court, on proof that the husband had been cited to take out letters of administration to the personal estate and effects of his wife, and had entered no appearance to the citation, passed him over, and made a grant to the eldest son of the intestate by a former husband. *Moore, In goods of*, 60 L. J., P. 98; [1891] P. 299.

The court made a grant, under s. 73, by reason of the "special circumstances" of the case, in respect of a married woman's separate estate, in favour of her father, passing over her husband, who was out of the country, without requiring him to be cited. *Hill, In goods of*, 66 L. T. 380; 56 J. P. 297.

Moneys belonging to or now vested in the mother of the deceased (her daughter) were, under a misapprehension, paid into a savings bank account standing in the name of the deceased, who died more than six years ago, leaving a husband, who, although he knew of the account, took no steps to obtain administration, and left this country for Hamburg and thence for America:—Held, on motion, that the court would not grant letters of administration to the mother without notice to the husband. *Rusch, In goods of*, 6 R. 538; 42 W. R. 304.

Where a married woman domiciled in Canada died intestate, leaving a husband and two minor children her surviving, the court, on the affidavit of a member of the Canadian bar that by the law of Canada the children, and not the widower, had the first right to administer the estate of a married woman dying intestate, granted letters of administration to the attorney of the said two minor children. *Babin, In goods of*, 59 L. J., P. 46; 62 L. T. 185.

The marital right of the husband as administrator by law excluded by a limitation to the next of kin of the wife. *Anderson* v. *Dawson*, 15 Ves. 537.

To Representatives of Husband and Wife—Death of Wife.]—A wife whose personal estate consisted of a legacy which became payable in 1864 died in 1856 intestate. In 1845 her husband went abroad, and was last heard of in 1853:—Held, that as there was no evidence that she died a widow, her next of kin was not entitled to administer without citing the representatives of her husband. *Nichols* or *Nicholls, In goods of*, 41 L. J., P. 88; L. R. 2 P. 461; 27 L. T. 323; 21 W. R. 161.

The rule that when husband and wife perish together, and there is no evidence that the one survived the other, administration of their personal estate will be granted to their respective next of kin, is not applicable to such a case. *Ib.*

Where a married woman makes a will and appoints no executor, the persons interested under the will are entitled to the grant in priority to the husband, who can only obtain the grant on their renunciations being filed in the registry. *Bailey, In goods of*, 2 Sw. & Tr. 135; 30 L. J., P. 190; 4 L. T. 90; 9 W. R. 540.

A woman, being entitled to a legacy on the death of another person, married and died in the lifetime of her husband, who also died before the legacy had become payable and without having taken out administration to his wife:—Held, that the legacy formed part of the estate of the husband, and that administration to the wife in respect of such legacy could only be granted to the representative of the husband. *Harding, In goods of*, 41 L. J., P. 65; L. R. 2 P. 394; 26 L. T. 668; 20 W. R. 615.

In the absence of express words in the grant, the administrator with the will annexed of a married woman, who was an executrix, takes only as administrator of an executrix, and has no relation with the original testator. *Bridger, In goods of*, 47 L. J., P. 46; 26 W. R. 535.

A husband appointed his wife and two other persons as executrix and executors. The wife remarried and died, having, during her second coverture, made a will in accordance with her power of appointment, and she appointed her husband her sole executor. The husband took out letters of administration with the will annexed. Part of the estate of the original testator remained unadministered, the two other executors having predeceased the wife. The court held that the grant of letters of administration to the second husband, with the will of his wife annexed, did not continue the chain of representation to the original testator, and, with the consent of the second husband, granted administration of the unadministered effects of the testator to his daughter as one of the residuary legatees. *Ib.*

Where a husband survives the wife, and dies intestate, without administering to her estate, his next of kin must constitute themselves his legal representatives before they have any claim to administer to the wife's estate. *Crause, In goods of*, 1 Sw. & Tr. 146.

A limited probate taken out of the will of a feme covert will not continue the chain of representation under the general probate of the will of the original testator; but the court will make a supplemental grant, limited to the property which the feme covert had as executrix. *Bayne, In goods of*, 1 Sw. & Tr. 132; 6 W. R. 815.

A. died in Ireland. B., his executor, proved his will there. B. died, and C., his executor, proved his will in Ireland and had the Irish grant resealed in the principal registry of the court of probate in England:—Held, that the chain of representation was not continued, and that C. was not entitled to a grant of administration of the personal estate and effects in England of A.'s wife, who predeceased her husband. *Gaynor, In goods of*, 38 L. J., P. 79; L. R. 1 P. 723; 21 L. T. 367; 17 W. R. 1062.

When a married woman, with her husband's consent, had made investments in her own name, and had made a will in his life disposing of property over which she had a power of appointment, and of all her other property, and her husband had, in writing, consented to and approved of the will, and the wife died in the husband's lifetime, the court revoked a limited grant made to her executors, and decreed a general grant of administration with the will annexed to them, upon the consent of the personal representative of the husband to such grant being filed. *Reay, In goods of*, 4 Sw. & Tr. 215; 31 L. J., P. 154; 8 Jur. (N.S.) 596.

A wife separated in 1836 from her husband, on account of his intemperate habits, and afterwards maintained herself. In 1873 she disposed by will of personal property which she had earned after the separation. The court made a grant of probate to the executors limited to the property of which she had disposed, and over which she had power of disposition. *Andrews, In goods of*, 28 L. T. 479; 21 W. R. 576.

A wife was deserted by her husband, and died possessed of property which was invested in 1871. It did not appear at what time she became possessed of the property, but it was after the desertion. The court granted probate only of the property to which the testatrix had become entitled since the passing of the Married Women's Property Act, 1870. *Pepper, In goods of*, 31 L. T. 274; 22 W. R. 832.

A couple married in 1811; in 1817 they verbally agreed to separate, and not to interfere with each other, and divided then their furniture and effects. They never again cohabited, and the wife supported herself by her own industry, and acquired property, which she disposed of by will in 1856. Probate of this will was opposed by the husband, who asserted his marital right to his wife's property:—Held, that the property had been acquired to the wife's sole use, and the jus disponendi would therefore attach to such property. *Haddon* v. *Fladgate*, 1 Sw. & Tr. 48; 27 L. J., P. 21; 6 W. R. 456.

A husband died intestate leaving a widow. His whole estate was under the value of 500*l.*, and therefore became the absolute property of the widow, by virtue of s. 1 of the Intestates' Estates Act, 1890. The widow died leaving a will disposing of all her property, whereof she appointed an executor, but without having taken out administration to the estate of her deceased

husband. On an application by the executor of the widow for a grant of administration to the estate of the deceased intestate, the court made the grant to the executor in preference to the next of kin of the deceased intestate; but, inasmuch as there was a possibility that the estate of the husband might after all turn out to be worth more than 500*l.*, made the grant under s. 73 of the Court of Probate Act, 1857. *Bryant, In goods of*, 65 L. J., P. 96; [1896] P. 159.

See also Cases post, col. 531.

—— **Death of Husband.**]—A husband was lost at sea in or about 1846, having made a will by which he left all his property to his wife, who died in 1874 without having taken any steps to prove his will. The widow for several years drew the dividends from money in the funds which had belonged to her husband, but the Bank of England had refused to transfer the stock, or pay the arrears of dividend, to her administrator, until administration to the husband's estate had been taken out. There was no evidence of the name or names in which the stock stood. The court, in the absence of evidence that the husband died possessed of property within the jurisdiction, refused to grant administration with the will annexed of his effects to the widow's administrator. *Lock, In goods of*, 24 W. R. 281.

The court will not, for the protection or convenience of the Bank of England, depart from the principles on which it is accustomed to act. *Ib.*

A wife and her husband made an agreement that an annuity to which the former was entitled, and which was in the hands of a trustee, should be equally divided between them. The husband afterwards, viz. in 1841, disappeared, and no payment of his share of the annuity was ever made to him. The wife died in 1856. The wife's executor now applied for a grant of administration de bonis non to the estate of the trustee, limited to a sum of money which was identified as the accumulation of the husband's unpaid share of the annuity, and which was part of certain unadministered estate of the trustee. The court having presumed the husband to have died before the wife, made the grant. *Serjeant, In goods of*, 26 L. T. 669; 20 W. R. 872.

A husband from time to time gave his wife sums of money, part of which accumulated as stock in his name; he received the dividends, and paid them to her, and in every way treated the stock as her separate property. The wife during coverture, with the husband's consent, made a will, whereof she appointed an executrix, survived him a few hours, and died without republishing the will:—Held, that the testatrix had acquired a separate estate, of which the husband had considered himself trustee for her, and to which the jus disponendi attached, and that her executrix was entitled to a limited probate. *Smith, In goods of*, 1 Sw. & Tr. 125; 27 L. J., P. 39; 4 Jur. (N.S.) 1193.

A husband left a will, in which he made his wife executrix, and gave her a life interest in the whole of his property; on her death he directed it should be sold, and the proceeds divided amongst his children; and he appointed his eldest son and another person trustees to carry such division into effect. The widow took probate of the will, and subsequently sold the property of her husband for 600*l.*; and with that sum, and 130*l.* of her own moneys, purchased two leasehold houses. On her death, the court granted administration of her effects to the eldest son, the trustee named in their father's will, in preference to the nominee of the other next of kin, five in number. *Stainton, In goods of*, 40 L. J., P. 25; L. R. 2 P. 212; 24 L. T. 320; 19 W. R. 567.

—— **Grant of Letters of Administration to Wife's Father.**]—A husband agreed by deed of separation that if his wife died intestate her next of kin should be entitled to her property. She died intestate, leaving separate property of which she had become possessed by virtue of the deed, and the court, notwithstanding that the husband objected, granted letters of administration to her father, limited to that property. *Allen* v. *Humphreys*, 52 L. J., P. 24; 8 P. D. 16; 48 L. T. 125; 31 W. R. 292; 47 J. P. 24.

Official Receiver in Husband's Bankruptcy.]—The court made a grant of administration under s. 73 of the Probate Act, 1857, in respect of the personal estate and effects of a married woman who had died intestate, leaving her husband surviving, upon the application and in favour of the official receiver in her husband's bankruptcy. *Thacker, In goods of*, 54 J. P. 759.

In a case of the estate of a married woman who had died intestate, leaving her husband, who survived her, an undischarged bankrupt, whose estate was vested in the hands of the chief official receiver in bankruptcy, under the Bankruptcy Act, 1883, s. 121; the court, upon motion by the chief official receiver, made a grant to him of the personal estate and effects of the deceased intestate, and, on account of the smallness of the estate, dispensed with any citation upon the husband of the deceased. *Conolly, In goods of*, 74 L. T. 461.

One of the official receivers in bankruptcy, as trustee of the estate of the husband of a deceased intestate, applied for administration without citing the husband. The amount of the estate was 105*l.* 2*s.* 10*d.*, which was claimed by the official receiver on behalf of the creditors of the bankrupt:—Held, that notice of some kind must be given to the husband, but that, upon the registrar being satisfied as to this, the grant might go. *Morgan, In goods of*, 75 L. T. 190.

Administration Bond—Consent of Husband.]—Since the Married Women's Property Act, 1882, when a married woman is administratrix, it is not necessary that her husband should join in the administration bond. *Ayres, In goods of*, 52 L. J., P. 98; 8 P. D. 168; 31 W. R. 660; 47 J. P. 440.

When a wife is entitled to administration, and the husband refuses to join in the administration bond, or to assist her in obtaining the administration, the court will grant the administration to her, allowing a third person to execute the bond for her. *Sutherland, In goods of*, 4 Sw. & Tr. 189; 31 L. J., P. 126; 8 Jur. (N.S.) 465.

When the universal trustee in a will was a married woman, the property being given to her for her sole and separate use, and the husband refused to execute the bond unless she undertook to share the property with him, the court granted administration with the will annexed to the attorney of the wife under s. 73 of Probate Act. *Warner, In goods of*, 17 L. T. 221.

Husband and Wife dying together.]—*See* post, col. 495.

4. On Presumption of Death.

Probable Death at Sea.]—A settler in New Zealand embarked 1st July, 1856, in a vessel bound for Sydney on his way to England. The vessel never reached Sydney, and no intelligence, after inquiries had been instituted, having been obtained, as to the vessel, or any of those on board, she was supposed to have foundered at sea, in some heavy gale, which occurred at the time she was making the voyage in question:—Held, that his death was to be presumed, and that advertisements in newspapers for persons supposed to be dead might be dispensed with, when their history is known and traced within a short period of their being last heard of. *Norris, In goods of*, 1 Sw. & Tr. 6; 27 L. J., P. 4; 6 W. R. 261.

M. sailed from Liverpool in the "Brevet," the 27th January, 1857, for Valparaiso. The voyage should have been made in ten weeks. Nothing had been heard of either the "Brevet" or crew since she left Liverpool. The ship was insured, and the underwriters had paid policy thereon, as upon a total loss:—Held, that his death was to be presumed; the payment of policy by underwriters was strong evidence in favour of such presumption. *Main, In goods of*, 1 Sw. & Tr. 11; 27 L. J., P. 5; 6 W. R. 262.

On the 15th November, 1857, S. sailed from Barcelona to Constantinople, the average duration of the voyage being thirty days. The vessel had never arrived at her destination, nor had anything been heard of her or the crew, and the insurers of the ship had paid as upon a total loss. The court refused to grant administration to his effects, as it did not appear that any inquiries had been made for the crew at Barcelona, but allowed administration to pass conditionally, on an affidavit of such inquiries having been made without the result being filed in the registry. *Smyth, In goods of*, 28 L. J., P. 1.

A master of a ship sailed in her from Demerara, on the 23rd of October, 1858, bound for London, the ordinary duration of the voyage being five or six weeks. A few days after sailing, a hurricane passed over the West Indian Islands, in which it was supposed that the ship and all hands had been lost, neither the vessel nor any of the crew having been heard of since the vessel sailed. The underwriters on the vessel had arranged to pay the amount insured as upon a total loss. On these facts, a motion made on the 30th of March, 1859, for a grant of administration of the effects of A., was rejected, the court holding that the application was premature, since, though the vessel might be lost, the crew might have been picked up by a vessel bound on so long a voyage, that tidings of them could not have been received in the period that had elapsed since the vessel was last heard of; and that inquiries should have been made at Demerara for the crew; but on the 22nd of June, 1859, the underwriters having paid the amount insured on the vessel, and nothing having been heard of either her or any of the crew, administration was granted. *Bishop, In goods of*, 1 Sw. & Tr. 303; 28 L. J., P. 93; 7 W. R. 375.

Evidence.]—The court will not presume the death of a person until it is satisfied that it has before it the best evidence that can reasonably be obtained on the subject. Therefore, where the affidavits filed in support of a motion for presumption of death spoke of certain letters of the deceased, the court adjourned the case in order that such letters should be produced or their absence sufficiently explained. In these cases it is necessary that the applicant should depose to his own belief in the death of the supposed deceased, and that (if possible) such affidavit should be corroborated by that of some other member of the family, or, if there be none such, a person acquainted with the deceased, who should also swear to his personal belief in the death. *Clarke, In goods of*, 66 L. J., P. 9; [1896] P. 287.

Upon motion to presume the death of a man who sailed from this country for Western Australia on board a small vessel which called at Cape Town and was never heard of after leaving that port, the certificate of the registrar-general of shipping and seamen was produced, which stated (inter alia) that the person in question was returned as serving upon the vessel as second mate at the time when she was last heard of, and that he was "supposed drowned." The certificate was furnished in pursuance of the provisions of the Merchant Shipping Act, 1894, and two members of the deceased's family swore to their belief in his death. The underwriters of the vessel had paid the insurance money, as upon a total loss, and notice had been given to the office with whom the deceased's life was insured. The court presumed the death as having occurred on or since the date when the vessel was last heard of. *Dodd, In goods of*, 77 L. T. 137.

Consent of Insurance Company—Letter containing such Consent ordered to be filed.]—Where an application was made for leave to presume the death of a sailor as having been drowned at sea, and the applicant had received a letter from an insurance company, in whose office the deceased was insured, consenting to the motion, the court ordered such letter to be filed with the papers. *Saul, In goods of*, 65 L. J., P. 101; [1896] P. 151.

Advertisement.]—The court refused to dispense with the usual advertisement in newspapers before presuming the death of a sailor who had been last heard of in 1859, as then about to sail from New Zealand to China in a barque now believed to have been lost. *Atkinson, In goods of*, Ir. R. 7 Eq. 219.

It is a general rule of practice in the probate division that no death will be presumed merely on the ground that the supposed deceased has disappeared for many years, and is probably dead. This rule applies even in cases where the supposed deceased has corresponded with his family for many years, and has suddenly ceased to do so. Semble, this rule is not affected by the smallness of the estate. *Robertson, In goods of*, 65 L. J., P. 16; [1896] P. 8.

Not heard of for Seven Years.]—The husband of A. had, seven years before her death, left this country for America, and had not been heard of since three days after his arrival there, although he had been advertised for in that country:—Held, that he must be presumed to be dead, and probate was granted of her will as if she had died a widow. *How, In goods of*, 1 Sw. & Tr. 53; 27 L. J., P. 37; 4 Jur. (N.S.) 366.

T. was not heard of from December, 1846. More than seven years afterwards, namely, in September, 1854, he would, if alive, have become entitled, by the death of a relative, to a share in

her residuary personal estate. This share had, in his absence, been paid into the account of the accountant-general of the court of chancery, who, it was stated, was prepared to pay it to T.'s administrator. He had no other property in this country. The court declined to make a general grant of administration to his brother, on the ground that he must be presumed to have died before the death of his relative, but made a grant limited to substantiate proceedings to the court of chancery. *Turner, In goods of*, 3 Sw. & Tr. 476; 33 L. J., P. 180; 10 Jur. (N.S.) 708. See also *Peck, In goods of*, post, col. 496.

Grant to Nominee of Parties interested.]—On a motion for presumption of death of an intestate, the court will also grant administration to a nominee of all parties without requiring a special motion for that purpose. *Curling, In goods of*, 11 R. 585.

Death of Husband of deceased Intestate—Refusal.] — Where a married woman died intestate in March, 1889, without issue or parent, having lost all trace of her husband since July, 1873, and application was made to the court by her natural and lawful sister and one of her next of kin, for leave to presume the death of the husband of the said deceased intestate:—Held, that it was contrary to the practice of the court to presume the death of a person other than the person whose estate is in question, and refused the application. Semble, the proper course would have been to cite the husband by advertisement. *Clark, In goods of*, 59 L. J., P. 6; 15 P. D. 10; 61 L. T. 653; 38 W. R. 448.

Affidavit supporting Application for Administration.]—It is not necessary, in a case of administration on presumption of death, in an affidavit for administration, to negative the existence of the persons who would, if alive, have prior interests to the applicant at the time of the death of the deceased, if the applicant is unable to do so. It is enough to negative their existence at the time of swearing. *Sloane, In goods of*, 11 L. T. 149.

Foreign Grant followed.] —Where a foreign court of competent jurisdiction had made a grant of administration on the presumption of the death of the intestate:—Held, that the grant might be accepted by the court of probate as sufficient proof of the death without requiring it to be proved by independent evidence. *Spenceley, In goods of*, 61 L. J., P. 133; [1892] P. 255.

5. Next of Kin.

Generally.]—The consent of the next of kin, who are minors, and some of them of tender years, is not sufficient to justify the court in making a joint grant of administration to the widow and one of the other next of kin, unless there are special circumstances for departing from the general practice of the court. *Newbold, In goods of*, 36 L. J., P. 14; L. R. 1 P. 285; 15 L. T. 248; 15 W. R. 262.

On sufficient grounds shewn, the court will depart from the general practice of the registry by which a party originally entitled in distribution is preferred in making a grant de bonis non to a party having a derivative interest, e.g. the personal representative of the next of kin, and will make the grant to the latter. *Carr, In goods of*, L. R. 1 P. 291; 16 L. T. 181; 15 W. R. 718.

The next of kin of an intestate has by law the same title to administration as has the widow, though, under ordinary circumstances, the practice is to make the grant to the widow. *Corser, In goods of*, 31 L. J., P. 170.

A person who is entitled to administration as next of kin cannot take the grant as a creditor. *Ib.*

The next of kin is entitled to administration of the personal estate on the oath that the deceased died intestate, except as to real estate. *Parkins, In goods of*, 1 Sw. & Tr. 465; 29 L. J., P. 47; 5 Jur. (N.S.) 1270.

To Father with Will annexed where no clear Disposition of Residue.]—The testator bequeathed to his father "a life interest, or until he shall marry again, of one-third of such money, stocks, funds or other securities, not hereinafter specially devised, as I may die possessed of;" and he gave the other two-thirds of his capital among such of his brothers and sisters as should attain the age of twenty-one. He also directed that, on the death or second marriage of his father, the one-third part, and the share of his mother's estate which would then belong to him, should be divided among his brothers and sisters. There was no specific gift of the residue; both the executors named in the will renounced probate. The court made a grant to the father of the deceased, as next of kin, of letters of administration with the will annexed, with a memorandum to the effect that the will contained no clear disposition of the residue. *Aston, In goods of*, 50 L. J., P. 77; 6 P. D. 203; 30 W. R. 92; 45 J. P. 816; 46 J. P. 104.

To Children.] — The court granted administration to the natural and lawful child of the deceased, she having been born six months after the marriage of her parents. *Turnock* v. *Turnock*, 36 L. J., P. 85; 16 L. T. 611.

P. bequeathed the residue of his personal estate to be equally disposed of between five of his children whom he named. One of those children died in his lifetime:—Held, that the five children took as tenants in common, and the share of the deceased child therefore lapsed to the undisposed residue, and the court granted administration with the will and codicil annexed to B., son of the deceased, not as legatee, but as entitled as one of his next of kin to part of the undisposed residue. *Pile, In goods of*, 2 Sw. & Tr. 628; 31 L. J., P. 40; 7 L. T. 194.

—— **Widow Abroad in Lunatic Asylum not cited.**]—The widow of a deceased intestate being absent in the colonies, and confined in a lunatic asylum, the court allowed the grant of administration to go to one of the children without citing her. *Jameson, In goods of*, 46 J. P. 40.

—— **Divorced Wife not cited.**]—Administration of the estate of a deceased intestate whose marriage had been dissolved by the high court of judicature in Bombay, granted to his next of kin without citing the divorced wife. *Nares, In goods of*, 57 L. J., P. 19; 13 P. D. 35; 58 L. T. 529; 36 W. R. 528; 52 J. P. 231.

Son preferred to Father of Intestate.]—If there be grandfather, father, and son, and the father dies intestate, the son shall have the

administration, and not the grandfather. *Crooke* v. *Watt*, 2 Vern. 125.

Grandmother preferred to Aunt of Intestate.]—One dies intestate, leaving an aunt and a grandmother his next of kin; the grandmother is nearer of kin than the aunt, and is entitled to administration. *Blackborough* v. *Davis*, 1 P. Wms. 41.

Children of First Wife preferred to Second Wife.]—A. died intestate, leaving her husband and children by him surviving. Her husband afterwards married B., and upon his dying intestate, leaving B. and children by both wives him surviving, administration of his effects was granted to a creditor, the widow and children having been duly cited, but not appearing. Afterwards a sum of money, to which A., at the time of her death, was entitled in reversion, became payable to her estate, and the creditor renouncing his right to administration of A.'s estate, B. applied that it might be granted to her:—Held, that B. had no right to the grant, as she was the representative neither of her husband nor of A., but that on the renunciation of the creditor, the representative of B.'s husband, the children of A. were entitled to the grant. *Bell, In goods of*, 1 Sw. & Tr. 288; 29 L. J., P. 162; 5 Jur. (N.S.) 473; 7 W. R. 349.

When Testator of Unsound Mind.]—A person made a will, whilst of unsound mind, in favour of a charitable institution. The only party interested to support it being cited to propound it, or shew cause why it should not be treated as void, did not appear. On an affidavit of the medical attendant of the deceased, as to his testamentary incapacity, administration was granted to one of his next of kin, as in an intestacy. *Perry* v. *Dyke*, 1 Sw. & Tr. 12; 27 L. J., P. 7; 6 W. R. 275.

Death of Husband and Wife—No Evidence as to which died first.]—W. perished with his wife and only child, an infant, in the Cawnpore massacre, leaving no will. There being no evidence as to survivorship, the court granted administration of his personal estate, as having died a widower, to his mother as his next of kin. The administrator's oath, instead of being in the usual form, may state that there is no reason to believe that the wife survived the husband. *Wainwright, In goods of*, 1 Sw. & Tr. 257; 28 L. J., P. 2.

G., with his wife and three children, perished in a shipwreck. There being no evidence as to survivorship, and no will, the court granted administration of his estate as having died a widower to the maternal grandfather of the surviving children, and directed that the administrator's oath, instead of being in the usual form, should state that there was no reason for believing that the wife had survived her husband. *Grinstead, In goods of*, 21 L. T. 731.

When husband and wife die by the same calamity, and there is no evidence that the one survived the other, administration of their personal estate will be granted to their respective next of kin. *Wheeler, In goods of*, 31 L. J., P. 40.

When a testator made a will appointing a sole executrix and residuary legatee, and next day killed his wife and committed suicide when (as found by a coroner's jury) in a state of insanity, and the residuary legatee had been cited and had not appeared, the court refused to grant letters of administration with an earlier will annexed until the next of kin of the residuary legatee had been cited. *Thomas* v. *Payne*, 31 L. T. 553; 23 W. R. 71.

A husband and wife executed identical wills, each appointing the other universal legatee and sole executor, and substituting executors in case of the other dying first. They started together upon a voyage in the same ship, which was supposed to have been lost at sea with all on board. There was no evidence that either of them survived the other:—Held, that a grant of administration with the will annexed of the estate of each, as in case of an intestacy, might be made to one of the next of kin of each. *Alston, In goods of*, 61 L. J., P. 92; [1892] P. 142; 66 L. T. 591.

No Evidence as to whether Son or Father died first.]—Where the presumption of A.'s death arose from the fact that he had not been heard of for seven years, and there was no evidence that he was ever married or had left a will, and his father died before the expiration of the seven years, the court, on account of the impossibility of ascertaining whether or not A. had survived his father, under 20 & 21 Vict. c. 77, s. 73, granted administration to the next of kin of A., without requiring administration to be taken out to his father. *Astell, In goods of*, 31 L. J., P. 38.

A bachelor, who had gone to Australia, had not been heard of for seven years. His father died intestate about two years and five months before the expiration of the seven years. No personal representation had been taken out to the father. It being uncertain whether he died before or after his father, the court granted administration of his effects to his sister. *Peck, In goods of*, 2 Sw. & Tr. 507.

S. died on the 7th August, 1858, a bachelor and intestate, leaving his mother and sister surviving him. His father left England in 1840, and had not been heard of since the receipt of a letter dated the 9th July, 1854; but there was no evidence on which the court could presume that the father was not alive on the 7th August, 1858, and the grant of administration to the estate was accordingly made to the mother, under the power given by 20 & 21 Vict. c. 77, s. 73. *Smith, In goods of*, 2 Sw. & Tr. 508; 31 L. J., P. 182; 7 L. T. 193; 10 W. R. 586.

Death of Testator and Legatee at Same Time.]—When the testator and his residuary legatee have been drowned at the same time and in the same ship, the legacy is extinguished, and the grant will be made as in case of an intestacy. *Carmichael, In goods of*, 4 Sw. & Tr. 224; 32 L. J., P. 70; 11 W. R. 462.

Representative of Next of Kin or Party entitled in Distribution—General Rule—Exception.]—A. having died intestate, leaving his sister his sole next of kin, and several nephews and nieces entitled in distribution, his sister took out letters of administration to his estate, and died, leaving two daughters, whom she appointed executrixes of her will, one of whom having proved that will the court granted to her letters of administration de bonis non of the goods of A. The general rule is, that a party originally entitled in distribution is preferred in making a grant de bonis non to a party having a

derivative interest; but the court has a discretion in the matter, and will, in a proper case, make a grant to the party having the derivative interest, provided all the persons entitled in distribution have been cited, or shall by appearance or consent waive citations. *Johnson, In goods of*, 7 L. R., Ir. 1.

To Mother on Father renouncing.]—One died intestate, unmarried and without issue, leaving his father and mother surviving him. His assets consisted mainly of the amount of a promissory note, which was payable by instalments, which the intestate had, by letters to his mother and his solicitors, directed the latter to hand over to his mother. Several of the instalments had been paid to her before the intestate's death. The court, acting under the 78th section of the Probate Act, 1857 (which corresponds with the 73rd section of the English act), and on the renunciation of the intestate's father, granted administration to the mother. *Ferguson, In goods of*, 7 L. R., Ir. 176.

To Sister when Mother is of Great Age.]—A spinster died intestate, leaving a mother and a sister. The former was seventy-nine years old, and in very precarious health, and it was thought that she could not be informed of her daughter's death without endangering her life. The court, under 20 & 21 Vict. c. 77, s. 73, granted letters of administration to the sister for the use and benefit of her mother. *Clarke, In goods of*, 46 L. J., P. 16; 25 W. R. 82.

To Father-in-law for Benefit of Son.] — A widower died intestate; his only son, the sole person entitled in distribution, was resident in Australia. A legal representative being required immediately for the preservation of the property, administration for the use and benefit of the son was granted to his father-in-law. *Jones, In goods of*, 1 Sw. & Tr. 13; 27 L. J., P. 17; 6 W. R. 276.

Persons equally entitled—Selection.]—In a contest among next of kin prima facie equally entitled to administer to the estate of a deceased relative, the choice of the fittest person should be made on summons before one of the registrars, according to the practice in the probate division, and parties improperly brought into court on motion will be entitled to their costs. *John, In goods of*, 58 L. T. 683; 52 J. P. 232.

Joint Grant to Next of Kin and another Person entitled in Distribution—Consent.]—A widow died intestate leaving a brother and nine nephews and nieces, the only persons entitled in distribution. Three of her nephews and nieces were in Australia, but the other six consenting, the court made a grant of administration to the brother and one of the nephews under 20 & 21 Vict. c. 77, s. 73. *Walsh* or *Wash, In goods of*, 61 L. J., P. 123; [1892] P. 230; 67 L. T. 355.

—— **All Next of Kin—Security.**]—An intestate died leaving a nephew and three nieces her sole next of kin. The nieces executed a power of attorney to their mother to enable a joint grant to be made to the nephew and mother. The court refused to make the joint grant, but under the special circumstances made a joint grant to the four next of kin upon their entering into a bond for double the amount of the gross assets, and on giving justifying security in a separate bond for 200*l*. *M'Crossan, In goods of*, 29 L. R., Ir. 412.

Property in England and America—Will disposing of American Estate only.]—M. died possessed of property in England and America, leaving a will dealing with her American estate only, which was duly proved by her executors in the American court; but she died intestate as to her English estate:—The court granted administration of the property in this country to her sole next of kin. *Mann, In goods of*, 60 L. J., P. 95; [1891] P. 293; 40 W. R. 144.

When not to Next of Kin—Special Reason Necessary.]—The court refused to grant administration jointly to the widow and son, no special reason being given for the application, and some of the next of kin being of an age at which they were incapable of consenting to such a grant. *Newbold, In goods of*, 36 L. J., P. 14; L. R. 1 P. 285; 15 L. T. 248; 15 W. R. 262.

A person died intestate leaving an aged uncle and aunt the only persons entitled to distribution; at their desire, administration was granted for their use and benefit to their son on the sureties justifying. *Roberts, In goods of*, 1 Sw. & Tr. 64; 6 W. R. 460.

Administration with the will annexed granted to the nominees of the residuary legatee, who was a married woman, without notice to her husband, the residue being settled to her separate use and at her absolute disposal. *Pine, In goods of*, 36 L. J., P. 95; L. R. 1 P. 388; 17 L. T. 31.

—— **When Next of Kin Abroad.**]—A person was supposed to have made a will, appointing his cousin his executor, but at his death it could not be found. His brother, the sole next of kin, had been absent in Australia for forty years, and a representative was urgently needed to carry on the business to collect the debts, and to represent the deceased in a chancery suit. The court made a grant ad colligenda to his cousin for the use and benefit of the next of kin, with special directions to make certain payments. *Tepper, In goods of*, 25 L. T. 853.

Where the estate of an intestate was perishable, and the next of kin were in Australia, the court granted limited administration for the use and benefit of the next of kin, under s. 73. *Young, In goods of*, 36 L. J., P. 80; 15 L. T. 446.

A person died in England intestate leaving two children the only persons entitled to her effects, who were resident in Georgia. She left money in the funds and in a savings bank, a small sum due to her, and a little furniture. The court refused to make a grant to her nephew, for the use and benefit of her children, although communication with her children from England was cut off by reason of the blockade of the southern ports of the United States, on the ground that the property was not perishable, and that there were no special circumstances to justify the court in departing from the ordinary practice. *White, In goods of*, 2 Sw. & Tr. 457; 31 L. J., P. 161; 6 L. T. 162; 10 W. R. 430.

The court granted administration to the sister of a deceased intestate, the mother being willing to renounce, and her husband being in Australia. *Llanwarne, In goods of*, 36 L. J., P. 25; L. R. 1 P. 306; 15 L. T. 193.

C. was possessed of a freehold estate, which he occupied and farmed himself; at his death his only next of kin was in New Zealand. The

court, under 20 & 21 Vict. c. 77, s. 73, granted administration of the personal estate to his sister for the use and benefit of such next of kin, and limited until the next of kin should apply for and obtain administration of the goods of the deceased. *Cholwill, In goods of*, 35 L. J., P. 75; L. R. 1 P. 192; 14 L. T. 338.

—— **Where Next of Kin of Unsound Mind.**]—A person died intestate, leaving her only sister solely entitled in distribution, a lunatic, and without any committee of her estate or person. Administration for the use and benefit of the sister during her lunacy was granted to the step-mother, who was co-executor and co-trustee with the deceased of the father's will, and beneficially interested under it. *Burrell, In goods of*, 1 Sw. & Tr. 46; 6 W. R. 461.

Renunciation by.]—The court refused to grant administration to a person not having any interest in the estate merely because the next of kin had agreed to renounce in his favour. *Blake, In goods of*, 35 L. J., P. 91; 14 L. T. 769; 14 W. R. 1021.

Where Intestate Illegitimate.]—A bastard dies intestate without wife or issue, and leaving a personal estate; the king is entitled, and the ordinary of course grants administration to the patentee of the crown. *Jones* v. *Goodchild*, 3 P. Wms. 33.

6. Cum testamento annexo.

In General.]—When a codicil contained dispositions independently of the will, and also referred to the will, which, however, could not be found, the court granted administration with the codicil annexed. *Greig, In goods of*, 35 L. J., P. 113; L. R. 1 P. 72; 13 L. T. 681; 14 W. R. 349.

A legatee was erroneously described as the sister of the deceased, being her daughter; the court, on being satisfied that it was a mistake, allowed the grant, cum testamento annexo, to pass to such legatee. *Hooper, In goods of*, 13 L. T. 445; 14 W. R. 210.

A person having had a will prepared, in which an annuity (the amount being left in blank) was given to his wife, and the residue to his children, and the names of executors were not filled in, at the instigation of those about him, executed the same in its unfinished state, at the same time remarking, that it would be no good until the blanks were supplied:—Held, that the court could not, on affidavit, say the deceased did not execute the will animo disponendi, and it must be admitted to probate, but that, as there was an uncertainty as to the residuary bequest, the right of the widow, under 21 Hen. 8, c. 5, s. 3, would prevail, and administration with the will annexed must be granted to her. *Pool, In goods of*, 35 L. J., P. 97; 14 L. T. 859; 14 W. R. 976.

An administrator with the will annexed who has intermeddled with the estate cannot be compelled to take a grant with a later will annexed upon the revocation of the original administration. *Davis, In goods of*, 29 L. J., P. 72.

C. executed a will in which she appointed an executor who subsequently became bankrupt, and left this country for Australia. The property being small, on the consent of the next of kin the court granted administration with the will annexed to one of the parties interested under it, by virtue of the authority given by 20 & 21 Vict. c. 77, s. 73. *Cooper, In goods of*, 39 L. J., P. 8; L. R. 2 P. 21; 21 L. T. 590.

Upon application by the assignee of the freehold and pure personal estate of a testator for a grant of administration, limited to certain leaseholds held by the testator upon trust for the said assignee:—Held, that it was safer in such cases that the will should be annexed to the grant. *Butler, In goods of*, 67 L. J., P. 15; [1898] P. 9; 77 L. T. 376.

Colonial Grant—Substitution of Executors—Administrator-General.]—A testator domiciled in British Guiana by his will appointed two executors—one resident in the colony, the other in England—with power of substitution in the event of either or both being unable or unwilling to act. The executor resident in the colony administered the estate on his own behalf and on behalf of the other executor until he returned to this country to reside here permanently. By the law of the colony an executor under such circumstances had the right to substitute as executor the administrator-general of the colony, who thereupon became possessed of all the powers necessary for the administration of the estate. This substitution had been effected by the executor before leaving the colony, and there being estate in this country which required a personal representative here, the court made a grant of administration with the will annexed to persons nominated as his attorneys by the administrator-general until such time as the administrator-general or the executor resident in this country who had not renounced should apply, and without requiring justifying security. *Black, In goods of*, 57 L. J., P. 20; 13 P. D. 5; 36 W. R. 400.

—— **Attorney of Executor—Death of Executor—Administration de bonis non.**]—A. obtained a grant of administration with a foreign will annexed as the attorney in England of B., the executor of C., the testatrix. After B.'s death a similar grant was made to D. as the attorney in England of A.'s executors:—Held, that the chain of representation was not broken by the grant of administration to the attorney of the original testatrix, and that D. was entitled to deal with the property of C. in this country without a grant of administration de bonis non. *Del Carmen Vea Murguia, In goods of*, 53 L. J., P. 47; 9 P. D. 236; 32 W. R. 799; 48 J. P. 711.

—— **Interest—Sister or Widow.**]—In a contest for administration with the will annexed the court preferred the sister of the testator to the widow, as it appeared that the sister, as a legatee, had the larger interest in the property to be distributed. *Homan, In goods of*, 52 L. J., P. 94; 9 P. D. 61; 31 W. R. 955.

7. Creditors.

Generally—In what Cases a Grant will be made.]—Letters of administration were granted to an assignee of a deceased tradesman, limited to the book debts specified in the deed of assignment. *Dixson, In goods of*, 10 Jur. (N.S.) 854.

G. being a married woman, and having an interest under her father's will expectant on the death of his widow, joined with her husband in 1841 in executing a mortgage of such interest to B., to secure a running account. G. died in 1851, and her husband in 1853, neither possessed of any

other property. On the death of her father's widow, a representative to G. was required to release the trustees. B.'s debt being larger than the amount of G.'s interest under the will, the court granted administration of the goods of G. to B. *Godfrey, In goods of*, 2 Sw. & Tr. 133 ; 4 L. T. 895 ; 9 W. R. 499.

Administration with the will annexed granted to a person as a creditor for funeral expenses, who had undertaken the funeral of the deceased, at the request of the universal legatee named in the will, upon his giving justifying security. *Newcombe* v. *Beloe*, 36 L. J., P. 37 ; L. R. 1 P. 314 ; 16 L. T. 33.

The court will not grant administration to an undertaker as a creditor for funeral expenses, unless informed of the circumstances under which the expenses were incurred, and by whose authority the applicant undertook the funeral. *Ib.*

A person died intestate and insolvent, leaving fifteen persons entitled in distribution, of whom one was in New Zealand. The estate chiefly consisted of the goodwills of public-houses, the full value of which could not be realised save by an immediate sale. Under the circumstances, and all the parties in England consenting, the court granted administration to a creditor, notwithstanding that, to avoid delay, the party in New Zealand had not been cited. *Durham, In goods of*, 24 L. T. 73 ; 19 W. R. 391.

An intestate died owing debts exceeding in value his personal estate and effects. Gifts of money had been made to him during his life by C., a relative of his deceased wife, to enable him to keep up his establishment, and after his death his debts were paid by C. There were only two next of kin and persons entitled in distribution, and of these one renounced, and the other was a lunatic, and his next of kin renounced on his behalf. The court granted administration of the intestate's estate and effects to C. *Bateman, In goods of*, 40 L. J., P. 24 ; L. R. 2 P. 242 ; 24 L. T. 399 ; 19 W. R. 759.

Where an executrix who was also universal legatee disappeared, taking the will with her, the court refused to grant administration, with the substance of the will annexed, to a creditor, until the executrix had been first formally cited by advertisement. *Wormington, In goods of*, 16 L. T. 208.

A husband having died intestate and insolvent, and his widow and next of kin having consented to renounce their prior rights to administration, the court refused to grant administration to a nominee of the deceased's principal creditors, their nominee being a stranger not personally interested in the assets. *Prosser, In goods of*, Ir. R. 11 Eq. 37.

Semble, in such a case the practice is for one of the creditors to obtain a grant of administration, and then to appoint their nominee to act as attorney. *Ib.*

J. W., entitled to the property of his wife, E. W., who predeceased him, became indebted to the estate of J. P. The estate of E. W. afterwards became entitled to a share in the residuary estate of J. P. The executrix of J. W. refused to take out letters of administration to E. W.'s estate, and a grant was necessary to enable the creditors of J. W. to obtain E. W.'s share of the residuary estate in satisfaction of their debt :—The court granted (under s. 73 of 20 & 21 Vict. c. 77) administration of the estate of E. W. to a creditor of J. W. *Wensley, In goods of*, 51 L. J., P. 21 ; 7 P. D. 13 ; 30 W. R. 431 ; 46 J. P. 264.

When a person, being the sole party interested in, and entitled to represent, the estate of a deceased party, died without having taken out a grant to such person, and his personal representative filed a renunciation and a consent to the grant being made to a creditor of the party so originally interested and entitled to the grant, the court made the grant to such creditor under 20 & 21 Vict. c. 77, s. 73. *Fraser, In goods of*, 36 L. J., P. 63 ; L. R. 1 P. 327 ; 16 L. T. 154.

In creditors' suit against heir, plaintiff allowed to take out administration to deceased debtor, who died intestate, and without personal estate. *Long* v. *Smith*, 2 Moll. 340. But see *Johnson* v. *Hamilton, Ib.*, n.

—— **To Nominee of Creditor.**]—An intestate was the holder of shares in a company on which a call was made after his death :—The court made a grant of administration to the nominee of the company as a creditor of the estate of the deceased. *Tomlinson* v. *Gilby*, 54 L. J., P. 80 ; 33 W. R. 800 ; 49 J. P. 632.

The court, upon the application of a creditor who had obtained a grant of letters of administration with the will annexed to the personal estate and effects of his deceased mortgagor, being satisfied that there were special circumstances bringing the case within s. 73 of the Probate Act, and upon affidavit that the estate was insolvent, rescinded such grant and made a fresh grant in favour of a nominee of the creditor, such nominee to be approved by the registrar. *Brown, In goods of*, 59 L. T. 523.

B., a pauper lunatic chargeable to the guardians of the Kingston Union, died, a spinster and without parents, leaving three brothers and one sister her surviving, all of whom renounced their right to administration. One other brother, who had gone to America in 1871, but who had not been heard of since 1883, was cited by advertisement, under order of the court. The court, upon the application of the guardians, made a grant of administration to the clerk to the board as their nominee. *Byrne, In goods of*, 52 J. P. 281. *See also Cases* post, col. 525.

—— **Poor Law Guardians—Deceased Pauper—Expense of Maintenance.**]—The deceased had, for over six years prior to her death, been supported as a pauper lunatic at the county lunatic asylum. During the whole of this period she was, in fact, entitled to an annuity of 24*l.* 16*s.* 6*d.*, payable by the commissioners for the reduction of the national debt. This fact only came to the knowledge of the guardians at the time of her death, or shortly thereafter :—Held, that the guardians were creditors of the deceased within the provisions of 12 & 13 Vict. c. 103, ss. 16, 17, and, as such, entitled to administration of her estate. *Lambeth Guardians* v. *Bradshaw*, 57 L. T. 86 ; 50 J. P. 472.

An intestate died having been in receipt of outdoor relief for twelve months and more before his death. He was then found to be possessed of certain property. Upon the application of the guardians the court granted administration to their nominee as creditors for the amount of outdoor relief afforded to the deceased during the last twelve months of his life. *M'Knight, In goods of*, 59 J. P. 135. *See also Cases* post, col. 512.

On Death of Executrix de son tort.]—An executrix who, without having taken probate, had intermeddled in the estate of her testator, died possessed of property belonging to him:—Held, after citation of her next of kin and their non-appearance, that the representative of the testator was entitled as a creditor to a general grant of letters of administration of her estate. *Mellor, In goods of*, or *Mellor* v. *Dyson*, 52 L. J., P. 62; 8 P. D. 108; 31 W. R. 476; 47 J. P. 280.

Creditor under a Verbal Promise — Claim sounding in Damages.]—Where an applicant for administration claimed the whole estate of an intestate (subject only to the payment of debts, &c.) under a verbal promise made by the intestate, and acted upon by the applicant, that, if the latter would go and live with the deceased and take care of him, he would leave her all his property, and where, through alleged improper overtures, the applicant had ceased to live with the deceased:—Held, that the applicant's claim was not a liquidated debt, but was a claim sounding in damages, and that the applicant must first establish her claim and its amount before she could obtain a grant of administration as a creditor. *Clook, In goods of*, 62 L. T. 607. See *S. C.* in C. A., 15 P. D. 132; 63 L. T. 536.

Priority of Application.]—An intestate died by his own hand, after murdering his wife and child, and all three persons were buried at the expense of the parish. A creditor having applied for administration, the guardians of the parish, supported by three other creditors, opposed, and the guardians asked for a grant to their nominee:—Held, that the fact of the guardians having had the duty of burial cast upon them gave them no prior right to administration, and that the creditor who had first applied to the court was entitled to the grant, subject to the usual conditions. *Weare, In goods of*, 66 L. T. 860; 56 J. P. 394.

In an insolvent estate the court made a grant to the creditor for the largest amount, in preference to one who claimed for a much smaller sum, but who was a prior applicant. *Smith, In goods of*, 67 L. T. 503.

Where Children of Intestate are Minors.]—A creditor was appointed guardian to minors (the only children of P.), who had no known relations, for the purpose of taking out administration to the estate of P., who had died intestate and insolvent. *Peck, In goods of*, 1 Sw. & Tr. 141; 27 L. J., P. 106; 6 W. R. 793.

Absence of Next of Kin.]—Where the next of kin of an intestate were two nephews, who could not be traced, nor anything be ascertained as to them, the court granted administration to a creditor, under s. 73, by reason of the "special circumstances" of the case. *Currie, In goods of*, 57 J. P. 745.

Surety who has paid Debt.]—A surety who, after the death of the principal, pays off the debt, is, in case of intestacy, entitled to administration as a creditor. *Williams* v. *Jukes*, 34 L. J., P. 60.

Granted to one Creditor although Proceedings commenced by another.]—Administration may be granted to one creditor though the proceedings for obtaining administration may have been initiated by another creditor, the latter being allowed such costs as were reasonably incurred by him before the former took up the application. *Andrews* v. *Murphy*, 4 Sw. & Tr. 198; 30 L. J., P. 37.

Right of Action Suspended.]—The rule that when a creditor is appointed executor by his debtor his right of action is suspended, because he is presumed to have retained his debt, and is the person both to pay and receive, applies only when the executor has received assets. *Lowe* v. *Peskett*, 16 C. B. 500; 24 L. J., C. P. 196; 1 Jur. (N.S.) 1049; 3 W. R. 481.

The rule does not apply where the debt arises on a negotiable instrument which has been legally transferred by the executor. *Ib.*

Statute of Limitations.]—A creditor was allowed to cite the next of kin to accept administration, or shew cause why it should not be granted to the applicant, although his right of action was barred by the Statute of Limitations. *Coombs, In goods of*, 35 L. J., P. 78; L. R. 1 P. 193; 14 L. T. 635; 14 W. R. 975.

Bond conditioned to administer Estate ratably.]—And on their not appearing he is entitled to the grant, but the bond must contain a condition that he distribute the assets ratably amongst all the creditors. *Coombs* v. *Coombs*, 36 L. J., P. 21; L. R. 1 P. 288; 15 W. R. 286.

When administration has been granted to a creditor, and no application was made at the time the grant issued that the administrator should pay the debts ratably, the court will not revoke such grant subsequently in order to compel such administrator to give up his right to retain assets sufficient to repay himself his own debt in full. *Brackenbury, In goods of*, 46 L. J., P. 42; 2 P. D. 272; 36 L. T. 744; 25 W. R. 698.

For the future, a creditor on taking out administration must, in all cases, if required by the court, enter into a bond conditioned to administer the estate ratably amongst the creditors of the deceased. *Ib.*

—— **And giving Security.**]—The next of kin having renounced, the court granted administration of the personal estate and effects of an insolvent intestate to a stranger nominated by the bulk of the creditors, in preference to a particular creditor whose debt was small, but required the nominee to give justifying security and to enter into a bond to pay the debts pro ratâ. *Smithson, In goods of*, 36 L. J., P. 77; 15 L. T. 296.

A testator by his will appointed A. and B. executors and trustees, and directed them to allow his wife to receive the rents and profits of his estate, and to carry on his business of a tailor and draper for the term of her natural life, if she should so long remain his widow. The executors declined the trusts and duly renounced probate, and administration with the will annexed was granted to the widow, who carried on the business down to the time of her death, in January, 1874. She did not marry again, and she died insolvent and intestate. With the exception of a policy of insurance for a small amount, the whole of the testator's property was employed by the widow in carrying on the business, and while she did so C. supplied her with goods in the way of the trade of a tailor to the amount of 399*l*. The debt remained unpaid at her death, and C. held no security for any part of it. The parties

interested under the will having been cited, and there being no opposition to the motion, the court decreed administration, with the will annexed, of the unadministered effects of the testator to C. as an equitable creditor of the estate, but required, as conditions to his obtaining the grant, that he should in the first place, as a legal creditor of the widow, take out administration to her estate, and also give justifying security. *Fairlamb* or *Fairland* v. *Percy*, *Percy*, *In goods of*, 44 L. J., P. 11; L. R. 3 P. 217; 32 L. T. 405; 23 W. R. 597.

Limited to part of Assets.]—The practice of the court of probate is to refuse to make a grant to a creditor of administration limited to part of the estate of the deceased. *Carroll*, *In goods of*, 31 L. R., Ir. 388.

A creditor insured the life of his debtor, but the policy having by mistake been made payable to the representatives of the debtor, the court granted administration limited to the policy. *Patteson* v. *Hunter*, 30 L. J., P. 272.

Upon a motion by a creditor for a limited grant of administration, the court, while thinking that in this particular case it might be a convenient course to make a limited grant to the creditor, declined to depart from the practice in such cases, which requires that a creditor who applies for administration shall take a general grant. *Sheather*, *In goods of*, 71 L. T. 848.

Insolvent Estate.]—The assets being insufficient to pay an intestate's debts and being in the hands of an executor de son tort, who was sued by the creditors, the court granted administration to one creditor, with the consent of the others, he undertaking to administer the assets ratably. *Willett*, *In goods of*, 21 L. R., Ir. 377.

Insolvency of Estate doubtful.]—The court will not grant administration with the will annexed to a creditor by reason of the insolvency of the estate of the deceased, if the widow and residuary legatee are willing to take it; much less will it do so if the insolvency is disputed. *Hawke* v. *Wedderburne*, 37 L. J., P. 33; L. R. 1 P. 594; 18 L. T. 336; 16 W. R. 712.

When there was a doubt as to the solvency of the estate of an intestate, and the sole next of kin was a woman in a low position of life and alleged to be of drunken and dissolute habits:—Held, that there were special circumstances to justify a grant of administration to a creditor under 20 & 21 Vict. c. 77, s. 73. *Farrands*, *In goods of*, 1 P. D. 439; 24 W. R. 1018.

Husband's Rights as Creditor.]—A husband may take a grant with the will annexed, as creditor, although he has signed a renunciation executed by his wife as residuary legatee. *Biggs*, *In goods of*, 37 L. J., P. 79; L. R. 1 P. 595.

A female having taken administration to an estate as a creditor, married and died. Under the administration she got in a considerable portion of the estate and paid some of the debts, but did not set apart any particular fund in payment of her own debt:—Held, that the husband was not entitled in his own right as a creditor, but only as the representative of his wife, to take administration of the unadministered effects of the deceased. *Risdon*, *In goods of*, 38 L. J., P. 40; L. R. 1 P. 637; 20 L. T. 330; 17 W. R. 576.

Subsequent Insolvency of Creditor.]—A. died intestate and letters of administration of his personal estate and effects were granted to B., a creditor. B. was subsequently adjudicated a bankrupt, and died leaving part of A.'s estate unadministered. The trustee in bankruptcy of B.'s estate assigned to C., who was also a creditor of B.'s, the debts due from A.'s estate and securities. The court made a grant de bonis non to C., limited to B.'s interest in A.'s estate. *Burdett*, *In goods of*, 45 L. J., P. 71; 1 P. D. 427; 34 L. T. 855.

Person buying up Debt after Death of Intestate.]—A person who has bought up a debt after the death of the intestate is not entitled to administration as a creditor; and, therefore, where a bill of exchange accepted by an intestate had been indorsed after his decease, the court refused to grant a citation to the next of kin to accept or refuse administration at the instance of the indorsee. *Galbraith*, *In goods of*, 3 L. R., Ir. 169.

Ad colligenda bona.]—The court, under special circumstances, made a grant to a creditor ad colligenda bona, limited to collect the personal estate of the deceased, to give receipts for his debts on the payment of the same, and to renew the lease of his business premises which would expire before a general grant could be made:—The court refused to include in the grant a power to dispose of the lease and goodwill of the business, or a power to carry on the business. *Clarkington*, *In goods of*, 2 Sw. & Tr. 380; 8 Jur. (N.S.) 84; 7 L. T. 218; 10 W. R. 124.

When a foreigner dies intestate in this country in itinere, without any relative or agent here resident, the custody of his property belongs to the crown; but under special circumstances, and by aid of 20 & 21 Vict. c. 77, s. 73, the court will without a formal notice to the Queen's proctor, grant administration to a responsible person limited ad colligenda bona defuncti. *Wyckoff*, *In goods of*, 3 Sw. & Tr. 20; 32 L. J., P. 214; 9 Jur. (N.S.) 84; 7 L. T. 565; 11 W. R. 218.

The widow and next of kin in this country renounced administration, and the estate, which was insolvent, was liable to depreciation if the property (timber) was not at once sold. The court, under the circumstances, made a grant ad colligenda bona to a creditor, the money realised by the sale of the timber (after deduction for wages and charges) and collection of debts to be paid into the registry, and the next of kin abroad to be at once cited with a view to the applicant taking a creditor's grant. *Stewart*, *In goods of*, 38 L. J., P. 39; L. R. 1 P. 727; 20 L. T. 279.

A Prussian subject resident in this country died a bachelor and intestate, without any known relations. He carried on the business of a schoolmaster, and an offer was made for the purchase of the goodwill of the school if possession was given forthwith. The court, in these circumstances, made a grant ad colligenda bona to a creditor, with power to dispose of the goodwill of the school, but directed that the administrator should bring into the registry the proceeds of the sale after deduction of expenses and his taxed costs of obtaining the administration. *Schwerdtfeger*, *In goods of*, 45 L. J., P. 46; 1 P. D. 424; 34 L. T. 72; 24 W. R. 298.

The court made a grant ad colligenda bona in favour of a creditor, on affidavit that the

deponent was informed and verily believed that the deceased died a widow, without any known relatives, and intestate. *Ashley, In goods of*, 59 L. J., P. 72; 15 P. D. 120.

Where a creditor applied for letters of administration without citing the next of kin, who resided at a distance and was of advanced age, the court refused to make the grant passing over the next of kin, but made a grant ad colligenda to the creditor. *Malkin, In goods of*, 6 R. 568; 70 L. T. 811.

Administrator out of the Jurisdiction.]—An assignee in bankruptcy of an administrator who is out of the jurisdiction is a creditor within the meaning of 38 Geo. 3, c. 87, s. 1, and 21 & 22 Vict. c. 95, s. 18, and as such may obtain administration de bonis non of the intestate, limited to the fund to which the assignee is entitled. *Hammond, In goods of*, 50 L. J., P. 70, 73; 6 P. D. 104; 44 L. T. 649; 29 W. R. 807; 45 J. P. 619.

Application by a Creditor—Necessary Affidavits].—An application by a creditor for a grant of administration of the estate of a deceased intestate, in default of appearance by the next of kin, must be accompanied by an affidavit of the amount and nature of his debt, and of the date when it occurred. *Von Desen, In goods of*, 43 L. T. 532.

When a deceased intestate's next of kin are abroad, or have no known address, and fail to appear to a citation, by advertisement, an affidavit that service of the citation has been attempted and failed, and that the deceased's next of kin have no known agent in England, is requisite. *Ib.*

Before administration to a creditor will be granted, an affidavit of the amount of the personal estate of the deceased must be filed. *Briggs* v. *Roope*, 29 L. J., P. 96.

Affidavits on which application is made for a grant of letters to a creditor should state that all persons entitled in distribution of the effects of the deceased have been cited. *Brown* v. *Wildman*, 28 L. J., P. 54.

The court will not grant administration to a creditor without an affidavit of the date when the debt became due. *Rawlinson* v. *Burnell*, 3 Sw. & Tr. 479; 33 L. J., P. 123.

—— **Citation.**] — Where administration is applied for by the creditor of a person who dies intestate without any known relation, a citation, calling upon the next of kin, if any, and all persons having interest in the estate of the deceased, should be issued, and an abstract of it advertised twice, with an interval of a fortnight, notice also being given to the Queen's proctor. After the lapse of thirty days from the last advertisement, if there is no appearance, and the Queen's proctor declines to interfere, administration will be granted to a creditor. *Brown, In goods of*, 28 L. J., P. 126.

Where one of the next of kin of a deceased was a minor, and was resident, in service, in Derbyshire, and her mother, her natural guardian, resided in Middlesex, the court granted administration to a creditor, without requiring the citation to be served on the minor in the presence of her mother; a copy of it, sent by post, having been received by the minor. *Lainson* v. *Naylor*, 2 Sw. & Tr. 7; 29 L. J., P. 126; 2 L. T. 391; 8 W. R. 451.

The court declined to make a grant de bonis non with the will annexed to a creditor, without citing the residuary legatees named in the will who were resident in Australia. *Fairweather, In goods of*, 2 Sw. & Tr. 588; 6 L. T. 788; 10 W. R. 862.

Where an application is made for a grant to the secretary of an association, on the ground that the deceased was indebted to the association, the court ought to have such information of the constitution of the association as would shew that the secretary can be treated as a creditor. *Ib.*

An intestate died insolvent, and the only assets were a fund in chancery which bore no interest, while two principal debts which exceeded it in amount bore interest at the rate of 5*l.* per cent.; the court, notwithstanding, declined to grant administration to a creditor until the next of kin, who were in India, had been cited. *Gerrard, In goods of*, 16 L. T. 267.

The sole executrix and universal legatee of a deceased testator was his widow. She was a lunatic, and a guardian had been appointed in the chancery division to receive certain rents, &c., to which she was entitled. A creditor of the deceased testator applied for a grant of administration with the will annexed, and served a citation on the guardian, who refused to allow personal service on the lunatic:—Held, that a grant might be made to the creditor under the 73rd section of 20 & 21 Vict. c. 77, without requiring the lunatic to be personally served. *Atherton, In goods of*, 61 L. J., P. 134; [1892] P. 104; 66 L. T. 267.

8. Guardians.

Of Minors.]—A. left surviving him a widow and two minor children. The widow deserted her children to lead an immoral life; the court passed her over, and granted administration to the guardian of the minor children. *Creed, In goods of*, 6 Jur. (N.S.) 590.

The guardian of a minor of the whole blood is entitled in preference to the half blood. *Stratton* v. *Linton*, 31 L. J., P. 48.

The court granted administration to the guardian elected by minors for their use and benefit, without requiring the citation or renunciation of their next of kin, where the property was very small and the next of kin were in Australia and their interest was infinitesimal. *Hagger, In goods of*, 3 Sw. & Tr. 65; 32 L. J., P. 96; 9 Jur. (N.S.) 386; 8 L. T. 470; 11 W. R. 540.

A. died intestate, leaving four children, of whom one was of age, but was abroad, and the other three were minors. An immediate grant of administration being necessary, the court granted administration to the newly-elected guardian of the minors for their use and benefit, limited until one of the children should apply for a grant. *Burgess, In goods of*, 4 Sw. & Tr. 188; 32 L. J., P. 158; 9 Jur. (N.S.) 553; 9 L. T. 86; 11 W. R. 687.

A., whose marriage had been dissolved by reason of the misconduct of her husband, died intestate, leaving one child under age. The court, on copies of the decrees nisi and absolute for the dissolution of such marriage being filed in the registry, ordered that administration should issue to the maternal grandmother of such child for her use and benefit, no notice of the application having been given to the father, who was resident in New Zealand. *Hay, In*

goods of, 35 L. J., P. 3; L. R. 1 P. 51; 11 Jur. (N.S.) 936; 13 L. T. 335; 14 W. R. 147.

The guardian of an infant, sole next of kin of an intestate, is entitled in preference to creditors. *John* v. *Bradbury*, 36 L. J., P. 33; L. R. 1 P. 245; 15 L. T. 414; 15 W. R. 285.

Where joint guardians have been appointed by the court of chancery to a minor, administration for his benefit cannot properly be granted to one of them only; but under special circumstances, and by authority of 20 & 21 Vict. c. 77, s. 73, the court of probate will permit this to be done. *Murphy, In goods of*, 5 Jur. (N.S.) 416.

When a married woman, living separately from her husband, having obtained a protection order, died, leaving him and a minor son her surviving, the court made a grant of her effects to a guardian elected by the son for his use and benefit without citing the father, requiring justifying security. *Stephenson, In goods of*, 36 L. J., P. 20; L. R. 1 P. 287; 15 L. T. 296; 15 W. R. 286.

C. gave all her property of whatsoever description to her son, when he attained the age of twenty-one, and then concluded, "I appoint C. and K., of &c., trustees." The court held that the trustees were not executors, and granted administration, with the will annexed, to the guardian of the minor. *Cozens, In goods of*, 16 L. T. 208; 15 W. R. 532.

When it is desired that a stranger should take a grant of administration for the use and benefit of minors, to whose guardianship there is a next of kin entitled, the practice is, not that the minors should elect the next of kin to be their guardian for the purpose of nominating the stranger to procure the grant, but that the next of kin should renounce his right to the guardianship, and that the minors should elect the stranger to be their guardian, in which capacity he can take the grant. *Molineux, In goods of*, 25 L. T. 162; 19 W. R. 568.

A father left two children in their minorities, his only next of kin. The minors' next of kin were four in number, and three of them renounced their rights to the guardianship and administration. The fourth went to Nevada in 1869, and nothing was now known of him. The court permitted the minors to elect a stranger in blood as their guardian, without requiring the citation or renunciation of the absent next of kin. *Langham, In goods of*, 25 L. T. 951; 20 W. R. 319.

A brother bequeathed his real and personal estate in two equal moieties to the children of his deceased sisters. The executor renounced, and the children were resident abroad. The sole surviving next of kin was another sister, to whom the testator had left a legacy of "one shilling," and who was leading a dissolute life. Under these circumstances, the court made a grant of administration with the will annexed to a relative not interested, for the use and benefit of the minors until they should appear and take the grant. *Thomas, In goods of*, 28 L. T. 677.

A husband and wife separated by agreement. The husband covenanted not to claim administration of his wife's estate if she should die during his life. She died during his life. The husband refused to renounce: the court refused to make a grant to the guardian of her children until he had been cited. *Pigott, In goods of*, 42 L. J., P. 77; 29 L. T. 45; 21 W. R. 823.

The nearest relatives of minor children having been abroad for many years, without having communicated with their friends in this country, the court permitted the children to elect another person to take administration on their behalf of the estate of their father, without citing such nearest relatives in the first instance. *Burchmore, In goods of*, 43 L. J., P. 1; L. R. 3 P. 139; 29 L. T. 377; 22 W. R. 70.

The sole executrix and universal legatee having died in the testator's lifetime, and the next of kin being abroad, the court granted letters of administration with the will annexed to the guardian of persons entitled in distribution. *See, In goods of*, 48 L. J., P. 70; 4 P. D. 86; 40 L. T. 658; 27 W. R. 665.

A father by will appointed two guardians of his daughter, a minor, and directed that in the event of the death of either of them the survivor should nominate some other person to act as co-guardian with him:—Held, that such direction was within the powers of 12 Car. 2, c. 24, ss. 8, 9, and administration de bonis non was granted to the guardian thus substituted. *Parnell, In goods of*, 41 L. J., P. 35; L. R. 2 P. 379; 26 L. T. 744; 20 W. R. 494.

Where a will duly executed contains simply an appointment of a guardian of his children by a father, but no disposition of personal property, or an appointment of an executor, it is not entitled to probate. *Morton, In goods of*, 33 L. J., P. 87; 9 L. T. 809; 12 W. R. 320.

A testamentary guardian of minor children is entitled to a grant for their use and benefit, preferably to a guardian elected by the children. *Morris, In goods of*, 2 Sw. & Tr. 360; 31 L. J., P. 80; 5 L. T. 768.

A testator divided the residue of his personal estate between his son, his only next of kin, and his three illegitimate daughters, who were minors. They propounded the will by their guardian. The son unsuccessfully opposed it, and was condemned in costs. He had a larger interest in the specific legacies than the minors, and it was proved that in fact there was no residue:—The court refused, under these circumstances, to make the grant to the guardian of the minors, but decreed it to the son. It also declined to make the grant to the son conditional on his payment of the guardian's costs, as by so doing it would delay the payment of the legacy to the widow. *Sawbridge* v. *Hill*, 40 L. J., P. 27; L. R. 2 P. 219; 24 L. T. 320; 19 W. R. 705.

A. and B. having been nominated by a testator to be executors and residuary legatees in trust, as such renounced probate and administration with the will annexed. They were also appointed, on the death or second marriage of the testator's widow, guardians of the minor children of the testator, the substituted residuary legatees named in his will:—Held, that they were entitled, as such guardians, to administration with the will annexed of the goods of the testator left unadministered by the widow, the first administratrix, for the use and benefit of the minors, with the usual limitations. *Loftus, In goods of*, 3 Sw. & Tr. 307; 33 L. J., P. 59; 10 Jur. (N.S.) 324; 10 L. T. 240.

The next of kin of a minor, the universal legatee, were an uncle who was abroad, an aunt who was in poor circumstances, and another aunt who had renounced. The court granted letters of administration with will annexed for the use and benefit of the minor to a guardian elected by her. *Gardiner, In goods of*, 53 L. J., P. 31; 9 P. D. 66; 32 W. R. 756; 48 J. P. 456.

Where upon an application for administration with the will annexed it appeared that the testator's children were minors, the court granted administration to a stranger in blood elected by the children as their testamentary guardian, without notice to the next of kin entitled to the grant, on proof that one had renounced and that the remainder were at a distance, or that their place of residence was unknown. *Webb, In goods of*, 57 L. J., P. 36 ; 13 P. D. 71 ; 58 L. T. 683 ; 36 W. R. 847 ; 52 J. P. 231.

Upon an application for administration with the will annexed it appeared that the testator by his will had appointed two executors, and made his daughter, a minor, his sole legatee. Of the two executors one was dead, and the other at the time of testator's death was in Brazil, the date of his return being uncertain. The next of kin of the minor either renounced or were resident out of the jurisdiction. The court, upon proof that there was urgent need of immediate administration, made a grant to the paternal aunt of the minor, whom she had elected her testamentary guardian. *Batterbee, In goods of*, 58 L. J., P. 38 ; 14 P. D. 39 ; 60 L. T. 838 ; 37 W. R. 416 ; 53 J. P. 231.

Guardian on behalf of one Minor — Other Minors interested.]—A. died unmarried, intestate and insolvent, his only assets being 48*l.* cash, and 11*l.* arrears of rent, leaving his only next of kin the children of three deceased sisters. The children of one sister were minors and wards of court ; the children of another sister were minors, but not wards of court ; the children of the third sister were three daughters, all married, and living abroad. The court made a grant to the guardian of the eldest minor, who was a ward of court, without requiring the married children to be cited. *Magrath, In goods of*, [1896] 1 Ir. R. 203.

—— **Of Minors appointed Executors.**]—Where an infant is sole executor, administration shall be granted to the guardian, or such person as the spiritual court think fit, till the infant is twenty-one, at which time, and not before, probate shall be granted to him. *Sergison, Ex parte*, 4 Ves. 149.

Though mother took out administration during the daughter's minority, yet the moment she comes of age of seventeen, she is, ipso facto, administratrix, and so considered by relation from the beginning. *Lee* v. *Cox*, 3 Atk. 422.

—— **Office, how and when Determined.**]—By the infant's coming of age, administration durante minore ætate ceases, and suit by such administration is thereby determined, and the infant cannot go on therewith, but must begin anew, unless a decree to account were had ; in which case, secus. *Jones* v. *Bassett*, Pre. Ch. 174. S. P., *Stubbs* v. *Leigh*, 1 Cox, 133.

An administration is granted during the minority of four infant children, one of whom, being a daughter, marries a husband who is of age. The administration is not determined. *Jones* v. *Strafford*, 3 P. W. 81.

Where an infant executrix being under seventeen, administration is granted, and the infant marries a husband of age ; this does not determine the administration, by the opinion in 5 Co. 29, which seems to have been extra-judicial, and is not taken notice of by contemporary reporters. *Ib.*, 88.

If administration be granted during the minority of four infants, and one dies ; this does not determine the administration, contrary to the opinion in 5 Co. *Brudenell's Case*, 3 P. Wms. 89.

Administrator durante minor ætate obtains a decree to account ; the infant marries, and a new administration during her minority is granted to the husband. *Coke* v. *Hodges*, 1 Vern. 25.

Where it is probable that there will be a misapplication and wasting of the effects of an intestate by a limited administrator, who is only a trustee for an infant, the court will appoint a receiver. *Havers* v. *Havers*, Barnard. 23.

Nominee of Guardian.]—Where a wife had obtained a magistrate's order protecting her property and earnings, and died intestate, leaving minor children, the court granted administration to the uncle of the children, elected by their guardian for that purpose, though the husband was alive. *Weir, In goods of*, 2 Sw. & Tr. 451 ; 31 L. J., P. 88 ; 8 Jur. (N.S.) 393.

Limited Grant to Guardian ad interim—Section 73.]—Where a naturalized Englishman died leaving three infant children, the two younger of whom were admittedly illegitimate, but the elder had been registered as the legitimate child of the deceased and his wife, and had been so brought up, and proceedings had been commenced in the chancery division, in which the legitimacy of the said elder child was in dispute, and the chancery division had appointed H. B. W. guardian ad interim of the said elder child, for the purpose of applying to the probate division for a grant of administration to the personal estate of the said deceased. The court, under s. 73 of the Court of Probate Act, 1857, made the grant asked for to the said H. B. W., but limited until the persons entitled by law to letters of administration to the said estate should have obtained such letters. *Mustapha, In goods of*, 59 L. J., P. 61 ; 62 L. T. 606.

In making a limited grant, under s. 73, of administration with the will annexed, in favour of the guardian appointed on behalf of minors, who, if of age, would be entitled to administer the estate of the deceased :—Held, that the best form of limitation would be "until one of the minors comes of age and applies." A limited grant, under s. 73, made without notice to the person primarily entitled. *Lilley, In goods of*, 76 L. T. 164.

Of Union.]—A pauper lunatic died intestate in the possession of 440*l.*, leaving a lunatic sister, his sole next of kin. The court having previously refused the application (*see* 40 L. J., P. 21 ; L. R. 2 P. 217 ; 23 L. T. 877 ; 19 W. R. 422), afterwards, under the 12 & 13 Vict. c. 103, ss. 16, 17, granted administration, for the use and benefit of the lunatic sister during her lunacy, to the board of guardians of the union to which the deceased was chargeable, as creditors of the deceased. *Windeatt* v. *Sharland*, 41 L. J., P. 9 ; L. R. 2 P. 266 ; 25 L. T. 574 ; 20 W. R. 211.

F. died intestate and a widow, leaving M., her daughter, the only person entitled in distribution. M. had been for some years in a county lunatic asylum, maintained at the charge of the hamlet of Mile End Old Town. No committee of her person or estate had been appointed. F. left a sum of money, principally in the funds, in the

name of her late husband, under whose will she was entitled to it. After the proper citations, the court, under 20 & 21 Vict. c. 77, s. 73, granted administration of the goods of F. to the clerk of the guardians of the poor for the use and benefit of the lunatic, limited during the period of her lunacy; the sureties to justify. *Findlay, In goods of, Southwell* v. *Findlay*, 3 Sw. & Tr. 265; 33 L. J., P. 21; 9 Jur. (N.S.) 1253; 9 L. T. 346; 12 W. R. 59.

The court granted administration of the goods and effects of a pauper dying intestate, without known relations, to the guardians of the union (as creditors) on which she was chargeable, the 12 & 13 Vict. c. 103, s. 16, empowering them, in the event of a pauper dying possessed of property, to reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper, at any time during the twelve months previously to the decease. *Cleaver* v. *M'Kenna*, 35 L. J., P. 91; 13 L. T. 411.

The whereabouts of both the husband and son of a woman, who had died as a pauper lunatic, were unknown, and the husband was cited, by advertisements, to accept or renounce administration to her estate, but had not appeared. Upon the motion of the guardians as creditors for maintenance and funeral expenses, the court granted administration to the nominee of the guardians, subject to an affidavit that the husband outlived the deceased. *King, In goods of*, 58 J. P. 464.

A woman was taken into a workhouse infirmary and died the following day, a spinster and intestate. Her only known relative was a sister. The guardians expended 7*l.* 15*s.* upon her funeral, and she was found to be possessed of property amounting to over 200*l.* The sister did not wish to take administration. Upon the application of the guardians as creditors, the court granted administration to their nominee. *Jowers, In goods of*, 58 J. P. 465.

The testatrix left a duly executed will, but appointed no executor; she had been in receipt of outdoor relief. The court granted to the nominee of the guardians, as creditors, letters of administration with the will annexed. *Baldwin, In goods of*, 55 J. P. 344.

Upon the death of a pauper lunatic, letters of administration were granted to the nominee of the guardians as creditors for her maintenance and burial expenses, the next of kin and the queen's proctor having failed to appear to citations calling upon them to take the grant. *Reeves, In goods of*, 55 J. P. 24. S. P., *Lillicrap, In goods of*, 55 J. P. 825.

Upon the application of the guardians of certain united parishes, the court made a grant of administration in favour of their nominee to the estate of a pauper lunatic who had died in the county lunatic asylum, and who, at the time of his death, and for some time previously, was chargeable to the said united parishes. *Luce, In goods of*, 54 J. P. 695.

The court granted administration to the clerk to the guardians of the estates of a husband and his widow, both of whom had died indebted to the union for maintenance, without requiring the next of kin to be cited. *Teece, In goods of*, 65 L. J., P. 41; [1896] P. 6; 73 L. T. 631; 44 W. R. 400.

—— **Under Special Circumstances — Section 73.**]—The value of the whole property of an intestate who died leaving a widow, but no issue, did not exceed 500*l.* The widow was a pauper lunatic, and her father had renounced his right to take the grant on her behalf:—Held, that a grant of administration might be made under s. 73 of the 20 & 21 Vict. c. 77, to a person nominated by the guardians of the union to whom the pauper lunatic was indebted for her maintenance without citing the next of kin of the intestate of the lunatic. *Everley, In goods of*, 61 L. J., P. 53; [1892] P. 50; 65 L. T. 765.

The testator appointed his widow sole executrix and left her all his property except one legacy of 10*l.* to R. The widow did not prove the will, became lunatic, and was taken to an asylum. R. renounced administration and died without any known personal representatives. The chief asset was a mortgage, and there were sundry debts to be paid. Administration with the will annexed was granted to the nominee of the guardians, under s. 73, for the use and benefit of the lunatic, upon an undertaking to secure the legacy if claimed. *Sharland, In goods of*, 67 L. T. 501; 56 J. P. 682.

The court made a grant of letters of administration in respect of the personal estate and effects of a deceased person, whose widow was a pauper lunatic, in favour of the clerk to the guardians on the ground of "special circumstances" within the meaning of s. 73 of the Probate Act, the next of kin entitled to take administration after the widow having been duly cited, but not having appeared. *Richards, In goods of*, 53 J. P. 807.

—— **Limited Grant.**]—Where the next of kin of a deceased intestate was a pauper lunatic confined in the county asylum at the charge of the union, the court, under s. 73 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), made a grant of administration to a person nominated by the guardians, but limited to such time as the pauper should remain insane. *Eccles, In goods of*, 59 L. J., P. 5; 15 P. D. 1; 61 L. T. 652; 54 J. P. 55.

The sole executrix and residuary legatee of a testatrix, who was also one of her next of kin, did not prove the will, and some time after the death of the testatrix became and remained chargeable to the rates as a pauper lunatic not so found by inquisition. The court required that the other next of kin should be cited, and upon this being done, and no appearance being entered on their behalf, made, under s. 73, a grant of letters of administration with the will annexed in favour of the nominee of the guardians of the union, for the use and benefit of the lunatic executrix, limited to the duration of her lunacy. *Hockin, In goods of*, 73 L. T. 316; 59 J. P. 472.

9. Legatees.

With Will Annexed de bonis non—Justifying Security.]—The estate of a testatrix having been administered except as to one legacy, the court granted administration with will annexed de bonis non to the legatee, without requiring the representative of the executor or his residuary legatees to be cited, but ordered that the sureties should justify. *King, In goods of*, 52 L. J., P. 93; 8 P. D. 162; 31 W. R. 843.

Residuary Legatee.]—If an executor dies before probate of the will, his executor cannot prove it, but administration cum testamento

annexo must be granted to residuary legatee (if any) or to the next of kin. *Day* v. *Chatfield*, 1 Vern. 200.

A father devised and bequeathed the residue of his real and personal estate to trustees for the benefit of his children, but in case of the failure of such trust, for such of his two brothers as should be living at the time the failure of the trust was ascertained. At the time of his death the testator had no child, and his wife was not enceinte; one brother died a fortnight after him:—Held, that the failure of the earlier trust, although not known, was determined on the death of the testator, and the residue vested at that time in the brothers, and therefore that the executors of the deceased brother, on the citation and non-appearance of the other brother, were entitled to a grant of administration with the will annexed of the goods of the deceased. *Sidebottom, In goods of, Sidebottom* v. *Sidebottom*, 41 L. J., P. 23; L. R. 2 P. 365; 25 L. T. 855; 20 W. R. 302.

In a will which contained specific bequests of several articles of plate, furniture, &c., the last specific bequest being that of 30*l*., a bequest to S. of "the residue of my things" would not entitle S. to a grant as residuary legatee. *Ludlow, In goods of*, 1 Sw. & Tr. 29; 27 L. J., P. 7; 6 W. R. 409.

A testator left to A. whatever money remained at his agent's, and also any money that might result from the sale of his effects:—Held, that he was not entitled to administration as a residuary legatee. *O'Loughlin, In goods of*, 39 L. J., P. 53; L. R. 2 P. 102; 18 W. R. 902.

The court will not grant administration with the will annexed to the residuary legatee, with the consent of the executor. It can only do so on the executor's renunciation of probate, or after a citation has been served upon him, upon his non-appearance within the prescribed time. *Garrard* v. *Garrard*, L. R. 2 P. 238; 25 L. T. 162; 19 W. R. 569.

A testator died leaving a mixed fund of real and personal estate. By his will he left the whole of the income arising from his estate and effects to his maternal aunt A. for life, and "the whole after her decease to my legal heirs and theirs for ever":—Held, that on the true construction of the words "legal heirs and theirs for ever" the heir-at-law took as residuary legatee of the personalty as well as the realty, and was in that character entitled to a grant of administration with the will annexed. *Dixon, In goods of, Todhunter* v. *Thompson*, 47 L. J., P. 57; 4 P. D. 81; 39 L. T. 234; 26 W. R. 883.

I. D., by his will, gave all his property to A. H. for life, and then "the whole" . . . . to his "legal heirs and theirs for ever":—Held, that both realty and personalty were given to his co-heiresses, and the grant made to M. T., one of the co-heiresses, as one of the residuary legatees. *Ib.*

B. died in 1864, leaving a will of which he appointed his wife (with others) executrix. She proved the will, and survived the other executors. She afterwards married S., and during coverture with him made a will under powers vested in her, and appointed her husband sole executor. On her death in 1876 letters of administration (with her will annexed) were granted to S., who was the sole person entitled to the personal estate over which she had no disposing power:—Held, that a further grant was required as to the unadministered effects of B., and such grant was made (with the consent of S.) to the natural and lawful daughter of B., and one of the residuary legatees under his will. *Bridger, In goods of*, 47 L. J., P. 46; 4 P. D. 77; 39 L. T. 123.

A testator directed, that after payment of his debts and funeral expenses all his remaining property, subject to certain legacies, should be placed in proper securities, and appropriated to the education of his sister's children, as should seem most meet and beneficial to them by the executors of his will:—Held, that the children of the testator's sister were absolute residuary legatees, and, the executors having died in the lifetime of the testator, were entitled as such to administration with his will annexed. *Present* v. *Goodwin*, 29 L. J., P. 115; 6 Jur. (N.S.) 404; 2 L. T. 57.

In 1817, administration with the will annexed was granted to certain parties in their character of residuary legatees in trust, who had already renounced as executors. B. had acted as executor under three several wills. His executors, being unwilling to intermeddle in the management of those properties, which were mixed up together and incumbered, renounced probate of his will. They afterwards applied for administration with the will annexed to be granted to them as residuary legatees in trust, which was decreed accordingly. *Bennet, In goods of*, 6 Jur. (N.S.) 326, n.

A testator on his deathbed gave instructions for a will to a person who was unknown to him, and who, in preparing it, omitted his surname and also introduced the name and description of an executor who was totally unknown to the testator or to any of his friends or relations, and who could not, therefore, be identified with the consent of all parties interested; the court granted administration with the will annexed to one of the residuary legatees. *Sawtell, In goods of*, 2 Sw. & Tr. 448; 31 L. J., P. 65; 6 L. T. 395; 10 W. R. 782.

S. made the following bequest: "My wardrobe, trinkets, and other things to my aunt. In the event of her decease before mine, then all my effects to her two daughters":—Held, that, looking at the language of the will generally, these words did not constitute the aunt residuary legatee. *Smith, In goods of*, 34 L. J., P. 15; 10 Jur. (N.S.) 1084; 13 W. R. 277.

A testator, after making several specific bequests, "ordered the management of all the rest to John Smith and Judy"; there not being in the will any other words indicative of an appointment of an executor or of a bequest of residue:—Held, that John Smith and Judy had been constituted, not executors according to the tenor, but residuary legatees, and were entitled, not to probate, but to administration with the will annexed. *Kerrane, In goods of*, Ir. R. 11 Eq. 447.

When a will does not dispose of the residue, the legatees are entitled to administration with the will annexed, limited to the property disposed of by the will; the next of kin without the consent of the legatees being entitled to a grant, save and except such property, or to a cæterorum grant. If the deceased dies a bastard and unmarried, the crown takes the same grant as the next of kin. *Rhoades, In goods of*, 35 L. J., P. 125; L. R. 1 P. 119.

A testatrix devised her personal estate to B. for her own use, and for "the education, maintenance, and placing out in business" of B.'s son, and in case B. should die during her son's

minority the testatrix directed that all moneys should be invested for the son's benefit until twenty-one, and should be handed over to him at that age:—Held, the executor having renounced, and B. having predeceased the testatrix, that administration with the will annexed should be granted to the son. *Arms, In goods of*, 11 R. 587; 71 L. T. 699.

—— **Duchy of Lancaster.**]—Where an intestate had died leaving no known relatives, and his estate had been partly administered by his widow, who died leaving a will, the court made a grant de bonis non to the nominee of the Duchy of Lancaster, who was the residuary legatee of the widow. *Avard, In goods of*, 11 P. D. 75; 56 L. T. 673.

—— **To Limited Representative of.**] — A married woman, a residuary legatee under a will, by virtue of powers enabling her to do so, executed a will by which she distributed the property of which she had a right to dispose, her residuary interest being part of the property. The chain of executors being broken, a grant of administration, with the will annexed, of her unadministered estate, was made to the limited representatives of the residuary legatee. *Ditchfield, In goods of*, L. R. 2 P. 152; 23 L. T. 325; 18 W. R. 1144.

Universal Legatee.] — A testator appointed his nephew universal legatee of his whole property in trust for legatees named in the will. The nephew took no beneficial interest, and the testator left a son living. No executor was appointed. On motion, the court made the grant to the nephew. *Ford, In goods of*, 23 L. T. 323; 18 W. R. 960.

A. left in the hands of trustees "all the property she might be possessed of at her death," &c., followed by an enumeration of properties, which, however, did not include the whole of her property:—Held, that the specific enumeration did not restrain the general terms preceding it, and that the trustees were entitled to administration, with the will annexed, as universal legatees in trust. *Goodyar, In goods of*, 1 Sw. & Tr. 127; 4 Jur. (N.S.) 1243.

A testator left all his property that he was possessed of to his eldest son for life, and if he had no family to revert to his fifth son. He stated that his property consisted of houses, stock, and bank shares, and named R. as trustee in conjunction with D., and directed that the said trustees first pay all debts due by his eldest son, and invest some stock and money as the said trustees should think proper in good securities, and that his grandchild T. should have 500*l.* when he arrived at twenty-one. The court granted administration cum testamento annexo to R. and D. as universal legatees in trust. *Palmer, In goods of*, 11 L. R., Ir. 1.

An application for a grant (with the will annexed) to the sole legatee on affidavit that the testatrix died possessed of no other property than that specifically described in the will:—Held, that no reason was shewn for not citing the next of kin; that they must be cited; or that administration might be taken limited to the property specified in the will. *Watson, In goods of*, 1 Sw. & Tr. 110.

A testatrix left to her three nieces all her personal effects and everything of every kind "that I have now, or may have at the time of my decease, at my apartments at A. or elsewhere":—Held, that the nieces were universal legatees, and, as no executor was appointed, that they were entitled to administration with the will annexed. *Scarborough, In goods of*, 30 L. J., P. 85; 6 Jur. (N.S.) 1166; 9 W. R. 149.

A universal legatee, under a will which does not appoint an executor, is by the invariable practice of the registry entitled to administration with the will annexed, and not to probate as executor according to the tenor. *Oliphant, In goods of*, 1 Sw. & Tr. 525; 30 L. J., P. 82; 6 Jur. (N.S.) 256; 1 L. T. 446.

A husband, left sole executor and universal legatee under his wife's will, which was made by virtue of a power, renounced as executor. Subsequently, owing to the disposition of the trust fund under his wife's will, his consent was required by the trustees to enable them to deal with it. On motion to the court that he might be allowed to retract his renunciation which had already been filed in the registry, the court directed that the applicant should take administration with the will annexed as universal legatee, in which capacity the applicant had not renounced his beneficial interest under the will. *Blisset, In goods of*, 44 L. T. 816.

—— **Will of Englishman Domiciled in France.**]—An Englishman, domiciled in France, wrote a holograph will, in which was the clause following: "J'institue pour ma légataire universelle Madame A. . . . et ce pour lui donner une preuve de ma reconnaissance des bons soins qu'elle a eu pour moi en France le tout sans rien excepter, et notamment pour tous les effets mobilier, et tous les biens meuble, que je possède en France":—Held on the evidence of French advocates, that A. was entitled to the whole personal property of the testator, whether in England or France. *Laneuville* v. *Anderson*, 2 Sw. & Tr. 24; 30 L. J., P. 25; 6 Jur. (N.S.) 1260; 3 L. T. 304; 9 W. R. 74.

With Limitation.]—A husband by his will made his wife sole executrix and residuary legatee. By a codicil he devised and bequeathed to A. all property held by him upon any trust or by way of mortgage. He died insolvent, and the widow renounced probate of the will and codicil as executrix, and administration as residuary legatee. The court granted administration, with the will and codicil annexed, to A., limited to the trust property so far as it was personally left to him by the codicil. *Protheroe, In goods of*, 44 L. J., P. 8; L. R. 3 P. 209; 31 L. T. 551; 23 W. R. 212.

Where Surviving Executor incapacitated by Illness.]—Where the sole surviving executor is unable from illness to attend to business matters, the court will grant letters of administration with the will annexed to a legatee, for the use and benefit of the executor until he shall recover, and take the grant as executor. *Ponsonby, In goods of*, 64 L. J., P. 119; [1895] P. 287; 11 R. 613; 44 W. R. 240.

Specific Legatee—No Residue—Citation of Residuary Legatee.]—A residuary legatee resident at a known address in Canada, and who was in regular communication with his relatives in England, was informally asked to renounce his right to administer to his father's estate, but made no reply to the letters of the solicitors.

The estate was being administered in chancery, and the chief clerk had certified that the assets were insufficient for payment of the debts and specific legacies. The court upon affidavits of these facts ordered a grant of administration in favour of one of the specific legatees. *Wilde, In goods of*, 57 L. J., P. 7; 13 P. D. 1; 57 L. T. 815; 36 W. R. 400; 51 J. P. 775.

When Executor and Residuary Legatee dead—Grant to Superior of Convent as Residuary Legatee.]—Where a testatrix appointed an executor, and after giving a legacy bequeathed the residue to the legatee to be disposed of at her discretion for the benefit of a specified convent, both the executor and the legatee having died in the lifetime of the testatrix, the court granted administration with the will annexed to the superior of the convent, being the head of the council in which the property of the convent was vested. *Walsh* v. *Gladstone* (1 Phillim. 290) followed. *McAuliffe, In goods of*, 64 L. J., P. 126; [1895] P. 290; 11 R. 610; 73 L. T. 193.

When Executors out of the Jurisdiction.]—The words "at the expiration of twelve months from the death of the testator," in s. 1 of 38 Geo. 3, c. 87, when compared with the words given in the form of affidavit in the second section, and of the grant of administration in the third, must be held to mean at or after the expiration of that period. *Ruddy, In goods of*, 41 L. J., P. 63; L. R. 2 P. 330; 25 L. T. 950; 20 W. R. 319.

When the applicant is the residuary legatee whose interest is undetermined, the grant will be made under 38 Geo. 3, c. 87, but where a particular sum is set aside for and actually payable to the applicant, the grant can be made under 21 & 22 Vict. c. 95, s. 18. *Ib.*

One of the executors named in the will proved the paper, and then left the country. The second executor named in the will was also out of the jurisdiction. The court made a grant durante absentiâ to a legatee and also one of the next of kin to enable her to become a party to a suit in the chancery division for the administration of the estate. *Jenkins, In goods of*, 49 L. J., P. 30; 41 L. T. 736; 28 W. R. 431; 44 J. P. 801.

Renouncing Probate.]—A person who has been appointed sole executrix and named universal legatee and has renounced probate may afterwards take a grant of administration de bonis non in the latter character. *Wheelwright, In goods of*, 47 L. J., P. 87; 3 P. D. 71; 39 L. T. 127; 27 W. R. 139.

B. appointed C. and D. executors and residuary legatees in trust, his widow residuary legatee for life or widowhood, and C. D., E. F., and G. substituted residuary legatees. C. and D. renounced probate and administration as executors and residuary legatees in trust, and letters of administration with the will annexed were granted to the widow; she died, leaving part of the estate unadministered. The court refused to allow C. to retract his renunciation as residuary legatee in trust, but granted him administration de bonis non as substituted residuary legatee. *Morrison, In goods of*, 2 Sw. & Tr. 129; 3 L. T. 786; 9 W. R. 518.

Where Legatee has purposely Destroyed Will.]—Where the court was satisfied, on the evidence, that the defendant, who had taken out letters of administration, had possessed himself of the will after the death of the deceased, and had suppressed or destroyed it, it therefore decreed letters of administration with the will annexed, as contained in a draft, and as the plaintiff and defendant were the residuary legatees in the will, and as such equally entitled in usual course to the letters of administration, ordered the grant to be made to the plaintiff. *Podmore* v. *Whatton*, 3 Sw. & Tr. 449; 33 L. J., P. 143; 10 Jur. (N.S.) 756; 10 L. T. 754; 13 W. R. 106.

Misdescription of Legatee.]—Where the object of a testatrix's bounty was erroneously described, the court, on being satisfied that the misdescription was the result of mistake, granted administration, with the will annexed, to such person. *Hooper, In goods of*, 13 L. T. 445; 14 W. R. 210.

10. Attorneys, Agents, and Nominees.

Person Entitled Resident in England.]—When the person entitled to administration is in England, a grant will not be made to his attorney, unless the estate consists solely of property held in trust. *Bullar, In goods of*, 39 L. J., P. 26; 22 L. T. 146.

Where a person, solely entitled, was resident in this country, and able to take it himself, the court declined to decree it to his attorney for his use and benefit. *Burch, In goods of*, 2 Sw. & Tr. 139; 30 L. J., P. 171; 4 L. T. 451; 9 W. R. 639; and *S. C.* and S. P., 5 L. T. 119.

Person Entitled Resident Abroad.]—When a party solely entitled to the grant of administration of an estate was abroad, and it was not known where she was, or when she would return to this country, and there was a sum of money payable to the estate, the court made a grant of administration to a person whom she had duly authorised by power of attorney to manage her property in England. *Escot, In goods of*, 4 Sw. & Tr. 186; 28 L. J., P. 17.

A testator left three next of kin, one of whom was resident in Calcutta, and another at New York. These two each nominated an attorney in this country for the purpose of taking a grant. The court, however, refused to make a joint grant to these attorneys. *Shepherd, In goods of*, 26 L. T. 405.

Where a party entitled to administration is abroad, and has given a simple power of attorney to his agent in England to take out administration for his use and benefit, the court will only grant administration to the agent on the same terms as it would have granted it to the party himself. *Goldsborough, In goods of*, 1 Sw. & Tr. 295; 5 Jur. (N.S.) 417; 7 W. R. 375.

Where a party entitled, being resident out of England, had, by a power of attorney, specially authorised his brother to execute for him an instrument of renunciation and consent, the court acted on a renunciation and consent so executed. *Rosser, In goods of*, 3 Sw. & Tr. 490; 33 L. J., P. 155; 10 L. T. 695; 12 W. R. 1014.

A testator while of unsound mind made a will disposing of large sums of money, although at the time of making the will he was possessed of no property whatever, and was dependent upon his relatives for support:—Held, that administration might be granted as in case of an intestacy to the sister of the deceased as attorney for his widow, who was resident in Australia, and that the oath of the administra-

trix should be to the effect that the deceased, so far as she knew and believed, had left no will. *Rich, In goods of*, 61 L. J., P. 94; [1892] P. 143.

Intestate Dying Abroad.]—B., having acquired a domicil in British Guiana, died a bachelor and intestate, without any known relations there. Under an ordinance of that colony the administrator-general took possession of B.'s property in that colony, and appointed P., F. and P., of Liverpool, to be his attorneys, and in his name to take letters of administration to the personal estate of the deceased in this country. The court, after notice to the queen's proctor, and citations of next of kin, made the grant accordingly. *O'Brien, In goods of*, 2 Sw. & Tr. 604; 31 L. J., P. 194; 7 L. T. 249.

Testator Dying Abroad.]—A testator named five executors, four of whom took probate in Victoria, in which colony he died, and power to do so was reserved to the fifth:—Held, that administration with the will annexed could not be granted in this country to the attorney lawfully constituted of the four executors who proved the will, unless the fifth executor had been first cited. *Fletcher, In goods of*, 8 Jur. (N.S.) 572.

Executors Abroad.]—Administration granted under 38 Geo. 3, c. 87, the executor going to Scotland, is not disputable in equity, though it may be at law. *Rainsford* v. *Taynton*, 7 Ves. 460.

Administration granted under 38 Geo. 3, c. 87, is not for a limited time but for a limited purpose—viz. to become or be made party to bills in equity, and carry decrees into execution. *Ib.*

The effect of return of executor is, that he must be made party in the usual course, and then the temporary administrator may account and have his costs, and be discharged; but the proceedings are not put an end to. *Ib.*

Administration was granted under the statute where the executor went to Scotland. The authority of an administrator appointed according to the provisions of the 38 Geo. 3, c. 87, during the absence of an executor from this country, does not become actually void upon the death of such executor, but only voidable. *Taynton* v. *Hannay*, 3 Bos. & P. 26; 7 Ves. 460.

A. died in 1832, leaving a will, whereof he appointed B., C. and D. executors, and B. residuary legatee. C. alone proved the will, power being reserved to grant probate to the other executors. In 1847 B. died, leaving a will, appointing E. sole executrix, who duly proved B.'s will. In 1855, C. died intestate, leaving part of the personal estate of A. unadministered. D., the surviving executor of A., not having appeared to a citation calling on him to accept or refuse probate of the will of A., administration with the will of A. annexed was granted to the attorney of E., then abroad, as the personal representative of the residuary legatee of A., the chain of executorship having been broken. *Collison* v. *Mawe*, 28 L. J., P. 90.

A., in April, 1856, executed a power of attorney appointing L. her attorney, for the purpose of managing her real and personal estate, and giving him very extensive powers, but not in terms sufficient to constitute him her attorney for the purpose of taking out letters of administration. A. then went abroad, and during her absence, money having become payable to the personal estate of B., who had died intestate, and in respect of whose estate A. was entitled to administration, it became necessary that an administrator should be appointed in order that a discharge for that sum might be given. It being uncertain when A. would return to this country, or where he was, the court granted administration of the estate of B. to L. *Escot, In goods of*, 4 Sw. & Tr. 186; 28 L. J., P. 17.

Where the sole executor to a will was abroad and not expected to return for at least two years, and could not be communicated with for several months, the court made a grant of administration with the will annexed to two gentlemen who had been appointed his attorneys in a power executed by him previous to leaving England. *Barker, In goods of*, 60 L. J., P. 87; [1891] P. 251; 39 W. R. 560.

A testator by his will nominated two executors, both of whom at the time of his death were resident out of the United Kingdom. The will contained a paragraph requesting R., the partner of one of the executors, to act for him in the event of his absence. It appeared that there was urgent necessity for the appointment of an administrator of the estate of the deceased:—Held, that administration with the will annexed might be granted to R. under s. 73 of 20 & 21 Vict. c. 77, until such time as one or other of the executors should come and prove the will. *Taylor, In goods of*, 61 L. J., P. 93; [1892] P. 90; 66 L. T. 266.

Where a testator domiciled abroad, having property there and also in England, made a will according to the law of the country of his domicil, and appointed executors thereof, and also appointed certain named persons in England to realise his English estate and transmit the proceeds to the testamentary executors, the court refused to appoint these named persons executors according to the tenor of the will, but made a grant to them under s. 73 of the Court of Probate Act, 1857, to administer the estate in England, for the use and benefit of the testamentary executors. *Earl, In goods of* (10 P. D. 196), approved. *Briesemann, In goods of*, 63 L. J., P. 159; [1894] P. 260; 6 R. 558; 71 L. T. 263.

To Attorney of Heir, with Decree of Persian Court annexed.]—A., a native of and domiciled in Persia, made and duly executed his will according to Persian law. By the law of Persia, which does not recognise the principle of representation of the estate of a deceased person, his will, as well as all his property, is taken possession of by the court having exclusive jurisdiction in matters of wills, inheritance and succession. This court is composed of ecclesiastics called "Moojateheds." It is presided over by one of the body, styled the "Superior Religious Head and Highest Authority," and his decrees are irrevocable. Neither the original nor any copy of the will is allowed to go out of the possession of the court. The contents of the will are published by the court in the presence of the persons (legatees and heirs) interested in the property of the deceased, and a document is given to each, certifying the portion of the property to which he is entitled. The testator died possessed of certain property (funds standing in his name in the books of the Book of England), and this property was appointed to B., his eldest son, by the "Superior Religious Head," who gave a document under his hand and seal certifying that

fact. The court granted to the duly-appointed attorney of B. letters of administration (with the decree of the Persian court annexed), limited to the property specified in the said decree. *Dost Aly Khan, In goods of*, 49 L. J., P. 78; 6 P. D. 6; 29 W. R. 80.

Receiver appointed by Chancery Division.]—Upon an application for administration it appeared that the widow of the intestate was a lunatic, and his only other next of kin, his brother, was unable to furnish justifying security. A suit had been instituted in the chancery division for the administration of the estate and a receiver appointed; but a portion of the estate, consisting of stock in a waterworks company, could not be realised except by a personal representative of the deceased:—Held, that administration could not be granted to the brother of the deceased without requiring justifying security, but that a grant might be made to the receiver, to issue when the registrar had been satisfied that the chancery division had continued his appointment. *Moore, In goods of*, 61 L. J., P. 119; [1892] P. 145.

Person appointed Factor loco tutoris by Scotch Court of Session.]—Administration of the personal estate in England of a domiciled Scotchman granted to A., appointed by the court of session at Edinburgh factor loco tutoris to the infant children of the deceased. *Jones, In goods of*, 28 L. J., P. 80.

Power of Attorney dispensed with.]—If the court, on the document before it, is satisfied that the party entitled desires the person applying to act as his attorney, it will not require a regularly-executed power of attorney. *Morley, In goods of*, 3 Sw. & Tr. 425; 33 L. J., P. 108; 10 L. T. 540; 12 W. R. 1064.

To Attorney out of the Jurisdiction.]—Administration will be granted to an attorney of the next of kin, such attorney being resident without the jurisdiction of the court, if the sureties to the bond are resident within the jurisdiction. *Leeson, In goods of*, 1 Sw. & Tr. 463; 29 L. J., P. 19; 1 L. T. 74; 5 Jur. (N.S.) 1270.

In the Case of Foreigners.]—Administration of the effects of an intestate who died domiciled abroad, granted to the agent of a foreigner entitled by the law of the domicil to administration. *Bianchi, In goods of*, 1 Sw. & Tr. 511; 28 L. J., P. 139.

Where an Italian subject died in this country leaving an infant, his next of kin, and his relatives were abroad, the court made a grant ad colligenda of his property here, under s. 73 of the Court of Probate Act, 1857, to the Italian vice-consul until one of the relatives obtained administration. *Migasso, In goods of*, 6 R. 571; 70 L. T. 246.

Pending a litigation in a Spanish court as to which of two testamentary papers of a deceased Spaniard ought to be established, the plaintiff, who was resident in Spain, was appointed by the Spanish court the judicial administrator of the deceased's goods, and the plaintiff, under the authority of that court, afterwards appointed the defendant to be his attorney to recover and receive 10,000*l.* due to the deceased's estate from C. & Co., of London. The defendant, after litigation in the prerogative court of Canterbury with one of the parties to the Spanish suit, obtained letters of administration to the deceased, to be granted to him as the plaintiff's attorney, limited to receive the 10,000*l.* until the plaintiff should obtain administration to the deceased. The defendant afterwards received the 10,000*l.*:—Held, that he might safely pay it over to the plaintiff, although he had not obtained administration to the deceased. *De la Viesca* v. *Lubbock*, 10 Sim. 629.

—— **Russian Imperial Family Law.**] — By the law of Russia all testamentary instruments executed by members of the imperial family are disregarded, and the disposition of the property of such persons after their death is within the exclusive power of the Emperor of Russia. *Oldenburg (Prince), In goods of*, 53 L. J., P. 46; 9 P. D. 234; 32 W. R. 724; 49 J. P. 104.

A., a member of the Russian Imperial family, died in Russia, having executed a will by which he appointed B., his son as his executor. After A.'s death a meeting of the members of his family was held, and an arrangement for the disposition of his property in accordance with the terms of his will was agreed to, and was embodied in a document termed an "Acte Définitif," which was subsequently confirmed by the Emperor of Russia; and by the terms of the "Acte Définitif" B. was constituted the sole and entire owner of certain shares held by the deceased in a railway company having its offices in England. The court, upon a certificate from the Russian ambassador in England, with the seal of the Russian embassy, reciting that the law of Russia is as stated above, and that under the "Acte Définitif," B. was the sole and entire owner of the railway shares, made a grant to the attorney of B. of letters of administration with the "Acte Définitif" annexed, limited to the property of the deceased in England. *Ib.*

Domiciled Scotchman having Indian Property.]—A domiciled Scotchman died, leaving a will, whereby he appointed executors. The executors proved the will in Scotland, and authorised F. & Co. to take out administration as their agents in India, where the deceased possessed considerable property. F. & Co. did so, and having realised the assets, they paid the money for their own protection into the court of chancery in England. On a suggestion that personal representation was also necessary in this country to enable the executors to take the money out of the court of chancery, the court expressed its willingness to grant probate of the will, but declined to allow the executors' oath to be altered to meet the facts of the case by having the property sworn under 20*l.* *Murray, In goods of*, 16 L. T. 266.

Englishman domiciled Abroad—Administration with Retranslation of Will annexed.]—A translation of the will of an Englishman dying domiciled abroad but possessed of personal property in England, originally written in English, had been proved in the court of the country of his domicil. One of the executors transferred his powers to his co-executor, who afterwards died, and G. was appointed in his place by the same court. The court granted letters of administration, with a retranslation of the will annexed, to G.'s attorney in this country. *Rule, In goods of*, 47 L. J., P. 32; 4 P. D. 76; 39 L. T. 123; 26 W. R. 357.

To Disinterested Nominee.]—The court will grant administration, with the consent of all parties interested in the property of the deceased, to their nominee who takes no interest in the property himself. *Farrell* v. *Brownbill*, 3 Sw. & Tr. 467.

Grant for Purpose of vesting Trust Term in New Trustees.]—Where, upon the occasion of the appointment of new trustees of a settlement, which comprised, amongst other trust funds, a charge on the settled lands, which had been paid off by the former trustees, and an assignment of it taken from the persons beneficially interested therein, the new trustees required that a term of years created for the purpose of securing the charge, which had not been assigned to the former trustees, should be transferred to them, and there was no personal representative of the surviving trustee of the term living, the court, on the application of the attorney of the person beneficially entitled to the charge, who was resident abroad, gave liberty to his attorney to apply for a grant, limited to assigning the term to the new trustees. Form of order. *Vereker*, *In the goods of*, [1896] 1 Ir. R. 200.

To Nominees under Special Circumstances—20 & 21 Vict. c. 77, s. 73.]—The consent of all the persons interested is not a sufficient ground for departing from the general rules as to grants of administration. The court therefore refused to make a joint grant to two of the persons interested in distribution and to a nominee of the next of kin, although the next of kin and all the persons interested concurred in the application. *Richardson*, *In goods of*, 40 L. J., P. 36; L. R. 2 P. 244; 25 L. T. 384; 19 W. R. 979.

The mere fact that the person who would be entitled to administration desires that some other person should take the grant, does not constitute such a special state of circumstances as to justify a grant under 20 & 21 Vict. c. 77, s. 73. In such a case the proper course to be adopted is for the person entitled to administration to take the grant, and then appoint his nominee to act as his or her attorney. *Hale*, *In goods of*, 44 L. J., P. 45; L. R. 3 P. 207; 31 L. T. 799.

A will having been set aside by reason of an informality in the execution, the widow and children entered into an arrangement by deed to carry out the intention of the husband as contained in such will, notwithstanding its informality. The court refused to grant administration to the executors named in the will under the Probate Act, s. 73, as the nominees of the parties interested in an intestacy, they themselves having no interest in the property of the deceased. *Ib.*

If next of kin are unable to agree amongst themselves which of them shall take administration, and are all willing that such administration shall be granted to a nominee who has no interest therein, that will not be a special circumstance to justify the court in making a grant to such nominee under 20 & 21 Vict. c. 77, s. 73. *Teague* v. *Wharton*, *Jeffries*, *In goods of*, 41 L. J., P. 13; L. R. 2 P. 360; 25 L. T. 764; 20 W. R. 214.

A doubt having been raised as to the legitimacy of the sole next of kin, a deed was entered into by the parties interested for the distribution of the property amongst themselves in certain proportions, and it was a part of the arrangement that administration of the personal estate should be applied for by an individual who had, under no circumstances, an interest therein:—Held, that there were special circumstances in the case which authorised the court to grant such administration to the person designated under 20 & 21 Vict. c. 77, s. 73. *Hopkins*, *In goods of*, 44 L. J., P. 42; L. R. 3 P. 235; 33 L. T. 320.

The court will, but under special circumstances only, make a grant of administration to a nominee of the parties interested in the estate. *Clayton*, *In goods of*, 55 L. J., P. 26; 11 P. D. 76; 34 W. R. 444; 50 J. P. 263.

An indiarubber merchant, carrying on business in this country, died here intestate. His next of kin consisted of a mother, two brothers, and two sisters, all resident in South America. The estates from which the indiarubber was produced were situate in Bolivia, 3,000 miles from the coast, and difficult of access. Quantities of goods were lying at Liverpool, and bills accepted by the firm were coming due. The only relation in this country was a nephew, who was only here temporarily and did not care to take administration. It was important that the business should be carried on. Under these circumstances (the nephew and all other persons interested in the business consenting), the court made a grant of administration under s. 73 of the Court of Probate Act, 1857, to a chartered accountant, limited until the proper person should come in and claim. Justifying security to be given. *Suarez*, *In goods of*, 66 L. J., P. 98; [1897] P. 82; 77 L. T. 137; 45 W. R. 704.

To Nominees of Guardians.] — *See* ante, GUARDIANS, col. 508.

Crown Nominees (15 & 16 Vict. c. 5).]—When a bastard, having no relations, makes a will disposing of a part only of his or her property, the crown has a right to a grant save and except, or to a cæterorum grant, but not to a general grant of administration, and the legatees have a right to a grant, with the will annexed, limited to the property disposed of by the will. *Rhoades*, *In goods of*, 35 L. J., P. 125; L. R. 1 P. 119.

A nominee of the crown taking out administration to the estate of an intestate is under the same obligation as any other administrator. *Att.-Gen.* v. *Köhler*, 9 H. L. Cas. 654; 8 Jur. (N.S.) 467; 5 L. T. 35; 9 W. R. 933.

The 15 & 16 Vict. c. 3, only dispenses with the necessity of his giving the usual bond to the ordinary, but imposes on him all the duties and liabilities of a private administrator. If he improperly pays to the crown part of an intestate's effects, though such payment is made under authority of a warrant under the sign-manual, he makes himself personally liable to restore it to parties afterwards proving themselves legally entitled. *Ib.*

Upon his death that liability only continues against his personal representatives, and not against his successor in office. But that successor may make himself personally liable for the acts of his predecessor, as by taking out letters of administration de bonis non to the same estate. *Ib.*

Where the nominee of the crown had improperly paid money (thus coming to his hands) to the then sovereign, and the succeeding nominee of the crown had taken out letters of administration de bonis non to the same estate, and in a suit by the next of kin against him, had only contested the fact of the claimants being truly the next of kin, and denied, if they were so, liability to pay interest on the sum claimed:—

Held, that this was in substance an admission of liability to pay the principal to the next of kin, and the claimants having satisfactorily established their title to that character, the liability to pay interest followed, as of course, on the liability to pay the principal. *Ib.*

The effects of an intestate having vested in the crown by forfeiture, if letters of administration are granted to A., in consequence of a warrant from the king, and they run in the usual form, viz., "To pay debts," &c., but with this additional clause, "For the use and benefit of his majesty," A. will be answerable as administrator for the debts of the intestate, and will not be permitted to give evidence tending to question the validity of the letters of administration. *Megit* v. *Johnson*, 2 Dougl. 542.

Prince of Wales when Intestate's Estates in Cornwall.]—T. C. died in Cornwall, intestate, without known relations. The court granted letters of administration of his estate for the use of his royal highness the Prince of Wales as Duke of Cornwall; but, semble, without prejudice to the rights of the crown. *Cornwall (Solicitor of Duchy of)* v. *Canning*, 5 P. D. 114; 41 L. T. 737; 28 W. R. 278.

Manager of Company appointed Executor and Trustee.] — Where a limited company were appointed executors and trustees under a will, the court granted administration with the will annexed to the general manager of the company as their nominee. *Hunt, In goods of*, 66 L. J., P. 8; [1896] P. 288.

Assignment of Right to Letters of Administration.]—A. bequeathed the residue of his personal estate to W., his sole executor and trustee, in trust for such persons as B., a married woman, should appoint, and in default of appointment to B. absolutely. W. renounced. By deed, B. appointed and assigned to M. and J., who accepted the trust, all her interest under the will, and her right to letters of administration, with the will annexed, in order that they might obtain such letters of administration. Letters of administration, with the will annexed, granted to M. and J. *Martindale, In goods of*, 1 Sw. & Tr. 8; 27 L. J., P. 29; 4 Jur. (N.S.) 196; 6 W. R. 277.

Grant ad colligenda bona—Liberty to pay pressing Debts, and dispose of Business.]—Under a grant ad colligenda bona, made to the solicitor to the treasury, the court gave leave to the administrator to pay all pressing claims for rent, rates, and taxes, to take the accounts of the manager of the intestate's business, and to dispose of the said business. *Oddy, In goods of*, 62 L. T. 643.

Liability of Nominee obtaining Grant.]—A party to whom letters of administration have been granted, as the attorney of the person entitled to the grant, and for the use and benefit of such person, is liable to be sued, in the same way as if he had obtained administration in his own right. *Chambers* v. *Bicknell*, 2 Hare, 536; 7 Jur. 167.

11. Committees of Lunatics.

When Entitled.]—An intestate, whose property was under 1,000*l.* in value, left no known relation except a sister, who was of unsound mind, but had not been found so by inquisition, and who had no property of her own. The court refused to grant administration for the use and benefit of the lunatic to a stranger in blood until the applicant should obtain an order from the court of chancery, under 25 & 26 Vict. c. 86, s. 12, rendering the property of the lunatic available for her maintenance and benefit. *Slumbers, In goods of*, 4 Sw. & Tr. 32; 34 L. J., P. 93; 11 Jur. (N.S.) 396; 12 L. T. 582; 13 W. R. 696.

A. died intestate, without child or parent, leaving a widow and several next of kin. Before the widow took out letters of administration she was found a lunatic, and a committee of her person and estate appointed:—Held, that the committee was entitled in preference to the next of kin. *Alford* v. *Alford*, 3 Jur. (N.S.) 990.

A sole executrix and sole legatee, who had taken out probate, was declared a lunatic. Her next of kin was appointed committee of her person, and another person committee of her estate. With the consent of the latter the court passed him over, and granted administration, with the will annexed, to the committee of the person. *Scarlett, In goods of*, 27 L. T. 215; 21 W. R. 79.

Where the next of kin of a deceased lunatic was of unsound mind, though not so found by inquisition, a transfer of the lunatic's personal estate was directed to be made to the person to whom administration durante animi vitio of such next of kin had been granted, agreeably to the practice of the ecclesiastical court. *Evelyn, Ex parte*, 2 Myl. & K. 3.

Person appointed to act with the Powers of a Committee.]—The sole next of kin of a deceased intestate was a person "not lawfully detained as a lunatic and not found a lunatic by inquisition, but through mental infirmity arising from age incapable of managing her affairs," within the meaning of sub-s. 1 (*d*) of s. 116 of the Lunacy Act, 1890. Her estate was administered by a person appointed to act with the powers of a committee under sub-s. 2 of such section:—The court made a general grant of administration, under s. 73 of the Court of Probate Act, 1857, to the person thus appointed for the use and benefit of the next of kin. *Leese, In goods of*, 63 L. J., P. 124; [1894] P. 160; 70 L. T. 810.

Objection of Masters in Lunacy.]—A. died intestate leaving B., a person of unsound mind, her lawful sister and sole next of kin, surviving her. C. was appointed committee of B.'s estate, but the masters in lunacy objected to his taking the grant of administration of A.'s estate. In these circumstances the court, with the consent of C. and the consent also of the next of kin of B., made the grant to D., a stranger in blood to the deceased. *Hastings, In goods of*, 47 L. J., P. 30; 4 P. D. 73; 39 L. T. 45.

12. On Renunciation of Parties.

Generally.]—The Probate Court Rules, 1862, are for the guidance of the registry, but capable of modification by the court. *Loftus, In goods of*, 3 Sw. & Tr. 307; 33 L. J., P. 59; 10 Jur. (N.S.) 324; 10 L. T. 240.

When a person has renounced probate or administration in one character, he may be entitled to administration de bonis non in an inferior character, which did not exist when he renounced in the superior character. *Ib.*

Next of kin refusing to take administration, title of person taking it out will not depend on next of kin's granting his permission, nor by his withholding it. *Cawthorne* v. *Chalie*, 2 Sim. & S. 128; 3 L. J. (o.s.) Ch. 125.

By Person Abroad.]—Where a party entitled, being resident out of England, had by a power of attorney specially authorised his brother to execute for him an instrument of renunciation and consent, the court acted on a renunciation and consent so executed. *Rosser, In goods of*, 3 Sw. & Tr. 490; 33 L. J., P. 155; 10 L. T. 695; 12 W. R. 1014.

Of Executors.]—Where one of several executors, after intermeddling in the testator's estate, executed a renunciation, and probate had been granted to his co-executors, the court, on the application of the renunciant, declared his renunciation to be invalid, and directed the record of it on the probate to be cancelled. *Badenach, In goods of*, 3 Sw. & Tr. 465; 33 L. J., P. 179; 10 Jur. (N.S.) 521; 11 L. T. 275.

An executor, having renounced in Australia, was appointed by the executors, who proved the will in the colony, their agent to obtain letters of administration with the will annexed in this country; the court held that r. 50 of the Probate Court Rules, 1862, did not apply, and made the grant to him as attorney, but required that he should file a fresh and definite renunciation, which beyond all question should strip him of the character of executor and bring him within the operation of s. 9 of the Probate Act. *Russell, In goods of*, 38 L. J., P. 31; L. R. 1 P. 634; 20 L. T. 231; 17 W. R. 471.

The renunciation of an executor need not be under seal. *Boyle, In goods of*, 3 Sw. & T. 426; 33 L. J., P. 109; 10 L. T. 541.

The court received and acted on an informal deed of renunciation, which stated in substance, although not in terms, that the executor had not intermeddled. *Gibson, In goods of*, 35 L. J., P. 114; L. R. 1 P. 105; 12 Jur. (N.S.) 344; 14 L. T. 23.

When a will, disposing of realty, appointed an executor, who afterwards renounced, the court granted administration with the will annexed to the next of kin. *Jordan, In goods of*, 37 L. J., P. 22; L. R. 1 P. 555; 16 W. R. 407.

The court will not recognise an agreement by an executor to renounce. *Hargreaves* v. *Wood*, 2 Sw. & Tr. 602; 32 L. J., P. 8; 7 L. T. 338; 11 W. R. 31.

An executor cannot renounce after he has taken probate. *Veiga, In goods of*, 3 Sw. & Tr. 13; 32 L. J., P. 9; 7 L. T. 644; 11 W. R. 84.

An executor under the will of a testator domiciled in Portugal accepted the executorship in that country, and also obtained probate in England. Becoming afterwards, through age and infirmity, incapable of acting, a competent Portuguese tribunal permitted him to renounce the executorship, and appoint A. to act as executor in his stead. Upon application for a grant to A. of administration de bonis non with the will annexed:—Held, that the renunciation of the executor, though sanctioned by the law of Portugal, could not be recognised in this country, and that A. therefore was not entitled to the grant prayed. *Ib.*

A renunciation of executorship is not complete and may be retracted at any time before it is filed in the court. *Morant* or *Morand, In goods of*, 43 L. J., P. 16; L. R. 3 P. 151; 30 L. T. 74; 22 W. R. 267.

An executor signed a renunciation of probate, in order that administration with the will annexed might be granted to a creditor. The necessary papers, including the renunciation, to lead the grant, were taken into the registry, but a difficulty arose in the way of the grant, and all the papers were withdrawn:—Held, that there had been no renunciation by the executor within the meaning of the Probate Act, 1857 (20 & 21 Vict. c. 77), s. 79, and that he was entitled to probate of the will. *Ib.*

A person who has been appointed sole executrix and named universal legatee, and has renounced probate, may afterwards take a grant of administration de bonis non in the latter character. *Wheelwright, In goods of*, 47 L. J., P. 87; 3 P. D. 71; 39 L. T. 127; 27 W. R. 139.

When "failing A.," B. was substituted executor, the court held, that the condition of substitution was satisfied by A.'s refusal to act, and granted probate to B. on the renunciation of A. *Colquhoun, In goods of*, 37 L. J., P. 1; 17 L. T. 123; 16 W. R. 88.

A testator left his property to his children who should attain twenty-eight; the sole executor renounced probate and refused to nominate any new trustee; the court granted letters of administration with the will annexed to two sons under the age of twenty-eight, that age being fixed for possession, and not for vesting of the shares. *Thompson, In goods of*, 67 L. T. 357.

See also EXECUTOR AND ADMINISTRATOR.

Of Next of Kin.]—Where the persons who are sole next of kin and the only persons entitled in distribution renounce their title to administration, the court will make the grant to a person who would have been next of kin if the sole next of kin had been out of the way, although such person has no interest. *Johnson, In goods of*, 2 Sw. & Tr. 595; 7 L. T. 337.

Retracting Renunciation.]—The court of probate has jurisdiction in a proper case to allow an executor to retract his renunciation even where the renunciation is complete. *Bell, In goods of*, 3 L. R., Ir. 230.

It has never been decided that an executor who has filed a renunciation of his rights may not afterwards retract such renunciation, notwithstanding the terms of the Probate Act, 1857, s. 79, but he certainly will not be permitted to do so, unless he can shew that such retractation will be for the benefit of the estate or of those interested under the will. *Gill, In goods of*, L. R. 3 P. 113.

—— **20 & 21 Vict. c. 77, s. 79, is not Retrospective.**]—The 20 & 21 Vict. c. 77, s. 79, does not apply to an executor who has renounced before that act came into operation; and the retractation of such renunciation after the act came into operation, and a second renunciation after such retractation, will not bring him within that section. *Whitham, In goods of*, 36 L. J., P. 26; L. R. 1 P. 303; 15 L. T. 447; 15 W. R. 560.

The next of kin may, with consent of the court, retract a renunciation before administration has issued to another party; but the court is not bound to allow such retractation. *Park, In goods of*, 6 Jur. (N.S.) 660.

A. having, before 20 & 21 Vict. c. 77, renounced, as executor, probate of A.'s will, and as residuary legatee in trust, administration with the will annexed, such administration was granted to the residuary legatee for life:—Held, that on the death of the administratrix, A. could not retract his renunciation in either capacity. *Richardson, In goods of*, 1 Sw. & Tr. 515; 6 Jur. (N.S.) 326; 1 L. T. 448.

13. General or Limited Grant.

General.]—A clause revoking all former wills in a will purporting to deal only with trust property, entitled the executor of the will to a general grant of probate. *Lancaster, In goods of*, 1 Sw. & Tr. 464; 29 L. J., P. 19; 1 L. T. 75; 8 W. R. 134.

When the person entitled to a general grant with the will annexed was also an appointee by the same will to a fund of 2,000*l.* in settlement, and the general estate of the testatrix, who died insolvent, did not amount to 5*l.*, the court declined to make a limited grant to the appointee on the suggestion that, by taking a general grant, he rendered himself liable to be harassed with actions by her creditors. *Somerset, In goods of*, L. R. 1 P. 350.

Administration granted under 38 Geo. 3, c. 87, is not for a limited time, but for a limited purpose—viz. to become and be made party to bills in equity, and to carry decrees into execution. *Rainsford* v. *Taynton*, 7 Ves. 468.

—— **To Executor of Married Woman.**]—A married woman executed a will under powers given to her by her marriage settlement. She survived her husband, and died without republishing her will. All the next of kin, except one in New Zealand, consented to a general grant with the will annexed of the goods of the deceased being made to the executor named in the will. The court made the grant without any notice to or consent from the next of kin in New Zealand. *Thorild, In goods of*, 36 L. J., P. 119; 16 L. T. 853.

Limited — To Part of Estate Applicant is interested in.]—Administration of the personal estate and effects of a deceased had been granted to A.; and all the property, with the exception of an interest in some fields as tenant from year to year, had been administered. A will having been propounded, dealing with these fields alone, and bequeathing the testator's interest in them to B., the court refused to grant to B. an administration with the will annexed limited to the property contained in the will; but revoking the former administration to A., granted her liberty to apply for and obtain letters of administration with the will annexed. *Clarke, In goods of*, Ir. R. 6 Eq. 26.

Where a party applying for administration has no direct interest in the personal estate of the deceased, he cannot obtain a grant extending to the whole of the property; it must be limited to the particular fund to which he satisfies the court he is entitled. *Dodgson, In goods of*, 1 Sw. & Tr. 260; 28 L. J., P. 116; 5 Jur. (N.S.) 252.

The court will grant administration to a cestui que trust of a trust fund, limited to that fund, when the trustee in whose name the fund stands is dead, and is without a personal representative, the parties entitled to represent the deceased trustee having been first cited. When there are several parties interested in the fund, the grant will be limited to the interest of the cestui que trust making the application, unless the other cestui que trusts assent to the grant extending to their respective interests. *Pegg* v. *Chamberlain*, 1 Sw. & Tr. 527; 2 L. T. 25; 8 W. R. 273.

—— **Citation of Next of Kin.**]—A married woman, who had lost sight of her husband for about twenty-seven years, bequeathed certain money in the post office savings bank to a man with whom she had lived in adultery during that time. The will did not appoint an executor, neither did it contain a residuary clause. The court refused to grant to the legatee administration with the will annexed limited to the amount of his legacy, without citing the next of kin. *Watson, In goods of* (1 Sw. & Tr. 110), distinguished. *Miles, In goods of*, 59 L. J., P. 59; 62 L. T. 607.

—— **To Property passing under a Power.**]—If executors are appointed in a will which disposes only of real property, they are usually entitled to probate of the same; but this is not the case if such will is made under a power, for then the executors have their authority limited to such property as passes under the power, and can take nothing jure representationis. *O'Dwyer* v. *Geare, Parkin, In goods of*, 1 Sw. & Tr. 465; 29 L. J., P. 47; 5 Jur. (N.S.) 1366; 1 L. T. 242.

—— **To Policy of Insurance.**]—The court may, if it thinks fit, depart from the practice of not granting limited administration to a person entitled to a general grant. The district registrars are, by the rules, bound to adhere to such practice. *Patteson* v. *Hunter*, 30 L. J., P. 272.

A creditor insured the life of his debtor, but the policy having by mistake been made payable to the representatives of the debtor, the court granted administration to it, limited to the policy. *Ib.*

—— **To Particular Bequest.**]—A wife who was a legatee under the will of her father died in his lifetime and in that of her husband, leaving issue. The husband died before the father, leaving a will of which probate was granted:—Held, that under 7 Will. 4 & 1 Vict. c. 26, s. 33, the bequest took effect as if the legatee had died immediately after her father, in which case she would have died a widow, her son was entitled to administration limited to the bequest, without citing the executor of the husband. *Councell, In goods of*, 41 L. J., P. 16; L. R. 2 P. 314; 25 L. T. 763.

—— **To Trust Fund.**]—A., when blind, made his will, having no property of his own, but being surviving trustee of a fund consisting of stock, solely for the purpose of enabling B., to whom the reversion in the trust fund had been assigned, to receive the same. By the will he appointed B., his executors, administrators, and assigns, his sole executor. B. died in A.'s lifetime, having made a will whereof C., one of his executors, had taken probate. The court being satisfied that A. knew and approved of the contents of his will when he executed it, granted probate of it to C., limited to the trust fund. *Asford, In goods of*, 1 Sw. & Tr. 540; 2 L. T. 86; 8 W. R. 340.

The surviving trustee of a fund being dead and no one having been appointed to administer his estate, the next of kin having failed after

citation to have his will proved; the court made a grant of administration under s. 73, limited to a specific fund, over which the deceased tenant for life had power to dispose, and did dispose, by her will, and by the said will appointed the applicants executors. *Rugge-Price, In goods of*, 67 L. T. 503.

—— **To carrying out Instructions of Testator.**]—A son, being entitled to the whole of the personal estate of his father, deceased intestate, wrote from Madras, where he was serving in the Royal Artillery, to a cousin in England, giving him directions as to securing the amount of the property, and transmitting a small sum to him. The court granted administration, under 20 & 21 Vict. c. 77, s. 73, to the cousin for the use and benefit of the son, limited to carrying into effect the directions contained in the letter. *Drinkwater, In goods of*, 2 Sw. & Tr. 611; 31 L. J., P. 93; 7 L. T. 251.

—— **To Property in England.**]—A husband having died in India, his property was administered by the administrator-general there, who paid one moiety of the available funds to the widow, who was resident in India, and transmitted the other moiety to this country for distribution amongst the parties entitled at the time of his death. The court, under 20 & 21 Vict. c. 77, s. 73, granted administration of his goods to one of such parties limited to the property transmitted to this country by the administrator-general. *Hughes, In goods of*, 43 L. J., P. 31; L. R. 3 P. 140; 29 L. T. 377.

—— **As to Debt of Englishman to Foreign Intestate.**]—On the death of A., who was a domiciled French subject, and at the petition of his wife, the tribunal of commerce of the Seine declared his estate bankrupt. According to the practice of that tribunal, a syndic was appointed to administer the estate, and an order was made that the debts due to the estate should be sold. They were accordingly sold by auction, and amongst them one due from a firm in England: —Held, that the court, in its discretion, will not grant administration to enable such a purchaser to recover a debt due in England. *Depit* v. *Delevieleuse*, 2 Sw. & Tr. 131; 30 L. J., P. 86; 7 Jur. (N.S.) 196; 4 L. T. 894.

—— **As to Time.**]—Upon the death of a testator, A., the surviving executor, being resident in Sydney, B., who held a general power of attorney to act for A. in this country, sent out to him for execution a special power of attorney to authorise B. to take out administration, with the will annexed for A.'s use and benefit, and also a process of renunciation in case he should wish to renounce. The residuary legatee for life was incompetent from senility to take administration, and, subject to his interest, B. and others were entitled to the residue. The majority of the persons interested under the will being desirous that a grant should be made without waiting for the return of the power of attorney or renunciation, the court granted administration, with the will annexed, to B., limited until such time as A. should apply for probate, or his attorney for administration, with the will annexed. *Lewis, In goods of*, 29 L. J., P. 94.

Administration of the estate of B. had been granted to two of his sons in 1818, one of whom had since died, and the other had for many years resided in the West Indies. A sum of money being divisible, in which the surviving administrator had no interest, an administration was granted to a third son, limited to the particular sum to be divided and to continue so long only as the former surviving administrator remained out of the jurisdiction of the court. *Baynes, In goods of*, 7 Jur. (N.S.) 832.

—— **During Minority.**]—The court, upon the application of the lawfully elected and appointed curator and guardian of three minors, the lawful children of the deceased, who died a widow and intestate, made a grant of administration under s. 73, without the consent of three children of the half-blood, all sui juris and resident in England; the grant to be limited to such time as one of the minors should attain full age and apply for administration on her own behalf. *Roe, In goods of*, 66 L. T. 266.

—— **During Insanity.**]—Where an administratrix who was herself beneficially entitled to the unadministered residue of the personal estate of the deceased became of unsound mind, but had not been so found by inquisition, the court granted letters of administration de bonis non to her next of kin for her use and benefit pending her unsoundness of mind: the letters of administration already granted being impounded in the meanwhile. *Espinasse, In goods of*, 3 L. R., Ir. 185.

Where a sole administrator becomes insane but is not so found by inquisition, and under s. 116 of the Lunacy Act, 1890, a person has been appointed with only limited powers over the lunatic's property, a grant of administration will be made to another of the next of kin of the intestate for the use of the lunatic so long as he remains a lunatic, and the first grant of administration will be impounded. *Binckes, In goods of* (1 Curteis, 286), followed. *Cooke, In goods of*, 64 L. J., P. 35; [1895] P. 68; 11 R. 594; 72 L. T. 121; 43 W. R. 428.

—— **Until lost Will found.**]—A will had been duly executed by the testator, but it could not be found after his death. His widow, who had made a statement to the effect that it had been accidentally destroyed, on being served with a notice to attend and be examined concerning the contents of the will, disobeyed the order, and was believed to have left the country. The court made a grant of letters of administration to the testator's only son, with the consent of the remaining next of kin, limited to dealing with certain leasehold property without requiring the widow to be cited. *Wright, In goods of*, 62 L. J., P. 31; [1893] P. 21; 1 R. 476; 68 L. T. 25; 41 W. R. 318.

Determination by Court of Construction.]—A wife died, leaving property in England and Ireland, and her executrix took out probate in England, "limited to such property as she had power to dispose of." A caveat having been lodged:—Held, that inasmuch as she had power to dispose of some property in Ireland, the court would not take upon itself to decide what particular sum it was, but simply setting aside the caveat and resealing the probate, would leave that question to be determined by a court of construction. *Mahon* v. *Hodgens*, Ir. R. 6 Eq. 344.

A woman made her will while under cover-

ture; and by it, after disposing of property to which she was entitled to her separate use, bequeathed "all the residue of the real and personal estate which I shall possess or have power to dispose of at the time of my decease to my niece." After the will was executed her husband died, bequeathing her considerable personal property. Shortly afterwards she died herself, without having re-executed her will:—Held, that although the court would be warranted in holding that the testatrix, having full power over the property acquired from her husband at the time of her death, and having used language in the will sufficiently large to include it, had effectually disposed of it, yet that it was its duty to conform to the decision of the privy council in *Barnes* v. *Vincent* (5 Moore, P. C. 201), and to leave the question for the court of construction. *Noble* v. *Willock* or *Phelps*, 40 L. J., P. 60; L. R. 2 P. 276; 25 L. T. 65; 19 W. R. 1115.

It accordingly refused a general probate of the will, but made the limited grant as full as it possibly could, so as not to prejudice the parties or fetter the court of construction. *Ib.*

When the will of a married woman is tendered for probate on the ground that she has separate property, and the probate is contested, if the court is satisfied that there is separate property, it has power to grant probate of all such property as the testatrix had power to dispose of without deciding what that property is. But it is generally the duty of the court, so far as the evidence and pleadings enable it to do so, to decide judicially of what such property consists. *Tharp, In goods of, Tharp* v. *McDonald*, 3 P. D. 76; 38 L. T. 867; 26 W. R. 770—C. A.

Foreigner Abroad—Property in this Country—Letters of Administration founded on a Foreign Decree.]—D. M. K., a Persian subject, was by a decree of a Persian court declared entitled to certain property in this country. The decree, though founded partly upon a will, made no mention of it, and the court which had custody of the will refused to give a copy of it. The court of probate granted letters of administration limited to the property mentioned in a duly-authenticated copy of the decree. The court allowed the law applicable to the case to be proved by a Persian ambassador. *Dost Aly Khan, In goods of*, 49 L. J., P. 78; 6 P. D. 6; 29 W. R. 80.

Limited to Appointment of New Trustees.]—A marriage settlement of personal estate contained a power for the surviving or continuing trustee, or the acting executors or administrators of the last surviving trustee (after the death of the husband and wife), to appoint a new trustee or new trustees in the place of any deceased trustee or trustees. The husband and wife were both deceased; and the last surviving trustee of the settlement died, having made a will. Administration of his estate, with the will annexed, was granted, but the administrator died, leaving his estate partly unadministered. The persons entitled beneficially under the settlement were infants under twenty-one years of age. A guardian having been appointed for them, the executors and legatees of the last surviving trustee were cited to accept or refuse probate or letters of administration, cum test. ann., and, on their not appearing, the court gave liberty to the guardian of the infant cestuis que trust to apply for and obtain letters of administration of the goods of the last surviving trustee, without his will annexed, and limited to the appointment of the guardian and one other person as new trustees of the settlement, and to the obtaining a transfer of the trust funds; these persons being shewn by affidavit to be fit and eligible to act as such trustees, and having consented in writing to act:—Mode of procedure and form of order in such a case. *Jackson, In goods of*, 7 L. R., Ir. 318.

In Case of Property of Married Women.]—By a post-nuptial settlement, an annuity for life was granted to a wife, her executors, administrators, and assigns, by her husband. The parties afterwards separated, and a decree dissolving the marriage by reason of the adultery of the husband was obtained in a Scotch court. Such decree, however, was ineffectual in this country, as the marriage had been celebrated in England and the parties domiciled here. Subsequently the husband died. After the decree made in Scotland, and before the death of her husband, she executed a will, in which she expressed an intention to dispose of her separate property only. This will was not republished after the death of the husband, and she made no other will. Probate was granted to the executor, limited to such property as he in his affidavit should state he believed to form part of her separate estate. *Crofts, In goods of*, L. R. 2 P. 18; 21 L. T. 596; 18 W. R. 230.

A wife died at Rome in 1854, in the lifetime of her husband. By an indenture of post-nuptial settlement it was provided that property which was then settled upon certain trusts, and any other property to which she might thereafter become entitled, should, in the event of her predeceasing her husband, and other events which happened, be distributable amongst her next of kin as if she had died unmarried and intestate. Her husband, an Italian, died at Rome in 1871, having executed a will, in which he appointed executors, but the will was not proved in this country. The wife was entitled to one-third share of her father's residuary personal estate which became distributable in November, 1874, and by an order of the court of chancery the share was carried over to her account. The court under these circumstances granted administration limited to the fund in chancery, to one of the next of kin, without requiring the representative of the husband to be cited. *Gorofolini, In goods of*, 44 L. J., P. 36; 33 L. T. 72; 23 W. R. 456.

De bonis non.]—A limited administration de bonis non, with the will annexed, will not generally be granted to a legatee. The persons entitled to a general grant should be first cited; and if they do not take administration, the legatee will be entitled to a general grant. *Watts, In goods of*, 1 Sw. & Tr. 538; 29 L. J., P. 108; 8 W. R. 340.

A married woman made a will under a power, and appointed two executors. One of them proved, and the husband took out a cæterorum administration. The deceased was the executrix of a will which she had proved:—Held, that the claim of executorship was not continued by the appointment of executors made under the power, and that the residuary legatee of the original testatrix was therefore entitled to a

grant of administration de bonis non, without citing those executors to accept or renounce probate. *Hughes, In goods of*, 29 L. J., P. 165.

Where the unadministered estate of a testator had been transferred to the accountant-general of the court of chancery, and a bill had been filed praying for it to be administered by that court, the court decreed a grant de bonis non to the residuary legatee for life, without requiring her to find sureties to the administration bond. *Cleverly* v. *Gladdish, Cleverly, In goods of*, 2 Sw. & Tr. 335; 31 L. J., P. 53; 5 L. T. 689; 10 W. R. 265.

A. died leaving a will, whereby he appointed his wife sole executrix and universal legatee. She took probate, and afterwards married B., and during her coverture made a will in execution of a power vested in her, and appointed B. sole executor. Upon her death B. took limited probate of her will, and also administration of the rest of her effects:—Held, that B., as representing the whole of his wife's personal estate, was entitled to administration of the unadministered effects of A. *Martin, In goods of*, 3 Sw. & Tr. 1; 32 L. J., P. 5; 8 Jur. (N.S.) 1134; 7 L. T. 756; 11 W. R. 191.

B., sole executrix of and universal legatee named in a will of A., died intestate, and her three children took out a joint administration to her estate. One of the children subsequently died, and a second took up her residence in Australia. A representative being required to the estate of A., to transfer trust property, the court granted administration, with the will annexed, of the estate of A. left unadministered by B., to one of the administrators of the effects of B., the other surviving administrator having been cited and not appearing. *Hancock, In goods of, Hancock* v. *Lightfoot*, 3 Sw. & Tr. 557; 33 L. J., P. 174; 10 Jur. (N.S.) 758.

An executor named in a will proved the same, but died without having distributed the whole estate. The court decreed administration with the will annexed of the unadministered property, to the assignee in bankruptcy of the residuary legatee. *Downward* v. *Dickinson*, 34 L. J., P. 4; 10 Jur. (N.S.) 1084; 11 L. T. 641.

If A. dies intestate, and B., who is solely entitled to A.'s personal estate, afterwards dies without taking out administration, the appointment of a representative to B. is a condition precedent to a grant of administration of the effects of A. *Allen, In goods of*, 3 Sw. & Tr. 559; 34 L. J., P. 1; 13 W. R. 106.

A., a married woman, the sole executrix and universal legatee named in the will of B., took probate of the same and died, leaving part of his estate unadministered. C., the sole executrix named in the will of A., took probate of the same limited to the property over which A. had a power of disposal, and also administration of the rest of her goods:—Held, that C. should take a grant of administration with the will annexed of the unadministered estate of B., and not a supplemental grant of administration of the goods of A., limited to such personal estate as vested in A. as sole executor of the will of B. *Richards, In goods of*, 35 L. J., P. 44; L. R. 1 P. 156; 13 L. T. 757.

A joint grant of administration de bonis non was made under 20 & 21 Vict. c. 77, s. 73, to a next of kin and to a person entitled in distribution, the next of kin consenting to the grant, and there being special circumstances rendering such joint grant convenient. *Grundy, In goods of*, 37 L. J., P. 21; L. R. 1 P. 459; 17 L. T. 451; 16 W. R. 406.

Ad litem.]—The court, in accordance with the practice of the ecclesiastical courts, will make grants limited to substantiate proceedings in chancery on a mere averment of interest, without in any way considering the merits of the case, and the 15 & 16 Vict. c. 86, s. 44, does not apply where the estate to be represented is the very estate to be administered in the suit. *Maclean* v. *Davison*, 1 Sw. & Tr. 425.

D. propounded a will of E., which was opposed by H., one of the next of kin of E., and certain issues in the suit came on for hearing before the court of probate and a jury. Before the jury was sworn, terms of compromise were signed by counsel on behalf of both parties; one of which terms was that a Scotch confirmation of the will brought into court by D. should receive the seal of the court. Subsequently, the parties being unable to agree as to the meaning and effect to be given to the terms of compromise, D. moved to have the confirmation sealed and delivered out to him; the court refused to give effect to one of the terms of the compromise, the parties being unable to agree as to the rest, but held that D. was entitled to take out the confirmation unsealed. H. afterwards filed a bill in chancery for the administration of E.'s estate; a demurrer to this bill for want of parties was allowed. The estate of E. was also alleged to be vested in trustees by sequestration under the Scotch bankruptcy acts. H. moved for administration with the will annexed, pendente lite, or for administration limited to substantiate the proceedings in chancery:—Held, that the nominee of H. was entitled to a grant of the latter description. *Hawarden* v. *Dunlop*, 2 Sw. & Tr. 614; 31 L. J., P. 180; 7 L. T. 251.

F. died in 1836, leaving a will and one codicil, and therein appointed three executors and residuary legatees in trust. Two renounced and the third took probate, but died in 1853 intestate. All the residuary legatees named in the will and codicil then renounced except T., and on his being cited and not appearing, a grant de bonis non (will annexed) was made to K. as a creditor. He died in 1858, leaving personalty of F. unadministered. F. was indebted to his co-trustees of the marriage settlement of D. in respect of trust moneys misappropriated by him, which had been the subject of proceedings in chancery. By indenture of the 28th of December, 1860, the executors of the surviving trustee agreed with the persons beneficially entitled to the trust fund to transfer all their right and title to sue, on receiving discharges from such persons; and the court, on T. being cited and not appearing, granted to the nominee of the assignees of the executors of the surviving trustee administration de bonis non, with the will annexed, of F., limited to revive and substantiate the proceedings in chancery. *Frampton, In goods of*, 3 Sw. & Tr. 169; 9 Jur. (N.S.) 755; 8 L. T. 701.

The grant of letters of administration ad litem makes the grantee complete representative of the estate to the extent of the authority which the letters purport to confer, and a decree obtained against such grantee is therefore binding upon anyone who may afterwards take out general administration to the estate. *Davis* v. *Chanter*, 2 Ph. 545; 17 L. J., Ch. 297.

T. was not heard of from December, 1846. More than seven years afterwards, namely, in

September, 1854, he would, if alive, have become entitled, by the death of a relative, to a share in her residuary personal estate. This share had, in his absence, been paid into the account of the accountant-general of the court of chancery, who, it was stated, was prepared to pay it to his administrator. He had no other property in this country. The court declined to make a general grant of administration to his brother, on the ground that he must be presumed to have died before the death of his relative, but made a grant limited to substantiate proceedings in the court of chancery. *Turner, In goods of*, 3 Sw. & Tr. 476; 33 L. J., P. 180; 10 Jur. (N.S.) 708.

A., under the impression that he was entitled in his own right to a share in the residue of an estate, assigned it for a sufficient consideration to B. At the time he executed the deed of assignment the share formed part of the estate of his father, to whom he was administrator. On the death of A. the court refused to grant administration to the executor of B. of the estate of the father, limited to A.'s interest in such share, the value of which had been ascertained in the court of chancery, but only limited to institute proceedings in that court, and to receive whatever he might be held entitled to by it. *Burdon* v. *Morgan, Longhurst, In goods of*, 41 L. J., P. 26; L. R. 2 P. 371; 26 L. T. 405; 20 W. R. 613.

A husband died leaving a will of which his wife was sole executrix at the time of his death. The executrix took out probate and died leaving a will, the validity of which was disputed in a suit which was pending in the court. A representative of the husband being required to receive money due to his estate, the court appointed an administrator pendente lite to the estate of the husband. *Dawes, In goods of* (L. R. 2 P. 147), doubted but followed. *Fawcett, In goods of*, 58 L. J., P. 87; 14 P. D. 152; 61 L. T. 303.

Where the parties to a testamentary suit took no steps to bring it to trial, and an action had been commenced in the chancery division in which a receiver had been appointed, this court, on the application of a creditor not a party to the testamentary suit, appointed an administrator, pendente lite. *Evans, In goods of*, 15 P. D. 215; 63 L. T. 254.

See also Cases ante, col. 480.

—— **To substantiate Claim in French Courts.**]—When a woman died in France, leaving personal estate there but none in England, and it was alleged that, by the law of France, her husband, from whom she had eloped, could not establish his claim to her property there without a grant from the court of probate:—Held, that the court had no jurisdiction to make a limited grant to enable him to substantiate his claim to the property in the courts of France. *Tucker, In goods of*, 3 Sw. & Tr. 585; 34 L. J., P. 29.

—— **For bringing Action for Damages for Negligence.**]—Where the death of a married woman had been caused by negligence, and her husband, a mariner, was abroad at the time, and was not expected to return until after the twelve months limited by 9 & 10 Vict. c. 93, s. 3, for bringing an action to recover damages would expire, the court granted to her mother letters of administration limited for the purpose of bringing such action. *Williams, In goods of*, 31 L. J., P. 40, n.

—— **Subsequent Application for General Grant.**]—A grant of administration in the goods of a deceased, limited to carry on proceedings in chancery, having lawfully issued and being still in force, the court will not revoke it, in order that a general grant may be made to the party who in the first instance would have been entitled thereto. The proper course is to supplement the limited grant with a grant of administration of the rest of the goods of the deceased. *Brown, In goods of*, L. R. 2 P. 455.

14. Probates of Wills affecting Real Estate.

How far Probate is Evidence.]—An appointment of a testamentary guardian is not "a devise or other testamentary disposition of or affecting real estate" within the 20 & 21 Vict. c. 79, s. 68 (similar to 20 & 21 Vict. c. 77, s. 64), so as to admit of being proved by "the probate of the will or the letters of administration with the will annexed, or a copy thereof, stamped with any seal of the court of probate." *Cope* v. *Mooney*, 14 Ir. C. L. R. 256; 10 L. T. 854.

Where the notice required by s. 68 of 20 & 21 Vict. c. 79 (Irish), similar to s. 64 of the 20 & 21 Vict. c. 77 (English), has been given, and no counter-notice served, probate of a will obtained prior to the passing of that act, and sealed with the seal of the prerogative court, is admissible upon a question relating to real estate, and does not require for that purpose to be sealed with the seal of the court of probate. *Irwin* v. *Callwell*, 12 Ir. C. L. R. 144.

Sect. 68 of the 20 & 21 Vict. c. 79 (Irish), only requires that the notice to be given thereunder shall state the party giving it means to rely on the probate of the will, or a copy thereof; and does not require the party giving such notice to specify the particular purposes for which he intends to make use of the probate or a copy thereof. *Ib.*

Probate of a will is admissible without being stamped with the seal of the court under 20 & 21 Vict. c. 77, s. 64. The stamp of the seal of the court is required for a copy only. *Rippon* v. *Priest*, 3 F. & F. 644.

In ejectment by the heir-at-law against the devisee, he served on the plaintiff, under 20 & 21 Vict. c. 77, s. 64, a notice, addressed to her and her attorney, that he intended at the trial "to adduce in evidence the probate of the will as proof of the devise." The plaintiff did not within four days of the receipt of that notice give notice to the defendant that she disputed the validity of the will. At the trial the defendant produced the probate of the will duly stamped with the seal of the probate court:—Held, that the probate was not conclusive evidence of the validity and contents of the will. *Barraclough* v. *Greenhough*, 8 B. & S. 623; 36 L. J., Q. B. 251; L. R. 2 Q. B. 612; 15 W. R. 934—Ex. Ch.

15. Foreign and Colonial Grants.

In General.]—Administration granted in a foreign court (as in Paris) not taken notice of in other courts. *Tourton* v. *Fowler*, 3 P. Wms. 371.

A will of a personal estate, which lies in a foreign country, may be proved there. *Jauncy* v. *Sealey*, 1 Vern. 397.

A. died beyond the sea, and made a nuncupative will; B. took administration here, and brought his bill for a discovery of the supposed intestate's personal estate. The defendant pleaded the will, and that he was executor, and that A. left no assets but what were beyond seas. Plea allowed. *Ib.*

When administration is granted in England to a person dying here, administration must be granted to the same person in the colonies. *Burn* v. *Coles*, Ambl. 416.

Administration taken out here will not extend to the colonies in America, but an agent there who gets in assets under the exemplification of probate, is equally chargeable as if executor got them in himself. *Atkins* v. *Smith*, 2 Atk. 63.

Where a party domiciled in one country has personal estate in another, though probate of his will in the latter country may be granted for the purpose of getting in his estate, yet such probate must be treated as ancillary to the law of the country of the domicil, and distribution of the estate ought to be directed accordingly. A British subject domiciled in France made, during a short visit to England, a will inconsistent with French law, which will was admitted to probate in the prerogative court. On a motion being made for an injunction to restrain the executor so appointed from getting in the estate: it was held that the court was not at liberty to question the validity of the appointment of executor, but that on a suit properly framed, distribution might be compelled according to the French law. *Thornton* v. *Curling*, 8 Sim. 310.

Payment of a sum of 34*l.* to the legal personal representatives under a Genevese probate refused. *Lassuer* v. *Tyrconnel*, 10 Beav. 28.

An Englishman having died intestate in Belgium, possessed of real and personal property there, his brother went over from England and obtained representation to him pur et simple, which by the Belgian law imposed upon him a personal obligation to pay all the debts of the intestate, independently of the amount of the assets. The intestate's brother afterwards returned to this country, but did not take possession of any property in England belonging to the intestate. A creditor of the intestate obtained letters of administration to him in England:—Held, that he could not sue the intestate's brother in equity in respect of the personal liability which he had so incurred, but that his remedy to recover his debt was at law. *Beavan* v. *Hastings* (*Lord*), 2 Kay & J. 724; 2 Jur. (N.S.) 1044; 4 W. R. 785.

Held, also, that the intestate's brother, as he had not taken possession of any of the English property of the intestate, was not an executor de son tort. *Ib.*

Foreign Grant.]—Probate in common form of a will alleged to be valid by the law of a foreign country will be granted on primâ facie proof that the foreign court has adopted it as a valid testament, but the certificate of a notary public, referring to some act of a foreign court, is not sufficient. *Deshais, In goods of; De Vigny* (*Countess*) *In goods of*, 4 Sw. & Tr. 13; 34 L. J., P. 58; 12 L. T. 54; 13 L. T. 246; 13 W. R. 616, 640.

A Spaniard died at Bilbao, in Spain. On the day of his death he caused a document to be prepared by a notary, purporting to give authority to his wife to make a will on his behalf. In pursuance of this authority she made a will on his behalf after his decease, and appointed herself executrix. The court being satisfied from the affidavit of a Spanish advocate that such a will was valid according to the law of Spain, decreed probate. *Guttierez, In goods of*, 38 L. J., P. 48; 20 L. T. 758; 17 W. R. 742.

The court refused to follow a foreign grant which was made by the foreign court to persons who were not entitled as of right, but who were nominated by the widow and next of kin for the purpose, there being nothing on the face of the proceedings to shew that she had renewed the consent in their favour in respect of the administration of the English estate. *Weaver, In goods of*, 36 L. J., P. 41; 15 L. T. 331; 15 W. R. 199.

The court follows the grant of the court of the testator's domicil, as to the document which that court has admitted to probate, but not as to the person to whom the grant is made. *Cosnahan, In goods of*, 35 L. J., P. 76; L. R. 1 P. 183; 14 L. T. 337; 14 W. R. 969.

Where a testator dies domiciled in a foreign country, and probate has been granted in that country, the court will indorse that grant without examining the grounds on which it was based. *Smith, In goods of*, 16 W. R. 1130.

Where one executor is appointed in Amboyna, and another in England, and the latter proves the will in England, and the former does not, the assets in England will not be bound by the act of the executor in Amboyna, even supposing him to have a right, by the Dutch law, to prove the will here and administer the assets here. *Lord* v. *Genslin*, 1 L. J. (O.S.) Ch. 189.

Foreign Will—Duly authorised Copy admitted to Probate in this Country.]—A foreigner domiciled abroad left a will disposing of property in England containing these words: "My wife during her life is to have the unrestricted right of administration and usufruct of the whole of my estate, and without giving security." Expert evidence was called to shew that by the law of the domicil of the deceased—first, the above words would constitute the widow an executrix as completely as though she had been expressly nominated; and, secondly, that the original will was by law compelled to be placed in a certain recognised repository, and not allowed to leave the country, but that the local courts would recognise a notarial copy as having the same force and effect as the original. On this evidence probate of a duly authorised copy of the will was granted, limited to such time as might elapse before the original will could be brought in, to the widow, as executrix according to the tenor thereof. *Lemme, In goods of* (61 L. J., P. 123; [1892] P. 89), followed as to form of grant. *Von Linden, In goods of*, 65 L. J., P. 87; [1896] P. 148; 44 W. R. 448.

Where a will has been proved in the proper court of the domicil of the deceased, it is the ordinary practice of the court to grant probate on a copy of the will authenticated by the authorities of the place of domicil; in the case of a Russian probate, however, as the original will forms part of such probate, it will accept a certified copy of the will made in this country. *Clarke, In goods of*, 36 L. J., P. 72; 16 L. T. 366; 15 W. R. 881.

The prayer for probate may also be supported on another ground, viz. on the affidavit of a skilled person as to the validity of such a paper by the law of the foreign country, and on an affidavit as to the domicil of the deceased. *Ib.*

Where a translation of a will originally written in English has been proved in the court of a foreign country, and probate is asked on that ground, a retranslation of the translation is the proper document to produce; but if proof of the validity of the paper by the law of the foreign domicil is relied on, then the original, or a copy of the original, should be before the court. *Ib.*

Limited to English Assets.]—The testator, a domiciled German subject, died in Germany, leaving a will in German form. In accordance with the laws of that country, and in pursuance of a request in the will, the local German court appointed German executors, who now applied for probate in this country in respect of the English assets of the deceased. The court made a grant of probate to the German executors limited to the testator's assets in this country. *Briesmann, In goods of*, 72 L. T. 268.

Assets in India.]—A testator resident in India, and having all his property there, bequeathed his residuary estate to H.; but if she should die before him, then to her children. H. died before the testator, and the executor, who was also resident in India, proved the will there, and remitted the residue to his agent in England, with directions to pay it to H. or her children. A suit having been instituted by the children, who were infants, against the executor and his agents, to have the residue secured:—Held, that the legacy duty was payable upon it, and that administration to the testator ought to have been taken out in this country, and the administrator made a party to suit. *Logan* v. *Fairlie*, 2 Sim. & S. 284; 3 L. J. (o.s.) Ch. 152.

An Indian company was ordered to be wound up by the court of chancery. An Indian creditor of the company had received a dividend on his claim. He then died, and his will was proved in India by his executor, whose domicil was in that country. A further dividend became payable after the creditor's death:—Held, that the dividend could not be transmitted to the executor without requiring him to take out probate in England. *Fernandez, Ex parte, Commercial Bank Corporation of India and the East, In re*, L. R. 5 Ch. 314; 22 L. T. 219; 18 W. R. 411. Reversing 39 L. J., Ch. 497.

E. having died in Ireland intestate, letters of administration were granted in Ireland to the plaintiff. Part of his assets being in India, the plaintiff sent out a power of attorney to F. & Company in India, who procured letters of administration to be granted to them in India for the use and benefit of the plaintiff, received the Indian assets, paid the Indian debts, and remitted the surplus to their agents in England. The Irish letters of administration were sealed in England:—Held, that the agents in England were bound to hand over the fund to the plaintiff, and could not require the concurrence of the next of kin, they not having taken any legal proceedings to prevent the plaintiff from receiving the assets. *Eames* v. *Hacon*, 50 L. J., Ch. 740; 18 Ch. D. 347; 45 L. T. 196; 29 W. R. 877—C. A.

A creditor of a person who died intestate in India, took out letters of administration to the deceased, in that country. He then came to England, and obtained letters of administration from the prerogative court. Afterwards one of the testator's next of kin procured that administration to be revoked, and administration to be granted to himself:—Held, that the Indian administrator is compellable to account to him for assets possessed in India as well as in this country, in a suit instituted by him as personal representative only of the intestate, and to which the other next of kin, who were resident in India, were not parties. *Sandilands* v. *Innes*, 3 Sim. 263.

To a bill which seeks an account of the assets of an intestate who died in India, possessed by a personal representative there, a personal representative of the intestate constituted in England, is a necessary party, although it does not appear that the intestate, at the time of death, had any assets in England. And it is not sufficient, in order to avoid a demurrer for want of parties in such a case, that the personal representative constituted in India, who is out of the jurisdiction, is made a party, and that process is prayed against her when within the jurisdiction; although the bill alleges that the Indian court was the proper court for granting administration, and that the administratrix constituted by it is the sole legal personal representative of the intestate. *Tyler* v. *Bell*, 2 Myl. & C. 89; 1 Keen, 826; 6 L. J., Ch. 169; 1 Jur. 20.

A., one of the executors of the will of B., who died in India, proved the will, and possessed the testator's assets in India. The widow and executrix of A. proved her husband's will, and possessed his assets in India, and having afterwards come to England she was made a party to a suit for the administration of B.'s estate:—Held, that it was not necessary that an administrator of A.'s estate in England should be also a party to their suit. *Anderson* v. *Counter*, 2 Myl. & K. 763.

To a suit in respect of an unadministered part of a testator's estate, which has been remitted from India, and remains in the hands of an executor residing in England, but who was only constituted executor of the testator in India, against such executor, a personal representative constituted in England is a necessary party. *Bond* v. *Graham*, 1 Hare, 482; 11 L. J., Ch. 306; 6 Jur. 620.

B. died in India, and his will was proved there by two of the executors. One came to England, and a portion of the testator's assets was remitted to him there by his co-executor, who shortly afterwards died. On a bill filed by his executor in England for an account of the moneys so remitted to him:—Held, that the probate or administration ought to have been taken out in this country. *Ib.*

Colonial Grant.] — A married woman died domiciled in the colony of the Cape of Good Hope. On her marriage with B. an agreement was entered into between them which, according to the laws of the colony, excluded B. from all right or interest in her property, but did not deprive him of the right to administration of her personal estate and effects, in the event of her dying intestate. On her death, intestate, letters of administration were granted by the supreme court of the colony to the husband of her sister, and the court granted administration of her personal estate and effects in England to one of her brothers and next of kin resident in this country, without requiring the husband to be cited. *Probart, In goods of*, 36 L. J., P. 71; 16 L. T. 298; 15 W. R. 798.

A person died domiciled in New South Wales,

in which country probate of his will was granted to A., as executor according to its tenor. According to the practice the words of the will did not constitute an executorship; but, in order to follow the colonial grant as near as possible, the court directed that administration should issue to A. under 20 & 21 Vict. c. 77, s. 73, as the person entitled by the grant from the proper court in New South Wales to administer the effects of the deceased. *Earl, In goods of*, 36 L. J., P. 127; L. R. 1 P. 450; 16 L. T. 799.

A certified copy of a will and codicil which had been proved in Jamaica was sent to this country by the secretary of the island, but by mistake the probate was not sent. The court being satisfied by the certificate of the secretary that the copy sent was a true copy of the will and codicil, granted probate until a more authentic copy should be brought into the registry. *Turner, In goods of*, 36 L. J., P. 82; 15 L. T. 446.

Colonial letters of administration will entitle the administrator to sue in this country in respect of a sum of stock standing in the names of trustees, to a share of which the intestate was entitled. *M'Mahon* v. *Rawlings*, 16 Sim. 429.

16. Scotch and Irish Grants.

Scotch Grant—Finding of Commissary as to Domicil.]—The finding of the commissary as to Scotch domicil, under 21 & 22 Vict. c. 56, ss. 9, 12, is conclusive evidence of the fact of domicil for the purposes of that act only, i.e. for rendering it unnecessary to take an English probate in respect of assets in England; but it has no effect in determining any issues raised in a suit in the court of probate, which will proceed to try such issues, though a confirmation of the will in question is tendered for the seal of the court. *Hawarden* v. *Dunlop*, 2 Sw. & Tr. 340; 31 L. J., P. 17; 5 L. T. 765.

—— **Confirmation.**]—Executors of a Scotch will, having sent the original confirmation granted by the commissary court to the colony of Victoria, obtained a duplicate confirmation from that court, and applied under 21 & 22 Vict. c. 56, s. 12, to have the seal of the probate court affixed to it. The court ordered the seal to be affixed, on the ground that it was bound to give faith to the commissary's certificate, and could not take into consideration the fact that the confirmation was a duplicate. *Webster, In goods of*, 29 L. J., P. 66; 5 Jur. (N.S.) 1270.

The fact of one of three executors having declined to accept a confirmation in Scotland is no bar to his afterwards applying, the other executors having died, for a grant of probate in England. *Campbell, In goods of*, 23 L. T. 323; 18 W. R. 844.

Where confirmation of the executor of a person who has died domiciled in Scotland has been sealed with the seal of the court of probate, in manner provided by 21 & 22 Vict. c. 56, s. 12, the executor has all the powers of an ordinary English executor, and may sell and dispose of leaseholds in England, although they are specifically bequeathed, and although, by the law of Scotland, an executor cannot deal with leasehold property in that country. *Hood* v. *Barrington (Lord)*, L. R. 6 Eq. 218.

The plaintiffs, who were nominated executors in a Scotch will, obtained ex parte, in Scotland, a confirmation of the nomination, and afterwards procured, as of course, the seal of the probate court in England thereto. They then sued some debtors of the testator in the court of chancery:—Held, that the pendency of proceedings in Scotland for a reduction of the confirmation was no defence, and the defendants were ordered to pay to the plaintiffs the amount due to the testator's estate. *Cumming* v. *Fraser*, 28 Beav. 614.

—— **Eik, or Additional Confirmation.**]—On the death of a domiciled Scotchman, his widow filed in the commissary court at Jedburgh an inventory of his estate, distinguishing which part was situate in Scotland and which in England, and the value of each, and she was decreed and confirmed executrix dative to the deceased. The confirmation was sealed in England. Subsequently additional estate was discovered in England. Thereupon the executrix filed a fresh inventory of such estate in the commissary court, and obtained an eik, or an additional confirmation, the court ordering the eik to be sealed in the registry. *Ryde, In goods of*, 39 L. J., P. 49; L. R. 2 P. 86; 23 L. T. 166; 18 W. R. 902.

The seal of the court will not be affixed to an eik, or an additional confirmation. *Hutcheson, In goods of*, 3 Sw. & Tr. 165; 32 L. J., P. 167; 11 W. R. 772.

Where an original confirmation obtained in a commissary court of Scotland is incomplete, it is requisite, for the purpose of obtaining the seal of the court of probate, that there should be a new confirmation, including the whole of the personal estate in England and Scotland. *Ib.*

An additional confirmation granted under 21 & 22 Vict. c. 56, s. 12, does not apply to an original confirmation granted before that act came into operation. *Gordon, In goods of*, 2 Sw. & Tr. 622; 29 L. J., P. 67.

Where an inventory has been recorded in a commissary court of Scotland of the personal estate of a person who died domiciled in Scotland, and confirmation has been granted in respect of the same, and afterwards an additional inventory has been recorded of personal estate belonging to the deceased in England, and an eik, or additional confirmation, has been granted in respect of the same, the court of probate will not seal such eik, or additional confirmation. *Wingate, In goods of*, 2 Sw. & Tr. 625; 8 Jur. (N.S.) 142.

—— **Inventory.**]—In a form of confirmation produced in order to be sealed in the English court of probate, it was not stated that the inventory given in on oath contained the personal estate of the deceased "at the time of his death":—Held, that since 23 & 24 Vict. c. 80, the fifth section of which requires that certain property, to be included in the inventory, shall be taken at its value on the day the inventory is sworn to, such words are properly omitted. *Hay, In goods of*, 3 Sw. & Tr. 273; 33 L. J., P. 25; 10 Jur. (N.S.) 136; 9 L. T. 454.

Assets in Scotland and England—Will proved in Scotland only—Right of Legatee to Insist upon Proof in England.]—W. E. died possessed of property of small value in this country, and entitled under the will of J. O. E. to large assets in Scotland which were being duly administered there. The executors of W. E. proved his will in Scotland only. G. W. H., a legatee under W. E.'s will, applied for a grant of administration of the estate of W. E. in this

country, which application was opposed by the executors:—Held, that the court is not bound to make such a grant, but that its power is discretionary. *Ewing, In goods of*, or *Hope* v. *Ewing*, 50 L. J., P. 11; 6 P. D. 19; 44 L. T. 278; 29 W. R. 474; 45 J. P. 376.

Held, also, that, it not having been shewn that the executors were not doing their duty, there was no necessity for any grant in this country. Application refused. *Ib.*

A similar application was made by another legatee upon the ground also that such a grant was necessary to substantiate proceedings in chancery. Application refused on its being proved that the grant was not necessary for the suit in chancery. *Ib.*

The courts in Scotland have no power to appoint persons to administer property in England, that power being exclusively vested in the English ecclesiastical courts, and of that the Scotch courts are bound to take notice. *Preston* v. *Melville* (*Viscount*), 8 Cl. & F. 1.

Where a testator domiciled in Scotland died possessed of large real estate there, and of personal estate there and in England, and devised the whole to executors and trustees, who renounced the office and trusts, and one of his next of kin, and devisee, obtained administration in England, and other trustees were by consent appointed by the court of session in Scotland:—Held, that the latter had no power to administer the personal estate in England, nor to call upon the administratrix to transfer the property to them; although the law of the domicile governs the succession wherever situated, yet the estate itself is to be administered in the country where possession is taken of it under lawful authority. *Ib.*

A testator domiciled in England, but occasionally residing in Scotland, gave the residue of his real and personal estate, the bulk of which was locally situated in England, to two of his sons, one of whom at the time of the testator's death was indebted to an insurance company, carrying on business in England and Scotland. The will was proved in England, and probate recorded in Scotland. The insurance company, having previously obtained judgment in an English court, instituted proceedings against the executors in the court of session to arrest in their hands the share of the debtor in the testator's residuary estate. One of the executors filed a bill for administration of the estate in England, and moved for an injunction to restrain the proceedings in Scotland. The court granted the injunction upon his undertaking to obtain an administration decree forthwith. *Baillie* v. *Baillie*, 37 L. J., Ch. 225; 16 W. R. 272.

In such cases the mere fact of a bill pending for administration is sufficient to support the injunction. It is not necessary that there should have been a decree. *Ib.*

—— **Memorandum as to Domicil of Deceased after Issue of Probate.**]—A note or a memorandum on a probate that the deceased died domiciled in England may, under 21 & 22 Vict. c. 56, s. 14, be written after the probate has issued. *Allison, In goods of*, 34 L. J., P. 20; 10 Jur. (N.S.) 1244; 11 L. T. 514; 13 W. R. 277.

Irish.]—Letters of administration granted in the Irish probate registry, limited to a fund, were presented in the probate registry in England to be resealed. They had attached to them a certificate from the inland revenue office, that the deceased had no personal estate within the jurisdiction of the English probate court to be affected by the administration, and from the registrar of the Irish probate court, that a bond had been given sufficient in amount to cover the property to which the said administration was limited:—Held, that the requirements of 20 & 21 Vict. c. 79, and 21 & 22 Vict. c. 95, had not been complied with, and the letters of administration could not be resealed. *Roche, In goods of*, 7 Jur. (N.S.) 784.

After a testamentary suit had been determined by a decree that a paper writing propounded as the last will of a deceased was invalid, the court ordered an Irish grant of administration, which had been brought into the registry, to be resealed with the seal of the court of probate in England under 20 & 21 Vict. c. 79, s. 95. *Collins, In goods of*, 32 L. J., P. 26; 11 W. R. 154.

A party, having obtained letters of administration of the effects of a deceased in this country, and given security to cover the property in England only, may subsequently give additional security to include property in Ireland, in order to apply for the certificate of the registrar in England, without which, under 22 & 23 Vict. c. 31, s. 25, such letters cannot be resealed in Ireland. *Potts, In goods of*, 6 Jur. (N.S.) 486; 2 L. T. 255; 8 W. R. 454.

G. died intestate, leaving her husband surviving her, who did not take administration to her estate. The will of the husband was proved in the prerogative court of Armagh, Ireland, but no grant was made in this country. The will of the sole executor of the husband was also proved in Ireland, but was resealed in London:—Held, that the executor under the last-mentioned will did not represent the husband in England so as to be entitled to obtain administration of the goods of the deceased. *Gaynor, In goods of*, 38 L. J., P. 79; L. R. 1 P. 723; 21 L. T. 367; 17 W. R. 1062.

17. In other Cases.

Debtors.]—Making a debtor an executor is not an extinguishment of the debt. *Carey* v. *Goodinge*, 3 Bro. C. C. 110.

Where a creditor makes his debtor, or one of his joint and several debtors, his executor, either alone or with others, the debt is discharged by operation of law, for he cannot have an action against himself; and a personal thing if suspended is lost. *Cheetham* v. *Ward*, 1 Bos. & P. 630.

Where the payee of a promissory note made the maker his executor:—Held, that the debt was discharged, and that no action could be maintained on the note, even by a person to whom the executor had indorsed it. *Freakly* v. *Fox*, 9 B. & C. 130; 4 M. & Ry. 18; 7 L. J. (O.S.) K. B. 148.

Parties in Equal Degree.]—A person died leaving a brother and three sisters surviving him. The brother had been twice bankrupt, and on the last occasion had paid no dividend. The parties applying for administration were, on the one hand, the brother, and, on the other, two of the sisters, with the assent of the third:—Held, that the court, where it has a discretion, will, cæteris paribus, grant administration to a male in preference to a female, but not so when such grant is opposed by those who have a majority of interests in the property. *Iredale* v. *Ford*, 1 Sw. & Tr. 305; 5 Jur. (N.S.) 474; 7 W. R. 462.

Where several parties in equal degree apply for administration, the party obtaining it will be required to find justifying security to the amount of the share of the dissenting party. *Ib.*

Parties Abroad.]—When administration to an estate of a person who died, resident abroad, is applied for, it should appear upon affidavit that he left personal property in this country. *Evans* v. *Burrell*, 4 Sw. & Tr. 185; 28 L. J., P. 82.

Where A., the person primarily entitled to letters of administration, is abroad, and a citation has issued, but has not been personally served, calling on him to accept or refuse letters of administration, or shew cause why they should not be granted to B., who, in the event of A.'s refusing to accept administration, would be entitled to them, the court, before granting administration to B., requires an affidavit that A. has no agent in this country. *Ib.*

Male or Female.]—Cæteris paribus, the male is preferred to the female in a contest for a grant of administration, but the female, when with the consent of the male she is prior petens, is preferred to the male who afterwards opposes her taking the grant. *Cordeux* v. *Trasler*, 4 Sw. & Tr. 48; 34 L. J., P. 127; 11 Jur. (N.S.) 587.

Although charges of intemperance and misconduct were alleged against the eldest male next of kin, who represented the majority of interests, and who was the prior applicant, the court granted administration to him in preference to a female representative of the deceased. *Ellison* v. *M'Cormick*, 14 W. R. 742.

When there has been an Intermeddling.]—On a proxy of renunciation and consent being filed by a widow, which omitted, however, the declaration that she had not intermeddled in the estate (she having intermeddled therein through mistake), the court granted administration to the natural and lawful father of the deceased. *Fell, In goods of*, 2 Sw. & Tr. 126; 3 L. T. 756; 9 W. R. 252.

The executors of a will intermeddled in the estate and effects of their testator without taking probate of the instrument. A citation having been served upon them to enter an appearance and take probate, they entered an appearance, but took no further steps in the matter. The court refused to grant an attachment against them for contempt in not obeying the citation, but directed a peremptory order to be served upon them to take probate within ten days from the date of the order. *Mordaunt* v. *Clarke*, 38 L. J., P. 45; L. R. 1 P. 592; 19 L. T. 610.

Assignees of Bankrupts.]—A., in 1813, assigned certain bills of exchange and negotiable instruments to B., who was, in 1833, adjudicated a bankrupt. In 1862, C., being his official assignee, assigned the sums remaining due and to become due on the bills of exchange and the negotiable instruments to D., as purchaser, under the Bankruptcy Act, 1861, s. 137, and D. sold and assigned them to E. The court declined to make a grant of the personal effects of A., limited to the aforesaid sums (the next of kin of A. having been cited and not appearing), to E., but made the grant to D. as assignee of the official assignee. *Coles, In goods of*, 3 Sw. & Tr. 181; 33 L. J., P. 175; 9 Jur. (N.S.) 1080; 9 L. T. 519.

A. died leaving a will, whereof he appointed B. executor and residuary legatee. B. proved the will, and afterwards became bankrupt, and subsequently died intestate, leaving part of the estate of A. unadministered. At the time of his bankruptcy B. was a creditor of A. The court granted administration with the will annexed of the unadministered estate of A. to the assignee in bankruptcy of B. in the character of assignee of a residuary legatee. *Chune, In goods of*, 3 Sw. & Tr. 564; 11 L. T. 641.

A married woman had, at the time of her death, a reversionary interest under the will of her grandmother, and shortly afterwards her estate became absolutely entitled to 242*l.* 10*s.* 11*d.* as her share of her grandmother's residuary personal estate. She left no children, and her husband was adjudicated a bankrupt. The husband refused to renounce administration, and did not appear to a citation issued by the trustee under his bankruptcy. The court, under 20 & 21 Vict. c. 77, s. 73, granted letters of administration to the trustee under the husband's bankruptcy, limited to the share of the deceased in the residuary personal estate of her grandmother. *Tilley* v. *Trussler*, 26 W. R. 760.

A married woman died intestate, the whole value of her separate estate being 20*l.* Her husband shortly afterwards absconded, and was adjudicated a bankrupt:—Held, that the husband's right to administration did not pass to the trustee in his bankruptcy under s. 44 the Bankruptcy Act, 1883, but that there were "special circumstances" to justify a grant to the trustee in bankruptcy under s. 73 of the Probate Act, 1857, without citing the husband. *Turner, In goods of*, 56 L. J., P. 41; 12 P. D. 18; 57 L. T. 372; 35 W. R. 384. See also *Brown, In goods of*, ante, col. 502.

Trustees.]—When a court of equity had made an order under the Trustee Act, 1850 (13 & 14 Vict. c. 60), ss. 27 and 32, substituting new trustees for those named in the will, the court of probate granted administration with the will annexed to the substituted trustees without requiring the execution of a deed of conveyance to them by the old trustees. *Woodfall, In goods of*, 42 L. J., P. 64; L. R. 3 P. 108; 29 L. T. 248; 21 W. R. 933.

A., who died intestate, was one of the executors and trustees of his father's will, and applied to his own use considerable sums, part of the trust funds, which came into his hands as trustee. A renunciation and consent having been filed by the next of kin, the court granted administration of the personal estate and effects of the deceased to B. and C., the substituted trustees under his father's will. *Bond. In goods of*, 44 L. J., P. 41; 33 L. T. 71; 23 W. R. 597.

—— Of Marriage Settlement—20 & 21 Vict. c. 77, s. 73.]—A. died intestate. His estate was insolvent, the only asset of any value being an interest in a mortgage of property in Ceylon, which he had conveyed to the trustees of his marriage settlement, one of whom was B., his brother-in-law. A. was a widower, and left five children, two of whom were of full age. The two adult children renounced administration. The court, on a renunciation by the eldest son on behalf of the minor children, who had appointed him as their guardian for the purpose of the application, made a grant of administration to B. under 20 & 21 Vict. c. 77, s. 73. *Tyndall, In goods of*, 51 L. J., P. 12; 30 W. R. 231; 46 J. P. 169.

The sole next of kin of an intestate was a married woman whose husband had been for several years in Australia without being heard of. By a settlement executed on the marriage all property was settled upon the wife to her separate use, independently of her husband and without power of anticipation, with remainder to the husband for life, remainder to the children of the marriage. The wife having renounced administration, the court granted letters of administration to the trustees of the settlement under 20 & 21 Vict. c. 77, s. 73. *Mayehell, In goods of*, 47 L. J., P. 31; 4 P. D. 74; 39 L. T. 94; 26 W. R. 439.

Officers of Isle of Man.]—In the Isle of Man officers called "sumners" are appointed in each parish by the bishop, whose duty it is to take upon themselves grants of administration with the wills annexed in the event of executors refusing to act, or being unable to give security to the ecclesiastical court of the diocese. A. died in the Isle of Man, leaving a will, whereof he appointed executors. The executors being unable to give security to the ecclesiastical court of the diocese, administration with the will annexed was granted to B., sumner for the parish in which A. died. The executors having been cited and not appearing, the court, upon an affidavit as to the circumstances under which the grant was made to B., and upon B.'s consent being filed in the registry, granted administration with the will annexed to the residuary legatee. *Whiston, In goods of*, 2 Sw. & Tr. 318. *S. C.* nom. *Cubbon* v. *Steele*, 30 L. J., P. 192; 5 L. T. 140.

Corporation.]—When an executor named in a will is a corporation aggregate, administration with the will annexed will be granted to its syndic, i.e. a person specially appointed by the corporation for that purpose. *Darke, In goods of*, 1 Sw. & Tr. 516; 29 L. J., P. 71; 2 L. T. 24; 8 W. R. 273.

Receivers of the Court of Chancery.]—Proceedings in chancery having been taken by persons having claims upon the estate of an intestate against his widow, who was alleged to have possessed herself of part of the estate, but who had not taken out administration, the court of chancery appointed a receiver, with authority to collect, get in, and receive the estate, and to apply to the court of probate for administration. The widow and all the next of kin and persons entitled in distribution having been cited, upon their non-appearance to the citation, the court made a general grant of administration to the receiver. *Mayer, In goods of*, 42 L. J., P. 57; L. R. 3 P. 39; 29 L. T. 247.

Oath of Administrator.]—The mother of an intestate was the sole forthcoming next of kin, and as no positive intelligence had been received of the father's death, though he had been missing since 1852, the court allowed the administratrix to swear that she believed herself to be the sole next of kin. *Reed, In goods of*, 29 L. T. 932.

Foreigner's Property in England.]—A domiciled Paraguayan died in Paraguay, leaving personal property in England. After his death, but before a grant was made in England, a decree of the government of Paraguay declared that all his property, wheresoever situate, was the property of the nation of Paraguay. The court held that, although by the law of Paraguay, as existing at the time when the grant of the probate of his will was applied for, the will might be invalid, the right to the grant and the succession to the property must be governed by the law of Paraguay as it existed at the time of the death; and, therefore, that the government of Paraguay had no locus standi to contest the validity of the will. *Lynch* v. *Paraguay Government*, 40 L. J., P. 81; L. R. 2 P. 268; 25 L. T. 164; 19 W. R. 982.

When the deceased is domiciled in a foreign country, and an application is made to the probate court either for an original or a de bonis grant of administration, it will be prepared to make it to the person recognised by the proper court of that country. *Hill, In goods of*, 39 L. J., P. 52; L. R. 2 P. 89; 23 L. T. 167; 18 W. R. 1005.

Succession to chattels real depends on the law of the country wherein they are situate, and not on that of the deceased's domicil; and in case of intestacy the right to administration as to chattels real must follow the right of succession to them; and it is not the practice of the court of probate to limit its grants by the measure of the beneficial interest of the grantee. *Gentili, In goods of*, Ir. R. 9 Eq. 541.

Where, therefore, a married woman, domiciled in Italy, died there possessed of a leasehold interest in Ireland settled to her separate use, her husband was held entitled to an unqualified administration as to the leasehold, although his beneficial interest in it was but limited. *Ib.*

Dying Abroad.]—When a party in respect of whose estate a grant is asked for died abroad, there should be an affidavit that he left personal property in England, otherwise the court has no jurisdiction to make the grant. *Evans* v. *Burrell*, 4 Sw. & Tr. 185; 28 L. J., P. 82.

In Case of Felons.]—A wife became entitled to a legacy of 100*l.* in 1827. In 1833 she was convicted of felony and transported to Van Diemen's Land for seven years. In 1843 she received a certificate of freedom, and was not heard of afterwards. The legacy, which was the only property to which she was entitled, became payable in 1870. The court required notice to be served on the Queen's proctor before granting administration of her personal estate and effects to her husband. *Stevens* or *Stephens, In goods of*, 42 L. J., P. 23; 28 L. T. 143; 21 W. R. 345; 12 Cox, C. C. 382.

Bastardy—Grants to the Crown—Practice.]—The practice heretofore followed of allowing grants to go to the crown before oath sworn that the deceased died a bastard and intestate disapproved of. The court expressed the intention to alter the practice in future. *Frend, In goods of*, 66 L. T. 380.

Legitimacy Doubtful—Agreement between Parties interested in Estate.]—Doubts having arisen as to the legitimacy of the person claiming to be next of kin, it was agreed between the persons interested in the estate of the intestate that such claimant should apply for a grant of administration under 20 & 21 Vict. c. 77, s. 73, and that the estate should afterwards be divided between them and the claimant:—Held, that there were "special circumstances" to warrant

the court in making a grant to the person applying in pursuance of the agreement. *Minshull, In goods of*, 58 L. J., P. 69; 14 P. D. 151; 61 L. T. 257; 38 W. R. 80.

Unexecuted Testamentary Paper naming Executors—Consent of Parties.]—D. died intestate, leaving an unexecuted paper signed by him, wherein he named his widow and two eldest sons as his executors. He left a widow and six children, of whom five were over twenty-one, and the sixth was twenty years and six months old:—The court, having regard to the age of the minor, the wishes of the deceased as expressed in the unexecuted testamentary paper, and the consent of all parties interested, made a grant of administration to the widow and the two eldest sons. *Newbold, In goods of* (L. R. 1 P. 285) distinguished. *Dickinson, In goods of*, 60 L. J., P. 94; [1891] P. 292; 64 L. T. 808.

No known Relatives—No Residuary Legatee—Grant to Stranger—Sect. 73.]—A testator, by his will, bequeathed a life interest in his estate, which consisted solely of five leasehold houses, to his wife, with remainder to his stepson, whom he nominated his sole executor. The stepson died without having proved the will, and his wife took out administration to his estate. The testator's widow entered into possession, and received the rents of the houses during her life, and by her will bequeathed them to her son C. B., who proved the will. Disputes having arisen as to the interests of other members of the family under a previous will, it was arranged that the stepson's administratrix should take out letters of administration with the will annexed to the estate of the testator and divide the property; but she died before the arrangement could be carried out. The testator had no known relatives, and his will did not appoint a residuary legatee:—Held, that under the circumstances a grant of administration with the will annexed to the estate of the testator might be made to C. B. *Jackson, In goods of*, 61 L. J., P. 126; [1892] P. 257; 67 L. T. 327; 56 J. P. 457.

C. ADMINISTRATION BOND.

General Rules as to.]—The court will not determine the amount under which an estate is to be sworn. *Cleverly, In goods of, Cleverly* v. *Gladdish*, 2 Sw. & Tr. 335; 31 L. J., P. 53; 5 L. T. 689; 10 W. R. 265.

The general rule is, that creditors are not entitled to require the next of kin, or the guardian of the next of kin, to give justifying security; and a very strong case ought to be made out before a departure from the rule is allowed. *John* v. *Bradbury*, 36 L. J., P. 33; L. R. 1 P. 245; 15 L. T. 414; 15 W. R. 285.

F. appointed S. residuary legatee and executor, and in case of his decease leaving the directions of the will unperformed, substituted P. as executor. In August, 1850, probate was granted to S., who died in December, 1862, leaving certain legatees of income for their lives under the will surviving. P. renounced probate, and the widow of S. renounced administration with the will annexed. One of the legatees for life was entitled to administration with the will annexed, technically a cessat grant, on which a bond is usually required in double the amount of the deceased's property at time of death. The court directed a bond to be taken in the same amount as would have been required if the grant had been one de bonis non. *Foxard, In goods of*, 3 Sw. & Tr. 173; 32 L. J., P. 160; 9 Jur. (N.S.) 756; 8 L. T. 702; 12 W. R. 19.

Lodging Assets in Court under Trustee Relief Act—Surety.]—The surety in the probate court of an administrator who has got money assets of the intestate in his hands, may lodge it in court under the Trustee Relief Act. *Monahan's Estate, In re*, Ir. R. 8 Eq. 353.

The balance of the assets of an intestate, after they have been fully administered, should be lodged to a credit entitled, "In the matter of the 11 & 12 Vict. c. 68, and separate credit of the next of kin" of the intestate. *Ib.*

When Penalty will be Reduced—Sureties.]—When an administrator, who was the sole person entitled in distribution, had no friends in this country willing to become sureties, the court, though it refused to dispense with the ordinary bonds, allowed the amount to be spread over several sureties or to be secured by one surety alone. *Smith, In goods of*, 29 L. T. 932.

When the estate was under 5,000*l.*, and all the debts of the intestate, with the exception of a few small debts, amounting to 25*l.*, had been paid and satisfied by the administrator, who was the only next of kin and the only person entitled in distribution to the personal estate, the court required only one surety to join in the administration bond. *Bellamy, In goods of*, 44 L. J., P. 49; 33 L. T. 71; 23 W. R. 552.

The husband of the sole next of kin of a deceased lunatic administered to the estate after her death. The estate was considerable, and the applicant being in humble circumstances was unable to find the requisite sureties. The court allowed the applicant himself to give a bond for the full amount of the usual penalties, and ordered him to find sureties in 100*l.* *Harrow, In goods of*, 21 L. T. 834.

A wife took out administration to her husband's estate, and became insane before completely administering it. The court in granting administration to the son allowed the sureties to justify for the present instead of the original value of the estate. *James, In goods of*, 21 L. T. 730.

When a limited administration was granted merely to enable the personal representative to assign the legal estate in certain leaseholds of the value of 6,000*l.*, which had been sold by the trustees, the court allowed the administrator's bond to be in the nominal penalty of 200*l.* *Bowlby, In goods of*, 45 L. J., P. 100.

A. died intestate, leaving B. his only next of kin, and solely entitled in distribution. His personal estate was of the value of about 55*l.*, and it seemed that he had no debts. B. being unable, through poverty, to obtain sureties to the amount of 200*l.*, the penalty of the requisite bond, the court reduced the penalty to 60*l.* *Harrigan, In goods of*, 32 L. J., P. 204.

A. died intestate, leaving personalty sworn under the value of 6,000*l.* A.'s father, who was his only next of kin, and the only person entitled in distribution, being unable to procure sureties to a bond in a penalty for double the amount of the estate, the court accepted two sureties in 1,000*l.* each. *M'Donald, in goods of*, 32 L. J., P. 132; 11 W. R. 957.

An administratrix was allowed to enter into a bond, with sureties, in the penalty of 100*l.* only,

although the effects would be sworn under 3,000*l.* *Gent, In goods of*, 1 Sw. & Tr. 54 ; 27 L. J., P. 37 ; 4 Jur. (N.S.) 341 ; 6 W. R. 460.

On an administration with the will annexed de bonis non, to a contingent annuitant and legatee, with the consent of minor children beneficially interested, the property about 8,000*l.*, the court allowed two sureties to justify to the amount of 1,000*l.* each. *Fraser, In goods of*, 33 L. J., P. 57 ; 9 L. T. 845.

When security had already been given by an applicant, as committee in lunacy, the court required a bond for one-fourth of the property, with two sureties, each in one-half the amount. *Powis, In goods of*, 34 L. J., P. 55.

A widow died intestate, leaving seven infant children, and a grant of administration was made to A., as guardian of the infants, for their use and benefit, till one of them should attain the age of twenty-one. A. absconded after misappropriating part of the personal estate of the deceased. One of the daughters of the deceased, who had attained the age of twenty-one and was resident abroad, afterwards appointed B. as her attorney to obtain a grant of administration in England of her mother's estate, for her use and benefit, till she should apply for a grant of administration. The court allowed the attorney to give an administration bond for an amount representing the present value of the estate of the deceased. *Halliwell, In goods of*, 54 L. J., P. 32 ; 10 P. D. 198 ; 33 W. R. 371 ; 49 J. P. 233.

Where an application was for a grant of administration de bonis non, the court allowed the administrator to give security in double the amount only of so much of the estate as remained unadministered. *Halliwell, In goods of*, supra, followed. *Oakey, In goods of*, 65 L. J., P. 38 ; [1896] P. 7 ; 44 W. R. 432.

Where an estate was being administered in the chancery division and an order had been made that each individual share of the estate should be paid directly to the parties entitled, the court allowed the penalty of the administration bond to be limited to double the amount of the beneficial interest of the applicant. *Paxton, In goods of*, 58 L. J., P. 55 ; 14 P. D. 40 ; 60 L. T. 513 ; 53 J. P. 135.

—— **Disability of Person entitled in Distribution.**]—In a case of intestacy, where one of the persons entitled in distribution was a minor, but the others were willing to dispense with justifying security, administration was granted to one of the latter, and the amount of security was limited to a sum sufficient to cover the estimated share of the minor in the assets—(1) on the consent of the remaining adult entitled in distribution that the security given should be primarily available to secure the interest of the minor in the personal estate of the intestate ; and (2) on the court being satisfied that no danger was to be apprehended from creditors. *Elliott, In goods of*, 3 L. R., Ir. 147.

Increase in Value of Property—Administrator Abroad.]—A., having taken out administration to the goods of the deceased, went abroad. Subsequently, under an order of the court of chancery, a considerable sum became payable to the estate of the deceased, and of his brother and sister, who were also deceased. The order could not be passed and entered until the additional duty on these estates had been paid. In the absence of the administrator, who was in Japan, the court allowed another person to file an affidavit as to the increase of property, and to execute the bond to cover the increased duty (in the place of the administrator) with two sureties, on the understanding that, as soon as possible, the administrator should execute a similar bond. *Ross, In goods of*, 46 L. J., P. 57 ; 2 P. D. 274 ; 25 W. R. 808.

Property Sworn under larger Sum than real Value.]—Where justifying security had been ordered, and it appeared that though the estate had been sworn under 2,000*l.*, its actual value was only 800*l.*, the court allowed the sureties to justify for double the amount of the actual value, instead of double the amount under which the estate was sworn. *England* v. *Wall*, 31 L. J., P. 16.

Where, under a misapprehension as to the value of the personal estate of an intestate, the penalty of the bond was too large, the court, upon the execution of a fresh bond in a penalty proportioned to the actual value of the estate, ordered the original bond to be delivered out of the registry to be cancelled. *Goold, in goods of*, 1 Sw. & Tr. 20 ; 34 L. J., P. 105 ; 11 Jur. (N.S.) 288 ; 13 L. T. 193.

Reswearing Amount.] — An administration was taken out under 20,000*l.*, and a bond in a penalty of double that sum entered into. The administratrix subsequently received a sum of money from a bankrupt estate indebted to the deceased, which made it necessary to reswear the amount under 25,000*l.* The court directed the registrars of the principal registry to receive a separate bond in the penalty of 10,000*l.*, which, together with the original bond, would be double the amount of the sum under which the estate was to be resworn. *Weir, In goods of*, 1 Sw. & Tr. 506 ; 28 L. J., P. 111 ; 2 L. T. 191.

Married Woman — Consent of Husband.]—Since the Married Women's Property Act, 1882, when a married woman is administratrix it is not necessary that her husband should join in the administration bond. *Ayres, In goods of*, 52 L. J., P. 98 ; 8 P. D. 168 ; 31 W. R. 660 ; 47 J. P. 440.

A married woman had become entitled to 3*l.* per cents. standing in the name of the accountant-general of the court of chancery, and it was proposed to apply to that court to have a settlement of such property made in her favour. In order thereto it was requisite that she should take administration to the estate of a deceased party under whose will she was so entitled ; but her husband refused to execute the bond :—Held, that on an attorney certifying that the wife could act upon such a grant without her husband, administration might issue to her, and that the bond might be executed on her behalf by a third person in place of her husband. *Sutherland, In goods of*, 4 Sw. & Tr. 189 ; 31 L. J., P. 126 ; 8 Jur. (N.S.) 465.

Sureties—When dispensed with.]—The court made an order to dispense with the usual sureties to be entered into by A. ; who was beneficially entitled to a fund which had been paid into the court of chancery, and for which the administration was required, it appearing that A. was in consequence of sickness, in great poverty, and unable to induce any of his relatives or friends to become sureties to the bond. *De la*

Farque, In goods of, 2 Sw. & Tr. 631 ; 31 L. J., P. 199 ; 7 L. T. 194.

Where a testator was a domiciled Frenchman, and the will was made in France, the court, on affidavits that the legacies were all paid, and that there were no debts in this country, allowed administration with the will annexed to go, without requiring sureties to the administration bond. *Bejot, In goods of*, 20 L. T. 231.

Where a grant of administration to the estate of an intestate was made to the chief official receiver in bankruptcy as trustee under the bankruptcy of the father and sole next of kin of the deceased, the court having regard to the position of the applicant as an officer of the high court, dispensed with the usual sureties to the administration bond. *Cornwall (Solicitor to the Duchy of)* v. *Canning* (5 P. D. 114) followed. *Cope, In goods of*, 59 L. J., P. 94; 15 P. D. 107; 62 L. T. 500; 38 W. R. 688. S. P., *Knapp* or *Robins, In goods of*, 63 L. T. 252 ; and *Thacker, In goods of*, 54 J. P. 759.

Where the whole of the proceeds of the estate were in court and a receiver had been appointed, the court dispensed with the sureties to an administration bond. *Stelfox, In goods of*, 6 R. 569 ; 70 L. T. 814.

The court dispensed with sureties upon an administration bond, where the whole estate of deceased was in court, and where the applicant had been appointed by the chancery division guardian of an infant, who was the sole surviving beneficiary. *Wilcocks, In goods of*, 67 L. T. 528.

A testator having duly executed his will, whereby he bequeathed all his real and personal estate to his wife and appointed her executrix, mislaid it, and not being able to find it subsequently made a similar will, except that it contained no appointment of executrix. After the testator's death the first will was found, and an application made for probate of both wills. The court granted administration with the last will annexed upon the widow giving her personal bond, and dispensed with further security. *Allen In goods of*, 62 L. J., P. 111 ; [1893] P. 184 ; 1 R. 479 ; 68 L. T. 462.

Where an administratrix, after having intermeddled in the estate, became lunatic, leaving a portion of the estate unadministered, and subsequently the greater portion of the estate was paid into court under an order of the chancery division, and it had become necessary to appoint an administrator to deal with the only portion of the estate remaining out of the hands of the chancery division, amounting to 850*l.*, the court refused to dispense with the usual sureties, but allowed them to justify to the amount of 1,700*l.*, the administrator's personal bond to be given for double the full value of the estate. *Morris, In goods of*, 59 L. J., P. 16 ; 15 P. D. 9 ; 61 L. T. 652 ; 38 W. R. 496.

The court will not by reason of the property being large and the risk small, dispense with sureties to an administration bond, or lessen the amount to be secured. But it will allow the security to be made up of any number of bonds. *Earle, In goods of*, 54 L. J., P. 95 ; 10 P. D. 196 ; 34 W. R. 48 ; 49 J. P. 761. S. P., *McGowan, In goods of*, 10 P. D. 197 ; 34 W. R. 48 ; 49 J. P. 761.

The official receiver in bankruptcy applying for a grant in his official capacity is only required to give his personal bond without any sureties. *Cowlly, In goods of*, 74 L. T. 461. S. P., *Morgan, In goods of*, 75 L. T. 190.

Where the official receiver in bankruptcy applies for a grant of administration of the estate of a deceased bankrupt, an application to dispense with sureties to the administration bond will be dealt with by the registrars, and need not be made to the court. *Renninson, In goods of*, 11 R. 583.

—— **Where Limited Company appointed Executors—Grant of Administration with Will annexed to General Manager—Company itself accepted as Sole Surety.**]—Where a testator appointed the "Trustees, Executors and Securities Insurance Corporation, Limited," to be executors of his will, the court made a grant of administration with the will annexed to the general manager for the use and benefit of the company as executors, and—being satisfied of its solvency and of the sufficiency of its assets—accepted the company itself as sole surety to the administration bond. *Hunt, In goods of*, 66 L. J., P. 8 ; [1896] P. 288 ; 45 W. R. 236.

Part of Fund paid into Chancery Division—Security required to cover amount of Nett Balance only.]—An estate was originally sworn by the administratrix at 4,569*l.* 18*s.* 2*d.*, and a bond given with sureties to the amount of 9,140*l.* Subsequently the administratrix discovered that the estate was entitled to a further sum of 4,492*l.* 6*s.*, making a total of 8,659*l.* 5*s.* 5*d.* Of this amount 6,823*l.* 13*s.* 9*d.* had been paid into court in the chancery division, leaving a sum of 1,835*l.* 15*s.* 8*d.*, out of which debts, probate duty and other expenses had been paid, leaving a nett balance estimated at 650*l.* Under these circumstances the court allowed the testatrix to give a bond without sureties for the full amount of the estate, and a bond with sureties for 1,300*l.*, being double the amount of the nett balance. *Cormack, In goods of*, 60 L. J., P. 96 ; [1891] P. 151 ; 63 L. T. 710.

Administration Pendente Lite—General Grant reduced to Limited Grant.]—Where the plaintiff in a probate action, who was also executor, had been appointed receiver of the real estate, and had also obtained a general grant of administration pendente lite to the personal estate ; but in consequence of the large amount of property involved, was unable to obtain the requisite sureties to the administration bond :—The court declined to dispense with sureties altogether, but reduced the general grant to a limited grant, so as to entitle him to receive certain specific sums of money only, and ordered him to give security in double the amount of such specific sums. *Askew* v. *Askew*, 60 L. J., P. 52 ; [1891] P. 174 ; 64 L. T. 145.

Foreign Testator—Personalty in England—Sureties to—Practice.]—Where a testator of foreign domicil died abroad leaving personalty in England of considerable value and nominal debts, and his widow had become the only person interested in his estate, the court reduced the amount of the administration bond to the actual amount of the estate in England instead of double, and allowed foreign instead of English sureties to be accepted if necessary, and in the case of English sureties allowed the amount to be made up by several persons. *Blank, In goods of*, 6 R. 563 ; 70 L. T. 810.

Foreign Sureties.]—Applications for leave to give foreign sureties to administration bond

should be made to a judge in chambers, and not by motion in court. *Scott, In goods of*, 65 L. J., P. 15; [1895] P. 342; 73 L. T. 317.

—— **Where no Debts in England.**]—The court allowed the administrator of a foreign subject resident abroad, who had left no debts in this country, to give a bond with foreign sureties. [*See now* rule, 10 May, 1893.] *De Beaufort, In goods of*, 62 L. J., P. 101; [1893] P. 231; 1 R. 483; 69 L. T. 420; 57 J. P. 553.

Creditors—Rights of.]—Where an action is brought against the principal and sureties in an administration bond, by a bond creditor of the intestate, as assignee of the ordinary, and judgment is suffered by default; the judgment shall stand as a security for so much as shall fall short to satisfy the bond creditors of the intestate. *Greenside* v. *Benson*, 3 Atk. 248.

Real assets followed under administration bonds by legatees; creditors have no such right. *Ashley* v. *Baillie*, 2 Ves. 368.

Creditor cannot take assignment of bond given by administrators pursuant to Statute of Distributions; nor will action lie upon it, though assigned for a breach that he was indebted to assignee in sum of 2,000*l.* on specialty. *Baker* v. *Dumaresque*, 2 Atk. 66.

Creditors cannot sue an administrator on bond taken by statute Car. 2, but may on bonds given by administrator pendente lite. *Wallis* v. *Pipon*, Ambl. 183.

Where no proceedings have been taken to put an administration bond in a suit, a sum due from the administrator at his death to the estate of the intestate is not a specialty debt. *Parker* v. *Young*, 6 Beav. 261; 12 L. J., Ch. 335.

An administratrix entered into the usual bond in the prerogative court to exhibit an inventory within a limited time, &c. The time having elapsed without an inventory being exhibited, a creditor put the bond in suit in the name of the archbishop. The administratrix filed her bill for an injunction, which was granted, on the terms of her giving judgment in the action, which was to stand as a security for the costs at law and in equity (but not for the debt), and amending the bill by submitting to account. *Thomas* v. *Canterbury (Archbishop)*, 1 Cox, 399.

A suit cannot be maintained in this court by a party interested in the intestate's estate upon an administration bond where no special reasons are shewn why the proceeding is not taken in the name of the ordinary. *Bolton* v. *Powell*, 14 Beav. 275; 16 Jur. 24. Affirmed, 2 De G. M. & G. 1.

—— **Notice to by Advertisement.**]—The 22 & 23 Vict. c. 35, s. 29, affords protection to sureties in an administration bond, where the administrator, before distributing the assets of the intestate, has pursued the course pointed out by that section. *Newton* v. *Sherry*, 45 L. J., C. P. 257; 1 C. P. D. 246; 34 L. T. 251; 24 W. R. 371.

Sureties Resident out of Jurisdiction.]—Where a limited grant of administration had been made to a person resident without the jurisdiction of the court, who was unable to procure justifying sureties within its jurisdiction, the court accepted sureties resident in Jersey. *Reed, In goods of*, 3 Sw. & Tr. 439.

The court will not allow residents in Scotland to be sureties. *Herbert* v. *Shiell*, 3 Sw. & Tr. 479; 33 L. J., P. 142.

The court is at liberty to accept as sureties persons resident out of its jurisdiction, when the principal, who is also residing without the jurisdiction, is unable to procure sureties within the jurisdiction, provided a writ of summons is servable on the sureties under 15 & 16 Vict. c. 76, s. 18. *Ballingall, In goods of*, 3 Sw. & Tr. 441, n.; 32 L. J., P. 138; 9 L. T. 116; 11 W. R. 591.

Where a person applying for administration was solely entitled to the personal estate of the deceased, and there were no creditors, the court allowed the sureties to be persons resident in Scotland. *Houston, In goods of*, 35 L. J., P. 41; L. R. 1 P. 85.

Administration bond allowed to be executed by foreigners resident abroad, upon proof that the administrator was unable to obtain sureties resident here, that the deceased had no debts unpaid, and that the person on whose behalf the letters of administration were applied for was solely entitled to the estate in this country. *Hernandez, In goods of*, 48 L. J., P. 31; 4 P. D. 229; 40 L. T. 366; 27 W. R. 664.

Receiver appointed by Court of Chancery.]—The mere fact that a receiver of the personal estate of an intestate has been appointed by the court of chancery is no ground for dispensing with justifying security on a grant of administration. *Jackson* v. *Jackson*, 35 L. J., P. 3; L. R. 1 P. 12; 13 L. T. 336; 14 W. R. 111.

If a receiver is appointed for a temporary purpose only, and it is not clear that the court of chancery will retain its control of the estate after the grant has been made, justifying security will be required. *Ib.*

Under £20.]—Where letters of administration were granted merely to enable a personal representative of a deceased party to execute a formal release to a trustee under a marriage settlement, the court allowed the property to be sworn under 20*l.* *Stacpoole, In goods of*, 2 Sw. & Tr. 316; 30 L. J., P. 191; 5 L. T. 140.

Payment of Premium to Guarantee Society out of Estate.]—In a probate action where an administrator pendente lite had been appointed and had been ordered to give security in a penal sum of 10,488*l.* for due administration of the estate, the court, on the application of an intervener, allowed him to pay 50*l.* out of the estate to a guarantee society which was willing to enter into a bond on his behalf, on condition that the intervener should undertake to recoup the estate in the event of his failing in the suit and being condemned in costs. *Harver, In goods of*, 58 L. J., P. 72; 14 P. D. 81; 61 L. T. 338; 37 W. R. 768.

Bonds prior to Commencement of Probate Act.]—*See* 21 & 22 Vict. c. 95, s. 15, as to bonds given before the 11th January, 1858.

Prior to the commencement of the 20 & 21 Vict. c. 77, probate was granted by the prerogative court of Canterbury; it turned out that a small portion of the assets lay in the province of York, but that they were included in the amount of property sworn to:—Held, this being a legal grant, that the 20 & 21 Vict. c. 77, s. 87, had made it unnecessary to have a further grant, but that the probate duty, which would have been payable upon taking out probate in the province of York, must be paid. *Freckleton* or *Hickleton, In goods of*, 1 Sw. & Tr. 16; 27 L. J., P. 6; 4 Jur. (N.S.) 124; 6 W. R. 262.

Administration to the goods of A. was granted in the consistory court of Lichfield in September, 1857; the property was sworn under, and the duty paid upon, 9,000*l.* It was afterwards discovered that 3,000*l.* consols formed part of this amount. The Bank of England refused to register the letters of administration, which were certainly void under the old law. It was sought to take the opinion or direction of the court as to the effect of ss. 86, 87, and 88 of the 20 & 21 Vict. c. 77, on such a grant. No definite motion being made, the court declined to give any opinion on the point. *Elwell, In goods of*, 1 Sw. & Tr. 27.

Discharge of Sureties.]—The court will not discharge the original sureties and allow other sureties to be substituted for them. *Stark, In goods of*, 35 L. J., P. 42; L. R. 1 P. 76; 13 L. T. 682; 14 W. R. 349.

Where an administratrix entered into a bond with two sureties, and one of them subsequently wished to be discharged, and two other persons of substance were willing to take his place, the court held, it could not allow the bond to be cancelled on the administratrix executing a new bond with the second original surety, and one or both of the persons offering themselves. *Ib.*

Death of Ordinary—To whom passing.]—A bond, taken by the ordinary, according to 22 & 23 Car. 2, c. 10, and taken to the ordinary by name, his executors, administrators, or assigns, passed on the death of the ordinary, according to the general rule with regard to the descent of chattels in the hands of a corporation sole, to his executor, and not to his successor. *Howley* v. *Knight*, 14 Q. B. 240; 19 L. J., Q. B. 3; 14 Jur. 665.

Issue and Form of.]—The court has no power, under any circumstances, to dispense with an administration bond. *Powis, In goods of*, 34 L. J., P. 55.

The court has no authority to vary the conditions of the bond so that an attorney shall undertake only to pay over the personal estate which may come to his hands to the party for whose use and benefit he takes administration, and not to administer it in the usual form, according to law. *Goldsborough, In goods of*, 1 Sw. & Tr. 295; 5 Jur. (N.S.) 417; 7 W. R. 375.

Attestation.]—Where the property was small, and the administratrix lived in Australia, the court dispensed with the rule of court which requires the bond to be attested by the person who administers the oath to the administrator or administratrix. *Parker, In goods of*, 36 L. J., P. 26; L. R. 1 P. 301; 15 L. T. 248; 15 W. R. 262.

Assignment of.] — An application for the assignment of an administration bond is not a proceeding in any action within Ord. LIII. r. 2, and coming under the old practice, the proceeding will be by a rule nisi without notice to the sureties. *Cartwright, In goods of*, 1 P. D. 422; 34 L. T. 72; 24 W. R. 214.

The assignee will not be required to give security for costs if he is resident in England. *Young, In goods of*, infra.

Leave to appeal against an order for the assignment was refused. *Ib.*

Where the alleged breach of the condition was, that the administrator had not paid any part of the personal estate of the intestate to one of the next of kin, and the only question in dispute was, whether the applicant was one of the next of kin, the court directed the bond to be assigned to him upon condition that he would consent to an order that no execution should issue at common law, but that the money, if any, recovered by the judgment should be paid into the registry. *Ib.*

A creditor of an intestate to whom a bond has been assigned, although thereby empowered to sue in his own name, is in all other respects in the same position as the ordinary was, and may, therefore, maintain an action thereon for the general benefit of all parties interested in the estate, but not for his own or the benefit of any one in particular. *Saundrey* v. *Mitchell*, 3 B. & S. 405; 32 L. J., Q. B. 100; 9 Jur. (N.S.) 968; 7 L. T. 849; 11 W. R. 363.

Since the Probate Act, 1857, an unpaid creditor of a deceased intestate is entitled to an assignment of the administration bond. A motion for the assignment of an administration bond should be on notice. *Harding, In goods of*, 15 L. R., Ir. 186.

Breach of Condition on.] — When a person makes out a primâ facie case that there has been a breach of the condition of the bond, the court will direct it to be assigned by the registrar. *Sandrey* v. *Michell*, 3 Sw. & Tr. 25.

The court will not entertain objections to the validity of the condition of the bond, but will leave such questions to be determined by a court of common law. *Ib.*

An administrator who distributes the whole of the personal estate of a deceased without retaining in his hands a sum sufficient to pay a legacy left to an infant on his attaining his majority commits a breach of the condition in an administration bond given under s. 81 of the Probate Act, 1857, that he shall "well and truly administer" the estate, and the sureties to the bond are liable in respect of such breach. *Dobbs* v. *Brain*, 61 L. J., Q. B. 749; [1892] 2 Q. B. 207; 67 L. T. 371; 41 W. R. 7; 57 J. P. 22—C. A.

Where a person interested under the estate of a deceased intestate, to whom administration has been taken out, makes out a primâ facie case of breach of the bond, the court will direct a rule nisi calling on the sureties to shew cause why the bond should not be assigned. *Jones, In goods of*, 3 Sw. & Tr. 28; 32 L. J., P. 26; 8 L. T. 90; 11 W. R. 191.

Discretion of Court as to.] — But the court might refuse to do so if, on cause shewn, the proceeding appeared to be wholly frivolous and vexatious. *Baker* v. *Brooks*, 3 Sw. & Tr. 32; 32 L. J., P. 25; 8 L. T. 89; 11 W. R. 110.

The court has a discretion as to ordering an assignment for the purpose of the bond being sued upon. It will order the assignment if satisfied that the application is bonâ fide, that a primâ facie case of breach of the condition is made out, and that the applicant is the proper person to sue. *Young, In goods of*, 35 L. J., P. 126; L. R. 1 P. 186; 14 L. T. 634; 14 W. R. 821, 970.

Suing upon.] — An administrator executed a bond with one surety under a nominal sum. He subsequently reswore the value of the property at a greatly increased sum, and executed a fresh bond with two new sureties. He afterwards became a bankrupt, without having

duly administered the estate of the deceased; and application was made to the court for leave to sue on the bonds. The court refused to grant leave to sue upon the first bond until the action on the second bond had been disposed of. *Irving, In goods of*, 38 L. J., P. 83; L. R. 1 P. 658; 20 L. T. 684.

A declaration against a surety on an administration bond in the form required by the rules under the Court of Probate Act, 1857, expressed to be made by B. as the true and lawful attorney of G., only next of kin of the deceased, and conditioned "all the rest and residue of the personal estate and effects, to deliver and pay unto such person or persons as shall be entitled thereto under the act of parliament," assigning, as breach of the condition, that other persons were entitled equally with G. to the residue of the personal estate as next of kin, yet that B. did not deliver and pay the same to such persons, but wrongfully paid over the whole to G., not being sole next of kin, but one of them, is good, the condition being absolute and not qualified by the recital in the bond that G. was sole next of kin. *Lester* v. *Gooch*, 17 W. R. 139.

D. Effect and Proof of Probate and Letters of Administration.

Effect of Probate.]—The grant of probate of a will not appealed against conclusively establishes that the will was executed according to the law where the testator was domiciled at the time of his death. *Whicker* v. *Hume*, 7 H. L. Cas. 124; 28 L. J., Ch. 396; 4 Jur. (N.S.) 533; 6 W. R. 813.

The probate whenever obtained has relation to the time of the testator's death. *Rogers* v. *James*, 7 Taunt. 147; 2 Marsh. 425.

Probate conclusive as to the character of executor. *Griffiths* v. *Hamilton*, 12 Ves. 298.

Where there are two wills, the first devising the real estate to charitable uses, and the personal estate to particular legatee, and the second will bequeathing the personalty to other legatees, and the real estate to such uses as testator should declare, and probate is granted of first will, such probate is conclusive against the claimants under the second will until reversed by commission of review. *Annesley* v. *Palmer*, 9 Mod. 8.

Will, though proved per testes, not declared well proved in absence of heir, but decreed to be established. *Stokes* v. *Taylor*, Dick. 349.

Probate of a will not evidence that copyholds pass by it. *Jervoise* v. *Northumberland* (*Duke*), 1 Jac. & Walk. 570.

Probate is not evidence of will of real estate. *Gibson* v. *Whitehead*, 4 Madd. 244.

Chancery requires judgment of ecclesiastical court that an instrument is testamentary, but is not satisfied with proof in that court, but requires the witnesses to be examined again, or if no witnesses, proof of signature. *Rich* v. *Cockell*, 9 Ves. 376.

Where personal property is bequeathed to the executors as trustees, the probate of the will is an acceptance of the trusts. *Mucklow* v. *Fuller*, Jac. 198.

Probate by one executor enures to the co-executors, although probate or letters of administration may have been granted; yet, if a sufficient case is made for disputing their validity, and a suit has been commenced in the ecclesiastical court for the purpose of having them revoked, this court will protect the property of the deceased by granting an injunction and receiver pending the litigation in the ecclesiastical court. *Watkins* v. *Brent*, 7 Sim. 512; 1 Myl. & Cr. 97; 5 L. J., Ch. 49.

To a bill against an executor for payment of a legacy, he pleaded that the testator was, at the time of making his will and of his death, domiciled in France, and all the bequests of personal estate affected to be made by his will were, by the laws of that country, null and void:—Held, that the plea was not double, as it did not state two bars, but two averments leading up to one bar or conclusion. *Campbell* v. *Beaufoy*, 1 Johns. 320; 28 L. J., Ch. 645; 7 W. R. 513.

Although probate of a will is conclusive so far as relates to the appointment of executors, it is not conclusive as to the validity of the particular dispositions therein contained, and the above plea therefore was held not to be bad on that ground. *Ib.*

Where an executor proves a will, probate has reference back to the death of the testator, and what was then in the hands of the executor is assets for the payment of the testator's debts. *Ingle* v. *Richards*, 6 Jur. (N.S.) 117; 8 W. R. 697.

In 1839 the son of the testator borrowed of his father 300*l.* upon his promissory note. In 1842, before the same was paid, the testator died, having by his will appointed his son, with three other persons, executors. The will was shortly afterwards proved by the executors other than the son, power being reserved for him to come in and prove the same. Subsequently the proving executors all died, leaving the son surviving, who thereupon, in 1855, proved the will. He had never been called upon by the father during his lifetime, nor by the proving executors of his will during their lives, to pay the sum due on the note:—Held, that although the debt could not be recovered at law (because an executor could not sue himself) or in equity (because more than six years had elapsed between the death of the testator and the proof of his will by the son), yet the son by proving the will had made the debt assets in his hands. *Ib.*

The ecclesiastical court granted probate of a will of personalty with cross lines drawn in ink over the bequests of certain legacies:—Held, on a claim raised by the parties interested in these legacies, that the will must be taken to have been executed after the cross lines were drawn, and that the only question was, what was the meaning of the testator, and that this was that the legacies were not to stand part of the will. *Gann* v. *Gregory*, 3 De G. M. & G. 777; 2 Eq. R. 605; 18 Jur. 1063; 2 W. R. 484.

A trust fund paid into the court of chancery, under the Trustee Relief Act, after the death of the cestui que trust, ordered to be paid to the administrator of the cestui que trust under a grant of letters of administration by the archdeaconry court, obtained after the fund was in the court of chancery. *Spencer's Trust, In re*, 9 Hare, 410. Affirmed, 1 De G. M. & G. 311; 21 L. J., Ch. 314; 16 Jur. 233.

Where a diocesan probate is proper with reference to the situation of the assets at the death, it remains so notwithstanding they may afterwards be rightfully or wrongfully removed out of the diocese. *Ib.*

A will is made in French, and the probate in English, and varies from the original; probate being in a different language is not conclusive. *L'Fit* v. *L'Batt*, 1 P. Wms. 526.

A plaintiff claiming a share of leaseholds, partly in the occupation of the defendant, under an alleged will, which he charged was being fraudulently suppressed by him, brought an action claiming partition or sale, and to have the will established and directions given for probate. The defendant denied all knowledge of the will:—Held, first, that before the plaintiff could obtain any relief upon the will it must first be proved, or probate must be admitted by the defendant; held, secondly, that a judge in the chancery division had, under the judicature acts, jurisdiction to grant probate, but that it would not be using a sound discretion to exercise the jurisdiction, and the action accordingly ordered to stand over for probate proceedings to be taken in the probate division. *Pinney* v. *Hunt*, 6 Ch. D. 98; 26 W. R. 69.

—— **Of Letters of Administration.**]—Where administration was granted, by the sentence of the ecclesiastical court, to A., as only next of kin of the intestate, in a suit in which B. also claimed to be the only next of kin, and that sentence was affirmed by the court of delegates on appeal, and B. filed a bill impeaching the pedigree of A. and to establish his own, this court will not, in such case, grant an injunction until answer, to prevent the administrator possessing himself of the assets, he being, by the decree of the ecclesiastical court, both legally and equitably entitled thereto. *Maher* v. *Gorman*, Ir. R. 6 Eq. 304.

Case in which a party in a cause heard upon bill and answer without replication, producing letters of administration to a deceased person,—the court may admit them to ascertain the representative character of such party, and may act upon the evidence which they furnish of that character. *Wilkinson* v. *Fowkes*, 9 Hare, 592.

An administration granted after an executor has acted in pais may be repealed by application to an ecclesiastical court; but it is not merely void, except as a protection to the executor. The act in pais of the executor could not be set up by a debtor to the fund in answer to a suit by the administrator. *Doyle* v. *Blake*, 2 Sch. & Lef. 237.

Letters of administration of the estate of an intestate were granted ex parte to the defendant, as "his natural and lawful brother of the half-blood." The plaintiff, who was an uncle of the intestate, then commenced an action in the chancery division for the administration of the estate, alleging that the defendant was illegitimate, and that he himself was next of kin; and moved for a receiver and an injunction:—Held, that the application must be refused, for that as long as the letters of administration remained in force they were conclusive evidence that the defendant was one of the next of kin, and that the plaintiff's proper course of procedure was to apply in the probate division to have them recalled. *Ivory, In re, Hankin* v. *Turner*, 10 Ch. D. 372; 39 L. T. 611; 27 W. R. 20.

When administration is granted to two, and one dies, the administration survives to the other without new letters of administration. *Hudson* v. *Hudson*, Forrest, 127. But see *Jacomb* v. *Harwood*, 2 Ves. 268.

Administration granted to two: if one dies, it survives to the other; but if a letter of attorney is made to two, and one dies, the authority ceases. *Adam* v. *Buckland*, 2 Vern. 514. And see *Eyre* v. *Shaftesbury*, 2 P. Wms. 121.

Where administration with the will annexed is granted to a person as the attorney of, and for the benefit of, the executor, such person represents the testator during the life of the executor, or until he takes out probate. *Suverkrop* v. *Day*, 3 N. & P. 670; 1 W. W. & H. 463; 8 A. & E. 624; 7 L. J., Q. B. 261.

—— **Estoppel—Res Judicata—Cognizance of Former Suit — Power to Intervene.**]—In proceedings in the probate court as to the validity of a will, a person who is not a party is bound thereby only if he has cognizance of the proceedings, and is entitled to make himself a party to them. *Young* v. *Holloway*, 64 L. J., P. 55; [1895] P. 87; 11 R. 596; 72 L. T. 118; 43 W. R. 429.

—— **Payment to Executor or Administrator a Good Discharge.**]—So long as the probate remains unrepealed, it cannot be impeached in the temporal courts. *Allan* v. *Dundas*, 3 Term Rep. 125; 1 R. R. 666.

Therefore a payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate is afterwards declared null, and administration is granted to the intestate's next of kin. *Ib.*

Semble, that payment of a debt to an administrator, to whom letters of administration have been regularly granted, exonerates the debtor, though it should turn out that there is a will existing. *Prosser* v. *Wagner*, 1 C. B. (N.S.) 289; 26 L. J., C. P. 81; 5 W. R. 146. *See* 20 & 21 Vict. c. 77, ss. 75, 76, 77.

—— **Enables Executor or Administrator to Sue.**]—The administrator has sufficient property in coal raised from mines after he takes out administration, and in the barges marked with the name of his intestate, to maintain an action of trover. *Fraser* v. *Swansea Canal Co.*, 1 A. & E. 354; 3 N. & M. 391; 3 L. J., K. B. 153.

Executors and administrators cannot recover property out of this country, because the jurisdiction of the prerogative courts does not extend beyond their respective provinces. *Scott* v. *Bentley*, 1 Kay & J. 281; 3 Eq. R. 428; 24 L. J., Ch. 244; 1 Jur. (N.S.) 394; 3 W. R. 280.

—— **Title of Administrator relates back to Death of Intestate.**]—Letters of administration have relation to the death of the intestate, so as to enable the administrator to sue for goods of the intestate which were sold and delivered by an agent after his death and prior to the granting of administration. *Foster* v. *Bates*, 12 M. & W. 226; 1 D. & L. 400; 13 L. J., Ex. 88; 7 Jur. 1093.

An administrator may maintain trespass for the seizure of goods of the intestate between the death and the grant of letters of administration. *Tharpe* v. *Stallwood*, 6 Scott (N.R.) 715; 5 Man. & G. 760; 1 D. & L. 24; 12 L. J., C. P. 241; 7 Jur. 492.

The doctrine of relation, by which the letters of administration are held to relate back to acts done between the death of the intestate and the taking out of the letters of administration, exists only in those cases where the act done is for the benefit of the estate. *Morgan* v. *Thomas*, 8 Ex. 302; 22 L. J., Ex. 152; 17 Jur. 283.

The widow of an intestate remained in the possession of her husband's property for some time after his decease. The intestate's son did

not interfere in any way with the property, which was seized under a fi. fa. issued against the widow. They afterwards took out letters of administration :—Held, first, that there was no evidence of the administrator's assent to the widow's taking the property. *Ib.*

Held, secondly, that if such an assent could be implied, the estate was not bound by it, as the act to which the assent was given did not benefit the estate. *Ib.*

Semble, that the rule of law, that the title of an administrator has relation back to the death of the intestate, so as to enable him to recover for an injury to personal chattels prior to the grant of administration, applies also to leasehold property ; but in that case he must first enter. *Barnett* v. *Guildford (Earl)*, 11 Ex. 19 ; 24 L. J., Ex. 281 ; 1 Jur. (N.S.) 1142 ; 3 W. R. 406.

—— **Purchaser not bound to pay Executor before Probate.**]—Although executors can make an assignment and give a receipt for purchase-money, which are binding, yet a purchaser is not bound to pay the purchase-money till probate, because till the evidence of title exists the executors cannot give a complete indemnity. *Newton* v. *Metropolitan Ry.*, 1 Dr. & Sm. 583 ; 8 Jur. (N.S.) 738 ; 5 L. T. 542 ; 10 W. R. 102.

Proof of Probate.]—A will of a feme covert, authorised by a power in her marriage settlement, cannot be given in evidence to shew a title to personal property till it has been proved in the ecclesiastical court. *Stone* v. *Forsyth*, 2 Dougl. 737.

In an action, as executor, for money had and received, the plaintiff proved a notice to produce the probate of the will of G., of which the defendant was executor, and under which the plaintiff's testatrix claimed the money which was the subject of the action, and also put in a judge's order to admit an office copy of the will. The will not being produced, the plaintiff tendered in evidence an official copy, purporting to be signed by the registrar of the ecclesiastical court, and annexed to which was a document purporting to be a copy of the act of the ecclesiastical court :—Held, that this, being a copy of an official act, was admissible as secondary evidence against the defendant. *Waite* v. *Gale*, 2 D. & L. 925 ; 14 L. J., Q. B. 212 ; 9 Jur. 782.

In an action on a promissory note, payable "to the executors of the late Mr. W. B.," the proper proof that they are the executors of Mr. W. B. is the production of the probate of his will, and the reading in evidence so much of it as shews that he appointed them his executors ; and the giving in evidence the grant of administration (annexed to the probate) is not sufficient for this purpose. *Hamilton* v. *Aston*, 1 Car. & K. 679.

Under 14 & 15 Vict. c. 99, s. 14, an unstamped copy of an act book of the ecclesiastical court is sufficient evidence of the probate of a will to prove the executorship of the person named in it. *Dorrett* v. *Meux*, 2 C. L. R. 807 ; 15 C. B. 142 ; 23 L. J., C. P. 221 ; 2 W. R. 480.

Where executors suing for a debt due to them as such had put in evidence probate of the will of their testator, and the same had been used without objection :—Held, that the defendant could not afterwards, by giving intrinsic evidence of the value of the estate, object to the admissibility of the probate for want of a sufficient stamp. *Robinson* v. *Vernon (Lord)*, 7 C. B. (N.S.) 235 ; 29 L. J., C. P. 310 ; 7 Jur. (N.S.) 146.

Before 20 & 21 Vict. c. 77, s. 62, the probate was the only evidence of a will of personalty. *Rex* v. *Netherseal*, 4 Term Rep. 258.

The title of three, claiming as executors, is well proved by the probate granted to one only of the will appointing them all. *Walters* v. *Pfeil*, M. & M. 362. S. P., *Davis* v. *Williams*, 1 Smith, 5 ; 13 East, 232.

The production of the original will, with the act of the ecclesiastical court, ordering probate, is sufficient evidence of the title of an executor, without accounting for the non-production of the probate. *Doe* d. *Edwards* v. *Gunning*, 2 N. & P. 260 ; 7 A. & E. 240 ; W. W. & D. 460 ; 6 L. J., K. B. 229.

The probate of a will is not admissible to prove declarations of the testator as reputation on a question of pedigree. *Doe* d. *Wild* v. *Ormerod*, 1 M. & Rob. 466.

The court will look only to the probate copy of a will, though strong grounds for suspecting that another copy tendered in evidence is the correct one. *Bernal* v. *Bernal*, 3 Myl. & Cr. 559, n.

As to personal estate, the court is bound by the terms of the will appearing on the probate, but if on production of the original a doubt exists as to the accuracy of the probate copy, the court will give an opportunity to the parties in the ecclesiastical court to set it right. *Havergal* v. *Harrison*, 7 Beav. 49 ; 13 L. J., Ch. 30 ; 7 Jur. 1100.

Though a court of equity may inspect the original will of personal estate with a view to its construction, it has no jurisdiction to decide that the probate is erroneous. *Taylor* v. *Creagh*, 8 Ir. Ch. R. 281.

—— **Of Foreign Wills.**]—The copy of a foreign will contained in the ancillary probate granted in this country to the foreign executors is the only admissible evidence of the will. *Enokin* v. *Wylie*, 10 H. L. Cas. 1 ; 31 L. J., Ch. 402 ; 8 Jur. (N.S.) 897 ; 6 L. T. 263 ; 10 W. R. 467.

The certificate of the Hanoverian ambassador, under the seal of the legation, was admitted as evidence of the law of Hanover as to the validity of a testamentary paper. *Klingemann, In goods of*, 3 Sw. & Tr. 18 ; 8 L. T. 172 ; 11 W. R. 218.

Proof of Letters of Administration.] — An examined copy of the act book, in the registry of the prerogative court of Canterbury, stating that administration was granted to the defendant of her husband's goods at such a time, is proof of her being such administratrix, in an action against her as such, without giving her notice to produce the letters of administration. *Davis* v. *Williams*, 13 East, 232 ; 1 Smith, 5.

To prove a person dead, the production of the letters of administration granted by the ordinary is not of itself sufficient evidence. *Thompson* v. *Donaldson*, 3 Esp. 63 ; 6 R. R. 812. S. P., *Moons* v. *De Bernales*, 1 Russ. 301.

E. REVOCATION AND ALTERATION OF GRANT.

Jurisdiction of Chancery Division.]—Though the chancery division may have jurisdiction to recall the probate of a will, it ought not, as a general rule, to exercise that jurisdiction, even if the estate of the testator is in court in a proceeding in that division. *Pinney* v. *Hunt* (ante, col. 565) followed. *Bradford* v. *Young*, 54 L. J., Ch. 96 ; 26 Ch. D. 656 ; 50 L. T. 707 ; 32 W. R. 901.

A will was proved in spiritual court, but executor of former will brought his bill in equity to discover by what means the latter will was obtained, and whether testator was not incapable, &c., and for account. Demurrer to jurisdiction overruled. *Andrews* v. *Powys*, 2 Bro. P. C. 504.

A court of equity had no jurisdiction to relieve against the probate of a will, unless the consent of the next of kin was obtained fraudulently. *Gingell* v. *Horne*, 9 Sim. 539.

Jurisdiction of Probate Division.]—Semble, the probate division has exclusive jurisdiction to revoke probate of a will. *Priestman* v. *Thomas*, 53 L. J., P. 109; 9 P. D. 210; 51 L. T. 843; 32 W. R. 842—C. A.

General Rules.]—If the validity of a will have been already determined, and it has been acted upon, equity will restrain proceedings in the prerogative court to controvert it. *Sheffield* v. *Bucks* (*Duke*), 1 Atk. 628.

Where parties are dissatisfied with a probate, chancery will suspend its determination, till after a trial upon the validity of it in the proper court; for equity cannot determine upon the validity of a probate adversely: but if it comes incidentally before the court, and that incident is admitted, the court may determine it, and hold the parties bound by their admission; for an admission by a party concerned in matters of fact, is stronger than if it had been determined by a jury, and facts are as properly concluded by admission as by a trial. There is no difference between parties admitting things proper to be determined by the court in which the admission is made, and the admission of things cognisable in another court, for they are equally bound. *Ib.*, 630.

Executor proves a will of a personal estate wherein one of the legacies is forged: the executor has no remedy in equity, but ought to have proved the will with a special reservation as to that legacy. *Plume* v. *Beale*, 1 P. Wms. 388.

The court will not grant an injunction to stay proceedings to repeal letters of administration, and grant them to a poor person on a suggestion that a judgment will consequently be released, &c. *Kennedy* v. *Kennedy*, 2 Ken. Ch. 26.

As to personal estate the court is bound by the terms of the will appearing on the probate; but if, on production of the original, a doubt exists as to the accuracy of the probate copy, the court will give an opportunity to the parties in the ecclesiastical court to set it right. *Havergal* v. *Harrison*, 7 Beav. 49; 13 L. J., Ch. 30; 7 Jur. 1100.

—— **Estoppel.**]—In an action in the probate division, T. and G. propounded an earlier and P. a later will. The action was compromised, and by consent verdict and judgment were taken establishing the earlier will. Subsequently P. discovered that the earlier will was a forgery, and in an action in the chancery division, to which T. and G. were parties, obtained the verdict of a jury to that effect, and a decree that the compromise be set aside. In another action in the probate division for revocation of the probate of the earlier will:—Held, that T. and G. were estopped from denying the forgery. *Priestman* v. *Thomas*, supra.

Revocation of Grant—Practice Opposed to it.]—Where a grant had been taken out under the misapprehension that a note or memorandum under 21 & 22 Vict. c. 56, s. 14, might be indorsed after it had issued, the court refused to revoke the grant. *Faulkner*, *In goods of*, 8 W. R. 454.

A citation was personally served upon the executor and universal legatee, named in a will, calling upon him to bring into the registry the probate of it which had been granted to him, and to shew cause why the probate should not be revoked and declared null and void, and the will itself declared null and invalid. The probate was brought into the registry, but no appearance entered to the citation. The court, although there was no evidence before it as to the invalidity of the will, revoked the probate, and ordered probate of an earlier will to issue in common form to the executor named therein. *Crosby* v. *Noton*, 36 L. J., P. 55; 16 L. T. 153; 15 W. R. 775.

Semble, where a general grant of administration is properly made, the practice is against revoking it, even with consent of the grantee, unless the grantee has become incapable by the act of God. Grants to creditors, however, are an exception to this rule. *Morris*, *In goods of*, 2 Sw. & Tr. 360; 31 L. J., P. 80; 5 L. T. 768.

After a decree had been made on the construction of a will and for the administration of the testator's estate in accordance therewith, a letter of later date was found duly executed and almost an exact counterpart of the earlier will. Questions having arisen as to the effect of the new will on certain legacies, named in both wills, which by the decree had been held to be superseded, the court, on the application of the trustees, directed an inquiry as to who were the persons interested in setting up the alleged new will, and that notice should be given to such persons that, unless they, within a limited time, took steps to recall the existing probate, and to prove the new will, the court would proceed to administer the estate on the will as proved. *Harrison* v. *Every*, 34 L. T. 238.

The court will not revoke a probate rightly granted, and not issued under a mistake. *Muir*, *In goods of*, 1 Sw. & Tr. 294; 28 L. J., P. 49; 5 Jur. (N.S.) 445; 7 W. R. 361. S. P., *Mooney*, *In goods of*, 3 L. R., Ir. 281.

Probate granted by consent without fraud will not be revoked, on the ground that the conditions on which the consent was given have not been fulfilled. *Nicol* v. *Askew*, 2 Moore, P. C. 88.

—— **On whose Application.**]—An executor who has proved a will in common form cannot, as such executor, take proceedings to call in question the validity of that will. He has no right, therefore, to cite the persons interested under it to propound it in solemn form, or shew cause why the probate in common form should not be revoked. *Chamberlain*, *In goods of*, 36 L. J., P. 52; L. R. 1 P. 316; 16 L. T. 97; 15 W. R. 680.

—— **Of Elected Guardian on Discovery of Testamentary Guardian.**]—Where a testamentary guardian to minor children had been appointed, and administration had, per incuriam, been granted to a guardian elected by the minors for their use and benefit, the court revoked the grant and granted administration to the testamentary guardian. *Morris*, *In goods of*, supra.

—— **Disappearance of Administrator de bonis non—Fresh Grant.**]—Where, in 1880, a grant de bonis non had been made to one of the grand-

children and residuary legatees of a testator, and in 1884 the administrator de bonis non disappeared, leaving a letter to the effect that his body would be found at the bottom of the river, and it appeared that he had already previously attempted to commit suicide, the court revoked the grant de bonis non so made to him, and made a similar grant in favour of another of the grandchildren and residuary legatees of the original testator. *Covell, In goods of*, 59 L. J., P. 7; 15 P. D. 8; 61 L. T. 620; 38 W. R. 79.

—— **Administrator Absconding.**]—Where an administrator could not be found, having absconded, after threatening to commit suicide, and the only estate remaining unadministered was a claim for debt against a bankrupt's estate, the court, without citation, revoked the grant, and made a new grant to one of the next of kin. *Covell, In goods of*, 61 L. T. 620; 38 W. R. 79.

A grant of administration of the estate of an intestate was made to a creditor, who, after his debt had been fully satisfied, absconded, and could not be found:—A personal representative of the estate being required in an action in the chancery division, the court revoked the grant to the creditor without citing him, and made a new grant to the sole next of kin of the deceased. *Bradshaw, In goods of*, 57 L. J., P. 12; 13 P. D. 18; 58 L. T. 58; 36 W. R. 848; 52 J. P. 56.

—— **Lunacy of one Executor after proving Will — Fresh Grant to remaining Executor, limited to Duration of Lunacy.**]—The executors of a will obtained probate in the ordinary way. One of them subsequently became of unsound mind, and no early recovery was to be anticipated. The co-executor moved the court for directions:—Held, that the most convenient course for the court to adopt would be to revoke the original grant of probate, and to make a fresh grant to the applicant, limited to such time as the other executor should continue of unsound mind. *Sowerby, In goods of*, 65 L. T. 764.

Wife's Estate—Grant to Next of Kin—Concealment—Right of Husband to Revocation.]—A husband and wife separated in 1863. The wife died in 1881, and the executors of her father's will took out letters of administration of her estate in her maiden name, describing her as a spinster, without notice to the husband, although they knew of the marriage, and that the husband was alive. In 1888 the husband first heard of his wife's death, and, after inquiries, brought an action in the county court for revocation of the grant and regrant to himself. The county court judge held that, in the absence of fraud, he was not justified in revoking the grant after so long a lapse of time:—Held, on appeal, that it was not necessary to shew fraud, and that the grant must be revoked and a grant made to the husband. *Copeland* v. *Simister*, 62 L. J., P. 38; [1893] P. 16; 1 R. 469; 68 L. T. 257; 41 W. R. 269.

Administration, with last Will annexed, revoked—Probate of earlier Will—Decree of Foreign Court.]—A British subject domiciled in Kentucky died, leaving several wills, the last of which was proved in one of the inferior courts of that state, and thereupon administration, with the will annexed, was granted to the attorney in England of the widow, who was the sole executrix. Subsequently, the superior courts of Kentucky upset the will, and the widow commenced a suit for revocation of the said letters of administration, and for probate of an earlier will. Upon affirmative proof of the testamentary capacity of the deceased:—The court revoked the letters of administration, and granted probate of the earlier will, now propounded by the plaintiff. *Newcomb* v. *Newcomb*, 73 L. T. 317.

Married Woman intermeddling with Estate.]—Administration with the will annexed was granted to a woman who intermeddled with the estate, and subsequently married. Her husband deserted her and could not be found, and an application was accordingly made for a revocation of the grant, and a fresh grant to another person:—Held, that the administratrix having intermeddled with the estate the grant could not be revoked. *Reid, In goods of*, 55 L. J., P. 75; 11 P. D. 70; 54 L. T. 590; 34 W. R. 577—C. A. Affirming 50 J. P. 263.

Conditional Revocation—Grant of Administration—Application to Revoke and for Probate of Will—Motion—Consent of all Parties.]—A testator destroyed a will in the belief that he thereby revived an earlier will; but his widow, under the impression that there was an intestacy, took out letters of administration of his effects. After the widow's death the executors of the destroyed will applied on motion for revocation of the grant to her and for grant to them of probate of a copy of the destroyed will. Some of the parties interested in the case of an intestacy were infants, the remainder consented:—Held, that in the absence of consent by all parties the court could not grant the application on motion, but the will must be propounded. *Andrews, In goods of*, 62 L. J., P. 25; [1893] P. 14; 1 R. 474; 68 L. T. 259.

—— **Of Lost Letters of Administration.**]—Upon the revocation of letters of administration, which have been lost, an undertaking will be required from the person to whom they were granted, that, if found, he will bring them into the registry, and that they will not be acted upon. *Carr, In goods of*, 1 Sw. & Tr. 111.

When Grant made in Error.]—An intestate married his deceased wife's sister. On his death she obtained letters of administration to his personal estate and effects, and died leaving part of the estate unadministered. The court revoked the grant so made in error, and decreed administration to the natural and lawful daughters and next of kin of the deceased. *Wells, In goods of*, 17 L. T. 123.

A next of kin took out administration of the effects of a deceased person and swore that she died intestate. Four years afterwards the administration was called in, and evidence was produced to shew that a will of the deceased, duly executed, was in existence at the time of her death, and that it had passed into the hands of the next of kin. It was not forthcoming. The court revoked the administration, and granted probate of a draft of the will limited until the original was produced. *Podmore* v. *Whatton*, 3 Sw. & Tr. 449; 33 L. J., P. 143; 10 Jur. (N.S.) 756; 10 L. T. 754; 13 W. R. 106.

A., the surviving trustee of a term of 500 years, died, having appointed B. and others his executors,

of whom B. proved his will, and survived his co-executors. B. appointed C. his executor, and C. proved B.'s will. D., for the purpose of bringing an ejectment, applied to the court of probate for letters of administration de bonis non, to A., limited to the term of 500 years, which were granted to him; and D. brought the ejectment for the term, as the personal representative of A.: —Held, that the letters of administration granted to D. were void, and that he should have been nonsuited. *M'Dougall* v. *O'Shaughnessy*, Ir. R. 2 C. L. 157.

Revocation — Procedure after.] — An order was made for the revocation of a grant with the will annexed. The letters of administration were in the hands of the proctors, who had obtained them, and who claimed a lien upon them for costs. The court declined to order the proctors to deliver up the letters for the purpose of cancellation, but directed that a copy of its order, revoking the grant and requiring the executor to bring the letters into the registry if they ever came into his possession, should be served upon them. *Barnes* v. *Durham*, 38 L. J., P. 46; L. R. 1 P. 728; 20 L. T. 545.

A grant of administration which had been made as upon intestacy was subsequently revoked, and probate granted to an executor of a will which had recently been discovered. Upon application by the executor for an account shewing how the administrator had dealt with the estate:—Held, upon the authority of *Taylor* v. *Newton* (1 Lee, 15), that the court had jurisdiction, notwithstanding the grant had been revoked, and ordered the defendant to furnish to the plaintiff, within fourteen days after probate should be exhibited to him, an account shewing how he had disposed of the estate. *Jenkins*, *In goods of*, 76 L. T. 164.

—— **Effect of—Legatee in Trust applying Money bonâ fide in accordance with Provisions of alleged Will.**]—Probate of an alleged will having been granted in common form to the executors named therein, they paid a charitable bequest to the defendant, who bonâ fide and without notice of any invalidity of the alleged will, applied portion thereof in accordance with the trusts of the bequest. Probate was afterwards revoked (not by consent), and letters of administration were granted to the plaintiff:—Held, that the plaintiff could not recover from the defendant the amount which the latter expended in execution of the supposed trusts. *Fitzpatrick* v. *M'Glone*, [1897] 2 Ir. R. 542.

—— **Suits for.**]—In a suit for revocation of probate the defendant propounding the will should deliver issue, and move for directions as to the mode of trial. *Brandreth* v. *Brandreth*, 2 Sw. & Tr. 446; 31 L. J., P. 153; 6 L. T. 335; 10 W. R. 672.

The court will not direct an issue to the assizes except upon application supported by affidavit. *Ib.*

Where executors of a later will having called in the probate of a will of prior date, propound in a declaration the later will, it is not competent to them to allege in their declaration that the probate of the earlier will was surreptitiously obtained, or that the earlier will ought to be pronounced null and invalid. *Rosbotham* v. *Rosbotham*, 2 Sw. & Tr. 121; 30 L. J., P. 38; 3 L. T. 557; 9 W. R. 148.

In a suit for revocation of probate, the party propounding the will must begin, though the plaintiff has declared, alleging an intestacy. *Cross* v. *Cross*, 3 Sw. & Tr. 292; 33 L. J., P. 49; 10 Jur. (N.S.) 183; 10 L. T. 70; 12 W. R. 694.

It being doubtful whether an unsuccessful plaintiff in a suit for revocation of probate would be able to pay the costs of an intervener who had propounded the will, the court ordered that the intervener's costs should be paid out of the estate. *Ib.*

A next of kin who unsuccessfully applied for revocation of the probate of a will, was condemned in costs, although there was strong evidence of the incapacity of the testator, on the ground that he had allowed an unreasonable time to elapse between the death of the testator and the institution of the suit, and had charged the widow of the testator and the drawer of the will with conspiring to obtain the will when the testator was incompetent. *Clayton* v. *Davis*, 3 Sw. & Tr. 290; 33 L. J., P. 28; 10 L. T. 70.

Where a next of kin wishes to recall a grant of administration with a will annexed, and have the will condemned on the ground of want of capacity, the proper course is to proceed by action and have the will condemned at the trial. *Ross* v. *Wallace*, 29 L. R., Ir. 330.

An application to revoke a grant of administration can only be decided by way of motion, if all parties consent to its being so heard. If such consent is withheld, the court will decline to deal with the matter upon motion, and an action must be commenced for the revocation of the grant. *Baddeley*, *In goods of*, 60 L. T. 237; 53 J. P. 40.

Where a motion was made to the court for revocation of a grant of probate and for a declaration of the validity of a subsequent will, a draft of which only was in existence, the court declined to hear the motion until the grant and draft will had been lodged in the registry. *Riley*, *In goods of*, 65 L. J., P. 41; [1896] P. 9.

Where the plaintiffs claimed a decree of intestacy, and the due execution of a will propounded by the defendant was admitted by the plaintiffs in their reply, the only plea against the will being that it was duly revoked by the testatrix:—Held, that the onus of proof lay on the plaintiffs, and that they must begin by opening their case. *Saqui* v. *Lazarus*, 73 L. T. 194.

A decree was made at the suit of residuary legatees for the administration of the real and personal estate of a testator. After this a subsequent will was discovered by which the estate was disposed of in a different way. Probate of the old will was recalled, and letters of administration with the later will annexed were granted to one of the beneficiaries. Under these circumstances the court of appeal made an order dismissing the action. *Dean, In re, Dean* v. *Wright*, 21 Ch. D. 581; 47 L. T. 501; 31 W. R. 174.

What Interest Necessary to entitle Person to Intervene in Suit.]—To entitle a person to intervene in a suit for revocation of letters of administration it is not necessary that he should have had an interest at the time of the death of the deceased; an interest acquired subsequently by purchase of part of the estates from the administrator is sufficient. *Lindsay* v. *Lindsay*, 42 L. J., P. 32; 27 L. T. 592; 21 W. R. 272.

A creditor of a person who takes an interest

under a will has sufficient interest to entitle him, in a proper case, to a citation to recall letters of administration. *White, In goods of*, 31 L. R., Ir. 385.

Pleas Allowed.]—A person who has no interest in the assets, except under a later will, cannot be allowed to plead any plea to an earlier will, except its revocation by the will on which his interest depends. *Philpott* v. *O'Callaghan*, Ir. R. 6 Eq. 327.

Withdrawal of Caveat, Effect of.]—An executor entered a caveat to a will of a later date, but withdrew the caveat before it was warned and allowed letters of administration, with the earlier will annexed, to be granted to one of the residuary legatees named therein:—Held, that he was not estopped by the withdrawal of the caveat under the circumstances from calling in the letters of administration (with the earlier will annexed) and propounding the alleged later will. *Goddard* v. *Smith*, 42 L. J., P. 14; L. R. 3 P. 7; 28 L. T. 141; 21 W. R. 247.

Judgment against Will in Absence of Witnesses in Support.]—The court with hesitation, in the absence of any cited authority, gave judgment for the plaintiff, with costs, revoking a grant of probate previously obtained by the defendants, in common form, without requiring any evidence to be given, on behalf of the plaintiffs, against the will. *Martyr* v. *Perry*, 65 L. T. 794.

Effect of revoking Grant—Sale of Leaseholds.]—A grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void ab initio, and accordingly a sale of leaseholds by an administratrix who had obtained a grant of administration under such circumstances to a purchaser who was ignorant of the suppression of the will was upheld by the court, although the grant was revoked after the sale. *Abram* v. *Cunningham* (2 Lcv. 182) distinguished. *Boxall* v. *Boxall*, 53 L. J., Ch. 838; 27 Ch. D. 220; 51 L. T. 771; 32 W. R. 896.

Amendment of Probate—Words of Will must be regarded.]—There is no difference between the words which a testator himself uses in drawing up his will, and the words which are bonâ fide used by one whom he trusts to draw it up for him. The court in either case must take the words as it finds them, and therefore held that the plaintiff, the natural daughter, was not entitled to have probate amended by omitting the words "from and after the decease of my said wife without leaving issue of our said marriage," on the ground that the draughtsman introduced them without reason or special directions, and that the effect of the same had not been intelligently appreciated by the testator. *Rhodes* v. *Rhodes*, 51 L. J., P. C. 53; 7 App. Cas. 192; 46 L. T. 463; 30 W. R. 709—P. C.

—— **Property Abroad—Foreign Court.**]—An intestate died leaving personal estate to the amount of 273*l.* in this country, and 6,100*l.* in the Italian rentes. The Italian court refused to grant the authority required to deal with the property within its jurisdiction, on the ground that the letters of administration granted by the court of probate here were on the face of them limited to the smaller amount in this country, and that this court, if it had been made aware of the full value of the estate, would have required greater security for its administration. The court allowed the letters of administration to be amended—the board of inland revenue having signified its consent to accept the succession duty on the Italian rentes as probate duty—so as to state on the face of them that the larger sum was also included. *Henley, In goods of*, 55 L. J., P. 61; 11 P. D. 126; 56 L. T. 895; 35 W. R. 184; 50 J. P. 520.

—— **As to Date on which Will was Executed.**]—The court may order a memorandum to be indorsed on a probate after it has issued, as to the true date on which a will was executed, if satisfied that the date given in the probate is erroneous. *Allchin, In goods of*, 38 L. J., P. 84; L. R. 1 P. 664; 20 L. T. 757.

—— **Description of Testator.**]—The court allowed a probate to be amended after it had issued by the addition of a fuller description of the testator than therein contained in the first instance. *Towgood, In goods of*, 41 L. J., P. 84; L. R. 2 P. 408; 26 L. T. 984; 20 W. R. 802.

Alteration in Grant—Omission of one of the Christian Names of an Executor.]—The christian names of an executor called in a will and grant of probate "Frederick," were "Frederick John":—The court, on proof that the Bank of England had objected to transferring stock into the names of the executors, in consequence of this executor having signed the memorandum for the transfer with the initials "F. J.," allowed the description in the grant to be altered into "Frederick John M. . . . , called in the will Frederick M. . . . ." *Honywood, In goods of*, 65 L. J., P. 9; [1895] P. 341; 44 W. R. 256.

F. PRACTICE RELATING TO.

1. Citation.

Parties Cited—Heir-at-Law and Devisee.]—The court will not authorise the citation of the heir-at-law, under 20 & 21 Vict. c. 77, s. 61, until a plea has been filed in the suit, or until the next of kin has been already cited to see proceedings. *Moore* v. *Holgate*, 35 L. J., P. 46; L. R. 1 P. 101; 14 L. T. 24; 14 W. R. 515.

Where an executor propounds the latter of two wills, the court will direct a citation to issue against the devisees under the earlier will, and against the heir-at-law, though already before the court, as defendant in the suit. *Lister* v. *Smith*, 3 Sw. & Tr. 53; 32 L. J., P. 13; 7 L. T. 219; 10 W. R. 429.

When a party to a suit is before the court as next of kin or legatee, being also heir-at-law or devisee under the same will, it is necessary to cite him to see proceedings under 20 & 21 Vict. c. 97, s. 61, as heir-at-law or devisee. *Emberley* v. *Trevanion*, 4 Sw. & Tr. 197; 29 L. J., P. 142.

Before a receiver of real estate will be appointed by the court, it is necessary that it should appear on affidavit that the heir-at-law or devisee, or other person having or pretending interest in the real estate, has been cited. *Purdey* v. *Field*, 33 L. J., P. 73; 12 W. R. 1088.

When a suit has been commenced with a caveat, and the defendant has filed no plea to the declaration propounding the will, a citation may issue against the heir-at-law under s. 61. *Domvile* v. *Domvile*, 4 Sw. & Tr. 17; 34 L. J., P.

79; 12 L. T. 54. S. P., *Coplestone* v. *Nicholes*, 33 L. J., P. 57.

Semble; contra, when contention arises about a testamentary paper of a deceased, and his heir-at-law is either not within the jurisdiction of the court, or has no known place of abode, the court may still order him to be cited, but will not decide that any particular form of service of the citation shall bind him. *Martin* v. *Harding*, 11 Jur. (N.S.) 118.

The executors under a will cited the executors named in a codicil to it, as also the other parties interested, to propound such codicil. An appearance had been entered for the executors named in the codicil, but no declaration had been filed. The bequests in the codicil affected the real estate. The court ordered the heir-at-law to be cited. *Comer* v. *Parnell*, 36 L. J., P. 81; 16 L. T. 299.

When in a suit commenced by caveat, the party propounding a will wishes to cite the heir-at-law before pleas have been filed contesting the validity of the will, he must make an affidavit that he intends to proceed and prove the will in solemn form. *Peacock* v. *Lowe*, 36 L. J., P. 46; L. R. 1 P. 311; 15 L. T. 634; 15 W. R. 717.

An heir-at-law who has not been cited, cannot, by entering a caveat, prevent the executors of a will affecting realty from obtaining probate in common form. If the heir-at-law has entered a caveat under those circumstances, it is not necessary for the executors to declare. *Young* v. *Ferrie*, 4 Sw. & Tr. 210; 29 L. J., P. 69; 5 Jur. (N.S.) 1318.

The provisions of 20 & 21 Vict. c. 77, ss. 61 and 62, which authorise the citing of the heir-at-law or persons interested in the real estate, when contentious proceedings arise as to the validity of a will, and by which the probate of a will granted after such litigation is to enure to the benefit of all persons interested in the real estate affected by the will, are not applicable to wills executed before the Wills Act, or to wills which in whole or in part have been executed not in accordance with the requirements of the Wills Act. *Campbell* v. *Lucy*, 40 L. J., P. 22; L. R. 2 P. 209; 24 L. T. 231; 19 W. R. 568.

The practice as to citations to see proceedings heretofore in use in the Probate Court has not been altered by the Judicature Acts, and the rules therein contained; and therefore, in order that a decree in a testamentary suit may bind the heir-at-law or devisees of real estate, a citation should be taken out against them under 20 & 21 Vict. c. 77, s. 61, notwithstanding the directions of r. 13 of Ord. XVI. *Kennaway* v. *Kennaway*, 45 L. J., P. 86; 1 P. D. 148; 34 L. T. 854; 24 W. R. 586.

—— **Form of Affidavit.**]—An affidavit, upon which an application to cite the persons interested in the real estate affected by a will in dispute is based, must state not only that it disposes of real estate, but that it was executed according to the law of England, and at a date since the Wills Act came into operation. *Campbell* v. *Lucy*, supra.

—— **Assignee of Heir-at-Law.**]—In an action as to the validity of a will the court will not order the assignee of the heir-at-law of the testatrix to be cited as a person having or pretending interest in the real estate affected by the will. *Jones* v. *Jones*, 51 L. J., P. 93; 7 P. D. 66; 46 L. T. 919; 30 W. R. 691; 46 J. P. 472.

—— **Executors.**]—When an executor had proved a will (power being reserved to his co-executors to come in and prove it), upon his refusal to produce the probate and an account of the estate in respect of which it had been granted, so as to enable a co-executor to prove the will without payment of probate duty, the court directed a citation to issue against him. *Turrell, In goods of*, 2 Sw. & Tr. 456; 31 L. J., P. 170; 6 L. T. 162; 10 W. R. 430.

An executor by non-appearance to a citation calling upon him to take probate of a copy of a missing will, is barred from afterwards obtaining probate of the original will when found. *Davis* v. *Davis*, 4 Sw. & Tr. 208; 31 L. J., P. 216.

The court allowed a citation to executors to bring in the probate to issue on an affidavit of the agent of the party citant (the next of kin), who was in Australia; the property being distributed by the Court of Chancery in due course of administration, which could not be stayed until proceedings were instituted for revocation of the probate, and the agent of the party citant being in a position to make the necessary averments to lead the citation. *Hutley, In goods of*, 38 L. J., P. 27; L. R. 1 P. 596; 19 L. T. 704.

Where an executor possessed himself of part of the personal estate of the deceased without obtaining probate, and did not appear to a citation which had been issued by a legatee to bring in and prove the will, the court, on the application of the legatee, made a conditional order that the executor should, within a limited time, extract probate. *Clune, In goods of*, 15 L. R., Ir. 470.

—— **Next of Kin.**]—The court allowed a citation to issue against the next of kin, calling upon him to take administration of the goods of a deceased, or shew cause why it should not be granted to the applicant as a creditor, although by the operation of the Statute of Limitations the applicant was debarred from recovering his debt against the estate of the deceased. *Coombs, In goods of*, 35 L. J., P. 78; L. R. 1 P. 193; 14 L. T. 635; 14 W. R. 975.

A person died on 27th March, 1862, leaving a will dated 17th April, 1860, whereof he appointed two executors; there was also a paper purporting to be a codicil dated 26th March, 1862. The executors believing this not to be a true codicil, asked for a citation on the legatees interested under it, calling on them to propound and prove it if they thought fit. The court refused to issue the citation, but suggested that the executors might proceed to prove the will in solemn form, and cite the next of kin and the legatees under the codicil to see the will proved. *Benbow, In goods of*, 2 Sw. & Tr. 488; 31 L. J., P. 171; 6 L. T. 659.

The executor named in the will having determined to propound it, cited certain persons who were the next of kin to see proceedings. They appeared, and there being reason to believe that there were other next of kin, the court made an order upon them, under 20 & 21 Vict. c. 77, s. 24, to attend before the registrar to be examined as to the state of the family. *Shepheard* v. *Beetham*, 41 L. J., P. 44; L. R. 2 P. 384.

A father left two children in their minorities, his only next of kin. The minors' next of kin were four in number, and three of them renounced their rights to the guardianship and administration. The fourth went to Nevada. in 1869, and nothing was now known of him. The

court permitted the minors to elect a stranger in blood as their guardian, without requiring the citation or renunciation of the absent next of kin. *Langham, In goods of*, 25 L. T. 951 ; 20 W. R. 319.

A brother bequeathed his real and personal estate in two equal moieties to the children of his deceased sisters. The executor renounced and the children were resident abroad. The sole surviving next of kin was another sister, to whom the testator had left a legacy of "one shilling," and who was leading a dissolute life. Under these circumstances, the court made a grant of administration with the will annexed to a relative not interested, for the use and benefit of the minors until they should appear and take the grant. *Thomas, In goods of*, 28 L. T. 677.

—— **Queen's Proctor.**]—When the will of a bastard affecting real estate is propounded, if such real estate would devolve on the crown in case of an intestacy, the Queen's proctor may be cited to intervene in respect of the real estate. *Wyman* v. *Ashwell*, 4 Sw. & Tr. 196 ; 29 L. J., P. 94.

—— **Person interested.**] — A citation was ordered to issue against the only person interested in the estate of a deceased person, calling upon him to take administration, on the application of a party who was interested in the due prosecution of a suit in chancery, for which purpose a representative of the estate was required. *Williams, In goods of*, 39 L. J., P. 48 ; L. R. 2 P. 81 ; 22 L. T. 630 ; 18 W. R. 844.

Before a person is permitted to contest a will he may be called on by the propounder to shew his interest ; but when two contest a will, neither can call upon the other first to shew his interest. *Hingeston* v. *Tucker*, 2 Sw. & Tr. 596 ; 31 L. J., P. 91 ; 9 L. T. 337.

Where an application for administration is made by a representative of the next of kin living at the death, it is the practice to require any person directly entitled in distribution at the death to be cited before making the grant, but the court has power, under s. 73 of the Court of Probate Act, 1857, to make a special order dispensing with such citation. *Kinchella, In goods of*, 63 L. J., P. 162 ; [1894] P. 264 ; 6 R. 556 ; 71 L. T. 263.

The deceased, while of unsound mind, wrote out a document in form of a will duly executed and attested ; the provisions in the will were manifestly absurd. The widow whom the deceased purported to most largely benefit by the will moved the court to pass over the document and decree letters of administration as upon an intestacy :—Held, that notice to all persons interested under the will must be given. *Rich, In goods of*, 65 L. T. 352 ; 55 J, P. 760.

Leave to presume Death—Insurance Companies.]—Upon a motion to swear that a testator died on or since a certain day, and for probate of his will, the estate partly consisted of policies upon the testator's life :—Held, that notice of the motion must be given to the insurance company. *Kirkbride, In goods of*, 55 J. P. 503. S. P., *Barber, In goods of*, 11 P. D. 78 ; 56 L. T. 894 ; 35 W. R. 80.

Advertisements for Testator dispensed with.]—Advertisements were dispensed with in the case of a testator who had gone abroad, and had not been heard of for many years, the assets being very small. *Patton, In goods of*, 23 L. R., Ir. 435.

Oath of Administrator—Motion to modify Form.]—A. P. died in 1887, intestate, without child or parent, leaving her surviving J. S., her natural and lawful brother and one of her next of kin. The said intestate, who was about sixty-three years of age at the time of her death, was married in 1860, and her husband, a sailor, of about the same age as herself, shortly afterwards left her, and at the date of this motion it was upwards of twenty years since he was last heard of. The said intestate left personalty amounting to 1,011*l.* 15*s.* 2*d.*, the result of her personal earnings and savings. J. S., now a resident in America, appointed as his attorney one J., a solicitor, and the latter applied for administration. The court was now moved on his behalf to modify the wording of the oath, and that he might have leave to swear that "he believed that the said A. P. was a widow at the time of her death." The court declined to follow the case of *Reed, In goods of* (ante, col. 551), and refused the application, stating that the practice in such cases was either to swear the oath in the regular form, and so to get the grant, or in the alternative to cite the next of kin. Upon the authority of that case alone the court felt disinclined to depart from the practice. Upon appeal :—Held, that this case was distinguishable from *Reed, In goods of* (ante, col. 551), and that, upon the facts disclosed by the affidavits the appeal must be dismissed. *Pridham, In goods of*, 61 L. T. 302—C. A.

Compromise — Devise of Real Estate for Charitable Purposes—Attorney-General cited.]—Where a testator devised a large portion of his real estate to a charity of somewhat undefined character, to the exclusion of a niece who had strong moral claims upon him, the estate in question having come from her mother, and terms of compromise had been agreed to between the parties to a probate action in respect of the said will, the attorney-general was cited to see proceedings for the purpose of sanctioning the compromise. *Boughey* v. *Minor*, 62 L. J., P. 104 ; [1893] P. 181.

Service—On Married Women.]—Service of a citation on a married woman is effected by serving her in the presence of her husband. *Hallett* v. *Cox*, 28 L. J., P., 55, n. S. P., *Herbert* v. *Shiell*, infra.

When a citation has not been duly served on a married woman, the court will act upon a renunciation subsequently executed by herself and husband. *Herbert* v. *Shiell*, 3 Sw. & Tr. 479 ; 33 L. J., P. 142.

—— **In Case of Husband and Wife.**]—When a wife and husband resident abroad have been served with a citation by advertisement, there should be an affidavit that neither of them has any agent in this country. *Evans* v. *Burrell*, 4 Sw. & Tr. 185 ; 28 L. J., P. 82.

A wife died at Rome in 1854, in the lifetime of her husband. By an indenture of post-nuptial settlement it was provided that property which was then settled upon certain trusts, and any other property to which she might thereafter become entitled, should, in the event of her predeceasing her husband, and other events which

happened, be distributable amongst her next of kin as if she had died unmarried and intestate. Her husband, an Italian, died at Rome in 1871, having executed a will, in which he appointed executors, but the will was not proved in this country. The wife was entitled to one-third share of her father's residuary personal estate which became distributable in November, 1874, and by an order of the Court of Chancery the share was carried over to her account. The court under these circumstances granted administration limited to the fund in chancery, to one of the next of kin, without requiring the representative of the husband to be cited. *Gorofolini, In goods of*, 44 L. J., P. 36; 33 L. T. 72; 23 W. R. 456.

A husband and wife separated by agreement. The husband covenanted not to claim administration of his wife's estate if she should die during his life. She died during his life. The husband refused to renounce: the court refused to make a grant to the guardian of her children until he had been cited. *Pigott, In goods of*, 42 L. J., P. 77; 29 L. T. 45; 21 W. R. 823.

In a probate suit the person interested in establishing an intestacy were the widow of the testator and his brother the heir-at-law. The widow was a lunatic confined in an asylum in Australia, and as the heir-at-law had already appeared as a party in the suit the court refused to order the widow to be cited to see proceedings. *Ward* v. *Huckle*, 56 L. J., P. 110; 12 P. D. 110; 57 L. T. 495; 35 W. R. 736.

W. died in 1891 intestate. It was not known whether his wife, whom he married in 1848, and who thereafter immediately left him and had not been heard of by him for some years prior to his death, survived him or not. The court refused to grant administration to the intestate's brother, without citing the widow. *White, In goods of*, 66 L. T. 861; 56 J. P. 409.

On an application for a grant of administration to the father of the intestate, passing over his widow, against whom misconduct was charged, the court refused to make the grant without citing the widow. *Middleton, In goods of*, 58 L. J., P. 28; 14 P. D. 23; 60 L. T. 237; 53 J. P. 103.

—— **On Minors.**]—The service of a citation on a minor is effected by serving it on him in the presence of his natural or legal guardian, or of some person upon whom the care and custody of the minor have for the time being devolved. *Brown* v. *Wildman*, 28 L. J., P. 54.

When a minor, of the age of seventeen, was living in service at a distance from her mother, her natural guardian, the court dispensed with the rule, which requires service of a citation upon a minor to be effected upon her in the presence of her natural or legal guardian, or of some person upon whom her custody for the time being properly devolved. *Lainson* v. *Naylor*, 2 Sw. & Tr. 7; 29 L. J., P. 126; 2 L. T. 391; 8 W. R. 451.

An affidavit that a minor was served with a citation in the presence of his guardian, should go on to shew how he became his guardian. *Johnson* v. *Weldy*, 2 Sw. & Tr. 313; 30 L. J., P. 170; 5 L. T. 118.

Where a citation was served upon two minors at the house where they resided, but their custodian declined to be present at the service, and an attempt was also made to serve the citation on the next of kin of the minor, but failed by reason of the process-server not being permitted to see the next of kin, the court held the service on the minors to be sufficient. *Lean* v. *Viner*, 3 Sw. & Tr. 469; 33 L. J., P. 88.

—— **On Lunatics.**]—When a person, whom it is necessary to cite as interested in the estate of a deceased, is a lunatic, and a committee of his estate has been appointed, service of a citation upon such committee is sufficient. It is not necessary that the lunatic should be personally served in the presence of some medical man. *Surtees, In goods of*, 28 L. J., P. 89.

Form of order for service of citation on a person of unsound mind, not so found by inquisition. *M'Cormick* v. *Heyden*, 17 L. R., Ir. 338.

—— **On Official Liquidators of Companies.**]—The plaintiffs propounded the will and codicil of A. W., under the latter of which her husband, who had survived her but a short time, took an interest. The court allowed a citation to issue to the official liquidators of the East of England Bank, creditors of the husband, to see the codicil proved. *Wilson, In re*, 3 Sw. & Tr. 572; 10 Jur. (N.S.) 1242; 11 L. T. 427.

Service in General.]—The court has no power to dispense with the service of citations. *Potts* v. *Potts*, 30 L. J., P. 112.

Leave to proceed to prove a will in solemn form will not be granted unless citations have been personally served on the persons entitled to see proceedings, or if personal service is impracticable, have been duly advertised. *Ib.*

When a citation has been served, a certificate of service should be indorsed on the citation. *Goodburn* v. *Bainbridge*, 2 Sw. & Tr. 4; 29 L. J., P. 163; 2 L. T. 439; 8 W. R. 504.

An affidavit of the service of a citation should identify the citation served; the citation should be made an exhibit to the affidavit. *Harenc* v. *Dawson*, 3 Sw. & Tr. 50; 32 L. J., P. 94.

The service of a citation by a party to a suit is insufficient. *Glyde* v. *Davie*, 33 L. J., P. 184.

—— **By Advertisement.**]—When a party is cited by advertisement, and has no agent in this country, there should be an affidavit that he has no attorney, agent or correspondent in this country. *Kenworthy* v. *Kenworthy*, 3 Sw. & Tr. 64; 32 L. J., P. 107; 8 L. T. 470; 11 W. R. 350.

A nephew applied for administration of the estate of his aunt who had died intestate; a brother of the deceased had emigrated to Australia thirty years before; nothing had been heard of him for eighteen years, if alive he would be about seventy; it appeared upon affidavit that his relatives thought him dead:—The court refused to dispense with the advertisement of the citation. *Cutler, In goods of*, 67 L. T. 355.

Amendment of Citation.]—A plaintiff, in a citation to bring in probate, described himself as one of the lawful cousins and next of kin of the deceased, and upon an order obtained by the defendant that he should propound his interest, filed an act on petition, in which he alleged that he was one of the executors and residuary legatees of A., deceased, who was the lawful cousin-german of the deceased, and one of his next of kin, and living at his death. The court gave the plaintiff leave to amend the citation by inserting in it his correct description, upon payment of the defendant's costs up to the time of the amendment, exclusively of the costs of

entering an appearance. *Ridgway* v. *Abingdon*, 3 Sw. & Tr. 3; 32 L. J., P. 4; 7 L. T. 756; 11 W. R. 10.

Return into Registry.]—When the estate of a deceased, who died without any known relation, was barely sufficient to pay his liabilities, and a citation had been issued and served on behalf of a creditor upon the Queen's proctor and by advertisement, but had been lost or destroyed by his solicitor's clerk, who had absconded for embezzlement, the court dispensed with the rule requiring the citation to be returned into the registry, and made the grant of administration to the creditor. *Robinson, In goods of*, 4 Sw. & Tr. 43.

2. Appearance.

Service of Writ of Summons to Appear.]—When a writ of summons cannot be personally served upon one of several defendants by reason of his address being unknown and not ascertainable, the court will not dispense altogether with the service, but will direct service of the writ to be effected by advertisement. *Whitley* v. *Honeywell*, 35 L. T. 517; 24 W. R. 851.

If a defendant is a foreigner resident out of the jurisdiction, he must be served with notice of the writ of summons in the action. *Beddington* v. *Beddington*, 45 L. J., P. 44; 1 P. D. 426; 34 L. T. 366; 24 W. R. 346.

Judgment in Absence of Plaintiff—Application to Restore.]—Where, for a reason explained to the court, the plaintiff was not represented at the hearing of a probate suit, and applied within six days from the date of the judgment for leave to restore the cause, the court, in granting the application, made it a condition that the plaintiff should before a certain day pay the costs of the defendant as between solicitor and client, and directed that, if he failed to do so, the judgment against him should stand. *Cudworth* v. *Hayward*, 75 L. T. 456.

Other Matters as to.]—An affidavit of search and of non-appearance should state the day on which the search was made. *Harene* v. *Dawson*, 3 Sw. & Tr. 50; 32 L. J., P. 94.

Where two persons have been cited, and neither has appeared, it should state that no appearance has been entered by or on behalf of either of them. *Ib.*

A caveat entered by a next of kin having been warned by the executors, the next of kin applied to have the time for entering an appearance extended in order that a communication might be made with another next of kin who was in Australia, the caveat purporting to have been entered also on his behalf. The court rejected the motion. *Corcoran, In goods of*, 11 W. R. 241.

3. Staying Proceedings in Suits.

Grounds for.]—It is no ground for a stay of proceedings in a suit commenced by the next of kin, that the alleged executor of a will has filed a petition in a commissary court in Scotland, to obtain confirmation of the same instrument. *Hawarden* v. *Dunlop*, 2 Sw. & Tr. 150; 4 L. T. 339.

The court refused to order that proceedings instituted to prove a will in solemn form should be stayed because the heir-at-law had commenced actions of ejectment in reference to the real estate bequeathed by the will. *Davies* v. *Dereveux*, 35 L. J., P. 77; 14 W. R. 901.

A native of France died after many years' residence in London, leaving a will, executed according to the English law, in which he appointed B. sole executrix. B. propounded the will in a declaration. C., the brother, who, with other next of kin, had entered a caveat, filed pleas and treated the will as that of a domiciled Englishman. Some months afterwards, the cause having in the meantime been ordered to be tried by a special jury, C. and the other next of kin commenced proceedings in France to set aside the will on the ground that the testator was a domiciled Frenchman, and that the will was not executed according to the law of France: the court refused to stay the proceedings pending the proceedings before the French tribunal, or to allow the pleadings to be amended so as to raise the question of domicil; the facts as to the domicil having been within the knowledge of C. from the first, and the case standing for trial. *Duprez* v. *Veret*, 38 L. J., P. 5; L. R. 1 P. 583; 19 L. T. 525; 17 W. R. 157.

When an action is brought against executors, who are restrained by an injunction, from disposing of their testator's effects, and they resist the claim, the court will not stay proceedings, although, if a judgment had been signed, it might stay execution. *Davis* v. *Salter*, 1 D. P. C. 561; 2 C. & J. 466.

The court refused to stay the proceedings in an action by an administrator, upon a suggestion that there was a will in India, which the intestate's widow, who was thereby appointed executrix, had intimated her intention to bring to this country to prove. *Prosser* v. *Wagner*, 1 C. B. (N.S.) 289; 26 L. J., C. P. 81; 5 W. R. 146.

A creditor, who had obtained a grant of administration pending suit, and who had incurred costs in respect of such administration and of proceedings in the Chancery Division, the amount of which costs, together with his original debt, would more than swallow up the amount which had come to his hands as administrator, was allowed by the court to pay himself the amount, pro tanto, of his debt and costs, and thereupon to take his discharge as administrator; but the court refused, upon his application, to dismiss the original probate suit for want of prosecution. *Evans, In goods of*, 65 L. T. 793.

4. Abatement by Death.

When a plaintiff died after the hearing and before judgment, the court would not, on the application of his personal representative, give judgment, unless such personal representative had been made a party to the record. *Staines* v. *Stewart*, 2 Sw. & Tr. 320; 31 L. J., P. 10; 8 Jur. (N.S.) 440; 4 L. T. 457.

By the death of a plaintiff, after a verdict in his favour, the suit abates, and a suggestion of the death must have been entered on the record before a decree could be made. *Jones* v. *Jones*, 36 L. J., P. 43; 15 L. T. 544; 15 W. R. 498.

5. Affidavits.

Form.]—An affidavit on which the addition or place of abode of a deponent is not inserted will not be admitted. *Bernard, In goods of*, 2 Sw. & Tr. 489; 31 L. J., P. 89; 6 L. T. 726.

When a joint affidavit was made by A. and by B., and B.'s addition was omitted, the court

treated the affidavit as that of A. only. *Woodburne, In goods of*, 31 L. J., P. 89, n.

Affidavits were sent out to New Plymouth, New Zealand, to swear the widow of W. K., deceased, as administratrix. In the meantime she had moved to Hobart Town, in Tasmania, and certain interlineations in accordance were made in the affidavits, but not initialled by the judge who administered the oath; the description of Mrs. King, as widow, was also slightly irregular. The judge made an order that such affidavit should be filed. *King, In goods of*, 2 Sw. & Tr. 621; 32 L. J., P. 14; 7 L. T. 394; 11 W. R. 171.

A., in the oath for executrix, described herself as of, &c., "the lawful widow and relict of the deceased," without any other addition. The affidavit was rejected in the registry as contrary to the practice, on the ground that the deponent might be a married woman notwithstanding the terms of the addition:—The court held the addition to be sufficient, and directed the affidavit to be received. *Morgan, In goods of*, 32 L. J., P. 139; 11 W. R. 749.

Supporting Petition—Reference to Facts not Mentioned in Petition.]—If affidavits filed in support of a petition as to the right of a party to obtain letters of administration go into matters not set out in such petition, the court will not allow counter-affidavits to be brought in at once, but at the hearing will either refuse to read such parts of the affidavits, or will then, if they be material, permit the other party to answer them on oath. *Cordeux* v. *Trasler*, 4 Sw. & Tr. 48; 34 L. J., P. 127; 11 Jur. (N.S.) 587.

Supporting Application for Examination of Witness.]—In order to found an application for the immediate examination of a witness in a pending suit, the affidavit must set out special circumstances; it is not sufficient that it states that the witness is a material witness. *Andrews* v. *Brooke*, 43 L. J., P. 39; L. R. 3 P. 181; 31 L. T. 102; 22 W. R. 712.

Affidavit of Scripts.]—A memorandum written by a solicitor from oral directions of the testator, and sent to counsel as instructions to draft a will, is a script within the meaning of the affidavit of scripts, although not read by the deceased. *Bagot* v. *Bagot*, 1 L. R. Ir. 308.

An omission to annex to, or mention in the affidavits of scripts, the instructions for a will, is no ground for allowing out of the estate the costs of an unsuccessful opposition to the will, if such opposition is not founded on the absence of instructions. *Foxwell* v. *Poole*, 3 Sw. & Tr. 5; 32 L. J., P. 8; 7 L. T. 757; 11 W. R. 32.

Where one of the defendants, who was sole heiress-at-law of the deceased, had resided in Belgium for seventeen years, where she was still living, and had written stating that she had not, nor never had, any testamentary documents or receipts belonging to the affairs of the deceased, the court dispensed with an affidavit of scripts from her, and allowed her solicitor to make and file the necessary affidavit. *Tallon, In goods of*, 31 L. R., Ir. 393.

Taken in Foreign Places or Countries.]—An affidavit sworn before a notary abroad will not be admitted unless it appears on affidavit that there was not, at the place where it was sworn, a British consul or other officer empowered by 18 & 19 Vict. c. 42, s. 1, to take affidavits, and that a notary has, by the law of such place, authority to take affidavits. *Bernard, In goods of*, 2 Sw. & Tr. 489; 31 L. J., P. 89; 6 L. T. 726.

A requisition to New South Wales under the seal of the prerogative court of Canterbury to swear an administrator:—Held, that the Court of Probate can decree administration on the affidavits so sworn. *Bedwell, In goods of*, 1 Sw. & Tr. 15; 27 L. J., P. 8.

But a declaration on oath was received instead of an affidavit, the person making it being resident abroad, where an affidavit could not be made. *Lambert, In goods of*, 35 L. J., P. 64; L. R. 1 P. 138; 14 L. T. 227; 14 W. R. 617.

In Reply.]—The court will allow affidavits in reply to be read at the hearing of a cause, if it thinks such affidavits are necessary. *Cordeux* v. *Trasler*, supra.

6. Parties.

Propounding Will.—A person appointed executor, and after the testator's death convicted of felony, is not thereby disentitled to maintain a suit in the Court of Probate with a view of establishing the validity of the will by which he is appointed executor. *Smethurst* v. *Tomlin and Bankes*, 2 Sw. & Tr. 143; 30 L. J., P. 269; 7 Jur. (N.S.) 763; 4 L. T. 712.

A party propounding a will may put any person opposing it on proof of his interest; but where two parties oppose a will, e.g., the Queen's proctor and an alleged next of kin, neither can put the other on proof of his interest. *Hingeston* v. *Tucker*, 2 Sw. & Tr. 596; 31 L. J., P. 91; 7 L. T. 337.

Being cited to propound and prove a will is a distinct matter from being cited to take probate under 21 & 22 Vict. c. 95, s. 16. *Bewsher* v. *Williams*, 3 Sw. & Tr. 62; 8 L. T. 290, n.; 11 W. R. 541.

The burden of proof lies upon the party propounding a will. He is, therefore, bound to begin, although he is an intervener, and although the plaintiff in the suit has, in his declaration, alleged an intestacy. *Cross* v. *Cross*, 3 Sw. & Tr. 292; 33 L. J., P. 49; 10 Jur. (N.S.) 183; 10 L. T. 70; 12 W. R. 694.

A jury found for a will although the only surviving attesting witness swore that it was a forgery, and the court refused, upon the evidence, to disturb the verdict. *Ib.*

Where parties interested under a testamentary paper have been cited to appear and propound it, and have not appeared and propounded it, the court will grant administration as to an intestate, or probate of an earlier will, as the case may be, in common form. *Morton, In goods of, Morton* v. *Thorpe*, 3 Sw. & Tr. 179; 32 L. J., P. 174; 9 Jur. (N.S.) 728; 9 L. T. 300.

A party who has no interest under a will cannot propound it. *Parton* v. *Johnson*, 37 L. J., P. 67; L. R. 1 P. 549; 18 L. T. 923; 16 W. R. 1192.

—— **Particulars of Papers Propounded.**]—Where a will or a codicil is propounded in a declaration in the usual form, and there is ground for suggesting that other testamentary papers, besides those specifically referred to in the declaration, may be included in the probate, the court will order the party propounding the will

or codicil to furnish the other party with particulars of the testamentary papers he intends to set up. *Marsh* v. *Corry*, 3 Sw. & Tr. 458; 33 L. J., P. 112; 10 Jur. (N.S.) 159.

—— **Interested in opposing.**]—A caveat was warned by the widow, and the defendants appeared thereto as universal devisees and legatees of the estate of A., the universal devisee and legatee of the whole estate of the deceased. The plaintiff thereupon declared, alleging an intestacy. The defendants pleaded propounding a will, whereof A. was sole executrix and universal legatee. On motion for an order to amend the pleas by setting forth how they derived their interest:—Held, that it was too late for the plaintiff to call upon the defendants to set forth their interest after the declaration had been delivered. *Inkson* v. *Jeeves*, 3 Sw. & Tr. 39; 32 L. J., P. 69; 8 L. T. 173; 11 W. R. 350.

A deed executed by the deceased in favour of the defendant, in which she was described as a sister of the deceased, is sufficient evidence of relationship, so that she, as next of kin, can contest the validity of the will of the deceased. *Smith* v. *Tebbitt*, 36 L. J., P. 35; L. R. 1 P. 354; 15 L. T. 594; 15 W. R. 562.

An executor having propounded a will, a party who appeared to dispute it as the natural son of the deceased was put upon proof of his interest. In his declaration he alleged that the deceased was a domiciled Portuguese, that he was his natural son, that, by the law of Portugal, he was entitled to the whole of the deceased's property, and that he had instituted a suit in Portugal against the executor, in which he obtained a decree that he should be put into possession of the property. The declaration did not state the nature of the suit, nor the questions involved in it, nor did the judgment shew that the plaintiff was in the same position as a legitimate son:—Held, that the foreign judgment alone did not shew such an interest in the party in whose favour it was made as to entitle him to dispute the will. *Crispin* v. *Doglioni*, 2 Sw. & Tr. 17; 29 L. J., P. 130; 3 L. T. 179; 9 W. R. 19. *See* col. 822, 1.

Parties entitled to Contest Proof of Will.]—An executor of a former will has the same right as a next of kin to put an executor of a later will upon proof in solemn form, and to interrogate his witnesses. *Boston* v. *Fox*, 4 Sw. & Tr. 199; 29 L. J., P. 68.

Infants—Guardian ad litem.]—When a will is disputed by a guardian ad litem on behalf of infants, the Court of Probate has power to inquire whether the suit is for their benefit. *Percival* v. *Cross*, 52 L. J., P. 16; 7 P. D. 234; 47 L. T. 353; 31 W. R. 124; 46 J. P. 792.

In appointing a guardian ad litem to an infant, the court, if it thinks fit, may pass over the next of kin. *Quick* v. *Quick*, 33 L. J., P. 177; 10 Jur. (N.S.) 372.

The court refused to appoint the paternal uncle guardian to a minor, for the purpose of instituting a suit on his behalf against the mother in reference to the validity of the will of his father, without first citing the mother to shew cause why such an appointment should not be made. *Jenkins, In goods of*, 38 L. J., P. 72; L. R. 1 P. 690. *See also* INFANT.

Defendant a Minor — Guardian refusing to take part in Proceedings.]—Where the defendant in a probate action was a minor, and both she and her guardian refused to take any part in the proceedings, the court, holding that the practice in such a case was governed by Ord. XIII. r. 1 of the Rules of the Supreme Court, 1883, and not by the Probate Rules, 1862 (Contentious Business), r. 74, appointed the official solicitor of the court the defendant's guardian ad litem, and ordered that his costs should be provided by the plaintiff. *White* v. *Duvernay*, 60 L. J., P. 89; [1891] P. 290.

Paupers.]—A plaintiff who through poverty is unable to prosecute a suit instituted by him should apply for leave to continue the suit in formâ pauperis. If he does not, and the suit is dismissed for non-prosecution, he will not afterwards be allowed to recommence it in formâ pauperis. *Cuthrell* v. *Jeffree*, 33 L. J., P. 178; 10 Jur. (N.S.) 445.

S. obtained probate, in common form, of a paper professing to be the will of L. Such probate, at the suit of the next of kin of the deceased, was revoked, the court holding that the paper was not the will of the deceased, and that S. had been guilty of fraud in obtaining probate; and in contesting the suit S., though suing in formâ pauperis, was condemned in the costs of the suit. *Carless* v. *Thompson*, 1 Sw. & Tr. 21.

A person suing in formâ pauperis, to whom counsel has been assigned by the court, cannot appear by another counsel until there has been a renunciation, or a new assignment of counsel, or he has been dispaupered. *Hamer* v. *Boreham*, 1 Sw. & Tr. 26; 27 L. J., P. 107.

Parties—Striking out.]—In a probate suit, out of nine defendants on the record eight had been cited and had not appeared. The remaining one, who was resident in New Zealand, had not been served. The court, at the hearing, allowed him to be struck off the record, and the case to proceed against the other eight defendants. *Drewitt* v. *Drewitt*, 58 L. T. 684; 52 J. P. 232.

7. Pleadings.

Claim—Form of.]—When a will which has been destroyed is propounded, it is not necessary to set out the substance of the will, or to allege its destruction in the declaration. *Glen* v. *Burgess*, 3 Sw. & Tr. 43; 32 L. J., P. 157; 8 L. T. 174; 11 W. R. 463.

The declaration should, however, if possible, assign a particular date to the will, and an averment that the deceased in or about a certain month made his last will is primâ facie insufficient. *Ib.*

A plaintiff propounded a will in a declaration in the ordinary form, to which the defendant pleaded. The plaintiff then filed a second declaration in a special form, propounding the will as an American will. To this declaration the defendant pleaded, and evidence was taken on the questions raised by the pleadings under a requisition and commissions in America. Before the case came on for trial, the plaintiff amended his declaration by reverting to the case which he had originally set up, whereupon the defendant abandoned his opposition and consented to probate. The court condemned the defendant in the costs of proving the will in solemn form, as if the suit had proceeded upon the original declaration, and made no order as to the costs caused by the filing of the second declaration.

Archer v. *Burke*, 37 L. J., P. 30; L. R. 1 P. 558.

Wills alleged must be propounded—if by the plaintiff, in his statement of claim; if by a defendant, by counter-claim at the end of the defence. *Madder* v. *Penrose*, 29 L. R., Ir. 16.

—— **Interest Suit.**]—The pedigree of parties claiming to be next of kin of a person dying intestate, against the Queen's proctor claiming administration on the ground of bastardy, must be set out in their pleadings, and not by way of particulars. *Griffin* v. *Greenwood*, 19 L. T. 661.

—— **Action to prove Will and to discharge Protection Order made in Wife's Lifetime.**]—A claim to pronounce against the validity of the will of a married woman who had obtained a protection order, and a counter-claim to discharge the protection order, may be included in the same action. *Mudge* v. *Adams*, 50 L. J., P. 49; 6 P. D. 54; 44 L. T. 185; 29 W. R. 307.

—— **Declaration of Legitimacy.**]—A prayer for a declaration of legitimacy cannot be included in a writ in a probate suit, but must be by petition. *Warter* v. *Warter*, 59 L. J., P. 45; 15 P. D. 35; 62 L. T. 328.

—— **Defendant's Legitimacy Questioned—Motion to strike out Defence.**]—In an interest suit, where the real question in dispute was the defendant's legitimacy, upon motion by the plaintiff to strike out the defence:—Held, that this was too serious a matter to be decided upon motion. *Harrington, In goods of*, 63 L. T. 228.

Leave to Plead.]—Before a plea that the testator did not intend the alleged testamentary instrument to operate as his will can be put on the record, leave must first be obtained; but it is not necessary to furnish particulars under such plea. *Harrison* v. *Kirby*, 17 L. T. 152; 16 W. R. 144.

Defence.]—When the statement of claim does not deny the defendant's interest in the estate, the court will not order the statement of defence to be struck out for not alleging an interest in the defendant. *Medcalf* v. *James*, 25 W. R. 63.

When a plea contains irrelevant matter, it should be objected to on application at chambers. *Farlar* v. *Farlar*, 1 Sw. & Tr. 124; 27 L. J., P. 103.

The admission of a responsive allegation, pleading in the earlier part the personal and testamentary history of the testatrix, and in the later part that the paper in question was procured by her husband at a time when, by reason of extreme illness, she had not testamentary capacity, was opposed:—Held, that the earlier part of the allegation, though in itself inadmissible, as not affecting the issue, would, in combination with the averment of testamentary incapacity contained in the later part, be such evidence as a judge could not properly withdraw from the consideration of a jury at a trial of the issue of testamentary competency, and must be admitted to proof accordingly. *Latham* v. *Woolbert*, 1 Sw. & Tr. 1; 27 L. J., P. 10; 6 W. R. 374.

When a party pleading relies upon a will of later date than that propounded, he is bound to set it forth in the plea, with the same particulars as in a declaration. *Leake* v. *Hurst*, 30 L. J., P. 39; 7 Jur. (N.S.) 104.

An executor propounding a will cannot plead in opposition to an earlier will propounded in the same suit any plea but revocation by the will which he propounds. *Parton* v. *Johnson*, 37 L. J., P. 67; L. R. 1 P. 549; 18 L. T. 923; 16 W. R. 1192.

Pleas of Undue Execution and Revocation.]—Under a plea that a paper propounded is not the will of the deceased evidence of undue execution, or of incapacity, is not admissible. The meaning of that plea is, that the deceased did not execute the paper intending that it should operate as his will. *Cunliffe* v. *Cross*, infra.

A plea that the will propounded is not the will of the deceased is too vague and indefinite, and will not be allowed to be pleaded. *Owen* v. *Davies*, 3 Sw. & Tr. 588; 33 L. J., P. 201; 13 W. R. 88.

—— **That Testator was incapable of executing Will.**]—A defendant pleaded, that at the time of the pretended execution of the will deceased was incapable of executing it, and that the will was prepared and made by A., and that deceased had not given to A. directions to prepare or make it:—Held, that both pleas were bad. *Middlehurst* v. *Johnson*, 30 L. J., P. 14.

—— **That Testator did not know Contents of Will.**]—A plea that at the time when the testator signed the will he did not know and approve of the contents thereof is good on demurrer. *Hastilow* v. *Stobie*, 35 L. J., P. 18; L. R. 1 P. 64; 11 Jur. (N.S.) 1039; 13 L. T. 473; 14 W. R. 211.

A plaintiff having propounded a will and codicil, the defendant pleaded that the codicil was not prepared in conformity with the instructions of the deceased; and that the deceased, at the time of the execution of the codicil, was ignorant of its contents:—Held, that the plea was bad. *Cunliffe* v. *Cross*, 3 Sw. & Tr. 37; 32 L. J., P. 68; 9 Jur. (N.S.) 210; 8 L. T. 172; 11 W. R. 258.

In a suit as to the validity of a will, the next of kin pleaded that it was not the will of the deceased. The jury found that the testatrix gave instructions for, and intended to have inserted in her will, certain small legacies, which were in fact omitted; that such instructions, at the moment she executed the will, were absent from her mind; and that the residuary legatee, who procured such execution, knew that such instructions were absent from her mind. The verdict on this issue, by direction of the judge of assize, was entered for the next of kin:—Held, that as no fraud was pleaded or imputed to the residuary legatee, and as the will was read over to the testatrix at the time she executed it, the mere omission of the legacies did not prevent the instrument propounded from being her will. *Mitchell* v. *Gard*, 3 Sw. & Tr. 75; 32 L. J., P. 129; 9 Jur. (N.S.) 673; 8 L. T. 438; 11 W. R. 773.

A plaintiff propounded a will. The defendant pleaded denying the due execution of such will; and that the deceased subsequently executed another will, by which the first was revoked; and, finally, that he destroyed the second will with an intention to revoke it:—Held, that the last fact was not properly pleaded, inasmuch as it was no answer to the declaration. *Powell* v.

Powell, 35 L. J., P. 5; L. R. 1 P. 6; 11 Jur. (N.S.) 982; 13 L. T. 566; 14 W. R. 147.

At the trial a legatee in an earlier will who resisted probate of a later will, which was propounded by the executors, impeached the genuineness of the testator's signature to the instrument, though no allegation of fraud had been pleaded:—Held, that evidence in support of the allegation of forgery was admissible under the plea of undue execution. *Hooton* v. *Dennet*, 17 L. T. 670; 16 W. R. 488.

A defendant pleaded, in addition to pleas of undue execution, want of testamentary capacity, and undue influence, that a will of an earlier date, brought in with the scripts, was the last will and testament of the deceased:—Held, that the plea might stand, as it occasioned no inconvenience to the plaintiff. *Tailby* v. *Brown*, 13 L. T. 566.

Pleas of Undue Influence and Fraud.]—A plea that a will was procured by undue influence, intimidation, duress, or improper control, is bad unless the name of some person exercising the undue influence is stated in it. *West* v. *West*, 4 Sw. & Tr. 22; 34 L. J., P. 146. S. P., *Harris* v. *Bradbury*, 30 L. J., P. 168.

A plea that a will was procured by the undue influence of "A. and others" is good, but the other side is entitled to the particulars of "the others." *Ib.*

When it is intended to invalidate a will on the ground of fraud, or of circumstances tantamount to a charge of fraud, there should be a plea alleging that the execution of the will has been obtained by fraud. A plea of undue influence is insufficient to let in a charge of fraud. *White* v. *White*, 2 Sw. & Tr. 504; 31 L. J., P. 215.

In a plea averring that the execution of a will was obtained by the undue influence or fraud of A. and others acting with him, it must be shewn that he personally exercised such influence or fraud. *Purcell* v. *Barlow*, Ir. R. 9 Eq. 367.

Leave was granted to a defendant (propounding the latest will of the deceased) to insert a different name in each plea, he paying the costs from the filing of the pleas to the amendment. *Ib.*

Leave was given to file a special plea of fraud alleged to have been exercised by the plaintiff in preventing the revocation by destruction of a will on the terms of the defendant giving particulars of the alleged fraud. *Kelly* v. *Kelly*, 23 L. R., Ir. 136.

Particulars of Pleas.]—By a rule of proceeding in the Probate Court (1865), made as to contentious business, it is required that any party having pleaded certain pleas as to the competency of the testator, and the validity of the execution of the will, shall give particulars in writing stating shortly the substance of the case he intends to present to the court, and no other defence shall be available. The particulars delivered set forth that, "at the time of the execution of the alleged will, the deceased was in a state of mental prostration brought on by habitual drunkenness and disease of the brain, and that when he executed the alleged will he was not conscious of, and did not approve of, the contents of the alleged will or of the residuary clause":—Held, that these particulars could not be construed as restricting the defendant to proof that the non-approval of the residuary clause was alone occasioned by mental prostration brought on by habitual drunkenness and disease of the brain. *Fulton* v. *Andrew*, 44 L. J., P. 17; L. R. 7 H. L. 448; 32 L. T. 209; 23 W. R. 566.

—— **Undue Influence.**]—The defendant in a probate action alleged that the will had been procured by the undue influence of the plaintiff "and others." The plaintiff applied for particulars of the names of the persons charged with undue influence and particulars of the acts of undue influence alleged, and the times when and places where each of the acts was alleged to have taken place. The president ordered the defendant to give the names of the persons charged with undue influence, but refused to order him to give particulars of the acts:—Held, that as it was admitted to have been the long-settled practice of the Probate Court, and subsequently of the Probate Division, not to require a party alleging undue influence to give particulars of the acts of undue influence, such practice ought not now to be disturbed; and semble (per Lindley and Fry, L.JJ.), that this rule of practice was founded on good reason. *Salisbury (Lord)* v. *Nugent*, 53 L. J., P. 23; 9 P. D. 23; 50 L. T. 160; 32 W. R. 221—C. A.

—— **Incapacity.**]—In an action for probate the court will not order particulars to be given of incapacity. *Hankinson* v. *Barningham*, 53 L. J., P. 16; 9 P. D. 62; 32 W. R. 324; 48 J. P. 24.

Embarrassing Matter.]—The plaintiff propounded for probate a will of September, 1880. A defendant counter-claimed to prove a will of May, 1881. The plaintiff replied (inter alia) that the testatrix was not of sound mind when she executed the will of May, 1881; and (5) that if she did duly execute it when of sound mind, she duly revoked it by a will of June, 1881, executed when she was in a similar state of mind:—Held, that clause 5 of the reply ought not to be struck out as embarrassing. *Rigg* v. *Hughes, Smith, In re*, 53 L. J., P. 62; 9 P. D. 68; 50 L. T. 293; 32 W. R. 355—C. A.

Costs of Pleas of Undue Influence.]—A defendant pleading undue influence, and not appearing at the trial in support of the plea, will be condemned in costs. *Tolland* v. *Stevenson*, 12 Jur. (N.S.) 300; 13 L. T. 609.

A defendant pleaded that the will propounded was not duly executed, and that the deceased was incapable at the time of making a will. With this plea, he gave notice that he only intended to cross-examine the witnesses produced in support of the will. Subsequently he obtained leave to, and did, file a plea of undue influence on the part of the plaintiff, but did not withdraw the notice:—Held, that such notice only protected the defendant from costs in case he limited his cross-examination to those matters required to be established by an executor in proving a will in solemn form, namely, that the will was duly executed and that the testator was capable at the time of execution. *Ireland* v. *Rendall*, 35 L. J., P. 79; L. R. 1 P. 194; 14 L. T. 574.

The court refused to condemn a next of kin in costs who had unsuccessfully opposed a will on the ground of incapacity and undue influence, although there was no direct evidence of undue influence, when it appeared that the will was made in favour of the testator's widow, and at her instigation, by answers of "Aye" and "No"

at a time when his capacity might be fairly questioned. *Smith* v. *Smith*, 36 L. J., P. 13; L. R. 1 P. 239; 15 L. T. 192; 15 W. R. 230.

Pleadings by Interveners.]—An intervener may plead after issue joined by leave of the court. *Jones* v. *Williams*, 4 Sw. & Tr. 19; 34 L. J., P. 102; 11 Jur. (N.S.) 288.

A party intervening after the pleadings have been closed, cannot be allowed by a minute of court to adopt and adhere to the pleas given in opposition to a will, but must file his own separate pleas. *Ib.*

Withdrawing Pleas.]—Leave to withdraw a plea to which there has been a demurrer, will not be granted except upon payment of costs. *Hawke* v. *Hawke*, 32 L. J., P. 132.

Amendment of Pleadings.]—M. A. D., the testatrix, in 1853, made her will, by which she gave her property equally between the plaintiffs, defendants and interveners. In an action by the plaintiffs propounding this will, it appeared that in 1874 she gave instructions for another will, which would have deprived the plaintiffs of all interest in her estate. In the course of the plaintiff's case some evidence was given tending to shew that the testatrix was prevented by force and threats from executing the proposed will. The court allowed the pleadings to be amended by adding statements to that effect, and praying for a declaration that the plaintiffs held their shares as trustees for the defendants and interveners. *Betts* v. *Doughty*, 48 L. J., P. 71; 5 P. D. 26; 41 L. T. 560.

The inclination of the court is to allow the record to be amended at the trial by the addition of a new plea rather than to shut out any defence which might be raised. *Todd* v. *Simpsion*, 1 Sw. & Tr. 269.

B. died in May, 1850, leaving a will dated May, 1849, and two codicils dated May, 1850. Probate of these papers was taken in common form, in July, 1850. In April, 1858, two legatees intimated their intention of disputing the two codicils; whereupon the surviving executors commenced a suit, and filed their declaration on the 25th June. On the 21st of July the defendants filed pleas, first, alleging that the codicils were duly executed; and, secondly, that the testator was of unsound mind at the time of their execution. On the 18th of November the plaintiffs set the case down for hearing, but it had not come on for trial. The defendants then, on the affidavit of their solicitor, applied for leave to amend their pleas by inserting similar pleas against the will, on the ground that since the pleas were filed their solicitor had received information impeaching the validity of the will. The court hæsitanter allowed such amendment, on condition of a portion of the legacy, already received by one of the defendants, being brought into court, the costs of the motion being paid, and the pleadings amended within a week. *Ware* v. *Claxton*, 1 Sw. & Tr. 251; 7 W. R. 145.

The court will, at the trial, allow pleadings to be amended by adding a plea on the terms of adjournment, if desired by the other side, and payment of the costs of the day. *White* v. *White*, 2 Sw. & Tr. 504; 31 L. J., P. 215.

But leave to introduce a new plea after issue joined will not be given, unless affidavits in support of the motion disclose such facts, as, if proved in evidence, would warrant the plea. *Twells* v. *Clarke*, 3 Sw. & Tr. 280; 33 L. J., P. 49; 9 L. T. 658.

If at the trial evidence of such facts should be given, the court would allow a corresponding plea to be added to the record if it could be done without injury to the other party. *Ib.*

The court will not give leave to amend at the eleventh hour unless fresh facts have only just been found out. *Duprez* v. *Veret*, 38 L. J., P. 5; L. R. 1 P. 583; 19 L. T. 525; 17 W. R. 157.

In a probate suit where the onus of proof lay on the defendant, application was made by the plaintiff, after the defendant had been cross-examined and his case had been closed, for leave to amend the pleadings by adding a defence that the codicil in dispute had been obtained by the defendant's fraudulent misrepresentations, the evidence in support of such defence to be confined to matters arising upon the defendant's cross-examination:—Held, that the amendment might properly be allowed. *Riding* v. *Hawkins*, 58 L. J., P. 48; 14 P. D. 56; 60 L. T. 869; 37 W. R. 575.

Demurrers.]—Where a party takes no step on an order to join in demurrer within a given time, the party demurring is at the expiration of the time entitled to judgment on the demurrer. *Wells* v. *Wells*, 2 Sw. & Tr. 607; 31 L. J., P. 112; 7 L. T. 250.

Pleas by Party Cited.]—A party cited to see proceedings who has appeared, and opposes a testamentary paper, is not allowed to adopt the pleas of the defendant, but should file pleas on his own behalf. *Jones* v. *Williams*, 4 Sw. & Tr. 19; 34 L. J., P. 102; 11 Jur. (N.S.) 288.

8. Evidence.

Subpœna.]—The Probate Court of Ireland has jurisdiction to order a subpœna to issue to compel the attendance of a witness resident in England or Scotland. *Ross* v. *Burke*, Ir. R. 6 Eq. 328.

Examination of Witnesses.]—Neither defendants nor interveners, unless they plead, can be permitted either to examine or to cross-examine witnesses. *Nugent* v. *Nugent*, Ir. R. 7 Eq. 519.

In a probate case, wherein the three plaintiffs propounded the will, which was opposed on various grounds, including a charge of undue influence against all three of the plaintiffs:—Held, that counsel for the plaintiffs was entitled to open the whole case, and, after calling one of the plaintiffs only, to reserve the evidence of the other two plaintiffs. *Faldo* v. *Lovett*, 77 L. T. 220.

Commission to Examine Witnesses.]—In a testamentary suit the question at issue was, whether the will of the deceased was executed in accordance with the provisions of the 7 Will. 4 & 1 Vict. c. 26. One of the attesting witnesses being resident in New Zealand, the court ordered the original will to be transmitted to that colony, attached to the commission for the examination of such witness, an attested copy having been first deposited in the registry, and time having been allowed for the examination of the other witness before one of the registrars of the court by either party. *Forster* v. *Forster*, 33 L. J., P. 113; 10 Jur. (N.S.) 594.

A commission for the examination of a witness in a distant colony will authorise the commissioners to act jointly or severally. *Ib.*

The court has power to issue a commission to examine a witness who is not prevented by illness or by reason of being without the jurisdiction of the court from attending the trial, but will not make such an order without the consent of the other side. *Jones* v. *Williams*, 13 W. R. 696.

The court directed a commission to issue for the examination of the surviving attesting witness to a will, which was in litigation before it, although the affidavit filed to support the application merely stated that the witness was upwards of sixty-six years of age, and frequently suffered from ill-health. *Brown* v. *Brown*, 38 L. J., P. 78; L. R. 1 P. 720; 21 L. T. 339; 17 W. R. 1110.

Under s. 26 of 20 & 21 Vict. c. 77, the court has power to order a commission to issue to examine a person as to her knowledge of a testamentary paper. *Banfield* v. *Pickard*, or *Pickard*, *In goods of*, 50 L. J., P. 72; 6 P. D. 33; 29 W. R. 613; 45 J. P. 508.

Discovery and Inspection.]—The court possesses powers as extensive as the Court of Chancery and the superior courts of common law to compel a discovery, by virtue of the 20 & 21 Vict. c. 77, s. 36, such powers being "auxiliary to the trial of questions of fact by a jury before the court itself." *Hunt* v. *Anderson*, 37 L. J., P. 27; L. R. 1 P. 476; 18 L. T. 33; 16 W. R. 583.

The court will exercise its power of compelling a discovery in cases where a discovery would be granted by the Court of Chancery, in order that parties may not be compelled to resort to the Court of Chancery for assistance in the prosecution of a suit in the Court of Probate. *Ib.*

The court has power to order any documents sufficiently described, and shewn to be material to the inquiry going on before it, to be brought into the registry, and also to order either party to file additional affidavits as to scripts. *Peacock* v. *Lowe*, 36 L. J., P. 91; 16 L. T. 641.

The opposite counsel cannot inspect letters which a witness has with him during examination, though they relate to the cause, without putting them, if required by the other side, in evidence. *Palmer* v. *Maclear*, 1 Sw. & Tr. 149.

Where the executors of a testatrix and their solicitors had in their possession certain old wills and other testamentary documents executed by her, as to the contents of which they refused to give any information to her husband's nephew and niece, who believed themselves to be benefited by the same, the court—an application for a subpœna to bring in such testamentary papers having been refused in the registry—under s. 26 of the Court of Probate Act, 1857, ordered the executors to bring all such testamentary papers into the registry, and that the applicants should be allowed to take copies of them, but that the applicants should pay the costs of such deposit and of the motion. *Shepherd, In goods of*, 60 L. J., P. 102; [1891] P. 323.

Interrogatories.]—The plaintiff sued to recall probate on the ground that the testator was not of sound mind, and that the will was obtained by the undue influence of the defendants, two of whom were the executors, and the third universal legatee. The plaintiff delivered interrogatories for the examination of the defendants, asking what sums they had received from the testator by way of payment for services, loan, or gift, and whether the universal legatee had since the death of testator made over any and what part of the property to the other defendants. The defendants declined to answer these interrogatories as irrelevant:—Held, that the interrogatories must be answered, the period in the first interrogatory being limited to three years. *Holloway, In re, Young* v. *Holloway*, 56 L. J., P. 81; 12 P. D. 167; 57 L. T. 515—C. A.

—— **Memorandum Relating to Will.**]—The court gave leave to two of the executors named in a will to interrogate the solicitor of the testator touching a memorandum which the solicitor had stated to the executors had been executed by the testator in reference to his property. *Lockwood, In goods of*, 66 L. T. 124.

Declaration of Deceased Person.]—Declarations of a deceased person, claiming a limited interest under a particular will of property of which he was in possession, are admissible to prove the fact that such will had a legal existence, and that certain persons were named executors therein. *Sly* v. *Sly*, 46 L. J., P. 63; 2 P. D. 91; 25 W. R. 463.

Copy of Will.]—A copy of a will in the handwriting of one of the attesting witnesses, who was a solicitor's clerk, was found after a lapse of fifty years among the solicitor's papers tied up with other papers belonging to a client who was one of the executors named in the will:—Held, on proof of due search for the original will, that the copy was admissible. *Ib.*

By Affidavit.]—In an action brought for the purpose of proving a will in solemn form, where none of the parties cited had appeared, the court declined to order the execution and attestation of the will, to be proved by affidavit under Ord. XXXVII. r. 1. *Cook* v. *Tomlinson*, 24 W. R. 851.

Affidavits having been sworn before the United States consul in Vera Cruz, as there was no English consul or diplomatic agent there:—Held, that the court had no power to receive them. *De Salazar, In goods of*, 21 W. R. 776.

In a probate suit the court allowed an affidavit, used on a motion formerly made in the suit, and sworn by a witness who had been subpœnaed but was unable to attend, owing to his being, at the time of the hearing, engaged as a witness elsewhere, to be put in evidence, and treated the application as made before the trial under Ord. XXXVII. r. 1. *Drewitt* v. *Drewitt*, 58 L. T. 684. See also *Gornall* v. *Mason*, 56 L. J., P. 86; 12 P. D. 142; 57 L. T. 601; 35 W. R. 672; 51 J. P. 663.

—— **Duchy of Cornwall.**]—On motion for grant of letters of administration of an intestate's effects to His Royal Highness the Prince of Wales, as Duke of Cornwall, it is not necessary, if the facts are sufficiently set forth in the warrant, that they should be verified by affidavit. *Griffith, In goods of*, 53 L. J., P. 30; 9 P. D. 63; 32 W. R. 524; 48 J. P. 312.

—— **As to Birth or Death.**]—Upon an application for administration to the estate of a child, the court allowed the birth and death of the child to be proved by evidence of declarations by

its deceased mother. *Thompson, In goods of*, 56 L. J., P. 46; 12 P. D. 100; 57 L. T. 373; 35 W. R. 384.

Notice with Plea to Call and Cross-examine Witnesses.]—When a party opposing a will has given notice that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of it, he may on the eve of the trial recall such notice, and substitute another expression of his intention to produce, if necessary, witnesses on the trial of the cause. *Edmonds* v. *Lewer*, 13 L. T. 248.

If a party opposing a will does not deliver the notice of his intention not to call witnesses until after he has delivered his plea, he loses the protection against condemnation in costs given by the rule of the court, and the question of costs is left to the discretion of the court. *Bone* v. *Whittle*, 36 L. J., P. 15; L. R. 1 P. 249; 15 L. T. 330.

An attesting witness to a codicil signed a written statement to the effect that it was not duly executed, and it was opposed upon that statement. The court being of opinion that the statement had been unfairly obtained from the witness by the party opposing the codicil condemned her in the costs. *Ib.*

A party who pleads that the deceased did not know and approve of the contents of his will may upon that question cross-examine the witnesses produced by the plaintiff without being liable to costs, if he has given the notice required by r. 41. *Cleare* v. *Cleare*, 38 L. J., P. 81; L. R. 1 P. 655; 20 L. T. 497; 17 W. R. 687.

A conditional notice, that if both attesting witnesses to a will are produced the parties opposing it only intend to cross-examine the witnesses, is a sufficient notice to protect them against condemnation in costs. *Leeman* v. *George*, 37 L. J., P. 13; L. R. 1 P. 542; 17 L. T. 518.

Executor—Error in Name—Correct Description — Admissibility of Evidence — Costs.] — Where there were two persons each of whom answered part of the description of a person named in a will as executor, one as to the name, the other as to the address and occupation, the court, on the principle of *Charter* v. *Charter* (L. R. 7 H. L. 364), admitted evidence of circumstances to shew who it was the testator meant. As this was an error made by the testator himself, costs were granted out of the estate. *Chappell, In goods of*, 63 L. J., P. 95; [1894] P. 95; 6 R. 576; 70 L. T. 245.

Calling Attesting Witnesses.]—The court will not, under 20 & 21 Vict. c. 77, s. 26, order the attendance for examination in open court of the attesting witnesses to a will because they may have declined to give information as to the circumstances attending the execution of the same. *Evans* v. *Jones*, 36 L. J., P. 70; 16 L. T. 299; 15 W. R. 775.

A party having been brought before the court to be examined as to her knowledge of the testamentary papers of the deceased, counsel was permitted to attend on her behalf, to put questions to her, and also to the other persons who had been required to attend on the same inquiry. *Cope, In goods of*, 36 L. J., P. 83.

In contentious proceedings the party propounding a will is not bound to call both the attesting witnesses. *Forster* v. *Forster*, 33 L. J., P. 113; 10 Jur. (N.S.) 594. S. P., *Belbin* v *Skeates*, 1 Sw. & Tr. 148; 27 L. J., P. 56.

But a party proving a will in solemn form is bound to call at least one of the attesting witnesses. *Bowman* v. *Hodgson*, 36 L. J., P. 124; L. R. 1 P. 362; 16 L. T. 392.

It will not suffice to prove the execution by other witnesses who were present at the time, but did not attest the instrument. *Ib.*

When a party propounding a will in a contested suit, the only issue being due execution, and notice under the 41st rule having been given, called one of the attesting witnesses, who gave evidence against the due execution:—Held, that he was bound to call the other attesting witness. *Owen* v. *Williams*, 4 Sw. & Tr. 202; 32 L. J., P. 159; 9 L. T. 86; 11 W. R. 808.

An executor having produced one of the attesting witnesses to the will in dispute, who failed, from mental incapacity or some other cause, to give a rational account of the time and manner of execution, called the second witness. The second witness deposed that the testator did not sign his name or acknowledge his signature in the presence of two witnesses present at the time:—Held, that though the second witness could not be considered a hostile witness, yet he was produced to satisfy the requirements of the law; and that the party producing him might put questions to other witnesses tending to throw doubts upon his general credibility. *Coles* v. *Coles*, 35 L. J., P. 40; L. R. 1 P. 70; 13 L. T. 608; 14 W. R. 290.

Onus probandi—Informal Will—Interested Parties propounding.]—Strict proof must be given of an informal will signed by a mark instead of the usual subscription in full of the testator and obtained from him by one of the propounders, who takes a substantial interest under its provisions, when two of the propounder's relations are witnesses to the signature. Such a will is not invalid, but the onus probandi may be increased by circumstances, and the presumption may even be conclusive against the validity of the instrument. *Donnelly* v. *Broughton*, 60 L. J., P. C. 48; [1891] A. C. 435; 65 L. T. 558; 40 W. R. 209—P. C.

Refusal of Attesting Witnesses to make Affidavit — Insufficient Attestation Clause — Jurisdiction.]—Each of the two attesting witnesses to a will (the attestation clause of which was insufficient) refused to make an affidavit as to due execution. The two executors named in the will made affidavits under Ord. LXXIX. r. 7 as to its due execution in their presence:—Held, that the court had jurisdiction to dispense with the testimony of the attesting witnesses, and would grant probate on the affidavits of the executors. *Ovens, In goods of*, 29 L. R., Ir. 451.

The attestation clause to a will presented for probate being insufficient, the registrar required an affidavit from the witnesses, under r. 4 of the Orders in respect of Non-contentious Business, that the will had been duly executed. Each of the three attesting witnesses—one being a beneficiary and another the wife of a beneficiary—refused to make an affidavit. The executor made an affidavit, under r. 7, stating that the signatures of the testator and attesting witnesses were in their handwriting, and that no other persons were present at the execution:—Held, that the evidence was not sufficient for

a grant of probate under r. 7, but that an order might be made under s. 24 of the 20 & 21 Vict. c. 77 requiring the attesting witnesses to attend for examination as to the execution of the will. *Sweet, In goods of*, 61 L. J., P. 15 ; [1891] P. 400.

Proof of Signature.]—When attesting witnesses are out of the jurisdiction, a will may be proved by evidence of their handwriting, although the will might possibly have been sent to the witnesses. *Wilson* v. *Collum*, 9 L. R., Ir. 150—C. A.

9. Trial.

20 & 21 Vict. c. 77, s. 29.] — Semble, that 20 & 21 Vict. c. 77, s. 29, applies only to procedure. *Oliphant, In goods of*, 1 Sw. & Tr. 525 ; 30 L. J., P. 82 ; 6 Jur. (N.S.) 256 ; 1 L. T. 446.

The rules for practice in the registry are not, under all circumstances, absolutely binding on the court. *Loftus, In goods of*, 3 Sw. & Tr. 307 ; 33 L. J., P. 59 ; 10 Jur. (N.S.) 324 ; 10 L. T. 240.

When Counsel will be Heard.] — All motions required to be made before the court must be made by counsel. *Drake* v. *Morgan*, 27 L. J., P. 3 ; 4 Jur. (N.S.) 32.

Where an executor propounds a will in solemn form, and there are several defendants whose case on the pleadings is substantially the same, the court will hear counsel only for one defendant. *Palmer* v. *Macleau*, 1 Sw. & Tr. 149.

A person suing in formâ pauperis, to whom counsel has been assigned by the court, cannot appear by another counsel until there has been a renunciation or a new assignment of counsel, or he has been dispaupered. *Hamer* v. *Boreham*, 1 Sw. & Tr. 26 ; 27 L. J., P. 107.

Right to Begin.]—In a testamentary suit the party propounding the last will is entitled to begin. So also is a party who alleges only undue influence in opposition to the validity of a will. *Hutley* v. *Grimston*, 48 L. J., P. 68 ; 5 P. D. 24 ; 41 L. T. 531.

At the trial of an ejectment by the heir and a devisee under a prior will as co-plaintiffs against the devisee under a later will, the defendant admitted the heirship, but, nevertheless, the plaintiffs were held entitled to begin, because of the joinder of the devisee as a co-plaintiff. *Purdon* v. *Longford* (*Earl*), Ir. R. 11 C. L. 267.

Consolidation of Actions.] — Two executors had commenced separate defences, and two records had been made up. The court ordered the records to be consolidated, but gave the defendants leave to be represented by counsel separately. *Limb* v. *Holden*, 21 L. T. 731.

Place of.]—In a testamentary suit touching the validity of a will, the jury was discharged without agreeing to a verdict. A rule absolute for a new trial was granted, but on motion by the plaintiff, at whose instance the first trial was had, the court refused to change the venue to Stafford assizes. *Mumford* v. *Shufflebotham*, 21 L. T. 835.

By Ord. XXXVI. r. 1, the statement of claim must contain a paragraph stating the place where the plaintiff proposes the trial of his cause shall take place. Except under special circumstances, the court will not allow causes to be tried out of Middlesex, unless the application is made in the statement of claim in pursuance of this order. *Ridge* v. *Ridge*, 35 L. T. 428.

Directions as to Mode of.]—The court will not make an order as to the mode of trial of a cause unless all the pleadings have been regularly filed in the registry. *Isaacks* v. *Whaley*, 11 W. R. 549.

—— **By the Court itself.**]—The court has power to direct issues of fact to be tried before itself by a jury, reserving issues of law arising out of the pleadings to be tried by itself alone. *Crispin* v. *Doglioni*, 2 Sw. & Tr. 493 ; 31 L. J., P. 64 ; 6 L. T. 694 ; 10 W. R. 810.

When the cause, from the nature of the issues of fact raised, is a more proper one to be tried before the court itself than by a jury, the court will, on the application of one of the parties, direct it to be heard without a jury, unless such application is opposed by the heir-at-law. *Quick* v. *Quick*, 3 Sw. & Tr. 460 ; 33 L. J., P. 108.

When the main question to be decided was presumptive revocation of a will, the court (the defendants who were not heirs-at-law opposing) directed the cause to be tried by the court without a jury. *Smith* v. *Hoad*, 3 Sw. & Tr. 462.

—— **By Jury.**]—The court will make it part of an order for the trial of a cause by a special jury, that if the applicant does not take the requisite steps for striking the jury, the other party may have it tried by a common jury. *Morris* v. *Owen*, 30 L. J., P. 213.

The court refused to allow an issue as to the contents of a destroyed will to be tried by a jury. *James* v. *Foster*, 36 L. J., P. 46 ; 15 L. T. 544 ; 15 W. R. 498.

—— **At the Assizes.**]—Application on behalf of a plaintiff to direct a cause to be tried at the assizes refused. There is no similarity between the position of a plaintiff in the Probate Court and his common law right to lay the venue where he pleases. A testamentary suit is at large, and ought to be tried before the judge, though he has a discretionary power to send an issue to be tried before a judge of assize. *Cooper* v. *Moss*, 1 Sw. & Tr. 143 ; 6 W. R. 866.

In order to save expense and delay, the court will generally allow issues to be tried at the assizes. When, however, the suit was for revocation of probate, and there had been great delay in calling in the probate, and the property was large, the court considered these circumstances sufficient ground for refusing an application by the plaintiff, opposed by the defendant, that the issues should be tried at the assizes, but ordered that the defendant, if successful, should not be allowed more costs than he would have been entitled to if the issues had been tried at the assizes. *Ridgway* v. *Abington*, 3 Sw. & Tr. 3 ; 32 L. J., P. 107 ; 11 W. R. 500.

When the principal issue raised was, whether the deceased had destroyed, with the intention of revoking it, a will which was not forthcoming, the court refused to send the issues for trial at the assizes. *Beech* v. *Rathbone*, 35 L. J., P. 26.

The court has no power to order an issue to be tried at the assizes by a judge without a jury. If both parties wish the issue to be so tried, they should apply to the judge, who will try the issue under the Common Law Procedure Act of 1854, s. 1.

Bushell v. *Blenkhorn*, 35 L. J., P. 75; L. R. 1 P. 89; 13 L. T. 80; 14 W. R. 408.

When issues are tried at the assizes, the postea should be signed by the associate. *West* v. *Goodrick*, 31 L. J., P. 39.

—— **By County Court Judge.**]—When the judge is satisfied that the county court has jurisdiction over a cause, he will direct a cause to be tried before the judge of a county court having jurisdiction, and will also direct the papers in that cause to be transmitted to the county court for the purposes of that suit, but he will give no directions as to the mode in which the cause shall be tried. *Norris* v. *Allen*, 2 Sw. & Tr. 601; 32 L. J., P. 3; 7 L. T. 338; 11 W. R. 32.

It will be for the judge of the county court to decide whether the cause shall be tried before him with or without a jury. *Ib.*

When a county court has jurisdiction, the court may, though application is made on behalf of all the parties to the cause for it to be tried at the assizes, still in its discretion direct it to be tried in the county court. *Dunn* v. *Dunn*, 1 Sw. & Tr. 521; 30 L. J., P. 40; 2 L. T. 24; 8 W. R. 259.

When on an application acquiesced in by all parties to direct an issue to be tried at the assizes, it appeared that the whole property did not amount to 300*l.*, the court required that it should also appear that the personalty was not under 200*l.*, so as to shew that the county court had no jurisdiction. *Ib.*

Where issues in a suit for proving a will in solemn form have been directed to be tried by the judge of a county court, and are found by him against the will, upon a certified copy of his decree being filed in the principal registry, the judge of the Probate Court will pronounce against the will, and decide any questions as to costs. *Thomas* v. *Crowther*, 2 Sw. & Tr. 501; 10 W. R. 861.

When contentious proceedings are referred by the court to a county court, the court has no further jurisdiction, except by way of appeal, over such proceedings. *Macleur* v. *Macleur*, 37 L. J., P. 68; L. R. 1 P. 604.

Amendment of Pleadings at.]—M. A. D., the testatrix, in 1853 made her will, by which she gave her property equally between the plaintiffs, defendants, and interveners. In an action by the plaintiffs propounding this will, it appeared that in 1874 she gave instructions for another will, which would have deprived the plaintiffs of all interest in her estate. In the course of the plaintiffs' case some evidence was given tending to shew that the testatrix was prevented by force and threats from executing the proposed will. The court allowed the pleadings to be amended by adding statements to that effect, and praying for a declaration that the plaintiffs held their shares as trustees for the defendants and interveners. *Betts* v. *Doughty*, 48 L. J., P. 71; 5 P. D. 26; 41 L. T. 560.

Restraining Proceedings in the Court of Probate.]—The defendants, the heir-at-law and some of the next of kin of a deceased person whose will could not be found, joined with the plaintiff in executing a deed confirming the dispositions made in a draft will in favour of the plaintiff. Afterwards, the defendants applied for letters of administration, and opposed the grant of probate to the (draft) will. On motion by the plaintiff, the defendants were restrained by a court of equity from further proceedings in the Court of Probate, but it was held that on the construction of the deed there was nothing in it to prevent the other next of kin from obtaining administration. *Wilcocks* v. *Carter*, L. R. 10 Ch. 440; 32 L. T. 444; 23 W. R. 530.

Issues.]—He upon whom the burden of proving an issue lies is not bound to prove every fact or conclusion of fact upon which the issue depends. From every fact that is proved, legitimate and reasonable inferences may be drawn; and hence, in discussing whether there is, in any case, evidence to go to the jury, what the court has to consider is, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue. *Parfitt* v. *Lawless*, 41 L. J., P. 68; L. R. 2 P. 462; 27 L. T. 215; 21 W. R. 200.

Refusal to Propound Will.]—When the parties interested under a questioned will do not, though cited, propound it, the mode of having the will condemned is by motion, on notice, for administration, notwithstanding such will. *Brennan* v. *Dillon*, Ir. R. 7 Eq. 215. See *S. C.*, Ir. R. 8 Eq. 94.

Survivorship of Husband or Wife ascertained by Petition or Declaration.]—A question whether a husband, who has not been heard of for many years, survived his wife, litigated between the next of kin of the husband and of the wife, may be decided either on a petition or declaration. *Peppercorne* v. *Gardner*, L. R. 3 P. 149.

Objection to either form of procedure is waived by taking any step in the cause. *Ib.*

Postponement of.]—A defendant moved for the postponement of a trial from the spring to the summer assizes, on the ground that a material witness for the plaintiff, whom the defendant wished to cross-examine in court, would be prevented by illness from being present at the trial. The court rejected the motion, as it appeared that the witness would probably die before the summer assizes, and no advantage would, therefore, be gained by the postponement. *Williams* v. *Henry*, 3 S. & T. 463; 33 L. J., P. 110.

10. New Trial.

Within what Time Application made.]—When an issue has been tried at the assizes, the parties are not bound by the rule of court, which directs that an application for a new trial must be made within ten days of the trial, or on the first sitting of the court after the trial. *Charlton* v. *Hindmarsh*, 29 L. J., P. 163.

By way of Appeal from Judge of County Court.]—When a testamentary cause, in which a county court has jurisdiction, has been commenced in, or has been transferred to a county court, the Court of Probate has no power to grant a new trial, or to make any order in the cause, unless it is brought before it by way of appeal from the determination of the judge of the county court in point of law, or upon the admission or rejec-

tion of evidence, under 20 & 21 Vict. c. 77, s. 58. *Zealley* v. *Veryard*, 35 L. J., P. 127; L. R. 1 P. 195; 14 L. T. 769; 14 W. R. 970.

For Further Evidence.]—When the only material question at issue was whether the deceased, who was proved to have been subject to insane delusions, was subject to them at the date of the will, and the evidence of the plaintiff's principal witnesses negatived the existence of delusions at any time, and the defendant's witnesses were unable to fix the date of their first appearance, and the defendant after trial (which terminated in a verdict in favour of the will) discovered evidence tending to throw further light on the question; the court being of opinion that the latter had not received that full investigation and final solution on which it was proper to found a decree, granted to the defendant a new trial upon payment by him of the plaintiff's costs of the former trial. *Young* v. *Dendy*, L. R. 1 P. 344.

Witness Convicted of Perjury.]—In a testamentary suit the jury, being unable to agree, was discharged without giving a verdict. The question in dispute, the capacity of the deceased, was afterwards referred to a second jury, who found in the affirmative and for the plaintiff. Application was made for a new trial on the ground of the verdict being against the weight of evidence, but it was refused. Subsequently the plaintiff was convicted of perjury in reference to the evidence he gave in the suit:—Held, that that circumstance was not in itself sufficient to justify the court in allowing a new trial after an application with that object had been rejected. *Davies* v. *Brecknell*, 42 L. J., P. 39; L. R. 3 P. 88; 28 L. T. 604.

Misdirection.]—On issues directed by the Court of Probate to determine the validity of a will, evidence was given on the part of those propounding the will that the will was read over to the deceased before execution, and this evidence those who impeached the will were not in a position to contradict. The jury found that the will was duly executed, that the testator was at the time of sound mind, that the execution was not procured by undue influence, and that he at the time of the execution knew and approved of the contents of the will except as to the residuary clause, of the contents of which he did not know and approve. A verdict was entered accordingly:—Held, that no new trial ought to be granted, on the ground that the jury was not directed that if they believed that the deceased was at the time of the execution of sound mind, they were bound upon the uncontradicted evidence that the will was read over to the deceased before execution to find that he knew and approved of its whole contents. For (assuming that the jury believed the evidence of reading over, which they were not bound to do merely because no contradiction was in fact given to it) no irrebuttable presumption of knowledge and approval of contents would arise upon proof that the testator was of sound mind, that the will was read over to him, and that he thereupon affixed his signature. *Fulton* v. *Andrew*, 44 L. J., P. 17; L. R. 7 H. L. 448; 32 L. T. 209; 23 W. R. 566.

—— **Grounds in Notice.**]—Ord. XXXIX. r. 3, which requires that the grounds on which misdirection is alleged should be stated in the notice of motion for a new trial, applies to motions in the Probate Division as well as to the Queen's Bench Division. *Pfeiffer* v. *Midland Ry.* (18 Q. B. D. 243) followed. *Murfett* v. *Smith*, 56 L. J., P. 87; 12 P. D. 116; 57 L. T. 498; 35 W. R. 460; 51 J. P. 374.

House of Lords.]—When the Court of Probate granted a rule nisi for a new trial, and made it absolute to enter a verdict, the House of Lords, upon appeal from the order in this form, entertained the original question of new trial, and made the order which ought to have been made in the court below. *Fulton* v. *Andrew*, supra.

On Affidavits—Postponement of.]—The hearing of a motion for a new trial upon affidavits, if formally made in time, will be postponed when there has not been sufficient time to procure the necessary affidavits. *Young* v. *Dendy*, 36 L. J., P. 43.

See also cases under PRACTICE.

11. Appeal.

Generally.]—The judge of the probate division having directed a jury to find in favour of a will, on the ground that the facts proved were no evidence of its having been revoked, and having pronounced in favour of the will, and directed an exception to his ruling to be annexed to the record, there being no record to which it could be annexed, the Court of Appeal directed notice of appeal to be given. *Harris, In re, Cheese* v. *Lovejoy*, 2 P. D. 161; 37 L. T. 294; 25 W. R. 453—C. A.

When a cause has been heard before a judge without a jury, the evidence being given viva voce, the parties may, if they please, apply for a rehearing under r. 60 of the Probate Court Orders of July, 1862, or they may, without doing so, appeal from the decision of the judge, on the facts as well as the law, to the Court of Appeal. *Sugden* v. *St. Leonards* (*Lord*), 45 L. J., P. 49; 1 P. D. 154; 34 L. T. 369; 24 W. R. 479—C. A.

Refusal to grant Letters of Administration.]—A person claiming to be a creditor of an intestate applied for letters of administration, having cited the next of kin, who did not appear. The judge refused the grant, holding that the applicant was not a creditor of the intestate. The applicant appealed:—Held, that, whether the application was contentious or non-contentious business, as to which the court gave no opinion, there was, under s. 19 of the Judicature Act, 1873, an appeal from the judge's decision to the Court of Appeal. *Clook, In re*, 15 P. D. 132; 63 L. T. 536—C. A.

Appeal direct from Chambers.]—Appeals from orders made in chambers are to be subject to the same rules in the probate division as in the chancery division, and will not be entertained unless the judge gives leave to appeal direct, or certifies that he does not require to hear further argument. *Rigg* v. *Hughes, Smith, In re*, ante, col. 592.

From Registrar—Time for.]—The time for appealing from an order made by a registrar of the probate division is the same as that limited by Ord. LIV. r. 21, for appealing from an order of a master: viz. four days from the decision, although a registrar is not mentioned in that

rule. *Patrick, In goods of*, 58 L. J., P. 36; 14 P. D. 42; 60 L. T. 343; 37 W. R. 393—C. A. Affirming 53 J. P. 231.

From County Court.]—Semble, that the appeal was not under the County Courts Act, 1888, but under the Court of Probate Acts, 1857 and 1858, and that, although s. 11 of the act of 1858 repeals s. 54 of the 1857 act, which confers the jurisdiction on the county courts, and the act of 1858, whilst giving jurisdiction to the county court, contains no reference to appeals, yet the acts of 1857 and 1858 must be read together, and the appellate jurisdiction under s. 58 of the 1857 act remains. *Copeland* v. *Simister*, 62 L. J., P. 38; [1893] P. 16; 1 R. 469; 68 L. T. 257; 41 W. R. 269.

To the House of Lords.]—Where there is an appeal from a final decree to the House of Lords, all interlocutory orders are under appeal, and it is unnecessary to obtain leave to appeal from such orders. *Smith* v. *Atkins*, 39 L. J., P. 78; L. R. 2 P. 169; 22 L. T. 247.

Leave to appeal from an order discharging a rule for a new trial was refused on the ground that it was unnecessary, the final decree being under appeal. *Ib.*

See also APPEAL.

12. Costs.

a. *On Opposing or Contesting Proof of Wills.*

Principles.]—A next of kin pleaded undue execution and incapacity in opposition to a will, and called witnesses in support of these pleas. The court pronounced for the will, but refused to condemn the next of kin in costs, undue influence not having been pleaded. *Summerell* v. *Clements*, 3 Sw. & Tr. 35; 32 L. J., P. 33; 8 L. T. 172; 11 W. R. 153.

Failure to establish pleas of undue influence and fraud will, as a rule, be followed by condemnation in costs. *Ib.* S. P., *Browning* v. *Mostyn*, 66 L. J., P. 37.

In deciding whether the costs of an unsuccessful party should be paid out of the estate or not, the court will be guided by the opinion of the judge before whom the issues were tried. *West* v. *Goodrick*, 31 L. J., P. 39.

When the opposition is groundless the unsuccessful opponent of a will, who has pleaded the incapacity of the testator, will be condemned in costs, although he may have acted bonâ fide. *Ib.*

In interest causes the general rule is that the unsuccessful party is condemned in costs, except under special circumstances of misconduct by the opposite parties. *M'Lean* v. *M'Lean*, 1 L. R., Ir. 271.

In a testamentary suit, condemnation in costs includes all the charges of an administrator pending suit. *Fisher* v. *Fisher*, 48 L. J., P. 69; 4 P. D. 231.

The rule and practice by which a party may compel proof of a will in solemn form without liability for costs does not extend to a residuary legatee under a prior will. *Hockley* v. *Wyatt*, 51 L. J., P. 92; 7 P. D. 239; 47 L. T. 354; 46 J. P. 792.

The opponents pleaded undue influence and fraud, but offered no evidence in support of these pleas. The court, to mark its sense of the impropriety of putting these pleas on the record, condemned them in whatever costs the plaintiffs might have incurred to rebut these pleas. *Du Boison* (formerly *Maxwell*) v. *Maxwell*, 28 L. T. 369; 21 W. R. 575.

In a probate suit the plaintiff claimed a decree of intestacy, and the defendant set up a will which had been duly executed by the deceased in her favour, and of which she was sole executrix. The only issue was one of fraud, which had been pleaded by the plaintiff, the alleged fraud being that the defendant had led the testator to believe that she was capable of contracting, and that she had contracted a valid marriage with him, whereas in fact her real husband was then and still alive. The plaintiff opened the case, and in the result, the court found that the plea of fraud had failed, and pronounced for the will in the defendant's favour, but left each party to pay their own costs. *Tute* v. *Tate*, 63 L. T. 112.

The plaintiff, with full knowledge of all the testamentary papers of the deceased, issued a writ, making one person only defendant. After the said defendant had appeared and filed his defence, setting up a later will of the deceased, the plaintiff took out a summons for leave to amend the writ by adding as a defendant the surviving attesting witness of the will which he had propounded by his statement of claim. The proposed second defendant was the solicitor who had prepared the last will propounded in the defence, and also an executor thereunder. The registrar refused the application, holding that it was misconceived, and dismissed the summons with costs. Upon appeal to the judge (in chambers) the proposed amendment was allowed, but the plaintiff was ordered to pay the costs of the defendant, which had been thrown away by reason of the non-joinder of the second defendant in the first instance. The plaintiff was also ordered to pay the defendant's costs on the appeal. *Coke* v. *French*, 76 L. T. 163.

Where Reasonable Grounds exist for.]—A will of a married woman being propounded by her executors, it was opposed by her husband, and a question of domicil was raised upon the pleadings. That question was decided in favour of the executors, and the decision was affirmed, upon appeal to the House of Lords, without costs. The costs of litigation in the Court of Probate were allowed out of the estate, on the ground that the question raised by the party opposing was so doubtful that he was entitled to have it decided by a competent tribunal. *Robins* v. *Dolphin*, 1 Sw. & Tr. 518; 29 L. J., P. 138; 1 L. T. 306; 8 W. R. 177.

A person entitled in distribution, who merely puts executors to strict proof of a will in solemn form, if he has reasonable ground for doing so, will generally be allowed his costs out of the estate. But if it appears that his object in calling for such proof was not simply to obtain the judgment of the Court of Probate as to the validity of the will, but to elicit evidence which might be used by him in a suit instituted in another court, he will not be allowed his costs out of the estate. *Swinfen* v. *Swinfen*, 1 Sw. & Tr. 283; 29 L. J., P. 153.

Where a legal question fairly arises on the papers of a deceased person, the court will order the costs of the losing party to be paid out of the estate. *Thorncroft* v. *Lashmar*, 2 Sw. & Tr. 479; 31 L. J., P. 150; 8 Jur. (N.S.) 595; 6 L. T. 476; 10 W. R. 783.

Where the judge of assize was satisfied with a

verdict for the plaintiff establishing a will, but would not have been dissatisfied with a contrary verdict, the court refused to condemn the defendant in costs. *Bramley* v. *Bramley*, 3 Sw. & Tr. 430; 33 L. J., P. 111, n.; 12 W. R. 992.

If the cause of litigation takes its origin in the fault of the testator, or of those interested in the residue, the costs will properly be paid out of the estate. *Mitchell* v. *Gard*, 3 Sw. & Tr. 275; 33 L. J., P. 7; 10 Jur. (N.S.) 51; 9 L. T. 491; 12 W. R. 255.

If there are sufficient and reasonable grounds, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent. *Ib.*

The costs of an unsuccessful opposition of a will allowed out of the estate, on the ground that the misconduct of those interested in setting up the will had given reasonable ground for the litigation. *Williams* v. *Henry*, 3 Sw. & Tr. 471; 33 L. J., P. 110; 12 W. R. 1015.

H. died in 1856: his widow proved his will in 1860, and died in 1862, making D. her executor, and leaving him all her property. C., next of kin of H., cited D. to bring in the probate of H.'s will. D. propounded it, and C. pleaded thereto; the jury found the issues in favour of D.:—Held, that though C., on the facts proved, might have had reasonable grounds for opposing the probate when taken, yet he had no right to wait till after the widow's death, who might have given important evidence, and then call in the probate, without being liable to costs in case of failure. *Hawkins, In goods of*, 3 Sw. & Tr. 290; 10 L. T. 70.

Costs incurred by Conduct of Testator.]—Doubts having been caused by the condition in which the testatrix had left her testamentary papers, the court allowed the costs of all parties out of the estate, including, besides the costs of the executors propounding the former will, the costs of legatees named in it. *Jenner* v. *Finch*, 49 L. J., P. 25; 5 P. D. 106; 42 L. T. 327; 28 W. R. 520.

Issues of undue execution, incapacity, and undue influence, raised by the next of kin in opposition to a will were found against him. The court, however, refused to condemn him in costs, because it was of opinion that the parties propounding the will, and in whose favour it was made, had acted so as to excite the suspicion of the next of kin; but refused to allow his costs out of the estate, because he had not sufficient grounds for the pleas he had filed. *Broadbent* v. *Hughes*, 29 L. J., P. 134.

A party pleading undue influence does not exempt himself from liability for costs, by giving notice that he intends only to cross-examine the witnesses produced in support of the will. *Harrington* v. *Bowyer*, 41 L. J., P. 17; L. R. 2 P. 264; 25 L. T. 385; 19 W. R. 982.

Primâ facie, an executor is justified in propounding his testator's will, and if the facts within his knowledge at the time he does so tend to shew eccentricity merely on the part of the testator, and he is totally ignorant at the time of the circumstances and conduct which afterwards induce a jury to find that the testator was insane at the date of his will, he will, on the principle that the testator's conduct was the cause of litigation, be entitled to receive his costs out of the estate, although the will is pronounced against. *Boughton* v. *Knight*, 42 L. J., P. 25; L. R. 3 P. 64; 28 L. T. 562.

A testator, before the execution of his last will, which was in favour of his wife, and was propounded by her, had executed another will not so favourable, but the existence of which he concealed from her. The last will being disputed unsuccessfully by parties interested under the prior will:—Held, that the testator had conduced to the litigation, and costs granted out of the estate. *Du Boison* (formerly *Maxwell*) v. *Maxwell*, supra, col. 606.

The court allowed costs out of the estate to the unsuccessful opponent of a will, although he had pleaded undue influence and fraud, being of opinion that the mode in which the testator had executed the will and the conduct of the persons beneficially interested under it, had reasonably excited doubt and suspicion, and justified those pleas. *Orton* v. *Smith*, 42 L. J., P. 50; L. R. 3 P. 23; 28 L. T. 112.

The costs of an unsuccessful opposition to a will must be paid out of the estate in cases where the testator, by his own conduct, and habits and mode of life, has given the opponents of the will reasonable ground for questioning his testamentary capacity. *Davies* or *Davis* v. *Gregory*, 42 L. J., P. 33; L. R. 3 P. 28; 28 L. T. 239; 21 W. R. 462.

In cases where neither the testator by his own conduct, nor the executors or persons interested under the will by their conduct, have brought about the litigation as to its validity, but the opponents of the will, after due inquiry into the facts, entertained a bonâ fide belief in the existence of a state of things which, if it did exist, would justify the litigation, and the opposition is unsuccessful, each party must pay his own costs. *Ib.*

Nine years after a testator's death, his executor produced and propounded a will. It was opposed by the next of kin. The executor accounted for the delay by saying that the testator had desired that it should not be produced until after his mother's death. The will being admitted to probate:—Held, that as the conduct of the testator in desiring its concealment had given the next of kin a reasonable ground for suspicion, she ought not to have been condemned in the costs of her opposition. *Emberley* v. *Trevanion*, 29 L. J., P. 143.

In a case where a will was opposed upon various grounds, but mainly upon an allegation of undue influence, the court found that the defence had not succeeded, and pronounced for the will; but, finding also, as a fact, that the testator's duplicity had led to the litigation, the court gave the costs of all parties out of the estate. *Cousins* v. *Tubb*, 65 L. T. 716.

The court allowed costs out of the estate to the unsuccessful opponent of a will, although he had pleaded undue influence, the court being of opinion that the mode in which the testator had executed his will, and the conduct of the person receiving under it, had reasonably excited suspicion. *Orton* v. *Smith* (supra) followed. *Shortman* v. *Shortman*, 1 R. 465; 67 L. T. 717.

If the mode in which a testator has executed his will raises in the minds of those who are interested in contesting it reasonable grounds for suspicion, and really give rise to litigation ensuing thereon, the court is justified, in the

exercise of its discretion, in ordering the costs of both plaintiff and defendant to be paid out of the estate, notwithstanding the fact that undue influence has been pleaded, but not proved. *Williams* v. *Coker*, 67 L. T. 626.

In a case where a will was disputed on the ground of the testator's sanity, and also on the ground of undue influence, the court, considering that the testator had by his own conduct given rise to considerable doubt as to his sanity, and thereby directly caused the litigation, and also having regard to the fact that the plea of undue influence had never been unduly pressed in taking the evidence of several witnesses on commission, and had also been freely abandoned at the trial, gave the defendants the costs of all the issues out of the estate, notwithstanding the plea of undue influence. *Davis* v. *Gregory* (42 L. J., P. 33; L. R. 3 P. & D. 28) commented on. *Browning* v. *Mostyn*, supra.

At the same time the court, considering that the defendants had by being separately represented incurred unnecessary expense, ordered that one set of costs only—namely, those of the executors of a former will which the defendants set up—should be allowed out of the estate. *Ib.*

See also *Roe* v. *Nix*, ante, col. 232.

Of Next of Kin.]—After a next of kin had taken out administration, a will was propounded by one of the residuary legatees. The court pronounced ~~for~~ the will, but allowed the costs of the next of kin, in obtaining administration and in putting the residuary legatee upon proof in solemn form, out of the estate, as the residuary legatee did not produce the will until after administration had been taken out, and several months after the testator's death, although he was several times desired by the next of kin to produce it if it existed, and he gave no explanation of the delay. *Smith* v. *Smith*, 4 Sw. & Tr. 3; 34 L. J., P. 57; 11 Jur. (N.S.) 143; 13 W. R. 504.

A next of kin, who unsuccessfully opposed a will, was condemned in the costs of another next of kin, whom he had cited to see proceedings, and who had appeared and pleaded, but had taken no other part. *Cross* v. *Cross*, 3 Sw. & Tr. 292; 33 L. J., P. 49; 10 Jur. (N.S.) 183; 10 L. T. 70; 12 W. R. 694.

A next of kin, who contested the validity of a will propounded by the widow of the deceased as the sole executrix named therein, which was pronounced against by the court, but without condemning the widow in costs, is entitled to have his costs out of the estate. *Critchell* v. *Critchell*, 3 Sw. & Tr. 41; 32 L. J., P. 108; 8 L. T. 173; 11 W. R. 401.

An executor propounded a will, to which the defendant, next of kin, pleaded undue execution, but gave no notice of merely cross-examining plaintiff's witnesses. At the trial the plaintiff examined one attesting witness, who proved due execution; the defendant called the other attesting witness, who negatived due execution, and the jury found a verdict establishing the will. The court refused to make an order as to costs. *Ferrey* v. *King*, 3 Sw. & Tr. 51; 31 L. J., P. 120; 7 L. T. 219.

B., acting really in the interest of an infant residuary legatee, succeeded in establishing a will under which she herself took only a trifling legacy, the executor having refused to propound the will. The court held that the circumstances of the case were such as to warrant the opposition to the will, and at first refused to make any order as to costs; but, on the representation that B. was not primarily entitled to the grant with the will annexed, and so might never be in a position to repay herself the expenses of the suit, it ordered her costs to be paid out of the estate. *Bewsher* v. *Williams*, 3 Sw. & Tr. 62; 8 L. T. 290; 11 W. R. 541, n.

A next of kin who calls in probate of a will and gives the usual notice under r. 41 will not, if unsuccessful, be condemned in costs because the sole evidence upon which his opposition to the will is founded must to his knowledge be open to grave suspicion, from being that of an attesting witness who had previously made an affidavit of due execution. Such evidence, though primâ facie untrustworthy, may justify the next of kin in requiring proof of the will in solemn form. *Sheffield* v. *Sheffield*, 43 L. J., P. 72; 31 L. T. 455.

A next of kin who unsuccessfully opposed a will on the ground of incapacity was not condemned in costs where the opposition was induced by a statement of the medical attendant of the deceased, who also attested the will, to the effect that he read over the will to the deceased, who signified his assent by gesture only, and that he could not swear that the deceased was in full possession of his mental faculties. *Tippett* v. *Tippett*, 35 L. J., P. 41; L. R. 1 P. 54; 14 W. R. 410.

—— **After Notice that Will not to be Supported.**]—When a next of kin, who resisted probate on the ground of undue execution, proceeded to trial, despite of notice by the executor that it was not intended to support the will, the court refused to allow him costs out of the estate other than such as the registrar, having regard to the duty cast upon him, might think reasonable. *Fritchley* v. *Fritchley*, 16 L. T. 267.

—— **Propounder withdrawing on Morning of Trial.**]—An attorney propounded, as executor, a will which purported to be attested by two of his clerks. The next of kin pleaded in opposition to the will; issue was joined, and the cause came on for trial before a jury. On the morning of the trial, the counsel for the executor stated that the executor would consent to a verdict for the defendant. In the absence of a satisfactory explanation by the plaintiff of the circumstances under which the will had been propounded and withdrawn, the court condemned him in the costs of the suit. *Richards* v. *Humphreys*, 29 L. J., P. 137.

—— **Intervening after Establishment of Will.**]—A next of kin, though not cited to see proceedings, and not having intervened, if in fact cognisant of a suit between the executor of a will and other next of kin ending in the establishment of the will, is not at liberty in any way to oppose probate of such will being taken; and where, on a verdict, the court had pronounced for a will, and a next of kin so situated had entered a caveat, the court directed probate to issue in spite of the caveat, and condemned the next of kin in costs. *Ratcliffe* v. *Barnes*, 2 Sw. & Tr. 486; 31 L. J., P. 61; 8 Jur. (N.S.) 313; 6 L. T. 658.

The next of kin opposed a will executed in the Mysore territory, in the East Indies, on the ground that the testator was a domiciled Scotsman, and that the execution was invalid by the law of Scotland. Pending the suit, a court of appeal in Scotland, in another case, determined

that the will of a domiciled Scotsman as to personalty was good, if executed according to the lex loci actus. The next of kin gave notice to the plaintiffs that they no longer intended to dispute probate, and when the cause came on for hearing asked for their costs out of the estate; but the court refused to make any order for costs, on the ground that they had raised an issue of fact as to domicil likely to put the plaintiffs to great expense, as well as the issue at law. *Onslow* v. *Cannon*, 2 Sw. & Tr. 136; 30 L. J., P. 165; 4 L. T. 217.

Of Executors.]—A widow twelve months after the death of her husband, who died in Canada, took probate of a will in which she was named executrix. A month afterwards a citation was extracted by the plaintiff calling upon her to bring such probate into the registry, which she did. He then propounded a later will, and after a short delay she withdrew from the suit. The court declined to condemn her in the costs. *Smith* v. *Fletcher*, L. R. 2 P. 20; 21 L. T. 646.

A person was of eccentric habits, but had always managed his own affairs. His executors propounded his will, but failed to support it, the evidence shewing that at the time it was executed he was not of sound mind. The court being of opinion that they had acted in the bonâ fide belief of his capacity, and that they could have had no knowledge of his true life and character until it was disclosed on the trial, allowed their costs out of the estate. *Boughton* v. *Knight*, 42 L. J., P. 41; L. R. 3 P. 64; 28 L. T. 562.

An executor propounded a will in the interest of infant children, and did not become aware, until after the suit was instituted, that it had not been duly executed:—Held, that he was entitled to his costs out of the estate. *Davies* v. *Rees*, 13 L. T. 609.

A will propounded by the executors was opposed by the plaintiff, one of the next of kin. The issues were tried by a jury, and were found for the executors, and the will was pronounced for. After an order nisi for a new trial, on the ground that the verdict was against the weight of evidence, had been granted, the plaintiff abandoned further opposition to the will. The court, upon the application of two of the next of kin, who had been cited to see proceedings and had appeared, but had not pleaded, allowed them to plead and adopt the proceedings already had in the suit. The order for a new trial was ultimately made absolute, the executors being allowed their costs up to that time out of the estate. *Boulton* v. *Boulton*, 37 L. J., P. 19; L. R. 1 P. 456; 17 L. T. 415.

—— **Acting without Reasonable Cause.**]—A nude executor who, without reasonable ground, propounds a testamentary paper, is liable for costs. An executor, if he has any doubt as to the validity of a testamentary paper, should, before propounding it, take security for his costs from the persons interested. *Rennie* v. *Massie*, 35 L. J., P. 124; L. R. 1 P. 118; 14 L. T. 188; 14 W. R. 516.

A nude executor who propounds a testamentary paper, of the validity of which there is no reasonable primâ facie probability, cannot escape from the liability of being condemned in costs by the fact that he takes no interest under the paper. *Roberts* v. *Cowmeadow*, 21 L. T. 367.

Where the will of a deceased lunatic shewed sign of insanity on the face of it, the executors propounding the will were condemned in costs, although they called evidence to shew that they were unaware of the condition of the deceased, and although the plaintiff and her advisers, when applied to, had refused to give them any information as to the facts of her case. *Rogers* v. *Le Cocq*, 65 L. J., P. 68.

—— **Where Negligent.**]—Where the substance of a will has been propounded, and, in most particulars, established by an executrix, through whose negligence the original will had been lost, the court condemned the executrix in the costs of the defendants, and allowed her only such costs as she would have incurred in proving the original will in solemn form. *Burls* v. *Burls*, 36 L. J., P. 125; L. R. 1 P. 472; 16 L. T. 677; 15 W. R. 1090.

—— **Guilty of Misconduct.**]—The executor propounded the will. It was opposed on behalf of the crown by the solicitor for the duchy of Lancaster, who alleged that the deceased had died intestate, leaving no next of kin, and also by persons claiming to be next of kin. The crown and the other defendants, whose interest was accepted by the plaintiff, pleaded the same pleas. All parties were represented by counsel at the trial, and the will was upset. The crown did not ask for costs; and it ultimately turned out that the other defendants were not next of kin. The court, notwithstanding, condemned the executors in the costs incurred by them in the suit. *Goss* v. *Hill*, 40 L. J., P. 39; 25 L. T. 133; 19 W. R. 878.

An executrix having propounded a will in solemn form, the residuary clause, which was in her favour, was opposed, and the court pronounced for the will, excluding the residuary clause from the probate on the ground that it had been obtained by her undue influence. The court condemned her in the costs of the suit, with the exception of the costs of proving the will in solemn form, which she was allowed to take out of the estate. *Smith* v. *Atkins*, L. R. 2 P. 169.

—— **Resisting Renunciation.**]—A testator executed two wills, the first in England and the second in Italy, where he was domiciled at the time of his death. The English will disposed of realty and personalty, and nominated an executor. The second, or Italian will, disposed of the personalty only, but contained a general revocatory clause:—Held, that the second will revoked the first, including the appointment of the executor; and the executor, who resisted revocation of the probate of it, granted to him in common form, was condemned in costs. *Cottrell* v. *Cottrell*, 41 L. J., P. 57; L. R. 2 P. 397; 26 L. T. 527; 20 W. R. 590.

—— **Of a Previous Will.**]—An executor of a former will has the same right as a next of kin to put an executor of a subsequent will upon proof in solemn form, and to interrogate his witnesses, without being liable for costs. *Boston* v. *Fox*, 4 Sw. & Tr. 199; 29 L. J., P. 68.

Probate of a will was opposed by the next of kin, who was also the executor of a previous will. He made an inquiry into the circumstances under which the later will was executed, though he was aware of the execution, and knew the name of the attorney who had prepared it. He pleaded undue execution, incapacity, and

that the will was not the last will of the deceased, but gave notice before the hearing that he did not intend to produce evidence. On cross-examination of a witness in support of the will, facts were elicited which, in the opinion of the court, would have justified the next of kin in calling for proof of the will in solemn form, if they had been known to him; but as they were not known to him until stated by the witness in court, and he had made no previous inquiry as to the circumstances attending the execution, the court refused to allow his costs out of the estate, although it did not condemn him in costs. *Seaton* v. *Sturch*, 29 L. J., P. 195.

Where executors of an earlier will, being disinterested persons, opposed on reasonable grounds a will of later date and the verdict of a jury establishing the latter will, the executors of the earlier will held to be entitled to their costs out of the estate. *Foale* v. *Trethewy*, 9 L. T. 87.

Where a next of kin successfully opposed, on the ground of undue influence exercised by the executor, and by the residuary legatee, a will propounded by the executor, the court condemned the executor in costs. *Nash* v. *Yellowly*, 3 Sw. & Tr. 59; 8 L. T. 290; 11 W. R. 541.

The plaintiff was also executor under an earlier will, which appointed the same residuary legatee, under which the executor took nothing, and the court refused to make an order securing out of the estate to the defendant such costs as he might not be able to recover from the plaintiff. *Ib.*

Interveners.]—A., B. and C., three legatees named in a codicil, sought probate of it in solemn form against the executors named in the will. Subsequently to their having propounded the codicil, D., another legatee, intervened. The executors by their replication, which was given in after D. had intervened, admitted part of the alleged codicil, including the legacy to D.: —Held, that D. was not entitled to have his costs out of the estate. *Shawe* v. *Marshall*, 1 Sw. & Tr. 129.

In interest suits, the unsuccessful party is, as a general rule, condemned in costs. *Wiseman* v. *Wiseman*, 36 L. J., P. 22; L. R. 1 P. 351; 15 L. T. 415.

But when the litigation was caused by the misstatements of the widow herself and the neglect of her attorney to supply the other side with the time and place of the marriage, which was denied, the court declined to condemn in costs the party who challenged her interest, and failed. *Ib.*

Where an intervener in a probate suit had been cited to appear by the defendants, the unsuccessful parties, and had been charged by them with procuring the will by undue influence, the court, in pronouncing for the will, departed from the usual practice of allowing only one set of costs, and condemned the defendants in the costs of the intervener as well as of the executors. *Tennant* v. *Cross*, 56 L. J., P. 74; 12 P. D. 4; 57 L. T. 372.

Of Legatees.]—Where the litigation arose out of the testator's act, and the subsequent conduct of the parties was calculated to excite suspicion, the court allowed a legatee, who resisted probate, costs out of the estate, although the opposition was unsuccessful, and fraud was charged. *Hooton* v. *Dennet*, 17 L. T. 670; 16 W. R. 488. S. P., *Mitchell* v. *Gard*, 3 Sw. & Tr. 276; 33 L. J., P. 7; 10 Jur. (N.S.) 51; 9 L. T. 491; 12 W. R. 255.

Of Heir-at-law.]—An heir-at-law cited to see proceedings, if he pleads, but does not prove suit, in opposition to a will, is, with respect to his liability to costs, in a position analogous to that of the next of kin in the prerogative court who, not content with putting the executors on proof of the will, have brought in an allegation, and have failed to prove it, and therefore an heir will be liable for costs incurred since an entry of a caveat by him. *Fyson* v. *Westrope*, 1 Sw. & Tr. 279; 29 L. J., P. 139; 5 Jur. (N.S.) 250; 7 W. R. 347.

When the court gives the next of kin, who unsuccessfully oppose a suit, their costs out of the estate, on the ground that the litigation was caused by the act of the testator, it will also give the heir-at-law, who has been cited to see proceedings, his costs out of the estate if he has not by his conduct put the estate to unnecessary expense. *Smyth* v. *Wilson*, 36 L. J., P. 82; 15 L. T. 446.

In a suit as to the construction of a will in which the heir-at-law is a necessary party, and is made a party by order of the court, he will be allowed the costs both of proving his heirship, and also of the general suit between the parties, even though he is ultimately unsuccessful. *Singleton* v. *Tomlinson*, 3 App. Cas. 404; 38 L. T. 653; 26 W. R. 722—H. L. (Ir.)

An heir-at-law, who intervenes in a suit and opposes a will, is entitled to costs if the will is pronounced against. *Rayson* v. *Parton*, 39 L. J., P. 20; L. R. 2 P. 38; 21 L. T. 647; 18 W. R. 232.

When issues are found distributively, the party condemned in costs is not liable for costs of issues found in his favour, if separately from the other costs. *Ib.*

—— **Where Notice Given of Intention to Cross-examine only.**] — If the next of kin or others having a right to put executors upon proof of a will in solemn form of law plead undue influence or fraud, they will be liable for costs, although they may have given a notice that they only intend to cross-examine the witnesses produced in support of the will. *Harrington* v. *Bowyer*, 41 L. J., P. 17; L. R. 2 P. 264; 25 L. T. 385; 19 W. R. 982.

A next of kin, who vexatiously calls in probate of a will granted in common form, may be condemned in costs, although he has given notice that he intends only to cross-examine the witnesses produced in support of the will. *Beale* v. *Beale*, 43 L. J., P. 70; L. R. 3 P. 179; 30 L. T. 770; 22 W. R. 712.

Application for—Lapse of Time.]—In a suit between the queen's proctor and a party claiming to be next of kin as to the legitimacy of a deceased, a verdict was given in favour of, and administration granted to, such alleged next of kin. Under the impression that he could pay his costs of suit out of the property of the deceased, no application was made by him to the court at the time of trial in reference to that matter, but in consequence of proceedings in chancery he had been unable to recover such costs. A citation having been served upon him to shew cause why the administration should not be revoked, by reason that he was not one of the next of kin of the deceased, he applied to the court, after the lapse of nine years, to make a formal order that his costs of suit against the queen's proctor should be paid out of the

deceased's estate. The court refused to do so after such lapse of time. *Dyke* v. *Williams*, 40 L. J., P. 33; L. R. 2 P. 239; 24 L. T. 805; 19 W. R. 784.

Codicil Proved by Legatee—Costs as of Executor proving.]—A legatee who has propounded a codicil and succeeded is entitled to the same costs as an executor under similar circumstances. The defendant, the executor of the will of R. C., had proved the will only. The plaintiffs propounded a codicil. The court having pronounced for the codicil, condemned the defendant in costs, and gave the plaintiffs also out of the estate such sum, nomine expensarum, as would cover the additional expenses. *Wilkinson* v. *Corfield*, 50 L. J., P. 44; 6 P. D. 27; 29 W. R. 613; 45 J. P. 440.

Varying Order.]—The court, having made an order that the costs of all parties should be paid out of the estate, with a priority to the costs of the executor, who was universal legatee of the personal and devisee of the real estate, refused to vary such order so as to make the costs a charge upon the real estate in case the personalty was insufficient. *Davies* v. *Reynolds*, L. R. 3 P. 90; 28 L. T. 605.

The court, on decreeing probate, ordered that the costs of a defendant (who was interested in both the real and the personal estate, and had unsuccessfully opposed the will) should be paid out of the assets, although he had pleaded undue influence and fraud, being of opinion that acts of the testator, indicative of delusions, justified the opposition; but, being also of opinion that that was no ground for the pleas of undue influence and fraud, deducted from the defendant's costs what appeared a reasonable sum to cover the additional expense thereby occasioned, and that decree having been passed, the court refused an application on motion on behalf of the widow of the testator to vary it as to the costs. *O'Kelly* v. *Browne*, Ir. R. 9 Eq. 353.

Liability of Applicant.]—A creditor taking out administration with a supposed will annexed does so, though acting innocently, at his own risk, and will not be allowed his costs in a successful action to condemn the will. *Ross* v. *Wallace*, 29 L. R., Ir. 330.

The half-sister of the deceased, in the absence of his widow and in the belief that the widow was dead, took out administration; the court, upon it being shewn that the widow was living, recalled the grant with costs against the half-sister. *Carr*, *In goods of*, 67 L. T. 357.

Notice given that Plaintiff intends only to Cross-examine.]—The defendants, as executors, obtained probate of a will in common form. The plaintiff, after having made inquiries and having received full information from the defendants, issued a writ against them, claiming revocation of the probate. The defendants set up the will, and counter-claimed that the probate should be delivered out to them. The plaintiff, in his reply, set out the grounds upon which he impeached the will, and gave notice, under Ord. XXI. r. 18, that he did not intend to call witnesses, but merely insisted upon proof in solemn form:—Held, that, upon the wording of the rule and the facts of the case, the plaintiff was not protected by the notice from being condemned in the costs. *Tappenden* v. *Lucas*, 65 L. T. 684.

Where the party opposing a will has given notice under r. 41 of the Contentious Business Rules of 1862, that he merely insists on the will being proved in solemn form and only intends to cross-examine the witnesses, the court has no jurisdiction to condemn him in costs, such power only existing where the party giving the notice has taken proceedings to call in the probate. The same rule applies to a defendant in a probate action tried before a county court judge. *Beale* v. *Beale* (L. R. 3 P. 179) distinguished. *Leigh* v. *Green*, 61 L. J., P. 66; [1892] P. 17.

Liability of Married Women.]—In an action for probate which was tried by a jury, and in which the verdict was for the plaintiff:—Held, that the court had power to condemn in costs the defendant, a married woman having general separate estate. *Morris* v. *Freeman*, 47 L. J., P. 79; 3 P. D. 65; 39 L. T. 125; 27 W. R. 62.

Where a will was propounded by a married woman, and her husband had not been joined with her as a party to the suit, the court, having pronounced against the will, condemned the wife in the costs. *Clarkson* v. *Waterhouse*, 2 Sw. & Tr. 378; 29 L. J., P. 136; 6 Jur. (N.S.) 326; 1 L. T. 415.

Parties cited but not appearing.]—The court has power to condemn a party who has been cited, but has not appeared, in the costs of a testamentary suit. *King* v. *Gillard*, 37 L. J., P. 4; L. R. 1 P. 539; 17 L. T. 297.

Order against Infant Defendant, against her Guardian ad litem, and against Defendant who appeared, but had not pleaded.]—The widow, as executrix of the deceased, propounded his will. The defendants were a sister of the deceased, who was one of the next of kin entitled in distribution in case of an intestacy, and an infant niece of the deceased, who would also have been entitled to a share in the event of an intestacy. The infant appeared by her mother, who had been appointed her guardian ad litem. The first-named defendant appeared to the citation, but did not plead; but on behalf of the minor a defence was put in alleging that the testator's marriage with the plaintiff was null and void by reason of the testator's insanity at the time; that the will was not duly executed; that the testator did not know and approve of the contents; that he was not of sound mind at the time he executed it; and that the will was procured by means of the undue influence of the plaintiff. At the trial the court pronounced for the will with costs:—Held, that the first-named defendant, the minor, as well as the guardian of the latter, must be ordered to pay the plaintiff's taxed costs. *Vivian* v. *Kennelly*, 63 L. T. 778.

Liability of Queen's Proctor.]—The court has no authority to condemn the Queen's proctor in the costs of unsuccessful litigation. *Atkinson* v. *Her Majesty's Proctor*, 40 L. J., P. 49; L. R. 2 P. 255; 25 L. T. 164; 19 W. R. 786.

—— **Of Administrator.**] — An order on an administrator to pay costs is equivalent to an order to pay out of the deceased's estate; and if the assets have been properly exhausted, no attachment will be granted for disobedience of such order. *Williams*, *In goods of*, 3 Sw. & Tr. 437; 33 L. J., P. 127; 10 L. T. 583.

Costs of Administrator and Receiver pending Suit.]—The duties of an administrator and receiver pending suit commence from the date of the order of appointment, and if the decree in the action is appealed from, do not cease until the appeal has been disposed of. Costs of the administrator and receiver pending suit and of his solicitor allowed from the date of the appointment until the dismissal of the appeal. *Taylor* v. *Taylor*, 50 L. J., P. 45; 6 P. D. 29; 45 J. P. 457.

—— **Of appointing Administrator pendente lite.**]—The costs of appointing an administrator pendente lite are part of the costs for which the unsuccessful party condemned in costs will be liable. *Fisher* v. *Fisher* or *Fry*, 48 L. J., P. 69; 4 P. D. 231; 44 J. P. 24.

Priority in Payment of.]—One of the creditors of a testator cited the executrix in the probate division to prove the will, and an order was made that she should prove it within a time limited, and that, in default of her doing so, administration should be granted to the creditor. The executrix proved the will, and another friendly creditor then commenced an action in the chancery division against her to administer the estate, and the ordinary administration decree was made. Afterwards the creditor who had issued the citation obtained in the probate division an order that his costs of the proceedings there should be paid out of the estate in priority to other claims:—Held, that the costs of the administration action must be paid in priority to the costs in the probate division. *Mayhew, In re, Rowles* v. *Mayhew*, 46 L. J., Ch. 552; 5 Ch. D. 596; 37 L. T. 48; 25 W. R. 521—C. A.

Set-off of.]—It is a common practice of the court to award each party a portion of the costs of a cause at the final hearing; and the court has jurisdiction to direct a set-off of costs awarded by the court itself as between two parties. *Magrath* v. *Magrath*, Ir. R. 10 Eq. 155.

—— **Of Probate Action when included in Costs of Administration.**]—A testator by his will gave 2,000*l.* to be equally divided among certain legatees, and the residue of his estate to his executrix. The will was proved, but an action to set aside probate wasshortly afterwards commenced in the probate division against the executrix by certain of the legatees, who were also next of kin of the testator, some of the plaintiffs being married women, suing without their husbands. Judgment, with costs of that action, was entered for the executrix on February 7th, 1879; and on March 1st, 1879, an action to administer the testator's estate was commenced in the chancery division by some of the plaintiffs in the probate action and some legatees, the husbands of the married women being now joined as plaintiffs against the executrix as defendant; the executrix thereupon paid the 2,000*l.* (less duty) into court, under an order which provided against its being paid out without notice. The probate division made an order on August 1st, 1879, directing the plaintiffs in the probate action to pay the specified taxed costs thereof to the solicitors of the executrix, and the executrix thereupon obtained a charging order in the administration action against the share in the fund in court of one party only, not being one of the married women. All the shares in question had been assigned or incumbered before the date of judgment in the probate action:—Held, that the costs of the probate action were expenses of administration caused by the acts and conduct of the legatees, and proper to be deducted from the legacies themselves, and to be considered a charge upon them as against assignees, incumbrancers, and husbands taking in right of their wives. *Knapman, In re, Knapman* v. *Wreford*, 50 L. J., Ch. 629; 18 Ch. D. 300; 45 L. T. 102—C. A.

—— **Executrix entitled to set off in Priority to other Claimants.**]—Held, further, that the executrix had not by payment into court of the specific fund resigned any claim she might have against it for expenses of administration, and she was entitled, in priority to all parties claiming, to set off against such share therein, and to be paid the proportionate share of the taxed costs of the probate action. *Ib.*

Orders for Costs enforceable—Action on.]—An order of the president of the probate division that defendant pay plaintiff a named sum, being the amount of plaintiff's taxed costs of a discontinued probate action which defendant had been ordered to pay, may be enforced by an action in the queen's bench division. *Norton* v. *Gregory*, 14 R. 735; 73 L. T. 10—C. A.

—— **Elegit.**]—A defendant in a suit having been condemned in costs, and having neglected to pay them, and having no personal property, but having real property:—Held, that the court had power to issue a writ of elegit. *Heath* v. *Heath*, 29 L. T. 931; 22 W. R. 266.

—— **Sequestration.**]—A writ of sequestration having been issued to enforce an order for the payment of costs, the sequestrator demanded possession of the property, which was in the hands of parties holding under the person whose estate had been sequestered, and was refused possession. The court declined to enforce the sequestration by an attachment against those parties, but granted a writ of assistance to the sheriff for that purpose. *Bayley* v. *Bayley*, 4 Sw. & Tr. 222; 29 L. J., P. 72.

—— **Out of what Estate payable.**]—The court has not jurisdiction to order costs to be paid out of real estate. *Young* v. *Dendy*, L. R. 1 P. 344.

When the court made an order for the payment of the costs of a defendant who was interested in the residue, and had unsuccessfully contested the validity of a will out of the estate, and it afterwards appeared that the residue was insufficient to meet his costs, and that unless the order was varied a specific legatee, who had not appeared at the trial, would have to contribute towards those costs, the court allowed the legatee to enter an appearance in the cause to enable him to move the court to vary the order. *Ib.*

An order of the probate division directing that the costs of a party to proceedings before it shall be paid imports that they shall be paid out of the personalty. *Shaw, In re, Bridger* v. *Shaw*, 64 L. J., Ch. 47; [1894] 3 Ch. 615; 8 R. 555; 71 L. T. 515; 43 W. R. 159.

—— **Out of Realty.**]—A testatrix directed by her will that all her "just debts, funeral and testamentary expenses be paid and discharged out of her real and personal estate." She died possessed of no personal estate, and the litigation in relation to her will was in some measure due

to its concealment by her direction from the defendant in the suit, who opposed probate of it but failed. In the circumstances of the case the court was of opinion that the defendant was entitled to his costs, and ordered such costs to be paid ratably out of the real estate. *Smith* v. *Hopkinson*, 47 L. J., P. 40; 4 P. D. 84; 39 L. T. 124; 26 W. R. 884.

The court has no jurisdiction to order costs to be paid out of real estate; and it is the practice of the court, without having regard to the amount or the ownership of the property, if the case has been a proper one for litigation, and has been properly conducted, to order the general costs to be paid out of the personal estate. *O'Kelly* v. *Browne*, Ir. R. 9 Eq. 353.

A will was proved by A., who acted as executor for some months. Then the probate court, and the house of lords on appeal from the probate court, decreed probate to B. instead, and directed all the costs to be paid out of the estate. There was very little personal estate, but considerable real estate. B. filed a bill for the administration of the real and personal estate of the testator in order to obtain payment of his costs:—Held, that the probate court not having jurisdiction over real estate, could not, neither could the house of lords on appeal from the probate court make an order for payment of the costs out of the real estate. B. therefore was not entitled to a decree for the administration of the real estate, but as he had acted for some time as executor, he was entitled to a decree for the administration of the personal estate. *Charter* v. *Charter*, 45 L. J., Ch. 705; 3 Ch. D. 218; 34 L. T. 412; 24 W. R. 874.

Where the heir-at-law successfully resists probate of a will of real estate, the court of probate has no jurisdiction to charge the real estate with the costs of the litigation. *Newton* v. *Newton*, 13 Ir. Ch. Rep. 245.

—— **Where no Estate out of which Costs can be paid.**]—A wife, having a power of appointment over certain funds, executed the same by will in favour of her husband. The funds were handed over to the husband in the lifetime of his wife, and by him transferred to the trustees of a settlement made in anticipation of the marriage of his adopted daughter. The husband survived his wife but did not prove her will, and died possessed of property of only nominal value. Subsequently his representative propounded the will of the wife, and was opposed by her next of kin. A copy of it was pronounced for, and the costs of the next of kin ordered to be paid out of her estate:—Held, that there was no property out of which such costs could be paid. *Adamson* v. *Hammond*, 43 L. J., P. 17; L. R. 3 P. 141; 29 L. T. 700.

Staying Proceedings until Payment.]—A. died intestate, and letters of administration of his estate were granted to B. as his half-brother and one of the next of kin. C. commenced against B. an action in the chancery division for the administration of the estate of A., alleging that he was the maternal uncle and sole next of kin of the intestate, and that B. was illegitimate. The action was dismissed for want of prosecution, and C. afterwards commenced a fresh action against B. in the probate division for the revocation of the grant of letters of administration. The court refused to order a stay of proceedings until after the payment by C. of B.'s costs in the administration action. *Hankin* v. *Turner*, 48 L. J., P. 28; 39 L. T. 611; 27 W. R. 232.

b. *Taxation of.*

Principle of.]—When the costs of an unsuccessful party are directed to be paid out of the estate, they are not taxed on so liberal a scale as between proctor and client. *Jeffrey* v. *Jeffrey*, 28 L. J., P. 43.

Inasmuch as, by 20 & 21 Vict. c. 77, s. 61, the heir-at-law is put in the same position as the next of kin, the same principles as to costs will be applied in both cases. *Fyson* v. *Westrope*, 1 Sw. & Tr. 279; 29 L. J., P. 139; 5 Jur. (N.S.) 250.

Where there are separate defendants liable to costs, the costs will be distributed in proportion to the issues raised by the respective pleas. *Ib.*

—— **Amount Allowable.**]—On taxation of costs, as between solicitor and client, the schedule of fees, though a guide to the taxing-officer, does not bind him in the exercise of his discretion, which ought to be exercised upon the principle of liability to the solicitor and justice to the opposite party. *Ryan* v. *Dolan*, Ir. R. 7 Eq. 92.

The remuneration for loss of time, which medical witnesses attending during the examination of the other witnesses fairly claim, may be paid to them and charged to the opposite party. *Ib.*

In a testamentary suit a compromise was effected by counsel, one of the terms of the arrangement being that the plaintiff should pay to the defendant's attorney a specified sum for his agreed costs:—Held, that the attorney was entitled to receive the sum specified, and there being nothing to shew that he had acted improperly in respect of the compromise, that his bill of costs was not liable to taxation. *Holditch* v. *Carter*, L. R. 3 P. 115; 29 L. T. 249; 21 W. R. 934.

Counsel.]—In taxing a bill of costs the registrar is not bound, by the practice of the prerogative court, as to the number of counsel to be allowed, but should exercise his own discretion in the matter. *Braine* v. *Braine*, 1 Sw. & Tr. 271; 29 L. J., P. 151.

In making an allowance for briefs, he should consider whether they have been made unnecessarily long and expensive. *Ib.*

The question brought before the court on this application having been raised by the registrar, costs of the application were not allowed against the plaintiff. *Ib.*

The court will not interfere with the registrar's discretion as to the number of counsel to be allowed, and more than one consultation in the progress of a cause is never allowed. *Edwards* v. *Payne*, 1 Sw. & Tr. 276; 29 L. J., P. 145.

Of Special Jury.]—An application for a certificate that a case was a proper one to be tried by a special jury ought to be made immediately after the verdict has been given; and if made on a subsequent day is too late. *Skipper* v. *Skipper*, 29 L. J., P. 133; 2 L. T. 636; 8 W. R. 589. *Dillon* v. *Caffrey*, Ir. R. 6 Eq. 363.

Witnesses.]—In taxing the costs of a trial, the registrar has a discretion as to the number of witnesses whose expenses should be allowed. *Edwards* v. *Payne*, supra.

c. *Security for.*

A plaintiff applied for administration to B. on presumption of death. The defendant appeared in answer to a citation advertised in newspapers,

and alleged that he was B. The court refused to make any order on the defendant to give security for costs. *Robson* v. *Robson*, 3 Sw. & Tr. 568; 34 L. J., P. 6; 10 Jur. (N.S.) 1243; 11 L. T. 459.

A. claimed administration of the estate of R., as having died intestate in 1843. The defendant pleaded that R. did not die in 1843, or at any other time; in fact he alleged that he himself was R. The defendant was permanently resident at Bathurst in New South Wales. The court refused to order the defendant to give security for costs. *Ib.*

The court will not order a plaintiff to find security for costs, when, though a foreigner, he is staying in England at the time of the application, and there is nothing to lead to the supposition that he is on the point of leaving the country. His affidavit in opposition to such an application need not state an intention of permanent residence. *Crispin* v. *Doglioni*, 1 Sw. & Tr. 522; 6 Jur. (N.S.) 303; 1 L. T. 446.

13. Orders and Decrees.

Amendment.]—When the court pronounced for a will, but in its decree made no order as to costs, it subsequently amended its decree by ordering the costs of the legatee, who had propounded it, to be paid out of the estate. *Bewsher* v. *Williams*, 3 Sw. & Tr. 62; 8 L. T. 290; 11 W. R. 541.

Effect and Operation—Generally.]—The 20 & 21 Vict. c. 77, s. 25, enacting that the court shall have the like powers for enforcing its orders as are vested in the court of chancery in relation to suits depending there, does not constitute an order of the probate court for payment of money a charge on land within 1 & 2 Vict. c. 110, s. 13. *Pratt* v. *Bull*, 1 De G., J. & S. 141; 1 N. R. 298; 32 L. J., Ch. 144; 9 Jur. (N.S.) 239; 7 L. T. 702; 11 W. R. 295.

The court of probate has, under 20 & 21 Vict. c. 77, s. 25, the like powers, jurisdiction and authority for enforcing its orders, decrees and judgments as are by law vested in the court of chancery, but the limit of this authority must be found in the powers exercised by the court of chancery prior to the passing of 1 & 2 Vict. c. 110. The court of probate does not possess the additional powers and authority indirectly conferred upon courts of equity for the enforcing of their orders by that statute. *Crispin* v. *Cumano*, 38 L. J., P. 28; L. R. 1 P. 622; 20 L. T. 150; 17 W. R. 535.

—— **Next of Kin bound by.**]—A next of kin, who has been cognisant of and privy to a suit between the executors and another next of kin, is bound by the decision in that suit, although he has not been cited to see proceedings, and has not intervened therein. He cannot therefore reopen the question of the validity of the will after its validity has been established in such suit. *Ratcliffe* v. *Barnes*, 2 Sw. & Tr. 486; 31 L. J., P. 61; 8 Jur. (N.S.) 313; 6 L. T. 658.

A next of kin, although not cited to see proceedings, and not having intervened, is bound by a decree in a suit in which a will is contested by other next of kin, if he was cognisant of the suit and had an opportunity of intervening. *Wytcherley* v. *Andrews*, 40 L. J., P. 57; L. R. 2 P. 327; 25 L. T. 134; 19 W. R. 1015.

But this rule does not apply to a case when the parties to the suit compromise it, and the decree is founded on the compromise. *Ib.*

The court having pronounced for a will in consequence of a compromise between the parties contesting it, a next of kin, who was no party to the suit, although cognisant of it, was held not to be barred by the decree from instituting a fresh suit for the revocation of probate. *Ib.*

—— **Heir-at-Law bound by.**]—The heir-at-law is bound, as to the personalty, by a decree in a testamentary suit of which he was cognisant, although he had not been cited and had not intervened, unless the decree was founded on a compromise or something equivalent to a compromise. *Moran, In goods of*, Ir. R. 8 Eq. 303.

When, therefore, probate has been decreed on a verdict directed in consequence of the non-appearance of a party to the record, an heir-at-law so situated was held to be barred by the decree from disputing, save as to the realty, the validity of the will proved, and condemned in costs. *Ib.*

—— **Acts as an Estoppel.**]—After administration of the effects of E. had been granted to W. as one of the next of kin, a suit was instituted in chancery to which he was a party, and in it the question was raised who were the next of kin of E. The administratrix of S., who in his lifetime was one of the next of kin of E., obtained leave to attend and took part in the inquiry, which resulted in a decision that W. was not one of the next of kin of E. A suit for revocation of the grant of administration was afterwards instituted against W. by A. and B., who were the next of kin of S., the administratrix of S. having renounced her right to administer the estate of E.:—Held, that, although as against the administratrix of S., W. would have been estopped by the decision of the court of chancery from alleging that he was one of the next of kin of E., he was not estopped as against A. and B., as they did not claim through the administratrix of S., and were not parties to the chancery suit. *Spencer* v. *Williams*, 40 L. J., P. 45; L. R. 2 P. 230; 24 L. T. 513; 19 W. R. 703.

Varying Decrees.]—The court has no jurisdiction to vary on motion a decree which had been passed. *O'Kelly* v. *Browne*, Ir. R. 9 Eq. 353.

Compromise—Enforced as a Rule of Court.]—In a cause of proving a will and codicil in solemn form, promoted by the executor against the legal personal representative of the sole next of kin, a compromise having been agreed to, by which a verdict establishing the will and codicil was to be taken by consent for the plaintiff, and the defendant was to receive 2,000*l.* out of the estate:—Held, that the judge had jurisdiction to make the terms of the compromise a rule of court and to enforce it as such. Probate of the will and codicil was decreed to the plaintiff, as executor, the terms of the compromise being embodied in the decree. *Harvey* v. *Allen*, 1 Sw. & Tr. 151.

The court, having jurisdiction, under the judicature act, to enforce the performance of consents, will not refuse to make them rules of court, except in the case of complicated accounts. *Warmingham* v. *Norman*, 1 L. R., Ir. 272.

—— **Refusal of Court to make Terms a Rule of Court.**]—But where on a trial, before a judge of assize and a jury, of issues relating to the

validity of a will, certain executors of which were the plaintiffs, and certain other executors of which were the defendants in the suit, a verdict was taken by consent for the plaintiffs on an agreement made an order of nisi prius, one of the terms of which was that the executors (the defendants) should renounce probate, the judge refused to make the order of nisi prius a rule of the court, on the ground that the court of probate could not properly enforce an agreement that any executors of a will should renounce probate thereof, but granted probate to the plaintiffs. *Hargreaves* v. *Wood*, 2 Sw. & Tr. 602; 32 L. J., P. 8; 11 W. R. 31.

When a suit is compromised before trial, the court will not make the terms of compromise a rule of court, as it has no power to enforce compliance with the terms; but it will make an order that the contentious proceedings be discontinued, and that the terms of compromise be filed in the registry. *Roadnight* v. *Carter*, 3 Sw. & Tr. 421.

Where, at the trial of an issue by agreement between the parties a verdict is taken by consent, such agreement cannot afterwards, even with the consent of the parties, be made a rule of court unless that was a term of the agreement. *Evans* v. *Saunders*, 30 L. J., P. 184.

During the progress of a suit, a compromise was entered into by the parties and committed to writing. A verdict was thereupon given for the validity of the will, but no order made as to the costs. The court, two years afterwards, refused to permit the terms of compromise to be embodied in an order to be enforced as a rule of court. *Carritt* v. *Christian*, L. R. 2 P. 181; 24 L. T. 236.

14. Attachment.

For Nonpayment of Money or Costs.]—When an order has been made for payment of costs, the court will not grant an attachment for nonpayment of them without an affidavit of personal service of the original order on the party to be attached. *Thomas* v. *Crowther*, 2 Sw. & Tr. 501; 10 W. R. 861.

The court will not consider the question of issuing an attachment for nonpayment of a sum of money ordered to be paid, till personal service of the order has been made, or it is shewn that personal service is evaded. *Williams, In goods of*, 3 Sw. & Tr. 437; 33 L. J., P. 127; 10 L. T. 583.

An order that a defendant, "as administratrix of the effects of the deceased," do pay the costs of a suit, is tantamount to an order that such costs should be paid out of the estate, and does not render the party personally liable. *Ib.*

Where, therefore, such an order was made, and there were no assets, the court refused an attachment for nonpayment of the costs. *Ib.*

The court will not allow an attachment to issue against a party for nonpayment of costs pursuant to an order, unless there are affidavits by all the persons to whom those costs are payable that they have not been paid. *Bayly* v. *Bayly*, 29 L. J., P. 146.

The same strictness will not be required before issuing a sequestration. *Ib.*

Against Married Women.]—Where the court has condemned the defendants in costs, and has made an order upon them for the payment of the same, it will refuse to direct an attachment to issue against them for noncompliance with that order, on their stating, on affidavit, that they are married women and have no separate property. *Harris* v. *Bradbury*, 2 Sw. & Tr. 459; 31 L. J., P. 86; 6 L. T. 163; 10 W. R. 447.

An attachment will not be granted against a married woman for disobedience of an order for payment of costs if she has no separate property. But the onus of establishing that fact lies upon her; and if she does not appear, upon a motion for an attachment, of which she had notice, the court will grant the attachment. *Parker* v. *Hick*, 3 Sw. & Tr. 436; 33 L. J., P. 154.

For refusing to bring in Will.]—A person served with a subpœna under 20 & 21 Vict. c. 77, s. 26, to bring in a testamentary paper, failed to comply with it. On a motion for an attachment against him:—Held, that, in accordance with Ord. XLIV. r. 2, the party proceeded against must have notice of the application in the first instance. *Baigent* v. *Baigent*, 1 P. D. 421; 33 L. T. 462; 24 W. R. 43.

The court granted an order for an attachment against A. for disobedience of a subpœna to bring in a will; but directed that the attachment should lie in the registry for eight days after notice to A. of its having issued, before proceedings should be taken to enforce it. *Simmons* v. *Dean*, 27 L. J., P. 103.

The application for such attachment is contentious business. *Ib.*

Where a subpœna has been personally served upon an individual to bring in a testamentary paper, and such individual fails to comply therewith, the court will not at once order an attachment to issue against him, but will make a preliminary order that he shall attend in court to be examined in reference to his possession of such paper. *Parkinson* v. *Thornton*, 37 L. J., P. 3.

The executors appointed in a will intermeddled in the estate, but did not take probate of the will. Having been cited to do so, and not having obeyed the citation within the time limited by it, an attachment was applied for against them. The court refused to order an attachment in the first instance, but directed that a peremptory order should be served upon them to take probate within ten days. *Mordaunt* v. *Clarke*, 38 L. J., P. 45; L. R. 1 P. 592; 19 L. T. 610.

For not filing Inventory.]—See *Marshman* v. *Brooks*, post, col. 626.

15. Writ of Sequestration.

For Nonpayment of Costs.] — The court granted a writ of sequestration for nonpayment of costs on an affidavit by the attorney that he had not received them, and that the parties to the suit had informed him that they also had not received them, notice of the motion having been given. *Bayly* v. *Bayly*, 29 L. J., P. 146.

The court refused to enforce a writ of sequestration for nonpayment of costs in a testamentary cause by an attachment against the tenants, who held under the person whose estate had been sequestered, and who refused to give up possession, but ordered a writ of assistance to the sheriff to be issued. *Bayley* v. *Bayley*, 29 L. J., P. 72.

In a testamentary suit an order was made on the defendant, both as executor of the original defendant and as being himself a party, to pay the taxed costs. The costs not having been paid within the time appointed, and the defendant being abroad, a writ of sequestration issued against his real and personal estate. A large

amount of stock was standing in the books of the Bank of England to the credit of the defendant, as executor of the original defendant in the suit, and a dividend was due thereon:—Held, that the court of probate had no authority to make an order upon the Bank of England (without their assent) to pay over such dividends to the sequestrators. *Crispin* v. *Cumano*, 38 L. J., P. 28; L. R. 1 P. 622; 20 L. T. 150; 17 W. R. 535.

16. Other Matters of Practice.

Statute.]—55 Vict. c. 6 *provides for the recognition in the United Kingdom of probates and letters of administration granted in British possessions.*

Photographing Signatures.]—The court will allow a photograph to be taken of signatures to a document purporting to be signed by an alleged testator when it thinks a proper case has been made. *Neilson* v. *Underwood*, Ir. R. 4 Eq. 59.

Appointment of Receiver.]—The court of chancery may appoint a receiver of personal estate pending the grant of probate, delayed on account of a caveat having been entered where a suit in the probate court has not been actually constituted. *Parkin* v. *Seddons*, 42 L. J., Ch. 470; L. R. 16 Eq. 34; 28 L. T. 353; 21 W. R. 538.

The court will also, under the same circumstances, appoint a receiver pendente lite of the rents of real estate, if neither the devisee nor the heir-at-law is in actual possession. *Ib. See also Cases* ante, col. 482.

Receiver—Security of Guarantee Society.]—The security of a guarantee society may be taken in the case of a receiver in a probate action. *Carpenter* v. *Solicitor to the Treasury, Stokes, In goods of*, 51 L. J., P. 91; 7 P. D. 235; 46 L. T. 821; 31 W. R. 108; 46 J. P. 663.

Presumption as to Death—Advertisements.]—The court refused to dispense with the usual advertisement in newspapers before presuming the death of a sailor who had been last heard of in 1859 as then about to sail from New Zealand to China in a barque now believed to have been lost. *Atkinson, In goods of*, Ir. R. 7 Eq. 219.

Marking Papers.]—A will, with the necessary affidavits, was forwarded to the executor in India. The several papers were returned correct in every respect save that the will was not marked by the person before whom the executor was sworn, as required by r. 49 of Rules and Orders, 1862. The court, under the circumstances, dispensed with the rule, and decreed probate. *Williams, In goods of*, 17 L. T. 484; 16 W. R. 406.

Caveats.]—Executors of a will affecting realty cannot be prevented from obtaining probate in common form by a caveat entered by the heir-at-law, if he has not been cited. *Young* v. *Ferrie*, 4 Sw. & Tr. 210; 29 L. J., P. 69; 5 Jur. (N.S.) 1318.

If an heir-at-law enter such a caveat, it is not necessary for the executors to deliver a declaration; and if they do so, and the heir-at-law does not plead to it, he will not be condemned in the costs incurred in delivering it. *Ib.*

A married woman, under the powers given to her by her marriage settlement, executed a will. Subsequently the marriage was dissolved, and the will itself was destroyed by burning. Administration having been taken by her next of kin, was called in by the residuary legatee named in the will, who propounded the same, and the next of kin made no defence. A caveat had been entered by the person interested under the settlement in case the deceased had not duly executed a will; but such caveat was not warned by the party propounding the will. The court directed that the caveat should be warned, in order that the party who had entered it might intervene, if he thought proper. *Ming* v. *Ming*, 36 L. J., P. 51; 16 L. T. 69; 15 W. R. 718.

A receiver pendente lite cannot be appointed where a caveat has been entered and warned, and appearance has been entered, but no writ has been issued. *Parker, In re, Dearing* v. *Brooks* (infra, col. 627), explained. *Salter* v. *Salter*, 65 L. J., P. 117; [1896] P. 291; 75 L. T. 7; 45 W. R. 7—C. A.

Inventories.]—An attachment will be granted against a married woman for non-compliance with a citation calling upon her to file an inventory in the registry of an estate of which she is administratrix. *Baker* v. *Baker*, 2 Sw. & Tr. 380; 29 L. J., P. 138.

An administrator in custody under an attachment, obtained by the persons entitled in distribution, for not filing an inventory, is not entitled to be discharged from custody upon his filing such inventory, except upon payment of costs. *Marshman* v. *Brookes*, 32 L. J., P. 95; 11 W. R. 549.

The court has no jurisdiction to compel an administrator, who obtained his grant of administration from an ecclesiastical court before January, 1858, to file an inventory of the goods of deceased in the registry. By 20 & 21 Vict. c. 77, s. 87, such inventories are returnable only into the court of chancery. *Bouverie* v. *Maxwell*, 36 L. J., P. 3; L. R. 1 P. 272; 15 L. T. 137; 15 W. R. 89.

Bringing into Registry Testamentary Papers.]—It is not sufficient, in order to make out the title to a term of years, with the view of obtaining administration, to refer to deeds deducing such title in affidavits; the deeds themselves must be brought into the registry. *Keene, In goods of*, 1 Sw. & Tr. 265; 28 L. J., P. 34.

Subpœna to bring Scrip into Registry—Contempt of Court.]—Where a writ of subpœna was issued in a non-contentious matter directing R., a solicitor, to bring into the probate registry a scrip which was stated to be, but which was not in fact, in his possession or control:—Held, that his non-compliance with the subpœna was not under the circumstances a contempt; that the fact that he had not followed the practice general in such a case (and compulsory in a contentious matter) of filing an affidavit explaining the reason for his non-compliance, with which practice he was acquainted, was not a contempt. *Emmerson, In re, Rawlings* v. *Emmerson*, 57 L. J., P. 1—C. A.

Non-contentious Proceedings — Declaration instead of Oath of Foreigner.]—Upon application by three German executors, all resident in

Germany, for probate of a will, one of the executors declined to take the usual oath, on the ground that he was not allowed to do so by the laws of his place of residence, and the registrar of the principal probate registry declined to accept his declaration in lieu of the usual oath, but the court accepted the declaration, and ordered that probate should issue in favour of all three executors. The rules of the supreme court do not apply to non-contentious probate business. *Caspari, In goods of*, 75 L. T. 663.

Taking Wills out of Registry.]—The court will not allow a will in its custody to be taken out of its jurisdiction on any alleged necessity for the furtherance of justice. It must presume that other courts, when satisfied that the original document is withheld by a competent authority, will admit secondary evidence. *Manfredi, In goods of*, 1 Sw. & Tr. 135; 6 W. R. 792. S. P., *Holl, In goods of*, 1 Sw. & Tr. 136, n.; 27 L. J., P. 38.

When an executor is in this country, the court will allow a will, which has been brought into the registry for the purpose of obtaining probate, to be delivered out to the executor, in order that he may be sworn thereto before a commissioner, on an exemplified copy of it being left in the registry. *Gibbs, In goods of*, 28 L. J., P. 90.

Receiver — Injunction — Executor intermeddling with Estate.]—An executor before obtaining probate, and without the consent of his co-executor, intermeddled with assets and made preparations to sell them. The court granted leave to the co-executor to issue a writ for an injunction and for a receiver. *Moore, In goods of*, 57 L. J., P. 37; 13 P. D. 36; 58 L. T. 386; 36 W. R. 576; 52 J. P. 200.

—— **Application before Probate — Chancery Division.**] — The Judicature Act, 1873, s. 25, sub-s. 8, enables any judge of the high court to appoint a receiver of a deceased's estate (before grant of probate or administration), notwithstanding the absence of lis pendens; but applications for any such order being on the way to probate proceedings are properly made in the probate division, and if made elsewhere will not be encouraged. *Parker, In re, Dearing* v. *Brooks*, 54 L. J., Ch. 694.

Grant with Omission—Mistake in Date of Reference.]—A testatrix executed a will in 1887, and a subsequent will in 1889, by which she revoked all previous wills. In 1891 she executed a codicil which by mistake was described as a codicil to the will of 1887:—Held, that probate might be granted of the codicil, together with the will of 1889, with the reference to the will of 1887 omitted. *Gordon, In goods of*, 61 L. J., P. 132; [1892] P. 228; 67 L. T. 328.

Words of Revocation included in Will without Knowledge of Testatrix.]—A testatrix by her will constituted her illegitimate son her universal legatee and one of her executors. After the execution of the will, and shortly before her death, she expressed a wish to bequeath part of her furniture and other personal effects to her sister, her sole next of kin and heiress-at-law, and proceeded to write out a bequest giving effect to such wish on a printed form of will, which was duly executed. The form commenced by a clause of revocation; but the testatrix did not fill up the blanks in this part of the form; and the clause was not read over to her at the time of execution, though the rest of the will was, and there was no evidence that she knew of such clause:—Held, that, under the circumstances, probate might be granted of the paper, omitting the clause of revocation, as a codicil to the original will. *Moore, In goods of*, 62 L. J., P. 9; [1892] P. 378; 1 R. 454.

If a testator employs another to convey his meaning in technical language, and that other person (without fraud) makes a mistake in doing it, the mistake is the same as if the testator had employed the language himself. *Collins* v. *Elstone*, 62 L. J., P. 26; [1893] P. 1; 1 R. 458; 67 L. T. 624; 41 W. R. 287.

A lady, after making a previous will and codicil, desired to make a special disposition of a small sum of money payable under a policy of life insurance. She asked an insurance agent to draw up a will carrying out her intentions. He procured a form, which the testatrix executed, containing a revocation clause that was allowed to remain under a misapprehension as to its effect:—Held, that the testatrix, having had the will read over to her, must, in the absence of fraud, be held to have approved as well as known the contents thereof, and probate of the last will only, with the words of revocation, was granted. *Guardhouse* v. *Blackburn* (L. R. 1 P. 109) and *Morrell* v. *Morrell* (7 P. D. 68) followed. *Ib.*

—— **Words introduced per incuriam.**]—However clearly an error can be established in a will, unless words have been inserted by fraud or by mistake without the knowledge of the testator, the court of probate cannot correct it either by the omission of words or by the insertion of other words. *Harter* v. *Harter*, 42 L. J., P. 1; L. R. 3 P. 11; 27 L. T. 858; 21 W. R. 341.

Upon motion to omit from probate christian names transposed in a will:—Held, that this could not be done, as it was not shewn that the testator did not mean those names to be inserted in the will, though he might not have meant so to benefit the persons to whom those names actually belonged. *Durlacher, In goods of*, 75 L. T. 664.

And see *Oswald, In goods of*, 43 L. J., P. 24; L. R. 3 P. 162; 30 L. T. 344. *Dent, In goods of*, 31 L. T. 552; 23 W. R. 417. *Morrell* v. *Morrell*, 51 L. J., P. 49; 7 P. D. 68; 46 L. T. 485; 30 W. R. 491; 46 J. P. 328.

—— **Name of Legatee inserted twice by Mistake.**]—Where a testator in his instructions for his will ordered a sum of 20,000*l.* to be bequeathed to his two daughters, Georgiana and Florence, in equal moieties of 10,000*l.* each, and the conveyancing counsel who settled the will by mistake drafted two clauses in each of which the sum of 10,000*l.* was bequeathed to Georgiana, and the name of Florence was omitted from the draft altogether, and such mistake was repeated in the engrossment, and the will was executed by the testator with such mistake in it, the court being satisfied on the evidence that there had been a bonâ fide mistake, with the consent of all parties admitted the will to probate with the name Georgiana omitted from the second bequest, leaving the interpretation of the clauses as altered to the chancery division. *Boehm, In goods of*, 60 L. J., P. 80; [1891] P. 247; 64 L. T. 806; 39 W. R. 576.

Same House devised twice over — Omission of Adjoining House—Number of House in one Devise struck out.]—A testatrix wished to devise No. 103, E. Road, to A., and No. 105, E. Road, to B., and a draft will was prepared and approved by her carrying out her intentions, but by a mistake in the engrossment both devises were of 103, E. Road, and the will was duly executed without the mistake having been discovered:—Held, on motion, that the court could not substitute 105 for 103; but that it would grant probate of the will with the figures 103 in the devise to B. struck out. *Walkley, In goods of*, 1 R. 480; 69 L. T. 419.

Erroneous Recital—Residuary Gift—Excepted Property—Intention to Exclude.]—Where the will of a testator contains a general residuary gift, then, in order to exclude from that gift a particular property belonging to the testator, and not otherwise disposed of by the will, it is necessary to find a plain and unequivocal intention on the part of the testator not to include that property in the residuary gift, even if it is his to dispose of. *Bagot, In re, Paton* v. *Ormerod*, 62 L. J., Ch. 1006; [1893] 3 Ch. 348; 69 L. T. 399—C. A.

A testatrix, by mistake, recited in her will that she had settled upon A. B. a particular property, which, in fact, was still at her disposition. The will contained other recitals and bequests of other properties, and also a residuary bequest in favour of X.:—Held, that the property mentioned in the recital passed under the residuary gift to X. *Circuitt* v. *Perry* (23 Beav. 275), *Harris* v. *Harris* (Ir. R. 3 Eq. 610), *Hawks* v. *Longridge* (29 L. T. 449), and *Clibborn* v. *Clibborn* (9 Ir. Jur. 381) observed upon. *Ib.*

Torn Will—Incomplete Restoration—Copy.]—The will of a testator was, after his death, torn into pieces by one of his sons while a copy was being made by the executor. Most of the pieces were recovered and gummed together; but there were still some blanks left, and it was in an incomplete form when presented for probate, though the copy shewed what all the words omitted in the blanks had been:—Held, that probate might be granted of the incomplete will and the copy as together constituting the will of the deceased. *Leigh, In goods of*, 61 L. J., P. 124; [1892] P. 82; 66 L. T. 379.

VIII. ESTABLISHMENT OF WILLS AND ISSUE DEVISAVIT VEL NON.

A. General Principles.

Jurisdiction of Court of Equity.]—A court of equity has no jurisdiction to declare what is or is not a man's last will. *Pemberton* v. *Pemberton*, 13 Ves. 297.

A court of equity has no jurisdiction to determine on the validity of a will either of real or personal estate. *Jones* v. *Jones*, 3 Mer. 161.

Will of real estate not to be proved on a reference before the Master. *Lechmere* v. *Brasier*, 2 Jac. & Walk. 289; 22 R. R. 130.

Bill by an heir-at-law for an issue to try the validity of a will made in England dismissed partly on the ground of his acquiescence both in the ecclesiastical court and upon a bill to perpetuate testimony, but principally because the lands lay in Pennsylvania. *Pike* v. *Hoare*, 2 Eden, 182; Ambl. 428.

If a British subject domiciled in a foreign country by his will appoints A. his executor, but makes a disposition of his personal property which, though valid by the laws of England, is invalid by the laws of that foreign country, the court of chancery is at liberty, notwithstanding probate may have been granted to A. in this country, to hold that the will has no operation beyond appointing A. the executor. *Thornton* v. *Curling*, 8 Sim. 310.

A., seised of lands subject to mortgages, devised them to B., in whom the mortgages became vested:—Held, that the court had jurisdiction in a suit instituted by the heir of A., praying the ordinary redemption relief and an issue devisavit vel non, to grant such an issue. *Egmont* v. *Darell*, 14 Ir. Ch. R. 564.

A court of equity has no original jurisdiction to try the validity of a will either of real or personal estate, but where on a bill filed for the removal of terms, or for other equitable relief, the validity of a will of real estate incidentally comes in question, the court will proceed to investigate that question, and will, generally speaking, for the purpose of informing its conscience, direct an issue devisavit vel non. *Middleton* v. *Sherburne*, 4 Y. & C. 358.

On question of validity of devise, issue at law must determine it. *Dawson* v. *Chater*, 9 Mod. 90.

Wills cannot be set aside for fraud and imposition in equity, because if of personal estate they may be set aside in the ecclesiastical court, and if of real estate by issue at law devisavit vel non. *Kerrich* v. *Bransby*, 7 Bro. P. C. 437.

A bill can be maintained by a devisee of the legal estate in real property, who is in possession, for the purpose of establishing the will against the testator's heir-at-law, although the heir has brought no action of ejectment against the devisee. *Boyse* v. *Rossborough*, 1 Kay, 71; 2 Eq. R. 675; 3 De G. M. & G. 817; 23 L. J., Ch. 305; 18 Jur. 205; 2 W. R. 91.

Previously to the statute of frauds the court of chancery frequently took upon itself to determine the validity of wills by inquiry before some of the masters of the court, a practice which has ceased since the case of *Kerrich* v. *Bransby*, supra. *Ib.*

But as early as the time of James I. it appears to have been considered that the proper mode of trying the validity or invalidity of a will of real estate was by a trial at law, the court of chancery reserving power to deal with the case as justice might require. *Ib.*

The proceeding in equity to establish a will against the heir differs very much from assisting to try its validity or invalidity, either by removing the obstacle of an outstanding term, in which case the trial at law would be by ejectment, or by perpetuating testimony concerning the will, because, by a decree establishing the will, the heir-at-law is so bound, that a perpetual injunction would be granted against him, if after such decree he should attempt to impeach the will. *Ib.*

The origin of this jurisdiction is obscure; but, on principle, it cannot arise from the fact of the devise being upon trust, for that can make no difference to the heir, or because the court experiences a difficulty, for then, in all other cases of difficulty occurring under deeds, there would be the same jurisdiction. *Ib.*

Nor can it be for the protection of trustees, because the jurisdiction exists where there is no trust, but only the obstacle of an outstanding

legal estate, which prevents an action at law. *Ib.*

But upon principle and authority there is an inherent equity on the part of the devisee, whether legal or equitable, arising from the mere fact of the devise, to have the will established against the heir. *Ib.*

An averment in such a bill that A. claims to be heir of the testator, supported by a statement that he has sued in that character in Ireland and succeeded, is sufficient. *Ib.*

That the legal estate has been conveyed by the plaintiff to his own trustee since the testator's death cannot give any equity to sustain such a bill. *Ib.* See also *Lovett* v. *Lovett*, infra.

Proving Will of Lands.]—Though it be proper to prove a will of lands in equity, yet the same is not absolutely necessary, any more than it is to prove the deed in equity. *Cotton* v. *Wilson*, 3 P. Wms. 192.

Will of Copyholds.]—There is no case in which the court has established a will of copyholds. Semble, the probate copy of a copyholder's will is sufficient to lead the uses of a surrender to the use of his will. *Archer* v. *Slater*, 10 Sim. 624.

Construction.]—Courts of equity determine on devises of legal estate, as courts of law do. *Sayer* v. *Masterman*, Ambl. 345.

Where a title depends on the words of a will, this is properly determinable in equity, as by a judge and jury at nisi prius. *Tanner* v. *Wise*, 3 P. Wms. 296; Cas. t. Talb. 284.

Practice.]—In a creditor's suit, since the 3 & 4 Will. 4, c. 104, for making the real estate subject to the debts, it is not necessary to establish the will against the heir. *Goodchild* v. *Terrett*, 5 Beav. 398.

When a bill prayed that the rights of all parties interested might be declared, and set forth the testator's will and codicil, and averred that the defendant was untruly described in the codicil as the testator's next of kin and heir-at-law, and that he had obtained probate on an untrue allegation that the executors were dead, there being no distinct averment of the character in which the plaintiff claimed:—A demurrer was allowed with leave to amend. *Parker* v. *Nickson*, 4 Giff. 306; 9 Jur. (N.S.) 196; 7 L. T. 460.

Although it is the rule that a will is only established against the heir from the day of its production, the court allowed, on the application of the plaintiff, that the decree should be dated on the day it was pronounced, though the will was produced on a later day. *Seale* v. *Buller*, 12 Jur. 108.

The court of chancery, in deciding whether the trial of an issue devisavit vel non has or has not been satisfactory, cannot act on precisely the same principles as a court of law, where a similar question might arise on the trial of an ejectment where the same will was in dispute; for in the latter case, if the jury come to an erroneous conclusion, it is open to the defeated party to bring his claim, in a fresh action, under the consideration of a new jury, and so from time to time, until the proceeding should have assumed a character of vexation. But if a verdict is satisfactory to the court of chancery, the effect is for ever to shut out further litigation and inquiry, and the court will put the plaintiff in possession if successful; but if he fails, it will not enable him again to open the question. *Lovett* v. *Lovett*, 3 Kay & J. 1; 2 Jur. (N.S.) 1130; 5 W. R. 5.

An issue devisavit vel non had been directed to try the validity of a later will as to real property, and a time was limited wherein to try it. The plaintiff in the issue claiming under the later will withdrew the record during the pendency of an appeal to the privy council, which resulted in the establishment of that will. An order was made in 1842 directing the issue to be taken pro confesso; and as consequential thereto a subsequent order was made vesting the enjoyment of the property in the claimants under the earlier will:—Held, that there were no special circumstances to take the case out of the usual course. *Townley* v. *Deere*, 1 W. R. 483.

Effect of Issue.]—Bill by heir-at-law against devisee to set aside will as having been obtained by undue influence and misrepresentation from testator, at whose death there were outstanding terms of years and tenancies which would be a bar to ejectment by plaintiff. Issue directed at hearing devisavit vel non; verdict in favour of heir. Motion for new trial refused; and by order on further directions will declared void. Appeal by devisee against the orders directing the issue and declaring the invalidity of the will:—Held, that in such a case, where an action of ejectment is barred by an outstanding term, the fittest relief generally is to restrain the term being set up as a bar, because such a course leaves each party at liberty to assert by legal proceedings what is in substance a mere legal right. But the court of chancery has power to direct the legal question to be tried by an issue, and will use that power in cases where effectual relief would not be given by merely restraining a party from setting up the outstanding term, as where the subject-matter of the devise is a mere equitable right. Difference between the two modes of proceeding discussed and commented upon. In deciding whether the trial of an issue devisavit vel non has been satisfactory, the court of chancery does not act on the same principles as a court of law in ejectment where the same will is in dispute, because, in the latter case, the defeated party may bring a fresh action, but the consequence of a verdict satisfactory to the court of chancery on the issue is to stop litigation for ever. *Boyse* v. *Rossborough*, 6 H. L. Cas. 1; 26 L. J., Ch. 256; 3 Jur. (N.S.) 373; 5 W. R. 414.

Testator by his will devised his lands in Ireland and England to B. The will was disputed by A., the heir-at-law, who filed his bill in Ireland to set it aside. An issue had been directed and a verdict given against the will, and a motion for a new trial refused. B. filed a bill in England to have the will established, and to have it declared that the English estates passed under it:—Held, that the proceedings in Ireland were no bar to B.'s obtaining an issue in England to try the validity of the will, the verdict in Ireland having no authority to conclude the question as to the English estates, although pronounced upon the same will. *Boyse* v. *Rossborough*, 1 K. & J. 124; 3 Eq. R. 78; 24 L. J., Ch. 7; 3 W. R. 8.

A bill filed in 1757 by H., pretending to be a devisee, charging that B., the only son of testator, was illegitimate, and making M. a party (who,

in case of B.'s illegitimacy, was heir-at-law to testator) : issue of devisavit vel non directed ; H. and B. proceed to the trial of that issue, M. taking no part in it ; the issue found in the negative, and bill dismissed in 1770. On a bill filed in 1776 by B. for the possession and title-deeds, he has an equity against H.'s ever insisting on the will, or the illegitimacy, and also against M.'s insisting on the illegitimacy, after having declined to contest it on the issue. *Bond* v. *Hopkins*, 1 Sch. & Lef. 413.

A verdict being against the will, the heir is entitled, although a new trial is directed, to be left in possession, provided no danger of insolvency to answer for the interim rents and profits in the event of the will being established. Devisee casually in the occupation of real estate after death of testator, or let into possession by the favour of the occupiers, acquires no right. The heir on the death of his ancestor in possession may enter and remove everybody, except the widow, who has a right to stay until her dower is assigned to her. *Lloyd* v. *Trimleston (Lord)*, 2 Moll. 81.

B. At Suit of Devisee, Executor, or Trustee.

Against Persons other than Heir-at-Law.]—Devisees, filing a bill to establish a will and carry the trusts into execution, have no right to call upon persons who claim paramount the will, to litigate such claims with them. *Devonsher* v. *Newenham*, 2 Sch. & Lef. 199.

The court of chancery can entertain a suit to establish a will against parties claiming under a prior will, and disputing the plaintiff's claim ; a devisee being entitled to have the will established and his title quieted not only against the heir, but against all persons setting up adverse rights. *Lovett* v. *Lovett*, 3 K. & J. 1 ; 2 Jur. (N.S.) 1130 ; 5 W. R. 5.

E., by her will, dated in 1851, gave landed estates to the defendant and his family. By a will dated in 1853 she revoked that will and gave the property to the plaintiff and his family. By a codicil dated in 1855 she confirmed the latter will, and died shortly afterwards. It was proved that the testatrix was eighty-three at the time of her decease ; that she had always been of a very violent and imperious temper, but had become much less firm in her will, and more under the subjection of others, since 1849 ; that she had always previous to 1853 expressed great bitterness against the branch of the family to which the plaintiff belonged, and had had no communication with him, and there were no other apparent circumstances to alter that feeling. The letter in which the instructions for the will of 1853 were addressed to her solicitor was full of rambling, incoherent hallucinations ; and there appeared to have been at least one other letter of the same description sent by her about the same time. On these grounds the defendant had contested in the ecclesiastical courts, but unsuccessfully, the will of 1853, under which the plaintiff claimed, probate of that will having been granted as of a good will of personalty. The plaintiff then filed a bill against the defendant to have the will of 1853 and codicil of 1855 established as to the realty :—Held, that such a bill would lie against a devisee as well as against an heir-at-law ; and that, consistently with *Boyse* v. *Rossborough* (1 K. & J. 124), the bill could not be dismissed. *Ib.*

But held also, that the court would not in such a case take upon itself to act without the intervention of a jury to decide upon the question of devisavit vel non, i.e. on the questions of capacity in the testatrix or undue influence exerted on her. *Ib.*

A document which had been proved in the course of the proceedings in the ecclesiastical courts, but not in the suit in equity, but which had been referred to by one of the witnesses in the suit in an affidavit, and which moreover had been verified, was allowed to be read, for the purpose, not of inducing the court to make a final decision, but of informing the court of the nature of the case alleged by the defendant to call for examination elsewhere ; and the court being of opinion that there was a primâ facie case for contesting the later will, an issue was directed accordingly. *Ib.*

A testator, being subject to a commission of lunacy, gave by his will certain benefits to his only daughter, a married woman, who was also his heiress-at-law, and declared that if she or her husband, or any person on their or either of their behalf, should dispute his will, or if any proceedings should be taken by any person whomsoever, by any possible result of which any estate or interest could be in any way attainable, by his daughter or her husband, of larger extent than was intended for her by the will, and she and her husband should not formally disavow, stay, or resist such proceedings to the best of their ability, then he revoked the benefits given to her. The heiress-at-law, on occasion of her marriage, and during her minority, had joined with her husband in assigning her expectant interest to the trustees of her marriage settlement. The trustees of the will filed their bill to have the will established and the trusts carried into execution, and adduced proof of the sanity of the testator at the date of his will. To this suit the heiress-at-law and the trustees of the settlement were made parties : —Held, without deciding on the validity of the settlement, that the plaintiffs were bound to prove their title as against the trustees of the settlement, and the court accordingly, at the instance of these trustees, directed an issue devisavit vel non. *Cooke* v. *Cholmondeley*, 2 Macn. & G. 18 ; 2 H. & Tw. 162 ; 19 L. J., Ch. 81 ; 14 Jur. 117. Affirming on this point 15 Sim. 611.

In order to protect the heiress-at-law from the clause of forfeiture contained in the will, the court directed a statement to be inserted in the order that the issue was directed at the instance of the trustees of the settlement. *Ib.*

A testator seised of large real estates made a will, by which he gave certain benefits to his daughter, who was his heir and a married lady, and declared that if she, or her husband, or any person on their or either of their behalf, should dispute his will, or if any proceedings should be taken by any person whomsoever, by any possible result of which any estate or interest could be, in any way, attainable by his daughter or her husband, of larger extent than was intended for her by the will, and she and her husband should not formally disavow, stay, or resist such proceedings to the best of their ability, then he revoked the benefits given to her ; the testator was the subject of a commission of lunacy when he made his will, and continued so until his death. In a suit by the

trustees of the will to establish it, the plaintiffs proved that the testator was of sound mind when he made his will, and there was no evidence to the contrary; nevertheless, the court directed an issue devisavit vel non to be tried, the plaintiffs to be plaintiffs at law, and a gentleman (with whom the husband had entered into a covenant, during the infancy of his wife and in the lifetime of her father, to make a settlement of any estates that she might thereafter become entitled to) to be the defendant at law. *Cooke* v. *Turner*, 15 Sim. 611; 16 L. J., Ch. 487; 11 Jur. 702. See *S. C.*, on appeal, preceding case.

Heir claiming as Devisee—Right to Issue.]—Where the point at issue was the validity of the will of A., and the party claiming under it was, at the time of the institution of the suit the heir-at-law of the testator, while the party opposing it was devisee of the immediate heir of A.:—Held, that the former party claiming as a devisee could not insist upon the privilege of an heir to have an issue as a matter of course. *Lorton* (*Viscount*) v. *Kingston* (*Earl*), 5 Cl. & F. 269.

Against the Heir-at-Law.]—Although a charge for debts created by will on real estate, in aid of the personal estate, does not entitle the executor to sustain a suit to establish the will against the heir, his duty being confined to administer the assets, and leave the parties who become interested in the real estate to work out their interests as they can, yet if one of the executors is also a devisee in trust such suit is proper. If there is no trust, the court does not direct the form of the trial in which to establish the will against the heir, but only takes care that a fair trial shall be had. But if there is a trust, that brings all under the control of the court, and it always directs an issue devisavit vel non, and never an ejectment. *Fingal* (*Lord*) v. *Blake*, 1 Moll. 113.

In a suit by devisees against an heir-at-law, alleging suppression by the heir of the testator's will, and praying delivery up of the premises. No case of suppression was made at the hearing, but the plaintiffs shewed distinctly that the will under which they claimed had existed, and was in the house of the testatrix within two years before her death, during which two years the heir-at-law, with his family, had been living in the house:—Held, that this was a case for an inquiry, and for an issue as to whether the testatrix did devise the lands in manner alleged. *Smith* v. *Spencer*, 1 Y. & C. C. C. 75; 5 Jur. 1056.

A bill, by a devisee of lands who was in possession, for the purpose of establishing a copy of a will which had been abstracted, against the heir-at-law, but raising no case implicating the heir in the abstraction, was retained for a year. The result of an action, in which the copy of the will had been received in evidence, having been in favour of the plaintiff, the court, by its decree, established the will upon and according to the copy, and restrained the defendant from bringing any action to disturb the plaintiff in the enjoyment of the lands devised to him. *Davies* v. *Evans*, 4 De G. & Sm. 440.

A bill to establish a will against an heir-at-law may be maintained at the suit of a mere legal devisee, not charged with any trust or duty under the will. *Boyse* v. *Rossborough*, 6 H. L. Cas. 1; 26 L. J., Ch. 256; 3 Jur. (N.S.) 373; 5 W. R. 514.

A mere legal devisee may file a bill against the heir-at-law of the testator for the purpose of having the will established against him, though no trusts are declared by the will, and though it is not necessary to administer the estate under the direction or decree of a court of equity. *S. C.*, 3 De G. M. & G. 817; Kay, 71; 2 Eq. R. 675; 23 L. J., Ch. 305; 18 Jur. 205; 2 W. R. 91, 290.

A decree of the court of chancery in Ireland, after verdict upon an issue devisavit vel non, does not determine the validity or invalidity of the will, so far as it relates to lands in England, and cannot be pleaded in bar to a suit in this court. *S. C.*, 1 K. & J. 124; 3 Eq. R. 78; 24 L. J., Ch. 7; 3 W. R. 8.

The right of the heir and that of a devisee to this issue distinguished; the former is absolute; the latter is in the discretion of the court. *Ib.*

Issue devisavit vel non granted to a devisee after a decree in Ireland against the will, and an order refusing a new trial; and although subsequently an attesting witness, who had been examined in Ireland, and whose cross-examination was deposed to have been very effective in support of the heir's case, had died, the devisee having appealed to the house of lords, and not appearing to be chargeable with delay, either in the appeal or in this suit. *Ib.*

The possibility that the house of lords might be influenced in the appellant's favour by the result of the English trial, and the consideration that this was a probable motive for the present application:—Held, not to afford ground for refusing or postponing the trial of the issue. *Ib.*

Obiter. The course, where an instrument is clearly established to be invalid as a will, is, that the heir has a right to have it delivered up as a cloud upon his title, unless it affects to pass real estate out of the jurisdiction.

Creditor claiming under Will against Heir-at-Law.]—In a creditors' suit, seeking the application of real estate in the payment of debts, both the heir-at-law and devisees of the debtor being parties, and the will not being admitted by the heir, the court would neither dismiss the bill against the heir, nor direct an issue devisavit vel non at his request, the right of the creditors being paramount. *Spickernell* v. *Hotham*, 9 Hare, 73; 20 L. J., Ch. 629.

—— **In Absence of Heir.**]—Bill to establish will and execution of trusts by sale of estate, heir-at-law not to be found, court cannot pronounce will proved, heir not being before court, but real estate to be sold. *French* v. *Baron*, Dick. 138; 2 Atk. 120.

Will, though proved per testes, not declared well proved in absence of heir, but decreed to be established. *Stokes* v. *Taylor*, Dick. 349. And see *Binfield* v. *Lambert*, *Id.* 337.

Will not declared well proved in absence of heir, but real estate to be sold in pursuance of trust. *Cator* v. *Butler*, Dick. 438.

In a suit to establish a will, and for the administration of real and personal assets, if the heir-at-law of the testator be abroad, it seems the court does not, as in other cases, declare the will well proved, or establish the same, but merely directs the trusts of the will to be carried into execution. *Thompson* v. *Topham*, 1 Y. & J. 556.

If an adult heir-at-law refuse an issue on the hearing of a cause, the court will establish the will against him, though he does not admit it. *Jackson* v. *Barry*, 2 Cox, 225.

On a bill to establish a will against an heir though he made default, the court ordered the proofs to be read, and said that otherwise the will could not be well proved. *Webb* v. *Litcot*, 3 Atk. 25.

Where a bill is not framed to establish a will, and the heir does not dispute it. Semble, that the court has no jurisdiction to declare against the heir the construction of a strictly legal devise as regards the quantum of the subject-matter; but if the heir elects to be dismissed, the court will make such a declaration for the guidance of the trustees. *Stanley* v. *Stanley*, 2 J. & H. 491; 10 W. R. 857.

—— **On Death of Heir pending Suit.**]—If, in a suit to establish a will, the heir admits the will, and dies before the hearing, the derivative heir is bound, and the will need not be proved. *Robinson* v. *Cooper*, 4 Sim. 131. S. P., *Lock* v. *Foote*, *Id.* 132.

—— **Where Heir an Infant.**]—Heir-at-law by his answer admitted the will, but died before the cause was brought to hearing, and left an infant heir; and by a bill of revivor, the infant was made a defendant and the suit revived; it was:—Held, that the will must be proved per testes against such infant heir. *Sleeman* v. *Sleeman*, Dick. 787.

—— **Where Heiress-at-Law a Married Woman.**]—Admission of will by feme covert, heiress-at-law living separate from her husband, sufficient to establish it. *Codrington* v. *Shelburne* (*Earl*), Dick. 475.

The admission of a will, in the separate answer of a married woman, who is the heiress-at-law of the testator, is not sufficient evidence to enable the court to declare the will established. *Brown* v. *Hayward*, 1 Hare, 433; 6 Jur. 847.

C. At Suit of Heir-at-Law.

Two suits were instituted, the one by a residuary legatee, and the other by the heir-at-law. In each suit the plaintiff insisted that the devisee was a trustee of the real estate:—Held, that the heir-at-law was entitled to have the will established against him, and that no administration of the estate could be made until the validity of the devise was ascertained; and on the heir-at-law asking for an issue, it was directed in both suits to ascertain whether the devise formed part of the will; but upon appeal the order for an issue was discharged, liberty being given to the heir-at-law to bring an ejectment. *Taylor* v. *Brown*, 31 L. J., Ch. 453; 10 W. R. 361.

Heir-at-law, not sole plaintiff, bringing bill to establish will, court declared it well proved, and established it. *Penny* v. *Penny*, Dick. 520.

If an heir files a bill stating that his ancestor's will was duly executed and attested, but dies before the cause is heard, leaving an infant heir, the will must be proved. *Hollings* v. *Kirkby*, 15 Sim. 183.

D. Proof of Will.

1. Testamentary Capacity.

Must be Proved.]—When a will is to be established, the testator must be proved to be of sound and disposing mind. *Wallis* v. *Hodgeson*, 2 Atk. 56.

Where a bill is brought to prove a will of land, the sanity of the testator must be proved. Secus, in the case of a deed of trust to sell for payment of debts. *Harris* v. *Ingledew*, 3 P. Wms. 93.

Evidence.]—Letters addressed by deceased persons to a testator, and found after his death in his bookcase among his private papers, with their seals broken (no act being proved to have been done by him in regard to them), are inadmissible in evidence, upon a question as to his competency to make a will. *Wright* v. *Doe* d. *Tatham*, 5 Cl. & F. 670. And see *S. C.*, 2 N. & P. 305; 7 A. & E. 313; 7 L. J., Ex. 340.

In considering the validity of a will, where the only question is, not as to unsoundness, but as to absence of mind of the testator, the court should disregard the contents and dispositions of the will, and be governed solely by the evidence of capacity. *Swinfen* v. *Swinfen*, 27 Beav. 148; 28 L. J., Ch. 849; 5 Jur. (N.S.) 1276.

—— **Interrogatories.**]—Where the evidence proves the execution of a will, but the witnesses have not been examined as to the sanity of the testator, the cause will be adjourned at the hearing, and liberty will be given to exhibit an interrogatory to prove his sanity. *Abrams* v. *Winshup*, 1 Russ. 526.

Questions for Jury.]—In ejectment on the title by heir against devisee—the main issue being whether the will was obtained by undue influence—the judge submitted two questions to the jury—first, whether the testator was, at the time of the execution of the instrument, of sound disposing mind, memory and understanding; secondly, whether he was induced to make the will by the undue influence of W. L. The jury having answered the first question in the affirmative and disagreed as to the second, the judge, being of opinion that there was no evidence of undue influence against the defendant in possession, directed a verdict for him:—Held, that, there being evidence from which, though not directly bearing on the instrument in question, the jury might reasonably infer that the will had been obtained by undue influence, the verdict so directed could not be upheld. *Purdon* v. *Longford* (*Earl*), Ir. R. 11 C. L. 267.

An issue—whether a will was obtained by undue influence—ought not to be submitted to the jury unless there is reasonable evidence that the person charged had influence over the testator; that he exercised that influence over the testator, to the extent of coercion, in relation to the will itself; and that the execution of the impeached instrument was procured by the exercise of such influence as the causa causans of the act itself. *Longford* (*Earl*) v. *Purdon*, 1 L. R., Ir. 75.

An issue—whether a will was obtained by fraud—ought not to be submitted to the jury unless there is reasonable evidence that fraud has been practised; that its influence continued so that the testator was labouring under it at the time he made his will, and that he was by that means induced to make his will. *Ib.*

Upon the trial of the issue, the due execution, the mental competence, and the voluntariness of the act, or absence of undue influence only are inquired into; and evidence touching the legal disability of testator to devise upon another ground ought not to be admitted upon that issue. Upon the return of the verdict establishing the

will, the court will proceed to consider the objections by the heir, against giving it operation: and though the court will not add to the issue devisavit vel non a further issue as to testator's disability to devise legally, the facts upon which that objection is rested being merely allegation in the answer, it might do so if proof was made of the facts, and a reasonable doubt entertained of their effect. *Fingal (Lord)* v. *Blake*, 1 Moll. 113, 158.

On an issue devisavit vel non, the will being impeached on the ground that the testator's mind was impaired by drinking, and was under undue influence on the part of the devisee or his family:—Held, that though the testator was proved to have been addicted to drinking, and to have had delirium tremens a few days before the will, the question was whether he was sane and sensible, and able to understand the nature and contents of the will at the time when it was executed. And, although it was drawn by a son of the devisee (an old friend), and at his house: Held, that if the testator had really requested him to do it, and it was his voluntary and spontaneous act, not under constraint, free from force or fraud, from imposition or importunity, there was no undue influence, and the will was valid. *Handley* v. *Stacey*, 1 F. & F. 574.

New Trial.]—Testatrix was in a state of great bodily disease which tended to affect her brain, and subject to wanderings and delusions previously and subsequently to the execution of the instrument purporting to be her will. An issue devisavit vel non having been directed, a new trial was granted, the court not being satisfied upon the evidence that the case in favour of the will was clearly established, or that there was that absence of continuous delusion at the time of executing the instrument that she was capable of forming and giving effect to a deliberate intention with respect to the disposition of her property. Where a person much depressed by illness, but with his mind calm and clear, gives instructions for a will of a complicated nature, such a will would not be set aside, although on executing it the next day the testator could not have given those complicated instructions, or even fully understood them; but at a time when the mind is incapable of forming an intention, or arriving at it as a new idea, the mere recollection of an intention vaguely expressed in conversation two months before is not sufficient proof of capacity. Distinction between temporary delusions arising from delirium and rooted delusions arising from insanity, principles which guide the court in granting a new trial of an issue. *Bennett* v. *Manchester (Duke)*, 2 W. R. 644.

On an issue devisavit vel non, it appeared that at the time of the will the testator was in extreme old age, and in the last stage of bodily infirmity, bedridden, utterly helpless, and dependent on the care of the plaintiff (sole devisee of the realty), and a nurse (the only legatee), and a physician, an attesting witness, and an intimate friend of the devisee, her own attorney (another witness) having prepared the will, upon instructions elicited by himself from the testator by interrogatories. They had a few days before represented him as "quite incapable of managing his own affairs, or taking care of his person"; and it being admitted that two or three days before he was not competent to make the will, yet the jury being told that if he understood the state of his property and his family, and the effect of the will, and if he had free volition, and the will was really in accordance with his intentions, and there being evidence that it was, a verdict in favour of the will was not disturbed. *Swinfen* v. *Swinfen*, 1 F. & F. 584.

2. Attesting Witnesses or their Handwriting.

Nature of Proof required.]—Chancery requires judgment of ecclesiastical court that an instrument is testamentary, but is not satisfied with proof in that court, but requires the witnesses to be examined again, or if no witnesses proof of signature. *Rich* v. *Cockell*, 9 Ves. 376; 7 R. R. 227.

Under the old practice a disputed will could not be proved vivâ voce at the hearing; but liberty was given, under the new practice, to prove a will in court, and the heir was allowed to cross-examine the witnesses. *Chichester* v. *Chichester*, 24 Beav. 289.

Answer of heir believing that a will was made will not prevent the necessity of its being proved. *Potter* v. *Potter*, 1 Ves. 274; Ambl. 98.

A feme covert has power given her by her husband to make a will; probate of such will per testes is sufficient proof without other proof. *Balch* v. *Wilson*, Pre. Ch. 84.

Plaintiffs by their bill sought, as devisees, to set aside a conveyance executed by the devisor. The defendant, by his answer, admitted that the will (which was made after the wills act came into operation) was duly proved in the ecclesiastical court. By a slip evidence was not adduced of the execution of the will:—Held, that the defect might be supplied; but that the defendant was entitled to require this to be done by an action of ejectment. *Davies* v. *Davies*, 3 De G. & Sm. 698.

In establishing a will, the attestation of all witnesses must be proved, and if not personally, either that they are abroad or dead, and the proof must be positive. In proving will for certain purposes only, such proof as will satisfy the court is sufficient, and in such case leave will be given to exhibit an interrogatory for further proof of will for the former purpose. *Wood* v. *Stane*, 8 Price, 613.

All Witnesses examined if living.]—In a suit to establish a will in equity, all the witnesses to it should be examined, or proof given of their deaths. *Ogle* v. *Cook*, 1 Ves. 177.

Where a will is to be established in equity, it it must be proved by each of the subscribing witnesses, if living, and if dead their death must be substantiated, &c. *Grayson* v. *Atkinson*, 2 Ves. 454.

In every issue devisavit vel non, the court of equity requires that all the attesting witnesses to a will shall, if it is possible to procure their attendance, be examined. *M'Gregor* v. *Topham*, 3 H. L. Cas. 132. Affirming 3 Hare, 488, 496.

On the trial of an issue devisavit vel non, all the subscribing witnesses must be examined, except in cases of necessity, as death, insanity, or absence abroad, or the heir waives his right, and the rule is not merely technical. *Bootle* v. *Blundell*, 19 Ves. 494, 500; G. Coop. 136; 15 R. R. 93.

It is enough to examine one of the witnesses to a will, except where it is proved against the

heir-at-law; in such a case it is necessary to examine all the witnesses. *Brown* v. *Chambers*, Hayes, 597.

When One Witness dispensed with.]—Proof of one of the witnesses of an old will, of whom no account could be given, dispensed with. *M'Kenire* v. *Fraser*, 9 Ves. 5.

One of three witnesses to will not to be found; but on sufficient evidence will declared well executed. *Binfield* v. *Lambert*, Dick. 337.

But in *Bird* v. *Butler* will not declared well executed, but trusts to be performed and carried into execution. *Ib.* note. See *id.* 349.

A motion for a new trial of two issues was made upon three grounds: first, the alleged improper summing up of the judge; secondly, because the weight of evidence was against the verdict; and thirdly, because only one of the attesting witnesses was examined at the trial. The motion was refused, on the ground that, upon the evidence alone, without regard to the summing up of the judge, the court would not have been satisfied, if the jury had given a different verdict; and because the two attesting witnesses, who were not examined, were present in court on the trial of the issue, and tendered to the party moving for a new trial, who declined to examine them. Semble, the rule is not universal, that, on the trial of an issue devisavit vel non, all the attesting witnesses must be examined at law. Semble, that rule does not apply where the bill is filed by the heir-at-law to restrain the devisee from setting up a legal estate as a bar to the ejectment. *Tatham* v. *Wright*, 2 Russ. & M. 31.

Where One Witness Abroad.]—Practice in a suit to establish a will where one of the witnesses is abroad. *Hare* v. *Hare*, 5 Beav. 629; 12 L. J., Ch. 344; 7 Jur. 337.

A subscribing witness to a will disposing of real estate being in Jamaica, his evidence was dispensed with. *Carrington* (*Lord*) v. *Payne*, 5 Ves. 405; 5 R. R. 87.

One of the witnesses being beyond sea, there should have been a commission to examine him, and the court could only direct a trial at law. *Grayson* v. *Atkinson*, 2 Ves. 454.

Where None Available.]—If, after the deaths of all witnesses who could have spoken to the will, which, while they lived, was, after an investigation by the parties interested and under advice, abandoned as invalid, a jury found a verdict in its favour, a court of equity ought not to act upon it. *Lorton* v. *Kingston* (*Earl*), 5 Cl. & F. 269.

Presumption in favour of a will apparently duly executed where one attesting witness was dead, the second denied her signature, but was not to be believed, and the third was of defective memory. *Hitch* v. *Wells*, 10 Beav. 84.

When a deceased had executed testamentary instruments having formal attestation clauses, a will was established upon the presumption omnia esse rite acta, although the attesting witnesses swore that they had no distinct recollection of the transaction. *Reeves* v. *Lindsay*, Ir. R. 3 Eq. 509.

Proof of Handwriting when Allowed.]—Witness to devise of real estate becoming insane, proof of his handwriting was allowed. *Bernett* v. *Taylor*, 9 Ves. 381.

One witness dead and other out of jurisdiction; proof of handwriting allowed. *Banks* v. *Farquharson*, Dick. 167.

Will not allowed to be proved by proof of handwriting of witness without positive proof of his being dead. *Bishop* v. *Burton*, 2 Comyn, 614.

Proof of the handwriting of an attesting witness to a will received under particular circumstances, in order to found a decree establishing the will. *James* v. *Parnell*, Turn. & R. 417.

A will of lands not declared to be well proved, so as to be acted on in a judgment creditors' suit, by proving the deaths and handwritings of two of the subscribing witnesses and the handwriting of the third witness, against whom an attachment had issued for refusing to be examined. To substitute proof of the handwriting of such witness for his personal examination, a bill ought to be filed, not by a judgment creditor, who was entitled, whether the will of the deceased debtor was or was not duly executed, to satisfaction out of his real estate, but by a person whose relief depended on the establishment of the will and the general administration of the assets. *Bomford* v. *Wilme*, Beat. 252.

When it is sought to have a will disposing of real property declared well proved, it must be proved by the three witnesses, or proof of their death and handwriting; but for other purposes, not requiring such a decree, but merely to read it as a legal instrument, one witness to prove it is sufficient. *Concannon* v. *Cruise*, 2 Moll. 332.

3. Onus of Proof.

The onus of proving a will being on the party propounding it, is in general discharged by proof of capacity, and the fact of executions from which the knowledge of and assent to its contents by the testator will be assumed. *Barry* v. *Butlin*, 2 Moore, P. C. 480.

The principles expounded in the cases of *Paske* v. *Ollatt* (2 Ph. 323) and *Barry* v. *Butlin* (supra) that the burthen of proof lies upon the party propounding a will, and that the court is not bound to pronounce in favour of a will unless it is judicially satisfied that it is the last will of a free and capable testator, considered and affirmed. *Browning* v. *Budd*, 6 Moore, P. C. 430.

The execution of a will by a competent testator being duly proved, the presumption is, that the testator was cognisant of its contents, and that the instrument expresses his will, unless there be other circumstances to lead to a different conclusion, or to render it doubtful for the court to act upon that presumption. *Ib.*

It is a settled rule of evidence in the ecclesiastical courts, that if a will traced to the possession of the deceased testator, and last seen there, is not forthcoming at his decease, it is presumed to have been destroyed by himself; and in order to let in secondary evidence of the contents of such will, the party propounding it must rebut the presumption by evidence of a contrary import. The onus of proof lies on the party propounding the will in such cases. *Welch* v. *Phillips*, 1 Moore, P. C. 299.

Proof of the factum of a will, and of the testator's capacity, are not sufficient to encounter suspicious circumstances which may raise a presumption of falsity or fraud, requiring clear and satisfactory evidence to remove it. *Von Stentz* v. *Comyn*, 12 Ir. Eq. R. 622.

It is not necessary to prove the fraud or

imposition. It may in such a case be presumed, the onus of proof lying on the party propounding the will. *Ib.*

4. Proof of Foreign or Colonial Will.

Will established on secondary evidence, the original being in the colonies. *Gardner* v. *Myre*, 4 Beav. 143, n.

Will proved in the West Indies established on production of a tested copy and prerogative probate. *Bayley* v. *Bayley*, 4 Beav. 143, n.

A will proved abroad and retained there established on production of a copy certified under the hand and seal of the proper officer, &c., which had been admitted to probate in the ecclesiastical court here. *Pullan* v. *Rawlins*, 4 Beav. 142. See also the cases on the same point reported, *id.* 143, n., et seq.

A will was proved in the West Indies, and a duly authenticated copy of it was sent to this country, accompanied by an affidavit made by one of the attesting witnesses when the will was proved, showing that the will had been executed and attested pursuant to the Statute of Frauds; and that copy was admitted to probate in this country, and was produced in the court of chancery with the affidavit annexed to it. The vice-chancellor, however, refused to establish the will without full proof of its due execution and attestation. *Rand* v. *Macmahon*, 12 Sim. 553; 6 Jur. 450.

The court of chancery will establish a will made and proved in the colonies on the production of a duly authenticated copy of it, provided the due execution and attestation of the original are proved by the attesting witnesses. *Ib.*

A will of a personal estate which lies in a foreign country may be proved here. *Jauncy* v. *Sealey*, 1 Vern. 397.

E. Bill to Set Aside Will.

Jurisdiction.]—A bill in equity will lie to set aside a will made under the influence of superstitious terrors. *Middleton* v. *Sherburne*, 4 Y. & C. C. C. 358.

A fraud in procuring a will cannot be determined in equity, but must be decided by a trial at law. *Webb* v. *Claverden*, 2 Atk. 424.

After probate of will, court of equity may inquire into fairness of residuary bequest of personal estate. *Marriot* v. *Marriot*, 1 Stra. 666.

Wills cannot be set aside for fraud and imposition in equity, because if of personal estate they may be set aside in the ecclesiastical court, and if of real estate by issue at law devisavit vel non. *Kerrich* v. *Bransby*, 7 Bro. P. C. 437.

Where an heir-at-law filed a bill to set aside as unduly obtained a will, purporting to dispose of real estate, alleging the existence of an outstanding legal estate, or in the alternative to have the benefit of legacies on the ground of their being void under the Mortmain Act, but failed to prove the existence of any outstanding legal estate, the bill was dismissed (without prejudice to the right to file another) as to the former alternative for want of equity, and as to the latter alternative as being premature; Knight Bruce, L.J., who thought that the bill might have been retained to afford an opportunity of bringing on the question of the validity of the will, not agreeing in the dismissal. *Wright* v. *Wilkin*, 4 De G. & J. 141; 7 W. R. 431.

The court of chancery has not jurisdiction to entertain a bill by an heir-at-law against a devisee to set aside a will on the ground of imbecility on the part of the testator, and of the exercise upon him of undue influence, no obstacles existing to prevent the heir-at-law from bringing an ejectment. *Jones* v. *Gregory*, 4 Giff. 468; 33 L. J., Ch. 679; 9 Jur. (N.S.) 1171. Affirmed, infra.

Demurrer to a bill by an heir-at-law for a declaration, that such of the will or paper writing of the testator as related to certain houses, being part of the real estate of the testator, was void, and ought to be cancelled, or that an issue might be directed to try whether the freehold estates of the testator were devised or not, or that the plaintiff might be at liberty to proceed by ejectment for the recovery of such estates, and also for the appointment of a receiver, allowed with costs. *Ib.*

A bill was filed by an heir-at-law to have a will of real estate cancelled on the ground that it had been obtained by the direct fraud of persons taking a beneficial interest under it, of whom the principal defendant was one:—Held, that, notwithstanding the 21 & 22 Vict. c. 27 and 25 & 26 Vict. c. 42, the bill was demurrable, the heir-at-law's remedy being only at law. *S. C.*, 2 De G. J. & S. 83; 10 Jur. (N.S.) 59; 9 L. T. 556; 12 W. R. 193.

After probate of a will of personalty has been granted, the chancery division has no jurisdiction to entertain a suit to set aside testamentary dispositions on the ground of fraud in obtaining the execution of the will, the probate division having exclusive jurisdiction in the matter. *Meluish* v. *Milton*, 45 L. J., Ch. 836; 35 L. T. 82; 24 W. R. 892.

Practice.]—Will is never set aside without issue devisavit vel non. *Pemberton* v. *Pemberton*, 11 Ves. 53.

The course upon a bill by heir impeaching a will is to direct him to bring an ejectment, removing obstacles from terms, &c. *Pemberton* v. *Pemberton*, 13 Ves. 297.

A court of equity will not entertain bill by heir-at-law for setting aside and declaring void an impeached bill, alleged to have been procured to be made under circumstances of fraud charged, unless some obvious definite impediment, which court can see and reach, to proceeding at law by ejectment, be shown by bill to obstruct heir in that (the regular) course, and that although defendants have possessed themselves of all the papers and muniments of the deceased, and threaten to set up outstanding terms. *Jones* v. *Jones*, 7 Price, 663.

Where a jury had found will to be a forgery, and it appearing that the will, which had been proved, was in the custody of the probate court, the court, on motion for a decree, declared that the will must be set aside so far as it related to the real estate, and that the devisees were trustees for the heir-at-law. *Bonser* v. *Bradshaw*, 5 Jur. (N.S.) 86.

Pending a suit for the establishment of a will of real estate, the heir-at-law, who had concurred in the will, and in the establishment of the suit, having commenced actions of ejectment and detinue to recover the estate and the title-deeds, the court, on the application of the trustee, referred it to the master to inquire what proceedings ought to be taken to defend the actions, and restrain the actions in the

meantime. *Edgecumbe* v. *Carpenter*, 1 Beav. 171; 8 L. J., Ch. 17.

Right of Heir to an Issue.]—An heir is entitled to have the validity of a contested will tried upon an issue, or possibly, under the 25 & 26 Vict. c. 42, by a jury before the court of chancery. But when the heir has caused the difficulty, as when he has destroyed the will, or where it is traced into his possession, and he does not produce it, he has no such right. *Hampden* v. *Hampden* (3 Bro. P. C. 551) followed. *Williams* v. *Williams*, 33 Beav. 306; 3 N. R. 100; 9 Jur. (N.S.) 1267; 9 L. T. 566; 12 W. R. 140.

It is at the option of the heir-at-law to have the validity of a will tried in an action of ejectment, or by an issue devisavit vel non. *Grove* v. *Young*, 15 Jur. 810.

Where a bill is filed by an heir-at-law against a devisee to try the validity of a will of real estate, the court, under special circumstances, will direct an issue devisavit vel non, on motion, before the hearing. *Middleton* v. *Shelburne*, 4 Y. & C. 358.

The fact that the validity of a will of great and personal estate executed since the passing of the 7 Will. 4 and 1 Vict. c. 26 has been established before the judicial committee as regards the personal estate, in a proceeding to which the heir-at-law was a party in another capacity, does not take away his right to an issue devisavit vel non. *Stacey* v. *Spratley*, 2 De G. & J. 94; 27 L. J., Ch. 725; 5 Jur. (N.S.) 28. *S. C.*, 4 De G. & J. 199; 28 L. J., Ch. 563; 5 Jur. (N.S.) 503; 7 W. R. 485.

An heir-at-law admitted by his answer the execution of the will under which the plaintiff claimed, but alleged another will, revoking the former and giving the estate to himself, which he said had been destroyed by mistake, but did not go into any evidence of the second will or its destruction:—Held, that he was not entitled to an issue devisavit vel non as to the validity of the first will, though the plaintiff, by reading the statement in the answer as to the second will, had made it evidence. *Whitaker* v. *Newman*, 2 Hare, 299; 12 L. J., Ch. 350; 7 Jur. 231.

An issue devisavit vel non was granted, as to a will alleged to have been forged, on an interlocutory application by an heir-at-law who was plaintiff in a suit against the devisee under the supposed will. *Bonser* v. *Bradshaw*, 4 Jur. (N.S.) 1011; 6 W. R. 427.

—— **To Receiver.**]—Where a bill was filed by an heir-at-law against devisees, alleging that the will was forged, and praying that it might be set aside, that the devisees might be directed to convey the estate to him, and that, if necessary, an issue devisavit vel non might be directed, the court, on motion by the plaintiff for an issue, or that he might be at liberty to proceed by ejectment, and for a receiver, made the order for an issue, but directed the motion for a receiver to stand over till the hearing. *Ib.*

Receiver not appointed on behalf of heir-at-law as against a devisee; the heir must try the question at law. *Knight* v. *Duplessis*, 2 Ves. 360.

Discretion of Court.]—It is not a matter of course to grant an issue at law, devisavit vel non, to the heir-at-law of a testator. In all such cases the court looks at the will, considers the evidence on both sides, and exercises its discretion in the matter; for an heir-at-law can in a court of equity, since the 25 & 26 Vict. c. 42, examine and cross-examine witnesses in open court, and, if he chooses, before a jury. *Cowgill* v. *Rhodes*, 33 Beav. 310; 10 Jur. (N.S.) 86; 9 L. T. 595; 12 W. R. 190.

Where, therefore, the heir-at-law filed a bill for the administration of his testator's estate, and for an issue devisavit vel non, or an action, to try the validity of his will, and the court was satisfied that the evidence already adduced in support of the will outweighed that which was brought or could be brought against it:—Held, that the bill must be dismissed, and with costs. *Ib.*

In a bill filed by an heir-at-law to impeach a will of real estate as having been obtained by undue influence or fraud, the court of chancery has a discretion to direct an issue devisavit vel non, or merely to remove obstacles out of the way of the heir asserting his legal title. The house of lords, on appeal, will not interfere with the exercise of that discretion, unless it appears that injustice has been, or is likely to be its consequence. *Boyse* v. *Rossborough*, 6 H. L. Cas. 2; 26 L. J., Ch. 256; 3 Jur. (N.S.) 373; 5 W. R. 414.

On an application by an heir-at-law to have a will condemned as against the devisees, there being no personal estate to be administered, the court has a discretion to refuse to try the case. *Lawless* v. *Lawless*, Ir. R. 3 Eq. 87.

When the heir-at-law had been party to acts done by the devisees, and parties claiming under the devisees alleged collusion between the heir-at-law and the devisees, the court refused to try the case. *Ib.*

On a bill by an heir praying an issue devisavit vel non, for the purpose of obtaining incidental relief, the court is bound, under 25 & 26 Vict. c. 42, to determine the question without remitting the parties to an action. But, by analogy to the old practice, the court will, in general, direct a trial by jury, and (with a view to the contingency of a motion for a new trial) will direct the trial to be before itself. *Egmont* v. *Darell*, 1 H. & M. 563.

Heir-at-law an Infant.]—Heir-at-law is in cases of wills entitled to issue devisavit vel non; but if counsel for infant heir feels clear, from evidence, that there is no ground to impeach the will, he is well justified in declining to ask an issue. *Levy* v. *Levy*, 3 Madd. 245.

Counsel acting for a minor heir-at-law are justified in exercising their discretion whether or not he ought to take an issue of devisavit vel non. *Knipe* v. *M'Mahon*, 3 Dr. & War. 295.

The court will not generally decree a will to be established against a plaintiff infant heir. *Hills* v. *Hills*, 2 Y. & C. C. C. 327.

—— **A Married Woman.**]—If an heiress-at-law, who is a married woman, does not, at the hearing of the cause, ask an issue to try the validity of a will, the court will not afterwards grant her a rehearing, in order to enable her to obtain an issue. *White* v. *Vitty*, 1 L. J. (O.S.) Ch. 188.

Effect of Acquiescence and Delay.]—Bill by an heir-at-law, for an issue to try the validity of a will made in England, dismissed, partly on the ground of his acquiescence, both in the ecclesias-

tical court, and upon a bill to perpetuate testimony, but principally because the lands lay in Pennsylvania. *Pike* v. *Hoare*, 2 Eden, 182; Ambl. 428.

Heir-at-law is usually entitled to an issue devisavit vel non, and is not liable to pay costs, notwithstanding issue is found against him and will established. *Tucker* v. *Sanger*, M'Cle. & Y. 425.

An heir-at-law contesting his ancestor's will, in a suit to establish it in equity, is not entitled to an issue devisavit vel non to try the validity of it in a court of law in all cases and at any distance of time, but he is not precluded from the exercise of that usual right except by a case of such acquiescence as would bar his possessory right at law (viz., an acquiescence of twenty years) or would put the adverse parties in a much worse situation than they would have been had he disputed the will originally. *Id.* 424. *S. C.*, 13 Price, 119.

An heir who disputes the will may, by long acquiescence, lose his right to have its validity tried at law upon an issue devisavit vel non; and where an heir had acted as devisee in trust under the will for a great number of years, he was refused an issue even to try the question of parcels. *Man* v. *Ricketts*, 7 Beav. 93; 13 L. J., Ch. 194; 8 Jur. 159.

An issue directed to try the validity of a will several years after testator's death, as a will cannot be established against the heir in equity by a decree without an issue or ejectment if he require it, and a person claiming under the will has a right to have its validity established. *Blake* v. *Foster*, 2 Ball & B. 387.

At the hearing of a suit to establish a will an issue was directed at the instance of the heiress-at-law, who was a married woman. Before any trial she and her husband presented a petition, stating that at the urgent request of their children (who were devisees) they had agreed to withdraw all opposition to the will upon being allowed their costs, and praying that the order directing the issue might be discharged upon these terms. Upon this petition an order was made according to the prayer, and purporting to be made upon the consent of the married woman by her counsel. Subsequently a private act of parliament was obtained, authorising leases to be made of the devised estates. The married woman was one of the petitioners for the act, and was excepted from the saving clause, and the act recited the will, and proceeded upon the assumption of its validity. Some years afterwards the married woman presented a petition to rehear the cause. This petition was entitled in the cause, and in the matter of the private act. It stated the subsequent transactions, but not the provisions of the act:—Held, that the preceding transactions did not constitute grounds for taking the petition off the file, and that such grounds were not afforded by the introduction into the petition of statements as to the matters occurring since the hearing, or by the petition being entitled in the matter of the act, or by the omission to set out in it the act itself, especially upon appeal, when these objections of form had not been insisted upon in the court below. *Turner* v. *Turner*, 2 De G. M. & G. 28; 21 L. J., Ch. 422. Varying 15 Jur. 711.

Held, also, upon the rehearing, that the order discharging the direction for an issue was not binding upon the wife, but was upon the husband. *Ib.*

Semble, per Lord Cranworth, that if at the hearing a married heiress-at-law does not ask for an issue she is bound by the decree. *Ib.*

F. Costs.

General Rules.]—The question of the costs of an issue devisavit vel non is in the discretion of the court. *Stacey* v. *Spratley*, infra, col. 650.

When an issue is granted, the costs of the heir are reserved till further directions. *Boyse* v. *Rossborough*, supra, col. 646.

Where a bill is filed to set aside a will, and, upon an issue directed by the court, the verdict of the jury is in favour of the will, and a new trial is refused, the bill will be dismissed without costs, unless the validity of the will could have been tried by ejectment. *Tatham* v. *Wright*, 2 Russ. & M. 31.

Heir-at-law is usually entitled to issue devisavit vel non, and is not liable to pay costs, notwithstanding the issue is found against him and will established. *Tucker* v. *Sanger*, M'Cle. & Y. 425; 13 Price, 609.

When the heir-at-law intervened in a suit which was instituted by the next of kin of the deceased to determine the validity of a will disposing of real and personal property, the court refused, on the will being pronounced invalid, to condemn the heir-at-law in his own costs, though it was shown he had intervened without being cited to do so. *Rayson* v. *Parton*, 18 W. R. 232.

One of the next of kin of a testator instituted a suit for the administration of his estate, and obtained a decree directing inquiries whether the testator died seised of any freehold estate, and, if necessary, who was his heir-at-law. The heir-at-law, on being served with notice of the decree, came in and proved his pedigree:—Held, that he was entitled to the general costs of so doing. *Swift* v. *Swift*, 1 De G. F. & J. 160; 29 L. J., Ch. 121; 1 L. T. 150; 8 W. R. 100.

In a suit to establish a will, one of the witnesses could not depose positively to the due attestation of it; and an issue was directed at the heir's request. The verdict was against the heir; but the court gave him his costs both at law and in equity. *Wright* v. *Wright*, 5 Sim. 449.

Heir-at-law disputing will, though on trial there were shown no grounds for disputing it, yet held he was entitled to his costs at law and equity. *Crew* v. *Joliff*, Pre. Ch. 93.

Bill by devisee against heir-at-law to establish will and execute trusts, but praying no more; plaintiff to pay costs. *Boson* v. *Boson*, Dick. 300.

If an heir-at-law is a creditor, and is brought into court as defendant, the circumstance of his having examined witnesses, and of having failed in the trials of issues at law to ascertain the validity of his ancestor's will, shall not deprive him of his costs in equity. *Burne* v. *Breen*, 1 Ball & B. 308.

As to costs given to heir-at-law where he brings bill to dispute will, or bill against him to establish it. *Blinkehorne* v. *Feast*, Dick. 153.

If heir-at-law infant brings bill and fails, he does not pay costs. *Ib.*

Costs of Heir when Disallowed.]—In what cases an heir-at-law is refused his costs in an issue devisavit vel non. *Tucker* v. *Sanger*, M'Cle. & Y. 439.

Heir-at-law raising a point against a will and

failing, costs were refused to and against him; but an executor or trustee merely submitting a point for opinion of court, though he fail, shall have costs. *Rashleigh* v. *Master*, 1 Ves. 205; 3 Bro. C. C. 99.

An heir-at-law burnt a writing, supposed at the time to be a valid will, but which afterwards on trial was found to be invalid. A bill having been filed to establish this writing as a will against the heir, or, failing that, to establish as a will another writing of earlier date, which had also been destroyed, and which was, at the trial, found to be a valid will, the heir-at-law, at the hearing, admitted that he had burnt the writing, and admitted a copy thereof, but refused to admit a copy of the earlier writing:—Held (on the question of costs), that the heir was not entitled to costs up to the hearing, but that the costs of the issues, and the heir's costs, subsequently to the hearing, were payable out of the estate. *Marriott* v. *Marriott*, 12 W. R. 303.

In suit against heir-at-law to establish will, if he examines witnesses in chief, he must pay his own costs. He is in no such case made to pay the costs of others. *Tucker* v. *Sanger*, supra.

In a suit to establish a will, the bill stated that A., one of the defendants, was the testator's heir. A. admitted it, and disputed the validity of the will, upon which an issue was directed. The verdict was in favour of the will. The plaintiff then discovered that A.'s elder brother had died, leaving two daughters, who were still living, as A. well knew. The court refused to give him his costs, either at law or in equity. *Roberts* v. *Scoones*, 7 Sim. 418.

Bill by devisee, against an heir to prove a will; the heir cross-examines the plaintiff's witness, and refuses to release his right, yet the heir shall have his costs given him on motion; otherwise, if he examines witnesses of his own. *Bidulph* v. *Bidulph*, 2 P. Wms. 185.

Heir-at-law has a right to his costs though he cross-examines plaintiff's witnesses; but if he examines witnesses on his own part he shall not have costs as to that. *Vaughan* v. *Fitzgerald*, 1 Sch. & Lef. 316.

Heir-at-law, defending in formâ pauperis, in a suit to establish a will, was held, under the circumstances, to be entitled only to pauper costs. *Stafford* v. *Higginbotham*, 2 Keen, 147; 6 L. J., Ch. 314.

The devisee for a mortgagee filed his bill against the heir and executor of the mortgagor for a foreclosure, and also made the heir of the mortgagee a party, in order to establish the will against him. This latter party cannot have his costs out of the estate. *Skipp* v. *Wyatt*, 1 Cox, 353.

——**On Pleading Testamentary Incapacity.**]—An heir-at-law questioning the sanity of his ancestor is entitled to an issue devisavit vel non, and if he fails will not be compelled to pay costs, if the circumstances justified him in trying the issue; but costs will not be allowed him. *Smith* v. *Dearmer*, 3 Y. & J. 278.

A will executed under very suspicious circumstances by a testator, whose testamentary capacity there was reasonable ground for disputing, was established, as regarded personal estate, by proceedings before the ecclesiastical court and the judicial committee, to which A. was a party as one of the next of kin. After this, at the hearing of a suit instituted by the devisee, A., who was also the heiress-at-law, asked for an issue devisavit vel non, which was granted. Further evidence was adduced on both sides, and the jury found in favour of the will:—Held, that under the circumstances the asking for an issue was not such vexatious and unreasonable conduct as to make A. liable to pay costs, but that as she had asked for it with full knowledge of the former proceedings, the result of which made it very improbable that she could succeed on the trial, she ought not to receive costs. *Stacey* v. *Spratley*, 4 De G. & J. 199; 28 L. J., Ch. 563; 5 Jur. (N.S.) 503; 7 W. R. 485.

Where an heir-at-law disputes the will of a testator on the ground of a testator's insanity, and the court directs an issue at law, the result of which is to establish the will:—Held, that the heir-at-law is not deprived of his costs on account of his having failed to prove his assertion of insanity, unless he made the assertion without any just or proper grounds. *Waters* v. *Waters*, 2 W. R. 642.

Heir-at-law, defendant in a suit to establish a will on the ground of insanity, does not as of course lose his costs of the trial of an issue devisavit vel non, although he has gone into evidence to prove insanity and failed, but the question of costs is in the discretion of the court: obiter. Circumstances under which the heir in such a case will lose his right to costs, both at law and in equity. *Roberts* v. *Kerslake*, 1 Kay & J. 751; 3 W. R. 616.

Upon a bill by a devisee to establish a will where the heir-at-law disputes such will upon the ground of insanity, and fails upon trial of the issue directed at law, the costs of the issue are in the discretion of this court, and the heir will not be deprived of them, though he has failed to prove insanity, if he has set up such defence upon fair and reasonable grounds. Such question may be tested by considering it as the case of an infant upon inquiry at chambers as to the propriety of allowing such a defence to be set up on his behalf. The heir who has raised such a defence upon his answer without fair or reasonable grounds will not be allowed his costs of the suit. *Ib.*

An heir-at-law filing a bill to set aside a will on the ground of insanity, and failing on the trial of the issue, is entitled to have the bill dismissed without costs. *Farnham* v. *Cosby*, Wall. Lyn. 288.

Though an heir, brought into equity to have the ancestor's will established against him, may demand an issue, yet, if he sets up insanity, he shall not have his costs of the issue. *Berney* v. *Eyre*, 3 Atk. 387; *White* v. *Wilson*, 13 Ves. 87, 91.

When Costs given against Heir.] — Will established against heir-at-law's bill, he pays costs at law and equity; but on bill by devisee no costs on either side. *Johnson* v. *Gardiner*, Dick. 313. S. P., *Gough* v. *Botevel*, Dick. 396.

Heir-at-law ordered to pay the costs of an issue to try the validity of a will in which he had failed. *Swinfen* v. *Swinfen*, 27 Beav. 148; 28 L. J., Ch. 849; 5 Jur. (N.S.) 1276; 7 W. R. 321.

When the heir-at-law filed a bill against the devisee and executor impeaching the validity of the will, and an issue was directed which resulted in the validity of the will being established:—Held, that the bill must be dismissed without costs as regarded the devisee, and that the heir-at-law must pay the costs of the executor.

Banks v. *Goodfellow*, 40 L. J., Ch. 511 ; L. R. 11 Eq. 472.

Bill of heir-at-law against devisee, where vexatious, dismissed with costs. *Seal* v. *Brownton*, 3 Bro. C. C. 214.

An heir-at-law of a testator obtained possession of the will by force, and tore it up. The pieces were, however, collected and put together, and proved. The will contained no devise of the real estate, and a claim was filed against the heir to enforce a sale. On the heir's request the court directed an issue devisavit vel non, when the will was established :—Held, that the heir had so misconducted himself, that although his misconduct had not increased the costs of the issue, he must pay the costs of it. *Middleton* v. *Middleton*, 5 De G. & Sm. 656.

Where a devisee brings a bill merely in perpetuam rei memoriam, and the heir only cross-examines the witnesses, he is entitled to his costs; but where he encounters the will he shall not have them. So if an heir has an issue directed to try a will, he shall have his costs though the will be established, for he has a right to know how he is disinherited ; but if the heir sets up a disability against the testator and fails, he shall not have his costs ; and the court will give costs against an heir in a case of spoliation, or secreting a will. *Berney* v. *Eyre*, 3 Atk. 387.

A testator made his will during his last illness, and thereby gave the bulk of his property, real and personal, to trustees, upon trusts for the benefit of the solicitor who prepared the will, and his children. Shortly after his death the trustees contracted to sell the real property. The heir brought an ejectment against them, alleging that the will had been improperly obtained. He failed on the trial. The trustees filed a bill to enforce specific performance of the contract against the purchaser. The cause was ordered to stand over for the trustees to file a bill against the heir to establish the will. They did so, and in his answer the heir alleged that the testator, at the date of the will, was incompetent to make it, and that the will had been fraudulently obtained. An ejectment was directed to try these facts : on such trial the verdict was in favour of the will :—Held, that the heir must pay the costs of such ejectment, and so much of the suit as was occasioned by the issues he had raised improperly ; and no costs of the suit were given to him. *Grove* v. *Young*, 5 De G. & Sm. 38 ; 21 L. J., Ch. 95 ; 15 Jur. 1099. And see *S. C.*, nom. *Grove* v. *Bastard*, 1 De G. M. & G. 69 ; 2 Ph. 619 ; 17 L. J., Ch. 351 ; 12 Jur. 385.

Heir-at-law, defendant, desiring an issue upon a will, in which he failed, entitled to his costs in equity ; no costs on either side as to the issue ; ordered to pay costs of a groundless motion for a new trial. *White* v. *Wilson*, 13 Ves. 87.

—— **Pleading Testamentary Incapacity.**]—The only son of a testator, who succeeded, on the death of his father, to a considerable landed estate, was condemned in costs for contesting, in a litigious and vexatious manner, the validity of a will, by which his father, who was a weak old man, bequeathed the whole of his personal estate, about 12,000*l.*, to persons in no way related to him, including his solicitor, medical man, and butler. *Barry* v. *Butlin*, 2 Moore P. C. 480.

If an heir-at-law, alleging insanity in a devisor, file his bill against the devisee, and he fail in the issue devisavit vel non, he shall pay the costs of the issue, but not the costs of the suit, unless he might have asserted his claim by ejectment ; and then his suit will be deemed vexatious, and he will be ordered to pay the costs of it. *Scaife* v. *Scaife*, 4 Russ. 309.

If an heir brings a bill to set aside a will for insanity, instead of an ejectment, he shall pay costs if he fails. *Webb* v. *Claverden*, 2 Atk. 424.

IX. CONSTRUCTION.

A. GENERAL PRINCIPLES.

Rule of Construction—Rule of Law.]—A rule of construction is one which points out what a court shall do in the absence of express or implied intention. A rule of law is one which takes effect when certain conditions are found, although a testator may have indicated an intention to the contrary. *Coward, In re, Coward* v. *Larkman*, 57 L. T. 285—C. A.

General Rules.]—General rules of construction of will. *Noel* v. *Weston*, 2 V. & B. 271 ; 13 R. R. 79.

If the operative part of an instrument is clearly large enough to embrace two classes of objects, its effect is not to be cut down because the previous recital does not refer to both those classes. *Savile* v. *Kinnaird*, 11 Jur. (N.S.) 195 ; 11 L. T. 687 ; 13 W. R. 308.

The circumstance of the testator not having had the legal estate can make no difference in the construction of a devise. *Jervoise* v. *Northumberland* (*Duke*), 1 J. & W. 573 ; 21 R. R. 229.

There is no difference between a direction to trustees to pay and a gift ; the testator is equally the donor in both cases. *Nicholls* v. *Judson*, 2 Atk. 301.

Fallacy of applying to a case of intestacy words which the testator has applied to the case of testacy. *Robinson* v. *London Hospital* (*Governors*), 10 Hare, 28 ; 22 L. J., Ch. 754.

The rules of construction of executory instruments, bearing date before the Wills Act, 7 Will. 4 & 1 Vict. c. 26 (1837), do not differ from those applicable to wills of the same period. *Hughes* v. *Whitby*, Ir. R. 7 Eq. 98.

Time from which Will speaks.]—Where a testator expresses himself in the present tense, it relates to what is in being at the time of making the will. *Abney* v. *Miller*, Atk. 597. Semble, overruled, 2 Bro. C. C. 292.

Wills in general construed from the making, unless circumstances or the tenor of it show it should be from death of testator, but the intermediate time not regarded. *Lomax* v. *Holmden*, 1 Ves. 295.

Construction of a will, as supposing the testator to contemplate the period of his death with reference to the objects who are to take under his will, and to look beyond that period with reference to the event on which his dispositions are to take effect. *Rye's Settlement, In re*, 10 Hare, 112 ; 22 L. J., Ch. 345 ; 16 Jur. 1128 ; 1 W. R. 29.

The general rule as to testaments is, that the time of the testament and not the testator's death is regarded. *Downing* v. *Townsend*, Ambl. 280.

The provision in the 7 Will. 4 & 1 Vict. c. 26, s. 24, that a will is to be construed as if made

immediately before the testator's death, relates only to the property comprised in the will. *Bullock* v. *Bennett*, 7 De G. M. & G. 283; 3 Eq. R. 799; 1 Jur. (N.S.) 567; 3 W. R. 545.

The statute 7 Will. 4 & 1 Vict. c. 26, extends generally to wills made previously to the passing of the act, where alterations have been made affecting such wills subsequently to the 1st of January, 1838. *Croker* v. *Hertford* (*Marquis*), 4 Moore P. C. 339.

And see cases post, col. 1257, sub tit. TIME OF OPERATION AND AFTER-ACQUIRED PROPERTY.

Circumstances taken into Account.]—In construing a will, the court has regard to the period when and the circumstances under which it was framed; and where the will is of ancient date, if there is any ambiguity in the construction, the course of action on the bequest since the will came into operation may be referred to in aid of the construction which has been adopted, on the ground that it is not to be assumed that a continued series of breaches of trust has been committed in the presence of those who are interested in an opposite conclusion. *Att.-Gen.* v. *Sidney Sussex College*, 38 L. J., Ch. 656; L. R. 4 Ch. 722.

Testator's Intention considered.]—In case of a will, the intent shall prevail unless contrary to law, i.e., if the limitations are allowable by law; not that the words must be taken in such signification as the law imposes on them. In a will, words taken in law as of limitation shall be taken as words of purchase if so intended. *Austen* v. *Taylor*, Ambl. 377.

The intention of a testator, if clear and consistent with rules of law, is to govern without regard to the grammatical construction, or whether it deserves favour or not. *Thellusson* v. *Woodford*, 11 Ves. 112; 8 R. R. 104—C. A.

A will is not to be affected on account of the unmeritorious object; only one general rule of construction for courts of law and equity applicable to all wills. However the court may condemn the object, the intention is to be collected from the whole will; every word is to have effect according to the natural common import; words of art to be construed according to the technical sense, unless upon the whole will plainly not so intended. The court is bound to carry the rule into effect, if consistent with the rules of law, and if it can see a general intention consistent with the rules of law; but the particular mode is not; though that shall fail, the general intention shall take effect. *Id.* 4 Ves. 329.

"Heir male" in a will may be words of purchase. *Id.* 326.

The intention of the testator is not to be set aside because it cannot take effect to the full extent, but it is to work as far as it can. *Ib.*

Where upon the careful perusal of an instrument it is impossible not to be satisfied that a strict and ordinary interpretation of its language would disappoint the intention with which it was framed, such an interpretation is not to be adopted. *Key* v. *Key*, 4 De G. M. & G. 73; 1 Eq. R. 82; 22 L. J., Ch. 641; 17 Jur. 769.

Order of words in wills not considered; if the intent better answered, it is otherwise. *East* v. *Cook*, 2 Ves. 32.

Distinction between marriage articles and wills; all the parties to the former considered purchasers to effectuate their intention; none of the parties mentioned in the latter are so, as the testator's intention is alone to be considered. *Stratford* v. *Powell*, 1 Ball & B. 25.

Rules for construction of wills; the intention if possible to be collected from the words, not from circumstances dehors; upon general principles and established rules, not by conjecture; and without inquiring whether the personal estate sufficient for the debts. The personal estate first liable to the debts, unless the intention is clearly to exempt it, and throw them wholly on the real, for which express words are not necessary. *Bootle* v. *Blundell*, 19 Ves. 521; 15 R. R. 93.

The testator's intent in a will must be consistent with the rules of law, and in many cases the intent has been restrained, as where attempting a perpetuity or to prevent a tenant in tail from alienating. *Bagshaw* v. *Spencer*, 2 Atk. 575.

Departing from strict words of a will has produced such uncertainty that it is to be wished they had been left to legal construction. *Id.* 576.

In construing words to make them agree with the intent of the party, a court of equity is more liberal than a court of law. *Id.* 580.

Where the intention of a party would put the estate in abeyance, such intention is overruled by the rules of law. *Papillon* v. *Voice*, W. Kel. 31.

In case of a will, where the remainder is devised in contingency, the reversion in fee is not in abeyance in the meanwhile, but descends to the heir. *Id.* 511.

Question of intention to be determined by the court, but not proper for the master. *Pitt* v. *Camelford* (*Lord*), 1 Ves. 83.

It is not a good rule in construing a will to consider what power would be, by a particular construction, given to a particular person, by the exercise of which he might be able to defeat what appears to be the general purpose of the will. *Atkinson* v. *Holtby*, 10 H. L. Cas. 313.

Intention Inferred for Creditors.]—In some cases, as for creditors, an intention will be inferred from the purpose beyond what is expressed. *Thellusson* v. *Woodford*, supra.

Construction for creditors favoured not doing violence to or straining the words. *Noel* v. *Weston*, 2 Ves. & B. 269; 13 R. R. 79.

The most liberal construction of wills for creditors. *Godolphin* (*Earl*) v. *Penneck*, 2 Ves. 272.

Testator's Interpretation of his own Words adopted.]—Where a testator has made a specific bequest to "his wife's nephew J. W. R.," who was illegitimate, and then subsequently given a portion of his residuary estate to "the nephews and nieces of my said wife," the illegitimate nephew will be entitled to share in the residuary gift with legitimate nephews and nieces, on the ground that the testator has himself shown how he intended his language to be interpreted. *Parker, In re, Parker* v. *Osborne*, 66 L. J., Ch. 509; [1897] 2 Ch. 208; 76 L. T. 421; 45 W. R. 536.

A testatrix, by her will made in 1879, gave the income of personal property amongst her

nephews and nieces and great-nieces therein named, with a direction that if any of them should die leaving issue him or her surviving such issue should take the share of income which his, her or their parent would have taken. M., one of the nieces named in the bequest, in 1865 went through the form of marriage with A., the husband of her deceased sister, by whom she had a daughter, G. In another bequest contained in the will the testatrix described M. as the wife of A., and G. as M.'s daughter. In a bequest, by a codicil, of specific chattels to G., the testatrix described her as her great-niece:—Held, that G., although illegitimate, was entitled to take the share of her mother. *Hill* v. *Crook* (42 L. J., Ch. 702; L. R. 6 H. L. 265) applied. *Walker, In re, Walker* v. *Lutyens*, 66 L. J., Ch. 622; [1897] 2 Ch. 238; 77 L. T. 94; 45 W. R. 647.

Whole of Instrument to be considered.]—For the purpose of collecting the intention, every part of the will must be considered. *Gittins* v. *Steele*, 1 Swan. 28; 18 R. R. 7.

Some effect must be given to every part of a will. *Collet* v. *Lawrence*, 1 Ves. 268.

A will cannot be construed by adverting to a single clause; everything bearing on the subject must be taken together. *Crone* v. *Odell*, 1 Ball & B. 456, 480. Affirmed 3 Dow, 61; 15 R. R. 20.

Particular intent clashing with the general intent in a will must give way. *Ib.*

Every word in construction of will is to have effect, if not inconsistent with general intention, which is to control. If two parts are inconsistent, the latter prevails. If a meaning can be collected, but it is wholly doubtful in what manner it is to take effect, it is void for uncertainty. *Constantine* v. *Constantine*, 6 Ves. 100.

Every word of a will must have a meaning imputed to it, if capable of it without a violation of the general intent, or any other provision in the will. *Reeves* v. *Brymer*, 4 Ves. 698.

The court may expound the words in a will, but cannot strike them out. *Southcot* v. *Wilson*, 3 Atk. 233.

In construing wills, the leading rule is, that the intent of the testator should be observed, and no part of a will to which a meaning or operation can be given shall be rejected. *Reeves* v. *Newenham*, 2 Ridgw. 36.

A testator bequeathed the residue to three trustees and their heirs, in trust for his daughter for life, with remainder over. He afterwards struck out the names of his trustees, and substituted that of his daughter. A facsimile probate was granted:—Held, that a construction must be put upon the whole will as it stood, for to neglect any part of it would be taking upon the court itself the province of a court of probate. Held, moreover, that the several parts of the will were not inconsistent, and might well be read together. *Shea* v. *Boschetti*, 18 Beav. 321; 2 Eq. R. 608; 23 L. J., Ch. 652; 18 Jur. 614; 2 W. R. 281.

Bequest in terms importing an intention not to make an immediate disposition may, upon the construction of the whole will, amount to a present bequest. *Lynn* v. *Beaver*, Turn. & R. 63; 23 R. R. 185.

In considering a question of election raised by a will, the court must have regard to the whole scope of the will to ascertain if the language of the testator can be fairly interpreted as disposing of an interest which he himself possesses. Prima facie the court must construe the words of disposition as applying to an estate, which the testator had power to dispose of, if the words will fairly apply to it; and in order to raise a question of election, it must be clearly seen that the words used point to an estate which is not the testator's own, but that of another. *Rancliff (Lord)* v. *Parkyns* (6 Dow, 149) discussed. *Minchin* v. *Gabbett*, [1896] 1 Ir. R. 1.

Will and Codicil.]—A codicil to a will does not affect the construction of the will itself as an independent instrument. *Rolfe* v. *Perry*, 1 N. R. 428.

In the construction of a gift in a codicil, the court may and must look at the previous will and codicils. *Hartley* v. *Tribber*, 16 Beav. 510.

Legal and Technical Words.]—The general rule of construction in almost all questions arising upon wills is first to ascertain by an examination of the entire will what is the natural and grammatical meaning of the language used by a testator, subject to this, that if the law places a certain signification upon the words he has used, they must, in the absence of a controlling context, be construed in that sense, no matter how he may possibly have meant them to be understood; and having thus arrived at the meaning of the words, they must be so applied, unless so to do would lead to some palpable absurdity, or violate some rule of law. *Palmer* v. *Orpen*, [1894] 1 Ir. R. 32.

Words in a will must be taken in their legal sense, unless by the context or by express words they clearly appear to be intended otherwise. *Synge* v. *Hales*, 2 Ball & B. 506.

The construction of a legal devise must be the same in a court of law or equity. *Id.* 507.

Where a testator expresses himself in ambiguous terms respecting the disposition of his property, the legal operation of the word he uses must be adopted. *Stubbs* v. *Roth*, 2 Ball & B. 553; 12 R. R. 119.

Rule of construction that the words used by a testator shall be interpreted according to their legal effect and operation, unless it clearly appear that he intended to use them in a different sense. *Winslow* v. *Tighe*, 2 Ball & B. 204; 12 R. R. 75.

Where a testator makes a codicil without professional assistance, his expressions are not to be construed literally and technically, if, upon the whole instrument, it appears that he meant to use them in a different sense. *Read* v. *Backhouse*, 2 Russ. & M. 546.

Whether a general intent, or a particular intent, expressed in a will is to prevail, must depend on the context of the whole will, in construing which words of a technical kind are not necessarily to receive a technical meaning. *Jenkins* v. *Hughes*, 8 H. L. Cas. 571; 6 Jur. (N.S.) 1043; 8 W. R. 667.

In order to determine the meaning of a will, a court of construction must read the language of the testator in the sense which he himself appears to have attached to the expressions that he has used, with this qualification, that when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator by his will excluded beyond all doubt such construction. *Towns* v. *Wentworth*, 11 Moore, P. C. 526.

When the main purposes and intentions of a testator are ascertained to the satisfaction of the court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified, and, on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which no words in the will expressly devise, the court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which, in its opinion, the testator has on the whole will sufficiently declared. *Ib.*

It is not desirable to multiply words having the same technical meaning, by introducing one which never had such a meaning, where another already exists with that technical meaning already appropriated to it. *Massy* v. *Rowen*, L. R. 4 H. L. 288.

Where a lay testator who writes his own will uses words which have an intelligible conventional meaning, he is not to be held as having used the words with any other meaning, unless the context of the instrument shows that he intended to do so. *Hamilton* v. *Ritchie*, [1894] A. C. 310—H. L. (Sc.)

Where a will gives an unqualified bequest of land, making no reference to the time at which it is to operate, the gift takes effect a morte testatoris, except where that date would disturb any of the provisions already made in the will, or where the testator has clearly indicated that he did not intend it to operate until a later period. *Ib.*

A testator, by his will, gave the life-rent of his entire estate, heritable and movable, to his wife, who survived him. The will proceeded: "I also leave to my nephew," W., the estate of Bankhead; "but I wish it expressly understood that in the event of my said nephew," W., "dying without leaving any lawful male heir of his body, then, in that event, my said lands of Bankhead are to revert back to my nephew," H. The nephew W. survived the testator, but died unmarried before the testator's widow. W. left a general disposition disposing of all estate which might belong to him. On the widow's death, the nephew H. claimed Bankhead:—Held, that the estate of Bankhead had vested in W. a morte testatoris, and that it was conveyed to W.'s trustees by his general disposition. *Ib.*

—— **Foreign Will.**]—If a domiciled Englishman makes a will expressed in the technical terms of the law of a foreign country, so as to manifest an intention that it should operate according to that law, the meaning of the will must be ascertained by the foreign law, and then an equivalent effect must be given to the will in England. *Studd* v. *Cook* (8 App. Cas. 577) discussed. *Bradford* v. *Young*, 54 L. J., Ch. 96; 26 Ch. D. 656; 50 L. T. 707; 32 W. R. 901.

An English will by a testator domiciled in Lower Canada must be interpreted with regard to the law of Lower Canada, and not that of England. *McGibbon* v. *Abbott*, 54 L. J., P. C. 39; 10 App. Cas. 653; 54 L. T. 138—P. C.

Words Recurring.]—It is a canon of construction that where a testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of it unless it violates the sense. *Rhodes* v. *Rhodes*, 27 Beav. 413.

It is a well-settled rule of construction never to put a different construction upon the same word when it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary. *Ridgeway* v. *Munkittrick*, 1 Dr. & War. 84.

The same word recurring in any instrument should, if possible, be construed to have the same meaning. *Foster* v. *Wybrants*, Ir. R. 11 Eq. 40.

Unambiguous Words Construed Literally.]—Rule of construction is not to make any intendment contrary to plain and usual sense of words, unless from other parts of will plainly appearing not intended to have that extensive operation. *Ilchester (Earl), Ex parte*, 7 Ves. 368; 6 R. R. 138.

Implication in a will cannot prevail, unless necessary. *Upton* v. *Ferrers*, 5 Ves. 801; 5 R. R. 167.

The literal and technical force of words in a will to be counteracted by rational implication. *Vauchamp* v. *Bell*, 6 Madd. 343.

In construction of residuary clause, question is not what the testator had in contemplation when it was made, but what the words he used according to their ordinary signification will embrace, unless qualified by other expressions in the will. *Bland* v. *Lamb*, 5 Madd. 412.

It is a common rule of construction, that if the words of a gift are of themselves plain, distinct, and capable of having a legal effect, effect must be given to them, notwithstanding any improbability which may arise from looking at the other parts of the will. On the other hand, if the words are ambiguous in expression or effect, they are not to be rejected for uncertainty, but you must collect, if you can, from the other parts of the will an indication of what the testator meant by those words, which, by themselves, appear to be ambiguous. *Wilson* v. *Eden*, 11 Beav. 289.

The plain first meaning of a testator's words is to be followed, unless they give rise to some incongruity. *Nockolds* v. *Locke*, 2 Jur. (N.S.) 1064; 5 W. R. 3.

The primary duty of a court of construction, in the interpretation of wills, is to give to each word employed, if it can with propriety receive it, the natural ordinary meaning which it has in the vocabulary of ordinary life, and not to give to words employed in that vocabulary an artificial, a secondary, and a technical meaning. *Young* v. *Robertson*, 4 Macq. H. L. 314, 325.

Primarily, the words of a will are to be considered. They convey the intention of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, among which is the law of the country in which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption. *Dossee* v. *Mullick*, 6 Moore, Ind. App. 526.

Admitting the correctness of the principle of giving to words their natural and grammatical meaning, yet the intention of a testator gathered from the context, may justify a modification of his words. *Grey* v. *Pearson*, 6 H. L. Cas. 61; 26 L. J., Ch. 473; 3 Jur. (N.S.) 823; 5 W. R. 454.

In constructing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further. *Ib.*

Where the words of a will have a primary and common-sense meaning, they must be taken to have been used in that sense, unless the contrary appears from the context, or from extrinsic circumstances. *Crook* v. *Whitley*, 26 L. J., Ch. 350; 3 Jur. (N.S.) 703; 5 W. R. 383—L. C.

In construing the autograph will of an illiterate man, the meaning of technical language may be disregarded, but no word which has a clear and definite operation can be struck out. *Hall* v. *Warren*, 9 H. L. Cas. 420.

The rule that a testator's language ought to be adhered to unless some inconsistency would result from doing so ought not to be departed from on slight grounds, and the court refused to depart from that rule in a case where there was very strong probability that the testator meant something different from what he had actually said. *Nunn* v. *Hancock*, 16 W. R. 818.

Where the words of a will are unambiguous, they cannot be departed from merely because they lead to consequences capricious or even harsh and unreasonable. But where they are capable of two interpretations, that construction of them is to be adopted which is in accordance with an intelligible and reasonable, and not a capricious or anomalous, result. *Bathurst* v. *Errington*, 46 L. J., Ch. 748; 2 App. Cas. 698; 37 L. T. 338; 25 W. R. 908—H. L. (E.)

A will is to be construed according to the plain meaning and intention of the testator, notwithstanding that the result of so construing it may be to defeat the object which he had in view. *Cunliffe* v. *Brancker*, 46 L. J., Ch. 128; 3 Ch. D. 393; 35 L. T. 518.

Words are to be construed according to their plain ordinary meaning, unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity. A testator must not be presumed to intend an absurdity; nevertheless, if shown by the context or by the whole will to have so intended, the intention, if not illegal, must be carried out. *Rhodes* v. *Rhodes*, 51 L. J., P. C. 53; 7 App. Cas. 192; 46 L. T. 463; 30 W. R. 709—P. C.

There is no difference between the words which a testator himself uses in drawing up his will and the words which are bonâ fide used by one whom he trusts to draw it up for him. The court in either case must take the words as it finds them, and therefore held that the plaintiff, the natural daughter, was not entitled to have probate amended by omitting the words, "from and after the decease of my said wife without leaving issue of our said marriage," on the ground that the draughtsman introduced them without reason or special directions, and that the effect of the same had not been intelligently appreciated by the testator. *Ib.*

The court in construing a will, must act on the language which the testator has used according to its ordinary signification, and must not extend the meaning of words without being able to assign any possible limit where to stop. *De Roebeck* v. *Clonecurry* (*Lord*), Ir. R. 5 Eq. 588.

Therefore, when a testator, having accounts in two banks, bequeathed all cash balances which should, at his death, be standing either to his current account or his deposit account with any of his bankers:—Held, that the bequest did not include moneys in the hands of his land agent or his salesmaster, although the testator's account was entered in the salesmaster's ledger; and sometimes got such money as he required in cash or by cheque; sometimes requested cheques to be sent to him; and on a few occasions gave orders for payments to third persons. *Ib.*

Where clear words of gift are found in a will, full effect is to be given to them, notwithstanding capricious results may follow. *Wharton* v. *Barker*, 4 Jur. (N.S.) 553; 6 W. R. 534.

It is the safest and best mode of construction to give to words free from ambiguity their plain and ordinary meaning. *Buchanan* v. *Andrew*, L. R. 2 Sc. App. 286.

In construing a will, plain and distinct words are only to be controlled by words equally plain and distinct. *Goodwin* v. *Finlayson*, 25 Beav. 65.

Ambiguous Words.] — The meaning of an ambiguous will to be collected from the words and the context, not from the punctuation. *Sanford* v. *Raikes*, 1 Mer. 651.

Testator having a right to order a thing to be done, expressing in his will that it is to be done, must be understood to speak imperatively, and not merely by way of recital. *Ib.*

Where a testator expresses himself in ambiguous terms respecting the disposition of his property, the legal operation of the word he uses must be adopted. *Stubbs* v. *Roth*, 2 Ball & B. 553; 12 R. R. 119.

Words that are doubtful and afford implication only are not to be attended to where testator has expressed himself in legal words. *Bagshaw* v. *Spencer*, 2 Atk. 575.

It is a common rule of construction, that if the words of a gift are of themselves plain, distinct, and capable of having a legal effect, effect must be given to them, notwithstanding any improbability which may arise from looking at the other parts of the will. On the other hand, if the words are ambiguous in expression or effect, they are not to be rejected for uncertainty, but you must collect if you can, from the other parts of the will, an indication of what the testator meant by those words, which, by themselves, appear to be ambiguous. *Wilson* v. *Eden*, 11 Beav. 289.

In case of doubtful words of a will, an heir is to be favoured; not where the will is plain. *Falkland* v. *Bertie*, 2 Vern. 340; 12 Mod. 182; 2 Freem. 220; 3 Ch. Ca. 129.

Where the words of a will are unambiguous, they cannot be departed from merely because they lead to consequences capricious or even harsh and unreasonable. But where they are capable of two interpretations, that construction of them is to be adopted which is in accordance with an intelligible and reasonable, and not a capricious or anomalous, result. *Bathurst* v. *Errington*, 46 L. J., Ch. 748; 2 App. Cas. 698; 37 L. T. 338; 25 W. R. 908—H. L. (E.)

Where there are two meanings of a word used in a will, one of which would effectuate and the other defeat a testator's intention, the court is bound to select that meaning which would carry out the testator's object. *Whicker* v. *Hume*, 7 H. L. Cas. 124; 28 L. J., Ch. 396; 4 Jur. (N.S.) 933; 6 W. R. 813. And see *S. C.*, 1 De G. M. & G. 506; 14 Beav. 509; 21 L. J., Ch. 406; 16 Jur. 391.

If the language in a will admits of two constructions, according to one of which property will go in a convenient and ordinary course of succession, and, according to the other, in a capricious and inconvenient course, courts of justice may reasonably lean towards the former as being what was probably intended. Semble. *Jenkins* v. *Hughes*, 8 H. L. Cas. 571; 6 Jur. (N.S.) 1043; 8 W. R. 667.

Ambiguous words will not control the legal effect of words of limitations. *Gummoe* v. *Howes*, 26 L. J., Ch. 323; 3 Jur. (N.S.) 176; 5 W. R. 219.

Before the court can resort to the context of a will in search of a meaning for the words of a particular clause, it must be satisfied that the meaning of the clause is different from that which the words naturally import. *Walker* v. *Tipping*, 9 Hare, 800; 16 Jur. 442.

In construing a will, if the words used are themselves of doubtful meaning, the circumstances of the case may be referred to for the purpose of assisting in the explanation, but must not be employed to show the construction to be doubtful, in order to enable the court to make what appears a more reasonable will for the testator. *Gordon* v. *Gordon*, L. R. 5 H. L. 254.

The recurring use of the words, "As to," at the commencement of several devises is not necessarily an indication of the commencement of a devise complete in itself, and separate and independent from other limitations. *Ib.*

Practice.]—Except in case of difficulty, this court will itself determine questions of construction in the first instance, without seeking the assistance of courts of law. *Wilson* v. *Eden*, 14 Beav. 317.

Where there is a doubtful question as to the legal title to an estate on the construction of a will, the practice is, not to determine it on demurrer, although the inclination of the court may be in favour of the defendant, but to overrule the demurrer, without prejudice to the defendant's insisting on the same matters by way of answer. *Brownsword* v. *Edwards* (2 Ves. 243) referred to on this point. *Mortimer* v. *Hartley*, 3 De G. & Sm. 316.

The court declines to express an abstract opinion on a point of law on the construction of a will when immediate relief is not given. *Hampton* v. *Holman*, 5 Ch. D. 183; 36 L. T. 287; 25 W. R. 459.

The court deprecates the citation of authorities in cases of wills unless to lay down some general principle or to explain some technical expression. *Waring* v. *Currey*, 22 W. R. 150.

Where there is a clear decision of a court of law upon the construction of a will, and no precise authority on the other side, a court of equity will not decide contrary to the decision at law. *Robinson* v. *Wood*, 4 Jur. (N.S.) 625; 6 W. R. 728.

Costs of obtaining Decision of Court.]—Where a testator has used doubtful language, it may be right for those interested to have recourse to the court to ascertain the true construction of his will, and to throw the necessary costs upon the fund in dispute. When the decision of the court of first instance has been obtained at the expense of the fund, if either party is dissatisfied, he must, as a general rule, challenge that decision at his own peril. If, however, the appeal be successful, the costs of the appeal may be regarded as part of the unavoidable expense of obtaining a correct decision. *Dillon* v. *Arkins*, 17 L. R. Ir. 636—C. A.

B. ADMISSIBILITY OF PAROL EVIDENCE.

Reference to Original Will.]—For the purpose of construing a will the court is entitled to look at the original will as well as at the probate copy. *Harrison, In re, Turner* v. *Hellard*, 55 L. J., Ch. 799; 30 Ch. D. 390; 53 L. T. 799; 34 W. R. 420—C. A.

Original will of personalty examined in order to arrive at the true construction of certain bequests. *Compton* v. *Bloxam*, 2 Coll. C. C. 201.

The original will of personalty cannot be looked to, to contradict the probate, though it may in some cases to explain it. *Oppenheim* v. *Henry*, 1 W. R. 126.

Cases in which the court will look at an original will of personalty, for the purpose of determining its meaning or construction. *Walker* v. *Tipping*, 9 Hare, 802, n.

—— **To Certified Copy.**]—A testator died in 1874, in France. His original will, in the French language, was registered in France, and retained there. In 1876 an English translation of a certified French copy of the original will was admitted to probate here. On an allegation that the translation was inaccurate, and none of the parties insisting that an application should first be made to the probate division to rectify the English translation:—Held, that the court might look at the certified French copy as well as at the English translation admitted to probate, to determine the true construction of the will, *Cliff's Trusts, In re*, 61 L. J., Ch. 397; [1892] 2 Ch. 229; 66 L. T. 483; 40 W. R. 439.

—— **To Will in Foreign Language.**]—A domiciled Englishman made his will in a Spanish colony, in the Spanish language and form, and empowered K., whom he appointed his universal heir, to make his (the testator's) will, making therein the declaration, &c., and other matters which had been and would be communicated to him. The will was admitted to probate:—Held, first, that the will was an English will, and that in construing it the Spanish language was only to be looked to in order to ascertain the equivalent expressions in English; and, secondly, that K. being appointed universal heir, the beneficial interests, after performing the trusts, if any there were, belonged to K., and not to the testator's next of kin. *Reynolds* v. *Kortright*, 18 Beav. 417; 2 Eq. R. 784; 2 W. R. 445.

—— **To other Documents.**]—No papers, letters, &c., can be taken notice of, to influence construction of will. *Bertie* v. *Falkland*, 1 Salk. 232.

A testator made a voluntary settlement of some real estates. He afterwards, by his will, devised other real estates to nearly the same

uses :—Held, that the deed could not be referred to for the purpose of construing the will. *Randall* v. *Daniel*, 24 Beav. 193.

A pedigree made by a testator's direction, and found among his papers, not admitted to explain a will, equivocal but not unintelligible. *Crosley* v. *Clare*, 3 Swanst. 322, n. See *S. C.*, nom. *Crossly* v. *Clare*, Ambl. 397.

To explain Words of Will.]—Parol evidence cannot be admitted to explain the written words of a will. *Stratton* v. *Payne*, 3 Bro. P. C. 103.

Parol evidence admitted to explain a will where doubtful; not to contradict. As on a legacy to the four children of B., and afterwards another to the children of B.; B. having then two children by the first husband, four by a second: admitted to show the first legacy was restrained to the last four children; not so of the other legacy. *Hampshire* v. *Peirce*, 2 Ves. 216.

In construing a will, if the words used are themselves of doubtful meaning, the circumstances of the case may be referred to for the purpose of assisting in the explanation, but must not be employed to show the construction to be doubtful, in order to enable the court to make what appears a more reasonable will for the testator. *Gordon* v. *Gordon*, L. R. 5 H. L. 254.

In trying the meaning of phrases in a will all circumstances may be looked at in which the court might have been called to determine the meaning of the same phrases applied to a different state of circumstances. *Radnor (Earl)* v. *Shafto*, 11 Ves. 457; 8 R. R. 198.

To Add to Will.]—This court will not add a legacy to a will upon parol proof, though it concerns personal estate only. *Whitton* v. *Russell*, 1 Atk. 448.

A testator, having devised his estates in a particular way, directed that a different disposition of them should take place, in case certain contingent property and effects in expectancy should fall in and become vested interests to his children. The children being entitled to no contingent interests at the date of the will, the court refused to admit evidence offered for the purpose of showing that the testator referred to expectation from particular individuals which had been afterwards realised, as being in effect to add to the will, and not to explain it. *King* v. *Badeley*, 3 Myl. & K. 417; 3 L. J., Ch. 206.

Of Instructions by Testator.]—Will is to be construed without regard to the instructions. *Murray* v. *Jones*, and *Fawcett* v. *Jones*, 2 V. & B. 318; 13 R. R. 104.

Where declarations to testator's solicitor, at the time of giving instructions for making a will, admissible in evidence. *Guillebaud* v. *Mears*, 7 L. J. (O.S.) Ch. 136.

Bequest to testator's cousin V. B., son of his late uncle P. B. Testator had no cousin of that name, but had a cousin G. V. B., son of an uncle J. B.; and had also a cousin F. B., son of the said uncle P. B. :—Held, evidence of all the circumstances surrounding the testator when he made his will was admissible to explain who he meant to take, but not evidence of instructions given to his solicitor when he made his will. *Bernasconi* v. *Atkinson*, 10 Hare, 345; 17 Jur. 128; 1 W. R. 152.

A name and description of a legatee were given in a will, which, taken together, could not be applied to any other person; evidence of the state of the family was admitted, and an affidavit of a solicitor who prepared the will was offered to show what had been the cause of the mistake: —Held, that the affidavit was inadmissible. *Drake* v. *Drake*, 8 H. L. Cas. 172; 25 Beav. 642; 29 L. J., Ch. 850; 4 Jur. (N.S.) 727; 6 W. R. 791.

There being a devise in a will of all testator's household stuff, as brass, pewter, linen, and woollens, except a trunk, the person who drew the will was examined to prove that the testator directed him to insert all his goods except the trunk, and was allowed to be read. *Pendleton* v. *Grant*, 2 Vern. 517. *S. C.*, better reported, 1 Eq. Cas. Abr. 230, pl. 2.

Devise to his nearest poor relations. Parol evidence admitted to show that testator knew he had such in Salop, but no further; not to prove declarations or instructions whom he meant by written words of the will. *Goodinge* v. *Goodinge*, 1 Ves. 231.

Where testatrix gave her real and personal estate to plaintiffs for life, remainder to J. in tail, remainder to R. in fee, with a few pecuniary legacies, and charged her real estate with the payment, if her personal estate should not be sufficient; and, by her will, declared she gave the rest and residue of her personal estate to Lord C.'s three daughters :—Held, that parol evidence of attorney, who drew the bill, that he had express directions to give the personal estate to the three daughters of Lord C., could not be read, though there were some things in the case which might make a judge wish to admit it. *Ulrich* v. *Litchfield*, 2 Atk. 372.

Courts of law and equity admit parol evidence in two cases only—to ascertain the person, where there are two persons of the same name, or where there has been a mistake in the name; and in resulting trusts, relating to personal estate, as where an executor has a small legacy, and the next of kin claim the residue, there parol proof is admitted to ascertain who shall have it. *Ib.*

Lord H. not satisfied with Lord Cowper's rule of admitting parol evidence in doubtful wills. Mr. Justice Tracy, who assisted Lord Cowper in *Strode* v. *Russel* (2 Vern. 621), was at first of same opinion with him; but, on consideration, was clear the evidence could not be admitted, and his alteration of judgment had weight in the house of lords. *Ib.*

In *Brown* v. *Selwin* (Cas. t. Talb. 240) Lord H. said he was for admitting it. And even Lord Talbot had a remorse of judgment at the same time he rejected it; but the house of lords refused it, and affirmed the decree. *Ib.*

In construing a will, nothing contained in a letter from a solicitor to the testator, written about the time of the execution of the will, is admissible as evidence of the construction of the will. *Wilson* v. *O'Leary*, 41 L. J., Ch. 342; L. R. 7 Ch. 448; 26 L. T. 463; 20 W. R. 501.

Evidence that the testator had in his possession a first codicil at the time he made the second was admitted, so far as it went to prove the position of the testator, but rejected so far as it suggested any motive for his making the second codicil. *Ib.*

Held also that a letter written to the testator by his solicitor, advising him to recopy his first codicil, was inadmissible. *Ib.*

At the death of a testator two copies of his will were produced, one of which had been retained by himself, the other deposited with

his bankers; each with a codicil containing the same gift in the same words, but of different dates, and attested by different witnesses. Probate having been granted of the duplicate will and of the two codicils:—Held, that evidence by one of the attesting witnesses to one of the codicils was admissible for the purpose of showing, from the circumstances attending the execution, that the two codicils were not two, but one instrument, and accordingly that the legatee therein named was entitled to one legacy only. *Hubbard* v. *Alexander*, 45 L. J., Ch. 740; 3 Ch. D. 738; 35 L. T. 52; 24 W. R. 1058.

Devise of real estate to be sold, and the produce, with the personal estate, to testator's wife for life, with power to appoint a moiety by deed or will, with two or more witnesses. The estate was not sold; the wife, having no other real estate, by will with three witnesses, gave specific legacies, some described to have been her husband's, and all the rest, residue, and remainder of her estate and effects, of what nature or kind soever, and whether real or personal, and all her plate, china, linen, and other utensils, which she should be possessed of, interested in, or entitled to at her decease; the power is executed by the residuary clause. Evidence of conversation with the person who drew the will, to show the testatrix had no other real estate, rejected. *Standen* v. *Standen*, 2 Ves. 589.

Of Declarations by Testator.]—Evidence as to statements made by a testator when he executed his will was rejected. *M'Clure* v. *Evans*, 29 Beav. 422. And see *Baker* v. *Ker*, 11 L. R., Ir. 8.

The declaration of a testator will not be admitted to explain an omission in a will, although evidence of surrounding circumstances will. *Sullivan* v. *Sullivan*, Ir. R. 4 Eq. 457.

Evidence of the declarations of a testator as to whom he intended to benefit, or supposed he had benefited, can only be received where the description of the legatee, or of the thing bequeathed, is equally applicable, in all its parts, to two persons, or to two things. But evidence of the circumstances, the habits, and the state of his family at the time he made the will, is admissible, so as to put the court in the position of the testator, in order to ascertain the bearing and application of the language which he uses, and whether there exists any person or thing to which the whole description given in the will can be with sufficient certainty applied. *Charter* v. *Charter*, 43 L. J., P. 73; L. R. 7 H. L. 364.

To have recourse to the declarations of a testator as operating on his will is considered dangerous, and if he has made different declarations at different times, little reliance can be placed on them. *Dwyer* v. *Lysaght*, 2 Ball & B. 162.

The acts and declarations of a testator at the time of his will, to show what he meant by a particular expression, admissible in evidence. *Blake* v. *Marnell*, 2 Ball & B. 35; 12 R. R. 68. Affirmed 4 Dow, 248.

Testator bequeathed to A. B. the premium of insurance on his life in an insurance office for her immediate expenses. Shortly before the date of the will a bonus had been declared upon the testator's policy of assurance:—Held, that the bonus alone passed under this bequest, a verbal declaration by the testator to A. B. upon the execution of the will to show that he intended her to have both the policy and the bonus being inadmissible in evidence. *Barrow* v. *Methold*, 3 W. R. 629.

A Presbyterian, who had three infant daughters bred up that way, and had three brothers Presbyterians, makes his will, appointing his brothers, and also a clergyman of the Church of England, guardians to his three infant daughters, and dies, having sent his eldest daughter to his next brother. The clergyman gets the two other daughters into his custody, and places them at a boarding school, where they were bred according to the Church of England, and brought his bill to have the eldest daughter placed out with the other daughters. The three brothers, that were Presbyterians, brought their bill to have the two daughters delivered to them, offering parol evidence that the testator directed and declared he would have his children bred up Presbyterians. The court declared no proof out of the will ought to be admitted in the case of a devise of a guardianship, any more than in the case of a devise of land. *Storke* v. *Storke*, 3 P. Wms. 51.

Devise of land not to be explained by parol proof touching the declaration of the testator, or the instrument given by testator for the making of his will. Parol proofs shall be admitted to explain a surrender of copyhold land, to show a mistake either in the land or uses. *Towers* v. *Moor*, 2 Vern. 98.

As to Condition of Testator's Family.]—In construing a will, the state of testator's family at time of will is to be attended to. *Crone* v. *Odell*, 1 Ball & B. 449. Affirmed 3 Dow, 68; 1 Bli. (N.S.) 594; 15 R. R. 20.

In construing will, the intention of testator, and not the technical import of words, is to be regarded. *Ib.*

For the purpose of construing a will, the court must be informed of the circumstances surrounding the testator when making his will, such as his family status and the nature of his property. Extraneous evidence of these matters is therefore admissible. *Webber* v. *Stanley*, 16 C. B. (N.S.) 698; 33 L. J., C. P. 217; 10 Jur. (N.S.) 657; 10 L. T. 417; 12 W. R. 833.

The construction of will is not to be altered upon inference from testator's knowledge of circumstances of family. *Radcliffe* v. *Buckley*, 10 Ves. 195; 7 R. R. 383.

A doubtful will construed upon evidence as to the state of the testator's family. *Blundell* v. *Gladstone*, 11 Sim. 467; 1 Ph. 279; 12 L. J., Ch. 225; 5 Jur. 481; 7 Jur. 269. Affirmed, sub nom. *Camoys (Lord)* v. *Blundell*, 1 H. L. Cas. 778.

As to Beneficiary Intended.]—In construing a will the court may, for the purpose of identifying the person or thing intended as the object or subject of the testator's bounty, inquire into every material fact, and all the extrinsic circumstances which were known to the testator, relating as well to the person who claims or the thing claimed as to the testator's family and affairs. But the court may not admit any direct extrinsic evidence of the testator's intention, unless there is more than one person or thing equally answering the description he has used. *Charter* v. *Charter*, supra.

When the object of a testator's bounty is not correctly named, or is described by a name which is only in part correct then, if there is enough in the will, when read with the knowledge of surrounding circumstances, to show who it was that the testator intended to benefit, so that, if the incorrect or partially correct description by name were expunged, the gift would

not be void for uncertainty, the indications of intention discoverable in the rest of the will are to prevail over those which arise from the use of the inaccurate or only partially correct description by name. *Ib.*

In the construction of wills, the court looks not only to the terms of the will itself, but to the surrounding circumstances and the state of the parties. *Pasmore* v. *Huggins*, 21 Beav. 103; 25 L. J., Ch. 251.

Upon this principle, where a testator gave the income of a fund to his sister (then sixty-eight years of age and married to a second husband) for life, and after her decease bequeathed the fund to her children "by her then present or any future husband," and she had children by both her first and second husbands:—Held, that the children by her former marriage were not excluded. *Ib.*

As evidence of friendly intercourse with parties benefited by a doubtful will is admissible in favour of that will, so also is evidence of friendly intercourse with relations not benefited by such will admissible against it, though of very slight weight. *Hitchings* v. *Wood*, 2 Moore, P. C. 355.

Parol evidence of collateral circumstances relating to the ages of the devisees, and the situation of the parties, and to their being married or unmarried, is admissible in evidence for the purpose of construing a will. *Lowe* v. *Huntingtower* (*Lord*), 4 Russ. 532; 2 L. J. (o.s.) K. B. 164; 26 R. R. 633.

Evidence of reputation is not admissible in expounding a will to prove a person's age. *Colclough* v. *Smith*, 10 L. T. 918.

Legacy to A., if in the testator's service at the time of his decease; parol evidence admitted to show that, though she had quitted his house, she continued and was by him considered as in his service, and upon that evidence the legacy was established. *Herbert* v. *Reid*, 16 Ves. 481.

Legacy to a person dead in the lifetime of the testator lapsed, although the words are "to M., his executors, administrators, and assigns"; and parol evidence inadmissible that the testator knew, at the time of making the will, that the legatee was dead. *Maybank* v. *Brooks*, 1 Bro. C. C. 84.

Evidence offered to prove that testator, who gave legacy to A., his executors, &c., knew A. to be dead, and meant it for his representative rejected. *S. C.* nom. *Mabank* v. *Brooks*, Dick. 577.

A bequest of residuary personal estate to "the children of the deceased son (named Bamber) of my father's sister share and share alike" is void for uncertainty where, at the date of the will, there were three such deceased sons; and evidence of the testator's intention cannot be admitted to show that he meant to benefit the children of all the three sons. *Stephenson, In re, Donaldson* v. *Bamber*, 66 L. J., Ch. 93; [1897] 1 Ch. 75; 75 L. T. 495; 45 W. R. 162—C. A.

The rule that the court can reject an inaccurate enumeration of a class and allow the whole class to share the bequest applies only where the testator's intention to benefit the whole class is shown by his will. *Hare* v. *Cartridge* (13 Sim. 165) doubted. *Ib.*

—— **Particular Words of Description.**]—A testator, after giving legacies to Mary Wyatt, Matthew Wyatt, Frederick Wyatt, Louisa Atwell (called Wyatt), Maria Weir, and Emily de Vere, proceeded, "I give and bequeath to , daughter of , holding some situation about the church , the sum of fifty pounds annually during the continuance of her natural life, and I direct my trustees or trustee for the time being to pay to the said the said annuity of fifty pounds . . . and the receipt of the said shall be sufficient discharge to my trustees or trustee for the time being; and from the decease of the said I direct," &c.; and the testator directed that, "in case any one of my said legatees, Mary Wyatt, Frederick Wyatt, Watthew Wyatt, Louisa Atwell (called Wyatt), Maria Weir, Emily de Vere, or Marian Elliott," should become bankrupt, &c., her or his legacy should determine, and that the trustees or trustee should pay to her or him, "if in the case of Mary Wyatt, Matthew Wyatt, and Frederick Wyatt, the sum of forty shillings a week," and "if in the case of Maria Weir and Emily de Vere, the sum of thirty shillings a week," and "if in the case of Marian Elliott, the sum of fifteen shillings a week":—Held, on an originating summons by Marian Furniss (formerly Marian Elliott), supported by an affidavit by her to the effect that she was the daughter of James Elliott, beadle of the parish church at Epsom, and that the testator was acquainted with her, that she was entitled to the annuity of fifty pounds given by the will. *Furniss* v. *Phear*, 36 W. R. 521.

A testatrix made the following bequest: "To the three children of B. 500*l.* each." At the date of the will, and at her death, there were nine children of B. Evidence was tendered to the effect that, at the time when B. had three children, the testatrix had made a will containing the same bequest; that when B. had six children she had made another will containing the same bequest; that when B. had nine children she had made another will containing the same bequest (the will in question being the fourth will); and that she at all four times knew the number of B.'s children:—Held, that, on the assumption that this evidence was admissible (but without deciding that point), each of the nine children was entitled to a legacy of 500*l.* *Daniell* v. *Daniell*, 3 De G. & Sm. 37; 18 L. J., Ch. 157; 13 Jur. 164.

A testator, in 1877, left to his trustees a sum of 10,000*l.* railway stock, in trust for the "children" living at his decease of his deceased niece, "Margaret Kerr." Some years before the date of the will the niece mentioned had married a second time, under circumstances which very much displeased the testator, who had in consequence declined to hold any communication with her, and always refused to recognise her by any other surname than that of "Kerr," her first husband's. There were five children of the first marriage, and one of the second, who survived the testator. Within three weeks after the date of the will the testator wrote a letter to one of the five children of the first marriage, from which it appeared that he intended to confine the gift of the 10,000*l.* to them, as he stated therein that he had by his will left them 2,000*l.* each. He also caused a similar letter to be written and sent about four years later. The testator died in 1883:—Held, that the word "children" must bear its primâ facie meaning, so as to include the children of both marriages, and that, there being no latent ambiguity as to its signification in this instance, the letters were not admissible to show the testator's intention. *Andrews* v. *Andrews*, 15 L. R. Ir. 199—C. A.

A testator bequeathed his residuary personal estate upon trust to pay and divide the same equally to and amongst his nine grandchildren, that is to say, the three children of his daughter Jane, the three children of his daughter Elizabeth, the two children of his son Joseph, and the child of his daughter Harriet. At the date of the will Joseph had four children, two by a former and the other two by his present wife. Evidence was tendered to show that the testator had declared an intention of benefiting the two children of Joseph by his first marriage, and a declaration by him that he knew nothing about Joseph's other children:—Held, that the evidence tendered was not admissible to construe the will, and that all Joseph's children were entitled equally with the several other grandchildren. *Matthews* v. *Foulshaw*, 4 N. R. 500; 11 L. T. 82; 12 W. R. 1141.

A testatrix gave a share of her residue to her "cousin, Harriet Cloak." She had no cousin of that name, but she had a married cousin, Harriet Crane, whose maiden name was Cloak; and she had a cousin, T. Cloak, whose wife's name was Harriet:—Held, that extrinsic evidence was admissible to show the testatrix's knowledge of and intimacy with the members of the Cloak family. *Grant* v. *Grant* (infra) distinguished. *Taylor, In re, Cloak* v. *Hammond*, 56 L. J., Ch. 171; 34 Ch. D. 255; 56 L. T. 649; 35 W. R. 186—C. A.

Parol evidence admitted to prove which heir was intended, viz., whether the heir of the mother's mother's side, or the heir of the mother's father's side. *Harris* v. *Lincoln* (*Bishop*), 2 P. Wms. 136.

Parol evidence is admissible to explain the sense in which the word "nephew" is employed in a will. *Grant* v. *Grant*, L. R. 5 C. P. 727; 22 L. T. 233; 18 W. R. 576. Discussed in *Parker, In re, Bentham* v. *Wilson*, 50 L. J., Ch. 639; 17 Ch. D. 262; 44 L. T. 885; 29 W. R. 855.

A testator by his will left to his nephew his (the testator's) interest in the lands of L., subject to the payment of all charges on the said farm and lands, and, as to the said farm, subject to the payment by him (the testator's nephew) to each of his parents during their respective lives, of the sum of 5*l.* per year. At the time of his decease, and at the date of the will, the testator had several nephews, sons of the testator's brothers, who had emigrated to America many years before. He had also a nephew, T. D., son of his sister, M. D. For some years before his death the testator resided with M. D. and her husband, and T. D. had managed the testator's farm at L. The solicitor who drew the will proved that the testator intended T. D. as the object of his bounty:—Held, that T. D. was entitled to the farm. *Phelan* v. *Slattery*, 19 L. R. Ir. 177.

A testator bequeathed a legacy to his niece E. A great-great-niece, E. J., held to answer the description, and to be entitled to the legacy. Parol evidence not admissible to show the circumstances under which the bequest was contained in the will, and that the testator could not have intended to designate his great-great-niece. *Stringer* v. *Gardiner*, 4 De G. & J. 468; 28 L. J., Ch. 758; 5 Jur. (N.S.) 260; 7 W. R. 602.

Local Description Inaccurate—Extrinsic Evidence admitted to show Testator's Intention.]—See *Anstee* v. *Nelms*, 1 H. & N. 225; 26 L. J., Ex. 5; 4 W. R. 612.

As to Condition of Testator's Property.]—The state of testator's property cannot be resorted to as a criterion to explain the will. *Kellett* v. *Kellett*, 1 Ball & B. 542. Affirmed, 3 Dow, 248; 15 R. R. 63.

Parol evidence admitted to show the state of testator's property when he made his will. *Hyde* v. *Price*, C. P. Cooper, 193.

The court ought not to consider the circumstances of the testator to determine his intention as to personal estate; whether as to real, quære. *Inchiquin* v. *French*, Ambl. 40; Ridgw. 230; 1 Cox, 1.

Will not to be construed by something dehors; as by the state of the property where no latent ambiguity. *Page* v. *Leapingwell*, 18 Ves. 466; 11 R. R. 234.

Different construction of the word "surplus" from that which it commonly bears, inferred from the expression of the will. *Ib.*

Where a testator gives stock standing in his name, and has not stock so standing, but it is in the name of a trustee, parol evidence is admissible of the mistake. *Hewson* v. *Reid*, 5 Madd. 451.

A testatrix, having a special power of appointment over a fund, gave by her will (as translated from the Italian), to objects of the power, "the whole of my property of every kind, including rentes, stocks, securities, &c., deposited with my bankers and trustees . . . in a word, all I may be seised of at the time of my death, nothing being excluded or excepted." At her death she had no such "rentes, stocks, &c." of her own; but certain consols and securities, representing the fund, had before the date of her will been deposited at her banker's in the names of the trustees of the fund:—Held, that her will was merely a general gift of her property, and contained nothing to show that she was executing the power. Evidence of the state of a testator's property at the date of the will, to show an intention to execute a power, is inadmissible, where the gift is not specific. *Innes* v. *Sayer* (3 Mac. & G. 606) followed. *Huddleston, In re, Faà Di Bruno* v. *Eyston*, 64 L. J., Ch. 157; [1894] 3 Ch. 595; 8 R. 462; 43 W. R. 139.

Of Testator's Belief as to his Property.]—Statement of property written by testator, and his books of accounts, admitted as evidence that he considered as his property, and meant to dispose of, property not strictly, though in some sense, his: viz., mortgages and leases, the property of his wife under will, by which he was executor with her before her marriage. *Druce* v. *Denison*, 6 Ves. 385.

A testator bequeathed a legacy to A. "in full satisfaction of all claims he may have upon me." The testator was indebted to the executor of B., who held B.'s residuary estate on trust for the wife of A. Parol evidence to show that the testator regarded the debt as belonging to A.'s wife, or to A. in her right:—Held, not admissible. *Parmiter* v. *Parmiter*, 1 J. & H. 135; 8 W. R. 578. Affirmed, 30 L. J., Ch. 508; 8 L. T. 799—L. C.

Where the intention to dispose was clearly expressed on the face of the will, and parol evidence was tendered for the purpose of showing that the testatrix had taken the amount of the property which she was capable of bequeathing, supposing certain property in which she had only a life interest to be her own, and that the legatee under the will, who also took an interest in such supposed absolute property under a

settlement made by the testatrix, ought, in order to enlarge the residuary bequest, to be put to his election, such evidence was held to be inadmissible. *Clementson* v. *Gandy*, 1 Keen, 309; 5 L. J., Ch. 260.

Held, that a court of equity, in a suit to enforce the trusts of the will, might receive parol evidence to show what the testator had been accustomed to consider to be an estate called the Ashford Hall estate. *Ricketts* v. *Turquand*, 1 H. L. Cas. 473, varying the judgment below.

Testator gave the residue of his estate to the poor of the parish of K. com. L., but that parish was in com. N. It was set up by the next of kin, that testator did not imagine his residuum would exceed 10*l*., and had so declared; whereas it amounted to near 1,000*l*. The court thought that parol evidence should be admitted, to help out the description of the parish, but not as to the quantity of the thing given. *Brown* v. *Langley*, 2 Barnard. 118.

A testator devised "the townland of T., including the house, offices and demesne, &c., of W." In addition to the demesne of W., which, in fact, formed part of T., the testator was entitled to adjoining lands, called M. and C.:—Held, that extrinsic evidence that the testator treated M. and C. as part of the demesne of W. was inadmissible for the purpose of showing that M. and C. passed under the devise. *King* v. *King*, 13 L. R. Ir. 531.

As to Testator's Intention.]—Extrinsic evidence is admissible to shew the circumstances of the testator at the time of making his will, so as to enable the court to place itself in the situation of the testator, but it is inadmissible to prove either his motives or intentions. *Martin* v. *Drinkwater*, 2 Beav. 215; 9 L. J., Ch. 247.

Parol evidence not admissible to show the intention of the testator against the construction upon the face of the will. *Cambridge* v. *Rous*, 8 Ves. 22; 6 R. R. 199.

Evidence not admissible that devisor did not mean what he had expressed, but admissible to show that a particular expression was not his will. *Powell* v. *Mouchett*, and *Lichfield* v. *Mouchett*, 6 Madd. 216; 22 R. R. 276.

The general doctrine of the admissibility of parol evidence to explain a testator's intention, and the cases of *Hurst* v. *Beach*, (infra, col. 675), *Booker* v. *Allen* (2 Russ. & M. 270), *Weall* v. *Rice* (2 Russ. & M. 251, 263), and *Lloyd* v. *Harvey* (2 Russ. & M. 310), considered. *Hall* v. *Hill*, 1 Con. & L. 120; 1 Dr. & War. 94; Ir. R. 4 Eq. 27.

Parol evidence is inadmissible for the purpose of explaining the testator's intention, even against the heir-at-law. *Irvine* v. *Sullivan*, 38 L. J., Ch. 635; L. R. 8 Eq. 673; 17 W. R. 1083.

Extrinsic evidence explanatory of a will in order to raise a case of election, is not admissible. *Dummer* v. *Pitcher*, Coop. t. Brough. 257; 2 Myl. & K. 262.

A legatee, son-in-law to the testator, was held entitled to his legacy, discharged from debts due by him to the testator, and a debt for which the testator was his surety, upon evidence from the testator's accounts, letters and memorandums in his handwriting. Parol evidence of declarations in conversation was produced for the same purpose; but the court appeared to rely on the evidence in writing. *Eden* v. *Smyth*, 5 Ves. 341; 5 R. R. 60.

A testatrix was the owner of four debentures of the Spanish government, each of which had impressed upon it the words "Capital 1,000*l*.," and purported to secure to the holder 50*l*. per annum in perpetuity, but redeemable on payment of "55*l*. per cent. on the nominal amount." By her will she bequeathed thus:—The sum of 2,000*l*. Spanish bonds or coupons now belonging to me, and all dividends which shall be due to me thereon at the time of my decease":—Held, that two only of the debentures passed, and that parol evidence of declarations of the testatrix as to her intention was inadmissible. *Horwood* v. *Griffith*, 4 De G. M. & G. 700; 23 L. J., Ch. 465.

Held, also, semble, that where there is a specific bequest, parol evidence is admissible to show what property there is answering to the description of it; but that, if on that evidence it appears that there was property correctly answering the description, no evidence can be adduced to show that it was intended to apply to other property. *Ib.*

J. B., at his death, had a balance due from his banker, and was also entitled to a share of the balance due to A. B. from his banker; A. B. having received moneys for him from time to time, and with his knowledge paid them to his own bankers, as his own moneys; but J. B. had no concern with A. B.'s bankers, nor did they know that he was interested in the moneys paid by A. B. J. B. bequeaths all his money in the hands of any banker:—Held, that his balance at his own banker's, and also his share of A. B.'s balance, will pass, and that evidence is admissible to show that he so intended. *Hemming* v. *Whittam*, 2 Sim. 493; 1 L. J., Ch. 94.

A testator devised all his real estates (except the hereditaments thereinafter particularly devised), including all estates vested in him upon trust, or by way of mortgage, to trustees upon certain trusts; in a subsequent part of his will he devised his farm in A., in the possession of T. H., to T. R. He had two farms in A. called respectively S. and M., both of which were in the possession of T. H., but at different rents. On a question being raised which of these two farms the testator intended to give to T. R.:—It was sufficiently established by the evidence that during the lives of the testator and his father the proceeds of the farm S. had been regularly paid to a Roman Catholic priest, and that the testator had uniformly dealt with it in conformity with a real or supposed trust affecting it for this purpose:—Held, therefore, that he must be taken to have intended to comprise it in the general devise of trust estates, and that consequently the farm M. was the one devised to T. R. *Blundell* v. *Gladstone*, 3 Macn. & G. 692. Reversing 14 Sim. 83; 8 Jur. 301.

Among the testatrix's papers some writings were found, made after the passing of the Wills Act, but not attested as thereby required:—Held, that these could not be looked at for the purpose of ascertaining what her intentions were. *Briggs* v. *Penny*, 3 De G. & Sm. 525; 13 Jur. 909. And see *S. C.*, 3 Macn. & G. 546.

A clause which the law will not allow to operate may be used to explain the intentions of a testator. *Martin* v. *Martin*, 35 L. J., Ch. 281; 12 Jur. (N.S.) 889; 14 L. T. 129.

—— **Meaning of Gift.**]—When the meaning of a will is doubtful, the court may resort to evidence of the state of the testator's property, but where the words are plain no such intrinsic

aid can be resorted to. *Hensman* v. *Fryer*, 37 L. J., Ch. 97; L. R. 3 Ch. 420; 17 L. T. 394; 16 W. R. 162.

Where there is a primâ facie gift, specific evidence of the state of the property at the date of the will is admissible. *Innes* v. *Sayer*, 3 Mac. & G. 606; 21 L. J., Ch. 190; 16 Jur. 21. Affirming 7 Hare, 377.

Extrinsic evidence admitted, not to construe a will, but to show with reference to what it was made. *Bengough* v. *Walker*, 15 Ves. 514; 10 R. R. 106.

Court will not take into consideration the amount of the property, nor the number of objects, for the purpose of construing will, except in case of a specific disposition. *Sibley* v. *Perry*, 7 Ves. 522; 6 R. R. 183.

Extrinsic evidence is more readily admitted to explain an ambiguity in the subject than in the object of the gift. *Rowlatt* v. *Easton*, 2 N. R. 262; 11 W. R. 767.

Where the subject of a devise is described by reference to some extrinsic fact, extrinsic evidence must be admitted to ascertain the fact, and to ascertain the subject of the devise. Different from the cases of reference to a paper which is to form part of the will, where the will itself must specify the paper to be incorporated with it. *Sandford* v. *Raikes*, 1 Mer. 653.

Testator contracts for the purchase of a house, and afterwards, by a codicil to his will, gives to A., his executor, the house which he had given a a memorandum of agreement to purchase, and which was to be paid for out of timber which he had ordered to be cut down. This amounts to a direction that the purchase-money for the house shall be so provided for: and evidence was admitted to show what was the order given by the testator, with reference to the cutting of timber. *Id.* 646.

Testatrix gave 800*l.* stock in long annuities to A.; the same to B.; 200*l.* long annuities to C., the interest thereof to accumulate. An inquiry admitted into the state of her property, to show she meant such sums of money, not annuities of this amount. *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 472.

A testator gives to some persons annuities of 500*l.* long annuities, and to several others, legacies of 500*l.* long annuities, on one of which he directs interest to be paid at 5*l.* per cent. Evidence of the amount of his property admissible to explain the meaning of the latter bequests; and his property being insufficient to pay them in long annuities:—Held, that sums of money to be raised out of his long annuities were intended. *Colpoys* v. *Colpoys*, Jac. 451.

A legacy of a "100*l.* long annuities stock":—Held, upon the context of the will, and the evidence of the state of the funded property, to be pecuniary and not specific. *Att.-Gen.* v. *Grote*, 2 Russ. & M. 699. Affirming 3 Mer. 316; 17 R. R. 91.

Legacy of 100*l.* out of my reduced bank annuities held pecuniary, the court leaning against holding a legacy specific, unless clearly intended; the court would not take into consideration evidence of the value of the stock at the date of the codicil, by which the legacy was given, nor an erasure of a legacy to the same person by the will, but decided upon the words of the codicil. *Kirby* v. *Potter*, 4 Ves. 748; 4 R. R. 342.

A testatrix by a codicil gave to A. and M. "50*l.* each of bank long annuities now standing in my name." At the date of the codicil, and at her death, she possessed long annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock. Evidence as to the state and value of the testatrix's property in the funds at those respective times was admitted, and on the effect of that evidence, and the language of the testamentary papers, taken together, the bequests to A. and M. were held not to be specific but pecuniary. *Boys* v. *Williams*, 2 Russ. & M. 689. Reversing 3 Sim. 563; 30 R. R. 223.

At the death of a testator two copies of his will were produced, one of which had been retained by himself, the other deposited with his bankers; each with a codicil containing the same gift in the same words, but of different dates, and attested by different witnesses. Probate having been granted of the duplicate will and of the two codicils:—Held, that evidence by one of the attesting witnesses to one of the codicils was admissible for the purpose of showing, from the circumstances attending the execution, that the two codicils were not two but one instrument, and accordingly that the legatee therein named was entitled to one legacy only. *Hubbard* v. *Alexander*, 45 L. J., Ch. 740; 3 Ch. D. 738; 35 L. T. 52; 24 W. R. 1058.

—— **Insufficiency of Estate.**]—Parol evidence is not admissible to show the inadequacy of the personal estate of the testatrix to satisfy the purposes of the will; but with regard to real estate, parol evidence would be admissible for that purpose, if an intention to pass realty appeared on the will. *Jones* v. *Curry*, 1 Swanst. 66; 1 Wils. Ch. 24.

The testator having a power over 3,000*l.*, originally the property of his wife, gave several legacies, and then, after the death of his wife, the residue to the defendant: his estate was not sufficient to pay the legacies, yet held that the will was not an execution of the power, the same not being referred to, nor anything by which an intention appeared in testator to execute it. Evidence to show the testator's own estate was insufficient for the purposes of his will without the 3,000*l.*, rejected. *Andrews* v. *Emmot*, 2 Bro. C. C. 297.

Legatee adducing Evidence to contradict Will.]—A testator gave the proceeds of sale of his real and personal estate to trustees, on trust to divide the same among his children living at his death, and the issue of deceased children, in equal shares per stirpes. The will stated that the testator had advanced to four of his sons respectively certain specified amounts, on account of their respective shares, and the testator directed that the "respective sums hereinbefore recited to have been advanced" should be brought into hotchpot by the four sons respectively for the purposes of the division of his estate:—Held, that the sons were bound by the statement in the will of the amounts of the advances made to them, and were not entitled to adduce evidence to show that the advances which had been made to them were in fact of less amount. *Aird's Estate, In re* (12 Ch. D. 291) followed. The decision in that case is not overruled by *Taylor's Estate, In re* (22 Ch. D. 495). *Wood, In re, Ward* v. *Wood*, 55 L. J., Ch. 720; 32 Ch. D. 517; 54 L. T. 932; 34 W. R. 788.

Of Matters subsequent to Execution of Will.]—Will not to be construed by subsequent circumstances. *Moggridge* v. *Thackwell*, 3 Bro. C. C. 517. Affirmed 13 Ves. 416; 6 R. R. 76.

Will, if extrinsic evidence could be admitted, not to be construed by matters posterior to its execution. *Welby* v. *Welby*, 2 V. & B. 192; 13 R. R. 58.

Inconvenient consequences, not in the contemplation of the testator at the time of making his will, not sufficient to authorise a variation or interpolation in the terms of a bequest; where those terms are in themselves clear and intelligible. *Smith* v. *Streatfield*, 1 Mer. 358; 15 R. R. 132.

To rebut or fortify Presumptions.]—Primary principle is, that evidence is not admissible to contradict a written will; but, in some cases, court will raise a presumption against it, and then admit evidence to repel the presumption. *Hurst* v. *Beach*, 5 Madd. 360; 21 R. R. 304.

Parol evidence is not admissible to contradict an express declaration in will; but if there be no express declaration, and only circumstances which afford inference or presumption, there parol evidence is admissible to answer that inference or presumption. *Gladding* v. *Yapp*, 5 Madd. 59; 21 R. R. 277.

A subsequent marriage and the birth of a child revokes a will. Quære, as to the propriety of admitting evidence against the presumption. *Gibbons* v. *Caunt*, 4 Ves. 848.

Although parol evidence is admissible to rebut a presumption of law against the words of a will, yet where the presumption arises from a rule of construction of words simply quâ words, no parol evidence can be admitted. *Barrs* v. *Fewkes*, 6 N. R. 355; 34 L. J., Ch. 522; 11 Jur. (N.S.) 669; 12 L. T. 727; 13 W. R. 987.

Therefore, under a gift of residuary real and personal estate to a person appointed executor, "to enable him to carry into effect the purposes of this my will," the court refused to admit extrinsic evidence to show that the executor was entitled beneficially, and was not a trustee merely for the heir of the surplus real estate, the heir being entitled by construction, and not by implication of law. *Ib.*

Docksey v. *Docksey* (3 Bro. P. C. 39), and *Mallabar* v. *Mallabar* (Cas. t. Talb. 78), explained. *Ib.*

Parol evidence is admissible to rebut the presumption that a legacy given to a person who is appointed executor is annexed to the office—Per Cotton, L.J. *Appleton, In re, Barber* v. *Tebbit*, 54 L. J., Ch. 954; 29 Ch. D. 893; 52 L. T. 906; 49 J. P. 708.

A testator's will contained the following clause: "I give and bequeath to my brother E. whatsoever real estate I may die possessed of, wheresoever situate, on trust nevertheless to pay thereout the sum of 800*l.* due from me to the trustees under the marriage settlement of S., and the sum of 300*l.* due from me to B., and also on trust to pay to each of my sisters M. and C. and to my brother A., as long as they respectively live, the sum of 50*l.* every year." The will contained a bequest of the personalty to E. and A. and certain of his sisters, and appointed E. executor thereof:—Held, that as E. was an express trustee, parol evidence was not admissible to show that there was an intention to give him a beneficial interest. *Croome* v. *Croome*, 59 L. T. 582.

Testatrix, who made her will on a printed form, after giving certain legacies, gave all her estate real and personal "unto to and for own use and benefit absolutely," and then appointed C. W. C. to pay all her debts, &c., and to be executor of her will. The chief clerk certified that the testatrix was illegitimate, and that she left no issue or next of kin. The crown and the executor claimed the residue, and the executor tendered evidence to prove that the intention of the testatrix was that he should take the residue, if any, for his own benefit:—Held, that, under the peculiar circumstances, parol evidence was admissible to rebut the presumption against the executor arising from the blanks in the will, and that the executor, subject to the payment of costs, was entitled for his own benefit to what should remain. *Bacon's Will, In re, Camp* v. *Coe*, 55 L. J., Ch. 368; 31 Ch. D. 460; 54 L. T. 150; 34 W. R. 319.

Legacy of interest then due on mortgage. After making will, testator survives eleven years, and receives interest on mortgage. Evidence admissible to prove interest was received as accruing since the making of will, and not on account of what was due before; therefore, legacy was held adeemed. *Graves* v. *Hughes*, 4 Madd. 381.

A testatrix was possessed of original shares in a company fully paid up, and of the same number of shares not fully paid up, which had been issued one for every original share. She bequeathed specifically certain of her shares in the company. Evidence is not to be admitted to show that the testatrix intended by each specifically bequeathed share a double share, consisting of one of each class. *Millard* v. *Bailey*, 35 L. J., Ch. 312; L. R. 1 Eq. 378; 13 L. T. 751; 14 W. R. 385.

Parol evidence admissible to fortify the presumption of a legacy being adeemed. *Monck* v. *Monck* (*Lord*), 1 Ball & B. 298; 12 R. R. 33.

Parol evidence may be read in support of legal operation of will. *Lake* v. *Lake*, Dick. 236.

Terms of Art.]—A statuary bequeathed articles used in his business, by their technical names, some of which were very obscurely written. Reference directed to ascertain what was meant, the master taking to his assistance persons skilled in writing, and acquainted with articles used by statuaries. *Goblet* v. *Beechy*, 3 Sim. 24; 9 L. J. (O.S.) Ch. 200. Reversed 2 Russ. & M. 624.

A testator bequeathed certain legacies, using letters to designate the amount, viz., "the sum of i. x. x." Parol evidence admitted to show that the testator used those letters as private trade marks, and to prove the amounts which they represented. *Kell* v. *Charman*, 23 Beav. 195; 4 W. R. 787.

A testator, by a will made in 1872, devised "forty-five acres of the lands of D." to A., and "fifty acres" of the same lands to B.:—Held, that extrinsic evidence was not admissible to show that the testator meant Irish and not statute acres. By the statutory definition contained in the 5 Geo. 4, c. 74, s. 2, the word "acre" has received a legal signification which must be attributed to that word, whether used in a contract or in a will, or other voluntary instrument. *O'Donnell* v. *O'Donnell*, 13 L. R. Ir. 226—C. A.

Secret Trust—To show Existence of.]—A testator who died in Jan., 1885, by his will dated in

Dec., 1884, bequeathed to his friends A. and B. the sum of 500*l.* free of legacy duty to be raised and paid out of his pure personalty, "relying, but not by way of trust, upon their applying the said sum in or towards the object or objects privately communicated to them" by him. The executors objected to pay over the bequest, on the ground that there was a secret trust, and that such trust appeared to be an illegal one. The legatee accordingly applied to the court to order payment of the legacy. The executors tendered affidavits to show that the bequest was upon a trust. The legatees objected that the court could not go beyond the terms of the will: — Held, that the evidence was admissible. *Russell* v. *Jackson* (10 Hare, 204) followed. *Spencer's Will, In re*, 57 L. T. 519—C. A.

C. ERASURES AND INTERLINEATIONS.

Erasures.]—How the spiritual courts proceed when there are erasures in a will, and the executrix submits to have the will proved as though no such erasures had been therein. *Parker* v. *Ash*, 1 Vern. 256.

A., by will duly executed, devises a copyhold estate to his wife, and on the day of his death orders his nephew to obliterate some devises, but nothing as to the copyhold, and then caused a memorandum to be written that he approved of the will as obliterated, but does not republish it, and orders his nephew to carry it to one to write it fair, and before it is done, he becomes delirious:—Held, to be a good will, and that the copyhold passed. *Burkitt* v. *Burkitt*, 2 Vern. 498.

A testator gave his residuary estate in certain portions between his two granddaughters and his four grandsons. He afterwards drew a line through the material parts of the bequest, and by a marginal note stated that, one grandson being dead, and the other three being provided for, he intended to bequeath 1,000*l.* to each of his grandsons, and the residue between his two granddaughters:—Held, that the first bequest was cancelled, and that the granddaughters were entitled to the whole fund, subject to the three legacies of 1,000*l.* *Ravenscroft, In re*, 18 L. J., Ch. 501.

Will of realty, date prior to the 1st January, 1838, and bearing upon the face of it certain obliterations which were favourable to the claim of the heir-at-law of the testatrix, established against the heir, without the obliterations, the evidence leading to the conclusion that the obliterations were not made previously to the execution of the will, or under circumstances rendering them valid within the provisions of the 6th section of the Statute of Frauds, and the heir not desiring an issue. *Wynn* v. *Heveningham*, 1 Coll. C. C. 630.

A testator having, by his will, directed his executors to transfer 500*l.*, part of his residuary estate, to N., and made a specific disposition of the other parts, and afterwards drawn a pen through the name of N. and by a codicil declared that he rased her name out of his will with his own hand, the 500*l.* belongs, as undisposed of, to his next of kin. The costs of ascertaining the right of that sum were paid thereout, in exemption of the general residue. *Strymsher* v. *Northcote*, 1 Swanst. 566; 1 Wils. Ch. 248; 18 R. R. 142.

A testator bequeathed certain property, after the death of his wife, as follows: "To our three children, Henry and James, now residing with me, our sons, and the before named Anne, our daughter." This last member of the sentence had been stroked with a pen, as if to obliterate the words, but they were still quite legible. The testator subsequently reacknowledged the will in presence of three witnesses: — Held, that the previous words of description, "our three children," were sufficient to entitle Anne to take, even if the obliteration were complete, which it was not. *Boyd* v. *Martin*, 2 Dr. & Wal. 355.

T., after giving specific legacies, gives the whole income of his property to his wife for life; as to the principal, one-half of my "Consols and Indian stock to my" son absolutely, and the other half in trust for the children of his daughter at twenty-one, with a gift of the residue to his son. The words between the inverted commas were struck through, and probate was granted of the will in blank as to them; and upon the question whether the children of the daughter were excluded or not:—Held, that they were, and that the son took everything, subject to the wife's life estate. *Taylor* v. *Richardson*, 2 Drew. 16; 2 Eq. Rep. 332; 23 L. J., Ch. 9; 2 W. R. 29.

A testator directed his executors to pay an annuity to his sister, A. B., the wife of C., for her separate use, or to such persons as the said A. B. should appoint, the receipt of the said A. B. to be a sufficient discharge, and he gave the residue of his estate among his brother E. and his sisters F. G. and A. B., the wife of the said C. He subsequently drew his pen through the name of his sister A. B. in the first, third, and fourth places where she was mentioned, leaving her description as the wife of C. still remaining, except in the third place, where there was no description:—Held, that the bequest to her was not revoked. *Martins* v. *Gardiner*, 8 Sim. 73; 5 L. J., Ch. 305.

Testator gives a moiety of the residue to such lying-in hospital as his executor should appoint. He afterwards strikes out the executor's name, and dies without appointing any other executor. This is not a revocation of the legacy, but the court will appoint. *White* v. *White*, 1 Bro. C. C. 12.

A legacy given thus, "£1.0.0.," which stood between two other legacies for 100*l.* each, the dots between the figures being smeared as if for the purpose of obliteration:—Held, to be a legacy for 100*l.* *Manchee* v. *Kay*, 3 Giff. 545.

—— **Reference to Original Will.**]—In construing a will of personal estate, the court, notwithstanding an objection by counsel that the probate copy alone could be looked at, ordered the original will to be produced, and had regard to certain erasures appearing therein, but which had been omitted in the probate. *Manning* v. *Purcell*, 7 De G. M. & G. 55.

Interlineations.]—The effect of interlineations considered. *Hutchinson* v. *Hutchinson*, Ir. R. 13 Eq. 332.

Rejection of a repugnancy by interlineation. *Boon* v. *Cornforth*, 2 Ves. Sen. 277.

Where a testator omits something, and supplies it by a mere pencil interlineation, which is not admitted to probate, the court cannot receive it, but must, if possible, supply the omission from the will itself; and can receive no evidence dehors the will, except as to the condition of the testator and his family at the time of execution. *Edmunds* v. *Waugh*, 6 W. R. 589.

A pencil memorandum, if regarded as a codicil, and therefore a part of the will, is receivable by the court. *Ib.*

Erasures with Interlineations.]—Testator gave legacies of 4,000*l.*, charged exclusively on real estate. He struck out the 4,000*l.* with his pen, and inserted 3,000*l.* in pencil; and by an unattached codicil, which was a nullity, as the legacies were exclusively charged on real estate, expressly altered the amount of the legacies from 4,000*l.* to 3,000*l.*:—Held, that the legatees were entitled to the legacies of 4,000*l.* *Kirke* v. *Kirke*, 4 Russ. 435; 6 L. J. (O.S.) Ch. 143.

Obliterations and interlineations by the testator in his will, coupled with an ineffectual codicil, do not amount to a revocation, but are a substitution, which failing, the original disposition stands good. *Ib.*

Where a testator interlined his will to except the plaintiff, who was named a legatee under it with others, and also made a codicil expressly excluding him, but afterwards obliterated the codicil without doing the same with the interlineation of the will, the court admitted the plaintiff to an equal interest with the other parties taking under the will, considering the inference as certain that the testator so intended. *Utterson* v. *Utterson*, G. Coop. 60; 3 V. & B. 122.

Alterations whether made before or after Execution.]—Where there are alterations on the face of a will, there is no presumption of law that they were made at any particular time; but the rule applicable to such cases is, that those who propound a doubtful instrument must make the doubt clear. *Williams* v. *Ashton*, 1 J. & H. 115; 3 L. T. 177.

Therefore, where a testatrix told the witnesses to her will, at the time of attestation, that she had made alterations in her will, but did not allow them to see what the alterations were:—Held, that, in the absence of any means to determine what alterations were made before execution, the court could not give effect to any of them. *Ib.*

The will contained alterations and erasures affecting the amount and objects of the testator's bounty, the existence of which, at the time of execution, the attesting witnesses could not depose to:—Held, by the judicial committee of the privy council, there being an absence of all direct evidence as to the alterations and erasures, that the presumption of law was, that such alterations and erasures were made after the execution of the will and probate of the will granted in its original form. *Cooper* v. *Bockett*, 4 Moore, P. C. 149; 10 Jur. 931.

The ecclesiastical court granted probate of a will of personalty with cross lines drawn in ink over the bequests of certain legacies:—Held, on a claim raised by the parties interested in these legacies, that the will must be taken to have been executed after the cross lines were drawn, and that the only question was, what was the meaning of the testator, and that this was that the legacies were not to stand part of the will. *Gann* v. *Gregory*, 3 De G. M. & G. 777; 2 Eq. R. 484; 18 Jur. 1063; 2 W. R. 484.

In the absence of direct evidence, the court will presume that obliterations and alterations in a will have been made subsequently to its execution, and uphold the gifts which occur in the part so obliterated or altered. *S. C.*, 1 Eq. R. 112; 17 Jur. 520; 1 W. R. 320.

A testator, who died in 1821, struck the name of one of the devisees out of his will, and interlined the names of two other persons above the erasure; but those alterations were not noticed in the attestation clause, nor was there anything to show, or from which it could be inferred, that they made before the will was executed:—Held, that they did not affect the devise. *Simmons* v. *Rudall*, 1 Sim. (N.S.) 115; 15 Jur. 162.

By the Statute of Wills (1 Vict. c. 26, s. 21) obliterations, interlineations, or other alterations in a will, after execution, are void, if not affirmed in the margin or otherwise by the signature of the testator, and the attestation of witnesses. *Greville* v. *Tylee*, 7 Moore, P. C. 320.

The mere circumstance of the amount, or the name of a legatee, being inserted in different ink, and in a different handwriting, does not alone constitute an obliteration, interlineation, or other alteration, within the meaning of the statute, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been superinduced by other writing. In such circumstances the onus probandi lies upon the party who alleges such alteration to have been done prior to execution, to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator. *Ib.*

In the absence of proof that certain words in a will, written with a different pen, and in different ink, and in a different handwriting, partly upon an erasure, were inserted prior to execution, so much of such will, consisting of the inserted words which constituted a reversionary disposition, pronounced against. *Ib.*

The case of *Cooper* v. *Bockett* (supra), considered and approved. *Ib.*

Although, when alterations are apparent on the face of a will, it cannot be presumed that they were made before execution, and they cannot be admitted to probate without some affirmative evidence that they were in fact so made, yet a court or jury trying this question of fact is not confined to any particular species of evidence, but may act upon any evidence which, having regard to all the circumstances, reasonably leads the judgment to the conclusion that the alterations were made before execution. *Moore* v. *Moore*, Ir. R. 6 Eq. 166.

A lawyer's holograph will settled property on his younger grandson Stephen for life, remainder to his first and other sons in tail male, then to his elder grandson Richard, remainder, &c. The word "Richard" was interlined, and "Stephen" struck out in the first, and vice versâ in the second case. These alterations were in the handwriting of, and initialled by, the testator, who had previously expressed his intention of settling the property on his grandsons in priority of birth, who also knew their names, and there was no reason why the younger should be preferred. There having been a subsequent opportunity for correcting the mistake before execution, and the appearance of the will and alterations raising the presumption, confirmed by the opinion of two experts, of contemporaneous writing, probate was decreed with such alterations. *Ib.*

A testator, by his will dated in 1834, devised and bequeathed real, copyhold, and personal estate upon certain trusts. Certain of the words in the declaration of trusts were interlineated. Probate was granted of the will by the consistory

court of C. A question being raised whether, with regard to the real estate, the interlineation was made before or after the execution of the will:—Held, having regard to the granting of the probate by the consistory court, that it was made before the execution of the will. *Cruttenden, In re, Davey* v. *Lansdell*, 45 L. T. 465; 30 W. R. 57. *See also* REVOCATION BY CANCELLATION, ante, cols. 424, et seq.

D. MISTAKE OR MISDESCRIPTION.

General Principles.]—A court of equity will not supply words in a will unless there be palpably error scribentis. *Molesworth* v. *Molesworth*, 1 Cox, 75.

Testator's mistake not rectified, because nothing to show what would have been the intention, if no mistake. *Smith* v. *Maitland*, 1 Ves. 362.

Evidence of mistake not admissible to affect the construction of a will. *Shergold* v. *Boone*, 13 Ves. 376; 9 R. R. 195.

Mistake in deed may be corrected in equity, but not a mistake in a will. *Powell* v. *Mouchett* and *Lichfield* v. *Mouchett*, 6 Madd. 216; 22 R. R. 276.

Parol evidence will not be admitted to show that a bequest in a former will had been inadvertently allowed to remain in a second will. *Stringer* v. *Gardiner*, 28 L. J., Ch. 758; 5 Jur. (N.S.) 260.

Mistakes in wills shall not be supposed, if any construction that is agreeable to reason can be made out. *Purse* v. *Snaplin*, 1 Atk. 415.

In our law particular legatees are always preferred to the residuary legatees. Secus in the Roman law. *Id.* 418.

When there is some property which exactly comes within the words of a bequest, the bequest will not include property to which it is doubtful whether the description can apply. *Ridge* v. *Newton*, 1 Con. & L. 381; 2 Dr. & War. 239; Ir. R. 4 Eq. 389.

A will cannot be varied upon the ground of mistake, unless the alleged mistake is clearly inconsistent with the intention upon the whole will. *Mellish* v. *Mellish*, 4 Ves. 45; 9 R. R. 335; *Philips* v. *Chamberlaine*, 4 Ves. 51.

A clerical error may be corrected where, if uncorrected, it makes the will absurd, and the proper correction can be gathered from the context. *Northen's Estate, In re, Salt* v. *Pym*, 54 L. J., Ch. 273; 28 Ch. D. 153; 52 L. T. 173; 33 W. R. 336.

A testator devised an estate called Lea Knowl to trustees upon trusts for the benefit of his daughter W., her husband and children, and empowered his trustees, at the request of his daughter W., to sell the estate and stand possessed of the sale moneys upon the trusts thereinbefore declared "concerning the said Lea Knowl estate hereby devised, as to such and so many of them as shall at the time of sale have been existing undetermined and capable of taking effect." He then devised an estate called Croxton to trustees upon similar trusts for the benefit of his daughter C., her husband and children, and empowered his trustees, at the request of his daughter C., to sell the last-mentioned devised hereditaments and stand possessed of the sale moneys "in trust for such person and persons, and for such estates, ends, intents, and purposes, powers, provisoes, and conditions, as are hereinbefore limited, expressed, and declared of and concerning the said Lea Knowl estate hereby devised, as to such and so many of them as shall at the time of sale have been existing undetermined and capable of taking effect":—Held, that the words "the said Lea Knowl estate" in the trusts of the moneys to arise from the sale of the Croxton estate had been inserted in the will through an obvious error; that to read the words "the said Lea Knowl estate" literally and grammatically would be making the will lead to a manifest absurdity or incongruity, and that the will must be read as if the words "the said Croxton estate" were inserted in the place of the words "the said Lea Knowl estate" in the trusts of the moneys to arise from the sale of the Croxton estate. *Ib.*

Testator gave 100*l.* in trust to pay the interest to A. till her daughter, B., should attain twenty-four, and then he gave the said 100*l.* and the interest then due to her said mother, A.:—Held, a mistake, and decreed the legacy to be paid to the daughter at the age of twenty-four. *Clarke* v. *Norris*, 3 Ves. 362.

Testator devised all the residue of his estates, as well copyhold as freehold, the copyhold part thereof having been previously surrendered to the use of his will upon several trusts in favour of his wife and children; the only trust for his eldest son and heir was an annuity of 300*l.* for life, remainder to his wife and children. The testator having never surrendered his copyhold, it was held a mistaken description, the copyhold being clearly intended to pass; and the annuity being much more valuable, the heir was decreed to elect, and was not bound by receiving half a year's payment of the annuity while abroad. *Rumbold* v. *Rumbold*, 3 Ves. 65.

A testator devised his freehold estate to his widow, charged with a legacy to another, and also bequeathed to his widow his personal estate. The widow, by her will, gave a leasehold estate, part of the same property (erroneously describing it as a freehold), to A., subject, in conjunction with the freehold premises, to the legacy; and she devised the freehold premises to B., subject, with the premises devised to A., to the payment of the same legacy:—Held, that the fact of the testatrix having left the estates to A. and B. respectively, in the mistaken supposition that both estates were, under the will of the original testator, subject to the legacy, but which he had charged on the freehold only, was no ground for exonerating the estate bequeathed to A., for there was no reason to presume the testatrix would have apportioned her bounty differently if the mistake had not occurred. *Westcott* v. *Cullifford*, 3 Hare, 265; 13 L. J., Ch. 136; 8 Jur. 166.

A testator gave to his wife, so long as she should continue his widow and until all his four daughters by his former wife should attain twenty-one or die under twenty-one, an annuity of 800*l.*, and a further annuity of 100*l.* in respect of each of such daughters who should for the time being be under twenty-one, such annuities to be employed by her in maintaining herself and hi said daughters, and in educating the daughters After all his four daughters had attained twenty-one or died, he bequeathed to his wife during widowhood 600*l.* a year, and after her future marriage 200*l.* a year; and if he should have any children by his then wife, he bequeathed to his wife in respect of each of such children who should for the time being be under twenty-one a further annuity of 150*l.*, to commence after all his said four daughters should have attained twenty-one or died, to be applied by his wife

in maintaining and educating such children, and to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months from his decease. He gave his residuary estate among such of his children by both wives as being sons should attain twenty-one, or being daughters attain that age or marry, in equal shares, subject to a provision for making the share of each child by the second wife exceed the share of a child by the former wife by 3,000*l.* There was the usual clause of maintenance, subject to a proviso that the power of giving maintenance should not be exercised as to any child while the annuity bequeathed to his wife in respect of such child was payable, unless the trustees thought the annuity insufficient. At the testator's death several of the daughters by the first wife were under twenty-one:—Held, that evidence that the latter of the two clauses was left in the will by mistake, and contrary to the testator's express instructions, was not admissible. *Bywater, In re, Bywater* v. *Clarke*, 18 Ch. D. 17; 30 W. R. 94.

Specific devises to various persons are void for uncertainty, if the testator, intending to select the particular subject-matter of the devise for each person, uses words that are not sufficiently clear to allow the particular gifts to be distinguished from one another. *Asten* v. *Asten*, 63 L. J., Ch. 834; [1894] 3 Ch. 260; 8 R. 496; 71 L. T. 228.

Mistake in Figures or Amounts.]—Though a debt devised amounts to a less sum than is stated in the will, yet the wrong description and falling short will not defeat the legacy, but shall be applied as far as it goes in the same manner as if there had been the whole sum mentioned in the will. *Att.-Gen.* v. *Pyle*, 1 Atk. 435.

Mistake in the computation of a legacy rectified according to the intention, though contrary to the words. *Milner* v. *Milner*, 1 Ves. 106.

Mistake in a will and codicil, as to the amount of a fund out of which younger children were to be provided for, rectified on the evident intent of the testator. *Brackenbury* v. *Brackenbury*, 2 Eden, 275; Ambl. 474.

A testator bequeathed "an annuity of 21*l.* per annum, which I purchased from J. G." The testator never had an annuity of that amount, but he had purchased from J. G. for 300*l.* an annuity of 46*l.* per annum, and had insured the life of J. G. at an annual premium of 25*l.*, and had made an entry in his books of "300*l.*, lent to J. G. at 7 per cent., 21*l.*; 25*l.*, premium on policy of assurance, 300*l.*":—Held, that the whole annuity of 46*l.* passed to the legatee. *Purchase* v. *Shallis*, 2 Hall & Tw. 354; 19 L. J., Ch. 518; 14 Jur. 403.

Devise of estates to A., upon condition that A. should release, in favour of her brother B., all A.'s interest in 1,000*l.*, "charged upon certain estates, limited by the marriage settlement" of the father and mother of A. and B. The sum of 2,000*l.* was comprehended in the settlement, and A. took an interest in it, but it was not charged on any estate:—Held, nevertheless, that it was the sum referred to in the will. *Howard* v. *Conway*, 1 Coll. C. C. 87; 13 L. J., Ch. 193; 8 Jur. 237.

Testator, possessed of 5,000*l.* 3 per cent. consols, bequeathed 2,000*l.* thereof to trustees, in trust as to 1,000*l.* to A., and as to 2,000*l.* to B.:—Held, that testator meant to give trustees 3,000*l.* in trust, bequest to them of the 2,000*l.* 3 per cent. being mentioned only once, and legacy of 2,000*l.* to B. being mentioned twice. *Alford* v. *Green*, 5 Madd. 92.

A will contained a bequest of 1,000*l.* on trusts, and of 5,000*l.* on trusts, and another bequest on trusts in which no sum was mentioned; but the language was continuous, and no actual blank was left. In another part of the will there was power to invest the said sum of 5,000*l.*, and the said two sums of 1,000*l.*:—Held, that the latter clause was evidence that the testator intended a bequest of 1,000*l.* in the bequest in which no sum was named. *Edmunds* v. *Waugh*, 4 Drew. 275; 6 W. R. 589.

A testator gave to each of his three brothers and six sisters a legacy of 500*l.*, and other legacies to other relations of his, which, with the preceding legacies to his brothers and sisters, amounted to 6,100*l.* He then gave "the remainder of his property to his wife absolutely, except 4,100*l.*, of which she was only to have the use during her life, and which he wished to be divided among his relations to whom he had left legacies in the fore part of his will, in proportion to the legacies left above, which would just make their legacies double the first bequest":—Held, that although there had been a mistake by the testator in computing the amount of the legacies given by him in the former part of his will, there was no such evidence of a clear intention on his part to double the amount of the preceding legacies as would justify the court in holding that the words "four thousand one hundred pounds" ought to be read "six thousand one hundred pounds." *Thompson* v. *Whitelock*, 4 De G. & J. 490; 28 L. J., Ch. 793; 5 Jur. (N.S.) 991; 7 W. R. 625.

A testator bequeathed 500*l.* to his widow, and by a codicil he bequeathed her "a further sum, not exceeding 300*l.*, making altogether a legacy of 1,000*l.* given to her by my will and this codicil":—Held, that there was a mere miscalculation, and that, under the codicil, the widow was only entitled to 300*l.* *Morgan* v. *Middlemiss*, 35 Beav. 278.

A testatrix bequeathed all her property, real and personal, to her son; and in the event of his receiving 450*l.*, or thereabouts, to which she considered herself entitled, she requested that he would add to that sum 50*l.*, to make up 400*l.*, which she left to her grand-daughter. The testatrix received the 450*l.* in her lifetime:—Held, that the legacy as to the 450*l.* was not specific or demonstrative, but conditional on the son receiving 450*l.*, and that the grand-daughter was not entitled to be paid that sum out of the general assets of the testatrix. *Taylor* v. *Creagh*, 8 Ir. Ch. R. 281.

Held, also, that 400*l.* should be read "500*l.*" by construction. *Ib.*

In Description of Stock.]—Bequest in these terms by a testatrix having, among other property, Government securities and bank stock, "the whole of my fortune now standing in the funds":—Held, not falsa demonstratio, nor to extend to the bank stock, but to be restricted to the Government securities. *Grainger* v. *Slingsby*, 8 De G. M. & G. 385; 25 L. J., Ch. 573; 2 Jur. (N.S.) 276, 1176; 4 W. R. 623. And see *S. C.*, 7 H. L. Cas. 273; 28 L. J., Ch. 616; 5 Jur. (N.S.) 111.

A. bequeathed "his 10,000 dollars Indiana 5 per cent. stock." He had, prior to his will,

possessed that amount, but, at that time, it had been changed into 5,000 of that stock, some 2½ per cent. Indiana stock, and some canal stock, all of which he retained until his death :—Held, that the 5,000 dollars alone passed. *Gilliat* v. *Gilliat*, 28 Beav. 481.

When a testator has stock which accurately answers the description in his will, though different in amount, the description will not be extended to stock of a different description. *Ib.*

A bequest of bank stock held to pass 3¼ per cent. annuities, no other stock being standing in the name of the testator either when he made his will or at his death. *Drake* v. *Martin*, 23 Beav. 89 ; 26 L. J., Ch. 786.

A bequest of eight Russian bonds purchased by L., his broker :—Held, to pass different Russian bonds purchased through another broker. *Ib.*

A testator bequeathed to each of his six cousins "3,000*l.* 3 per cent. consols, part of that sum standing in his name in the funds." The estate at the time of his death was insufficient to satisfy the whole of the legacies. Amongst other property he was entitled to 11,000*l.* new 3 per cent. annuities, but to no consols or any other stock :—Held, that the legatees were entitled to the 11,000*l.* stock in equal shares. *Burbey* v. *Burbey*, 15 L. T. 501 ; 15 W. R. 479.

A general gift of money or shares in a particular society will not be invalidated by words erroneously describing the amount. *Lane* v. *Way*, 19 W. R. 842.

A. bequeathed "all his shares in a banking company then standing in the names of A. and B." to C. At the date of the will twenty shares were standing in the name of "B. as executor of A.," and fifty-nine shares were standing in the name of B. alone. There was a gift of the residue of the personalty contained in the will :—Held, that all the shares passed by the bequest to C. *Coltman* v. *Gregory*, 40 L. J., Ch. 352 ; 23 L. T. 583 ; 19 W. R. 122.

Husband devises to his wife 700*l.* East India stock, having none ; but there was 700*l.* bank stock, to the surplus of which the wife was entitled as an executrix, after payment of her testator's debts, and which the husband afterwards transferred in his own name. The 700*l.* bank stock shall go to the wife, being an erroneous description. *Door* v. *Geary*, 1 Ves. 255.

Testatrix bequeathed "to my uncle P. P. the interest on 200*l.*, being part of a greater sum, in Government stock, now remaining in my name in the Bank of Ireland," and after his decease "this principal sum of 200*l.* to be divided equally between the children of P. P." The testatrix had no stock in her name at the date of her will or at her decease, but was entitled to 1,000*l.* stock standing in her mother's name, to whom she was executrix and sole residuary legatee :—Held, that the legacy was specific, and that 200*l.* of the stock standing in the name of her mother passed to the legatee. *Power* v. *Lenehan*, 2 Jones, 728.

A testator directs the produce of his real estate to be invested by his executors in their own names in 4 per cent. consols. He then directs them to transfer the 4 per cent. consols and 3 per cent. consols, then standing in his name, to the said account in their own names, and afterwards disposes of "the said 4 per cent. trust stock." This disposition under the special provisions of the will includes the 3 per cent. consols which were standing in his name at the making of the will. *Jacques* v. *Johnson*, 2 Myl. & K. 64.

Bequest by will made in 1857 of "my shares in the Great Western Railway." At the date of the will testatrix had no shares, strictly speaking, in the Great Western or any other railway company, but she was possessed of Wilts and Somerset stock of the Great Western Railway, and also of preference and other stock, which was increased by further purchases of stock in the same company between the date of the will and her death :—Held, that all the Great Western and Wilts and Somerset stock in the possession of the testatrix at her death passed under the bequest. *Trinder* v. *Trinder*, L. R. 1 Eq. 695 ; 14 W. R. 557.

A testatrix gave all her leasehold and personal estate to trustees, upon trust to pay the rent and profits of two specified houses to A., and she gave the sum of 100*l.* bank stock to B. when he attained the age of twenty-one years, and in the case of his death to C. At her death the testatrix had bank annuities, but no bank stock :—Held, that 100*l.* bank annuities would not satisfy the gift of bank stock, but that the trustees must purchase 100*l.* bank stock out of the funds of the testatrix. *Bignall* v. *Rose*, 24 L. J., Ch. 27 ; 3 W. R. 77.

A testatrix bequeathed 8,000*l.* bonds which she described as "standing in the names of A. and B. at C.'s bank." She had 8,000*l.* bonds standing in the names of A. and B., but part only of such bonds was at C.'s bank, the remainder being at Y.'s bank :—Held, that the bonds at both banks passed. *Hull* v. *Hill*, 4 Ch. D. 97 ; 25 W. R. 223.

D., being possessed of 4,000*l.* 4 per cent. bank annuities, by his will gave parts of it to a number of persons ; he then made a codicil in which he said, "I find willed away only 5,600*l.* 4 per cent. bank annuities, and I have there at present 6,000*l.* I give the interest of the remaining 400*l.* to F." It appeared that he had disposed of only 3,200*l.* of the stock by his will. F. shall take the whole residue of the stock under the bequest in the codicil. *Danvers* v. *Manning*, 1 Cox, 203 ; 2 Bro. C. C. 18.

A bequest of "the capital stock or sum of 800*l.* consols," with other specific property, does not pass 800*l.* consols standing in the joint names of the testator and his wife. *Poole* v. *Odling*, 10 W. R. 591.

If testator gives stock standing in his name, and has no such stock, the legacy fails. The court sends it to the master to inquire what the testator intended as well where there is a misdescription of fund as of legatee. *Evans* v. *Tripp*, 6 Madd. 91.

A. having forty-one shares in a bank standing in her own name and being her own property, and having only a life interest in twelve shares in the same bank standing in the name of B. as trustee of a deed by which she had put in settlement those twelve shares, by her will recited that she was entitled to twelve shares in the bank, which stood in the name of herself and B. as trustee for her, and bequeathed the said shares to three persons :—Held, that the bequest was inoperative, and could not be made good out of her own shares. *Millar* v. *Woodside*, Ir. R. 6 Eq. 546.

A testator bequeathed to his son all the shares he held in the Hibernian Bank, and all dividends that might be due thereon at his decease, in

trust for his eldest daughter, to his son all the stock of the governor and company of the Bank of Ireland to which he might be entitled at his decease in trust for the benefit of another daughter and her children, and he appointed his son residuary legatee. The testator had not at the date of his will or of his death, but some years before he had had, Bank of Ireland stock:—Held, that new 3 per cent. Government stock, which he was entitled to at his death, did not pass under the latter bequest. *Beahan* v. *Beahan*, 14 Ir. Eq. R. 427; 17 W. R. 603.

A testator gave to his niece "1,000*l.*, and all the policies of life insurance which I have effected in the Union and Law Life insurance offices, and the moneys payable in respect thereof; and I direct the same to be paid to her" in a specified manner. He then gave to his wife "the other policies of life insurance which I have effected in any other offices"; and the gift of his residuary personal estate to his wife contained in its enumeration "shares in public companies." The testator never had any "policies" effected on his life in the Union or Law Life insurance offices, but he had "shares" in those offices, and in other offices, as well as two policies on his life in one other insurance office. On a case stated between the niece and widow of the testator:—Held, that the testator, imagining in error that he had policies in two offices, meant to give those policies; that where he meant to give shares he had so described them; and that, as it could not be known what will the testator would have made if he had not committed this error, the court held that the shares did not pass under the description of policies. *Waters* v. *Wood*, 5 De G. & Sm. 717; 22 L. J., Ch. 206; 17 Jur. 33.

In June, a testator directed his bankers to purchase 1,127 francs French rentes for him. They entered the purchase in their books, but never transferred the amount into the testator's name; they had, however, sufficient rentes to answer it, which they considered they held for the testator. In July following the testator bequeathed "the annual rente of 1,127 francs, inscribed in his name in the book of public debt of France," to A.:—Held, that A. was entitled to 1,127 rentes, although the testator had none in his name, and though, on the balance of previous transactions in rentes with his banker, he was entitled only to 708 francs in rentes. *Ellis* v. *Eden*, 25 Beav. 482.

Testator gave a sum, part of his 4 per cent. bank annuities, to his wife for life, and after her decease to several relations; evidence was admitted that he had no such stock at the date of the will, having previously sold it all and invested the produce in long annuities, and to show the cause of the mistake; and the legacies were established. *Selwood* v. *Mildmay*, 3 Ves. 306.

Testator bequeathed part of his 3 per cent. consolidated bank annuities; upon evidence that he had no bank stock at the date of his will or his death, but that he had 3 per cent. South Sea annuities, the legacy was established. *Id.* 808.

Bequest of stock if the testator has it at the time is specific, and any act destroying it proves an intention to revoke; if a ring or a picture bequeathed cannot be found, that cannot be rectified. *Id.* 310.

In 1843 a testatrix made several bequests to the amount of 1,000*l.* "of the stock 3 per cent. consols then standing in her name in the books of the Bank of England." The testatrix died in the same year, and had not, at the date of the will or at her death, any stock whatever standing in the bank books. It appeared, however, from extrinsic evidence, that in 1840 she had had a sum of 1,000*l.* bank annuities standing in her name, which she sold out and lent to A. B., he paying her, down to her death, a sum equal to the dividends. It was held that extrinsic evidence was admissible to prove how the mistake in description arose, and that the legatees were entitled to a sum equal to the value of 1,000*l.* consols at her death. *Lindgren* v. *Lindgren*, 9 Beav. 358; 15 L. J. Ch. 428; 10 Jur. 674.

In Description of other Property.]—Testator bequeathed all his property in the Austrian and Russian funds, and also that vested in a Swedish mortgage security. The testator at the date of his will had several sums invested on different Swedish mortgages:—Held, that the bequest was not void for uncertainty, but that all the sums invested on Swedish mortgages passed by it. *Richards* v. *Patteson*, 15 Sim. 501; 11 Jur. 113.

By her will the testatrix recited that she was absolutely entitled to the sum of "500*l.* invested in the Australian Bank on deposit receipt, and also to the sum of 200*l.* on deposit receipt in Messrs. G.'s, making together the sum of 700*l.*," and bequeathed to her son 300*l.*, and to each of her two daughters 200*l.*, portions of the said sum of 700*l.* At the time of making her will, and at the time of her death, the testatrix had no sum on deposit receipt in Messrs. G.'s, nor any sum on deposit receipt in the Australian Bank, but there were standing in her name eleven shares in the Union Bank of Australia:—Held, that these shares passed under the bequest of the sum on deposit receipt in the Australian Bank. *Mosse* v. *Cranfield*, [1895] 1 Ir. R. 80.

A testator makes a general devise of all his lands in nine parishes; in five of them he had only lands in fee; in three others he had only lands over which he had a power of appointment; in the other he had lands in fee, and also lands over which his power extended. All the lands pass by his will, except the lands in the latter parish, which were subject to his power. *Napier* v. *Napier*, 1 Sim. 28; 5 L. J. (o.s.) Ch. 65.

A testator gave his four leasehold messuages in L. P., with other tenements in trust out of the rents to pay the ground rents of the whole, and of another tenement in Y. P., comprised in the lease under which two of the houses in L. P. were held, and to apply the surplus on certain trusts. The testator had five messuages in L. P. held under four leases:—Held, on the context, that the five messuages passed under the bequest. *Sampson* v. *Sampson*, L. R. 8 Eq. 479; and see *Blundell* v. *Gladstone*, 3 Mac. & G. 692.

In Wording of Gift.]—By her will, dated April 1, 1895, a testatrix, among other legacies, bequeathed to A. "the sum of 300*l.* in addition to the sums owing to her from my late husband's estate," and she appointed A. and another person executrix and executor. The testatrix died on April 11, 1895. A. alone proved the will. The estate of the testatrix consisted almost entirely of property derived by her under the will of her deceased husband. A. was a grandniece of the testatrix, and for many years had resided with

her and her husband and had assisted them in household matters. She was paid a nominal salary of 8*l.* per annum, it being, as she alleged, always understood that she should be provided for by the sums of money given or secured to her by the testatrix's husband. These sums were represented by an I O U for 500*l.* and a promissory note for the same amount. In her administration accounts she included the payment to herself of the two sums of 500*l.* :—Held, that the testatrix being the person to pay, and having the whole estate of her husband in her hands, her intention was that A. should receive thereout the two sums of 500*l.* plus the 300*l.* expressly bequeathed to her, the reference to such sums as debts of her husband being a mere falsa demonstratio. *Rowe, In re, Pike* v. *Hamlyn*, 77 L. T. 475—C. A.

In naming Beneficiary.]—Testator gave 100*l.* in trust to pay the interest to A. till her daughter, B., should attain twenty-four, and then he gave the said 100*l.* and the interest then due to her said mother, A. :—Held, a mistake, and decreed the legacy to be paid to the daughter at the age of twenty-four. *Clarke* v. *Norris*, 3 Ves. 362.

In Number of Class—Principle.]—In the case of a testamentary gift to children, describing them as consisting of a specified number which is less than the number in existence at the date of the will, the court rejects the specified number on the presumption of mistake, and all the children in existence at the date of the will are held entitled, unless it can be inferred who are the particular children intended, in which case the court holds those children entitled to the exclusion of the others. When a testator in a bequest to a class describes the class as consisting of a number which is found to differ from the number actually existing at the date of the will, the presumption that the testator intended to benefit the whole class is liable to be rebutted by evidence. *Newman* v. *Piercey*, 46 L. J., Ch. 36 ; 4 Ch. D. 41 ; 35 L. T. 461 ; 25 W. R. 37.

—— **Specified Number less than Actual Number.**]—A testator bequeathed "to the two sons and the daughter of A. B., 50*l.* each." At the date of the will, and the death of the testator, A. B. had one son and four daughters ; each of these five children is entitled to a legacy of 50*l.* *Harrison* v. *Harrison*, 1 Russ. & M. 72 ; Taml. 273.

Legacy of 100*l.* to the three sisters of A. ; A. had four sisters. The court will reject the word "three" and give the 100*l.* to the four. A release by one of the sisters to the other three does not aid their claim to the legacy under the will. *Lee* v. *Pain*. 4 Hare, 249.

Bequest of 100*l.* each to the two children of the testator's nephews, A. and B. A. had three children, and B. two children :—Held, that the five children, who were living at the date of the will and at the death of the testator, were entitled under the bequest to 100*l.* apiece. *Morrison* v. *Martin*, 5 Hare, 507.

Bequest to the two servants that should live with testatrix at her death ; she had three at that time, and all of them were held entitled. *Sleech* v. *Thorington*, 2 Ves. 560.

Testator bequeathed 500*l.* to each of the daughters of C., if both or either of them should survive D. At the date of the will, and the death of the testator, C. had three daughters, all of whom survived D. : the three daughters are entitled to 500*l.* each. *Scott* v. *Fenoulhett*, 1 Cox, 79.

Legacy to the three children of A., the sum of 600*l.* each ; four children, all born before the date of the will, entitled to 600*l.* each. *Garvey* v. *Hibbert*, 19 Ves. 125 ; 12 R. R. 155.

A., by will, gave to the two daughters of S. the sum of 10*l.* each. B., by will, gave 82*l.* short annuities, in trust to pay the same to and between the two daughters of S. in equal shares and proportions ; and if either of them should die before the expiration of the term for which the annuities were to run, then to pay the whole to the survivor ; but if both should die before that time, then the same was to fall into the residue of the personal estate. At the times when both these wills were made, S. had three daughters. Under the first will the three daughters shall take 10*l.* each ; and, under the second, the three shall take the short annuities equally, with survivorship amongst them all. *Stebbing* v. *Walkey*, 1 Cox, 250 ; 2 Bro. C. C. 85.

Bequest, in 1829, of 40*l.* a year to each of the seven children now living of J. S. Y. He had nine children then living :—Held, that they all took. *Yeats* v. *Yeats*, 16 Beav. 170.

Gift of 250*l.* to each of the two children of S. He had three children :—Held, that the three children were each entitled to 250*l.* *Spencer* v. *Ward*, L. R. 9 Eq. 507 ; 22 L. T. 702 ; 18 W. R. 858.

The executors, in ignorance that there were three children, paid the eldest, who was of age, her legacy, and set apart 250*l.* for the second, and also paid all the debts and other legacies, and paid over the residue to the residuary legatee. On a bill by the two younger children against the executors and residuary legatee, the court declared them entitled, and ordered the legacies and the costs, including those of the executors, to be paid by the residuary legatee. *Ib.*

A bequest of 10*l.* and furniture was made to each of the three children of W. and E. B. They had four children :—Held, that each of the four was entitled to 10*l.* and a share of the furniture. *Perkins* or *Parkins* v. *Fladgate, Bassett, In re*, 41 L. J., Ch. 681 ; L. R. 14 Eq. 54 ; 20 W. R. 589.

The testator gave the residue "amongst his seven children, A., B., C., D., E. and F.," naming only six. The seven children shall all share equally. *Humphreys* v. *Humphreys*, 2 Cox, 185.

A testator, having given to each of his six children a freehold estate, made a second devise to two of the children, and then gave, devised, and bequeathed all the residue of his real and personal estate unto his said four children, naming three only :—Held, that all the four children (other than the two) were entitled. *Eddels* v. *Johnson*, 1 Giff. 22 ; 27 L. J., Ch. 302 ; 4 Jur. (N.S.) 255 ; 6 W. R. 401.

A testator bequeathed a fund equally amongst his nine grandchildren, the three children of A., the three children of B., the two children of C., and the child of D. C., at the date of the will, had four children, two by each marriage. It was proved that the testator took an interest in the children of the first marriage, and had declared an intention of benefiting them alone :—Held, that this evidence was inadmissible ; that all C.'s children were entitled ; and that the fund was, therefore, divisible in elevenths. *Mathews* v. *Foulsham*, 4 N. R. 500 ; 11 L. T. 82 ; 12 W. R. 1141.

A testator bequeathed certain property, after the death of his wife, as follows: "To our three children, Henry and James, now residing with me, our sons, and the beforenamed Anne, our daughter." This last member of the sentence had been stroked with a pen, as if to obliterate the words, but they were still quite legible. The testator subsequently reacknowledged the will in presence of three witnesses:—Held, that the previous words of description, "our three children," were sufficient to entitle Anne to take, even if the obliteration were complete, which it was not. *Boyd* v. *Martin*, 2 Dr. & Wal. 355.

A testatrix, in 1831, made a will, bequeathing as follows: "To the three children of my niece, F. W., the sum of 500*l.* each." At the date of this will, F. W. had three children only, as the testatrix knew. F. W. subsequently had six other children, of the birth of each of whom the testatrix was informed. The testatrix, in 1836, 1842, and 1844, made three new wills, successively revoking the former, in each of which the bequest was repeated in the same words:—Held, that the bequest in the will of 1844 must be read as if the word "three" had been omitted, or had been the word "nine." *Daniell* v. *Daniell*, 3 De G. & Sm. 337; 18 L. J., Ch. 157; 13 Jur. 164.

A will contained the following bequest:—"I bequeath to each of my four nieces . . . the daughters of my deceased brother Joseph Vaughan, the sum of 500*l.*" At the date of the will there were five daughters of Joseph Vaughan, living, all of whom survived the testator, by two of whom a bill was filed, praying for a declaration that each of the testator's five nieces was entitled to a legacy of 500*l.*:—Held, that the testator was ignorant of the state of the family, or that he intended at some future time to exercise a choice, and that the former was the more probable. And the word "four" must, therefore, be rejected as falsa demonstratio. *McKechnie* v. *Vaughan*, L. R. 15 Eq. 289; 28 L. T. 263; 21 W. R. 399.

A testator bequeathed a legacy to two sons and a daughter, naming them; and the residue of his estate unto the four children of his deceased son Henry. The testator never had more than the four children, who were named; and his son Henry was still living. Henry had five children, all of whom were born at the date of the will, and known to the testator:—Held, that the five children of Henry were entitled to the residuary estate. *Lee* v. *Lee*, 10 Jur. (N.S.) 1041.

—— **Actual Number less than Specified Number.**]—The testator bequeathed an annuity to his niece, during the lives of herself and her five daughters, and the survivors and survivor of them, and, after the death of the niece, the annuity was to be paid to her said daughters, and the survivors and survivor of them. The testator's niece had five sons, and only one daughter, at the date of the will and at the death of the testator:—Held, that this only daughter was entitled to the annuity. *Selsey (Lord)* v. *Lake (Lord)*, 1 Beav. 146; 8 L. J., Ch. 233.

A husband directed that after the death of his wife his trustees should pay and divide 1,000*l.* equally between such ten of the children or remoter issue of H. as the trustees should think fit. At the death of the widow there were only six descendants of H. living:—Held, that the sum was to be divided equally amongst them. *Carthew* v. *Enraght*, 26 L. T. 834; 20 W. R. 743.

A testator directs the residue of his property to be divided into eight equal shares, and disposed of "as follows among the children of B."; he then gives two shares to each of the two daughters, and one share to each of the three sons of B., making together only seven shares:—Held, that the whole residue is divisible amongst the children of B., in seven parts, each daughter taking two of those seventh parts, and each son one. *Berkeley* v. *Palling*, 1 Russ. 496; 4 L. J. (O.S.) Ch. 226; 25 R. R. 115.

Specified Number not rejected — Intention ascertainable.] — The principle on which an erroneous statement of the number of a class is rejected is to avoid uncertainty, and does not apply where a will affords the means of determining which of the class are pointed at. Under a bequest as follows: "I give to the two grandchildren of A. 19*l.* 19*s.* each. They live near B." A. had three grandchildren, of whom two only lived near B.:—Held, that the third grandchild was not entitled. *Wrightson* v. *Calvert*, 1 J. & H. 250.

A testatrix, by will made in 1873, bequeathed "to each of the three children of Mrs. W., widow of W. W., one hundred pounds." W. W., brother of the testatrix, died in 1857, leaving a widow and three children, of whom one died in 1870, and two survived. Mrs. W. married again in 1858, and had six children by that marriage living at the date of the will. The evidence shewed that the testatrix knew of the second marriage, and that there were children of that marriage, but that she did not know their number; also that she had not seen Mrs. W. for six years before the date of her will:—Held, that the two children by W. W. were alone entitled, and not the children of the second marriage. *Newman* v. *Piercey*, supra.

Bequest of stock to trustees in trust, after the death of A., to transfer the same to and amongst all and every the nephews and nieces that should be then living to wit, the said J. B. or her children, and the said P. B. or his children, and D. L. or his children, and P. L. or his children; under this bequest a nephew not expressly named is not entitled to any share; and the fund is equally divisible amongst such nephews and nieces, and their children, as were living at the time of the death of A. *Eccard* v. *Brooke*, 2 Cox, 213; 2 R. R. 31.

Gift by will of stock to trustees, for "my four nephews and niece, namely, A., B., C. and D." The testator had four nephews and one niece, but he named three nephews only, and the niece:—Held, that the fourth nephew was not entitled to share in the fund. *Glanville* v. *Glanville*, 33 Beav. 302; 3 N. R. 58; 33 L. J., Ch. 317; 9 Jur. (N.S.) 1189; 9 L. T. 470; 12 W. R 93.

Gift by will of a specific sum among the six children of A. A. had six children at the time; one more was born after the testator's will, but before the codicils: she shall not take a share with the six born before. *Sherer* v. *Bishop*, 4 Bro. C. C. 55.

Gift to each of the three children of testatrix's niece. At the date of the will the niece had three children living, and a fourth child en ventre sa mère at the time:—Held, the gift was to the three children only who were born at the date of

the will. *Emery, In re, Jones* v. *Emery*, 3 Ch. D. 300.

Misdescription—Son for Daughter.]—A testator bequeathed 100*l*. apiece to the four sons of A. H. by a former husband. She had four children by such former husband, but one of them was a daughter:—Held, that the daughter took a legacy of 100*l*. *Lane* v. *Green*, 4 De G. & Sm. 239; 15 Jur. 763.

—— **Name of one Grandchild omitted and Another repeated.**]—Residue to six grandchildren, the name of one repeated, that of another omitted, all of them shall take. *Garth* v. *Meyrick*, 1 Bro. C. C. 30.

—— **Uncle for Cousin.**]—Bequest of 800*l*. to the four eldest children of the testatrix's cousin A. B., and 200*l*. to the three remaining children of her uncle, A. B. The testatrix had a cousin and uncle of that name; the cousin had seven children, and the uncle one, but he had three remaining grandchildren, one other having died:—Held, that the three younger children of the cousin were entitled to the 200*l*. *Bristow* v. *Bristow*, 5 Beav. 289.

Blanks—Treated as Absolute Omissions.]—Where there is no devisee named, this is an absolute omission, and cannot be supplied by parol evidence. *Castledon* v. *Turner*, 3 Atk. 258.

Gift, by will, of pictures to Lady ——, absolutely void, and shall not go to the master, nor be supported by parol evidence. *Hunt* v. *Hort*, 3 Bro. C. C. 311.

Where testator gave to Bread Street Ward 200*l*. according to Mr. ——'s will, parol evidence was not allowed to explain testator's intention where there was a blank only. *Baylis* v. *Att.-Gen.*, 2 Atk. 239.

A gift to all the children of the testatrix, "with the exception of one, viz. ——," established as a gift to the class, not affected by the incomplete exception. *Illingworth* v. *Cooke*, 9 Hare, 37; 20 L. J., Ch. 512; 15 Jur. 572.

A legacy to a class not definitively fixed will be carried into effect so far as the objects can be ascertained, but blanks in a will cannot be filled up, though the testator apparently contemplated an extension of the class.

Bequest to all and every the sons and daughters of A., including —— who —— the —— illegitimate —— of A.:—Held, that the illegitimate children of A. could not take. *Mason* v. *Bateson*, 26 Beav. 404; 28 L. J., Ch. 391; 5 Jur. (N.S.) 400; 7 W. R. 225.

Devise and bequest of real and personal estate in trust for all the testator's nephews and nieces, the sons and daughters of his sister R., including ——, who —— the —— illegitimate —— of R., equally as tenants in common, is a good devise to the legitimate sons and daughters of R., exclusive of R.'s illegitimate children. *Gill* v. *Bagshaw*, 35 L. J., Ch. 842; L. R. 2 Eq. 746; 14 W. R. 1012.

A testator gave to his wife the income of his property in the funds, East India stock, or elsewhere, for her life. The principal of all such funds and stock and property he bequeathed and devised as follows: he bequeathed "one-half of my [here there was a blank] son, Montague James, to be under his own control, and the other moiety in trust for the children of my daughter Fanny." He made his son executor and residuary legatee:—Held, that no construction could be put on the blanks, and the son, as residuary legatee, took the whole. *Taylor* v. *Richardson*, 2 Drew. 16; 23 L. J., Ch. 9; 2 Eq. R. 332; 2 W. R. 29.

A testator bequeathed a sum of money to be appropriated "for some one or more purposes, charitable, philanthropic, or ":—Held, that the gift was not bad merely by reason of the blank; that the money must be treated as applicable for charitable or philanthropic purposes only. *Macduff, In re, Macduff* v. *Macduff*, 65 L. J., Ch. 700; [1896] 2 Ch. 451; 74 L. T. 706; 45 W. R. 154—C. A.

W. bequeathed to trustees stock and moneys, in trust, after life interest, to be divided in equal shares as follows: "Unto and amongst my nephews and nieces, John Parker and Nanny Parker, ——, or to such of them as shall be living at the time of the decease of all of them" the tenants for life. The words "Nanny Parker" were written in pencil, and were followed by a long blank. The will was proved, and the words "Nanny Parker," were in the probate. The testator had, at the time of his death, including John Parker and Nanny Parker, fourteen nephews and nieces. It being uncertain what bequest the testator meant to make:—Held, that the next of kin were entitled to the fund. *Greig* v. *Martin*, 5 Jur. (N.S.) 329; 7 W. R. 315.

Bequest "unto each of my four nieces ——, the daughters of my deceased brother Joseph, the sum of 500*l*." There were five daughters of Joseph, who all survived the testator:—Held, that the blank left in the will was not sufficient to distinguish this case so as to take it out of the settled rule, and that each of the five nieces was entitled to a legacy of 500*l*. *McKechnie* v. *Vaughan*, L. R. 15 Eq. 289; 28 L. T. 263; 21 W. R. 399.

—— **Filled up by Parol Evidence.**]—Parol evidence as to facts and circumstances within the knowledge of the testatrix at the time of making her will was admitted to explain a patent ambiguity, and to make the description of a person perfect. S. B. gave and bequeathed unto A. and B. a sum of stock, in trust to pay the dividends unto S. D. for life; and, after her decease, "in trust to assign and transfer the same unto —— Davis, daughter of S. D., to and for her own use and benefit." At the date of the will, and at the death of the testatrix, S. D. had three daughters, the plaintiff being the eldest. S. D. died in 1842. Upon the evidence produced, and not rebutted, that the plaintiff was the only daughter of S. D. the testatrix ever knew or heard of:—Held, that the plaintiff was the person described as "—— Davis," and therefore entitled to the legacy. *Phillips* v. *Barker*, 1 Sm. & G. 583; 2 Eq. R. 795; 17 Jur. 1146; 2 W. R. 110.

Persons named in a will blank identified from external circumstances. *Gregson's Trusts, In re*, 4 N. R. 222; 2 H. & M. 504; 10 Jur. (N.S.) 696; 10 L. T. 642; 12 W. R. 935.

Where a testator devised real estate to A., B. and C., also his nephews and nieces D., E. and F., also "—— Cort and —— Cort"; and A., B. and C. were nephews and nieces, and the only persons of the name of Cort known to the testator were his brother-in-law and a nephew and a niece:—Held, that the nephew and niece were the persons intended by the testator. *Ib.*

Legacy to —— P., the son of —— P.; upon

the evidence, the plaintiff, the only claimant, was declared entitled. *Price* v. *Page*, 4 Ves. 679.

—— **In Figures.**]—A testator purported to give a legacy, but left the sum blank. A little further on the sum of "30*l.*" occurred casually in the middle of a direction to the executors to sell the testator's furniture, &c. :—Held, that a legacy of 30*l.* was given. *Hibbert* v. *Hibbert*, 42 L. J., Ch. 383.

The wife made a will bequeathing the sum of £10 00 (sic) :—Held, that 1,000*l.* only passed by it, and contemporaneous evidence of a declaration by the testatrix as to what she had left rejected. *Baker* v. *Ker*, 11 L. R. Ir. 3.

E. INCONSISTENCY OR REPUGNANCY.

Principles.]—If the meaning of a will is ascertained, reasoning from supposed cases will not induce the court to make a different construction ; but can only lead to a conclusion that the testator did not see all the consequences ; but the absurdities, improbabilities, and inconsistencies, which may arise out of cases falling within one construction or another, are attended to with a view to ascertaining the meaning. *Leigh* v. *Leigh*, 15 Ves. 103 ; 10 R. R. 31.

Where literal force of expressions differs in a will, rule is to seek the intent of testator in a consistent and rational purpose, rather than in a purpose irrational and inconsistent. *Jenkins* v. *Herries*, 4 Madd. 67 ; 20 R. R. 272.

In construing a will, if two passages in it are directly opposed to each other, the latter will prevail ; but where there is a mere inconsistency, the court will endeavour to discover from the whole the real meaning of the testator, and, if possible, reconcile all its parts. *Brocklebank* v. *Johnson*, 20 Beav. 205.

Where there are two repugnant devises, what construction shall be put on the will. *Davies* v. *Preece*, Romilly's Notes of Cases, 147.

Latter Clause prevails.]—Every word in the construction of a will is to have effect, if not inconsistent with the general intention, which is to control. If two parts are inconsistent the latter prevails. *Constantine* v. *Constantine*, 6 Ves. 100.

The rule of construction of wills is, that if the general intention can be collected, or any one particular object, expressions militating with that may be rejected, if plainly appearing to have been inserted by mistake ; not otherwise, and if two parts of the will are totally irreconcilable, the latter overrules the former. *Sims* v. *Doughty*, 5 Ves. 243.

Of two inconsistent dispositions in a will, both being intelligible, whether occurring in the same sentence or in different sentences, the last is to prevail unless a contrary intention can be safely inferred from the context. Discussion as to the amount of internal evidence which will justify such an inference. *Morrall* v. *Sutton*, 1 Ph. 533 ; 14 L. J., Ch. 266 ; 9 Jur. 637. And see *S. C.*, 4 Beav. 478 ; 5 *Id.* 100. And see *Crone* v. *O'Dell*, 1 Ball & B. 449 ; 3 Dow, 61 ; 15 R. R. 20.

Effect must be given to every part of a will if possible. But if two clauses are so irreconcilable as to be incapable of bearing a connected meaning, the earlier clause should be discarded, and effect given to the later one. *Biggar* v. *Eastwood*, 15 L. R. Ir. 219.

A testator bequeathed the interest of all moneys invested in loan societies, as well as all other property, to his wife for life. He then directed all his debts to be got in and invested in government securities for the benefit of his wife for her life, and after her decease he gave various legacies to his grandchildren ; and as to the remaining part of his estate, he directed the same to be put out at interest for the benefit of his wife, during her life, and all moneys were to be kept in the Bank of England. The testator afterwards directed that all moneys belonging to him in the friendly societies, when received, should belong to his wife for her own use absolutely :—Held, that the last clause in the will must control the first, and that the testator's wife was entitled to the money in the friendly societies absolutely, and not merely for life :—Held, also, that the trustees were not bound to convert the money in the societies immediately for the purpose of investment in government securities. *Marks* v. *Solomon*, 18 L. J., Ch. 234. Reversed 2 H. & Tw. 323 ; 19 L. J., Ch. 555, the wife being held to take only a life estate.

A testator directed his debts to be paid out of his personal estate, and in a subsequent clause, out of a mixed fund composed of realty and personalty :—Held, on the context, that the latter direction prevailed. *Hopkinson* v. *Ellis*, 10 Beav. 169 ; 16 L. J., Ch. 59.

There were two inconsistent clauses in a will. By the former, the surplus rents of the testator's real estates, after maintenance of the person entitled to the possession until twenty-five, were added to the residue of the personal estate. By the latter, the surplus rents, after maintenance of such person until twenty-one (provided his attaining twenty-one happened within the legal limit of time), were settled upon the same trusts as the realty. Testator then, by a codicil, reciting the former clause, directed that the person entitled to the possession of the estate should be let into the receipt of the rents and profits at twenty-one :—Held, that as the codicil merely affected the surplus rents between the ages of twenty-one and twenty-five, and as, in other respects, the latter of the two clauses in the will was more probably consistent with the testator's intentions, the latter clause should prevail against the former, notwithstanding the express recognition of the former clause by the codicil. *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 441 ; 6 Jur. 658.

The rule of law in favour of preferring the latter to the former of two dispositions in a will dealing differently with the same subject, is applied only after the failure of every endeavour to give such a reasonable construction to the entire dispositions as will render every part of them operative. *Ib.*

A testator, after leaving all he possessed to his wife for life, and after giving at her death part of his property to one of his sons, gave, without any reference to his wife's death, a large specific portion of his property to trustees "for the support of another son, his wife and children, and for their education and starting in life, and at the death of their parents to be equally divided amongst those then living" :—Held, that the widow took a life interest in the specific property given to the trustees. *Conquest* v. *Conquest*, 16 W. R. 453.

A. devises an estate for life to his wife ; and in the latter part creates a trust term, to take place from the day of his death, for payment

of debts in such manner as the wife should direct. Declared that the term, though subsequent, shall take place of the wife's estate for life, and that the last words do not give the wife the power of exempting her life estate, but only the power of raising it by the most convenient method, by mortgage or otherwise. *Ridout* v. *Dowding*, 1 Atk. 419.

In this case an absolute term of ninety-nine years limited to C., amongst other limitations of a real estate under a will, was, with reference to the true construction of the several parts of the will, considered not as an absolute term, but as determinable on the death of C. *Coryton* v. *Helyar*, 2 Cox, 340 ; 2 R. R. 75 ; cited Burr. 923, 1631.

When a certain time is appointed for the payment of a legacy, and afterwards a contingent clause is added touching the same legacy, all the words of the will must stand together, which can never be, unless the contingency happen within the period of time appointed for the payment of the legacy. *Colhoun* v. *Thompson*, Beat. 248.

Testatrix gave her real and personal estate to plaintiffs for life ; remainder to J. A. in tail ; remainder to R. A. in fee, with a few pecuniary legacies, and charged her real estate with the payment, if her personal estate should not be sufficient, and by her will declared she gave all the rest and residue of her personal estate to L. C.'s three daughters :—Held, that the testatrix's charging real estate with the legacies, if the personal is not sufficient, shows her intention in one event to revoke the devise of personal ; and there being an alteration of her intention before she finishes her will, the construction is, she has altered her will throughout, and plaintiffs are not entitled to any part of the personal estate, but residue belongs to three daughters of L. C. *Ulrich* v. *Litchfield*, 2 Atk. 372.

Where the same thing is given in a will to two different persons, Lord Coke said, "The latter words shall revoke the former," but in the case of *Paramour* v. *Yardley* (Plowd. 539) it was held they shall take as joint tenants ; but Lord Hardwicke said he rather inclined to Lord Coke's opinion. *Ib.* And see *Ridout* v. *Pain*, 3 Atk. 492.

So where a man gave a horse to A. in the first part of his will, and in the latter part he gave the same horse to B., it was held a revocation, and Swinburne, pt. 7, c. 1, is mistaken in point of law in saying they should take as joint tenants. *Ib.*

A testator by his will desired that his wife might reside during her widowhood in the freehold house in which he dwelt. After directing his business to be carried on by his executrix (who was his wife) and his executors, so long as they thought expedient, he gave the house, stock-in-trade, and the residue of his property to his executrix and executors, upon trust to pay the wife an annuity of 20*l.* so long as the business should be carried on, and when his youngest child attained twenty-one, to sell the business, stock, and effects, together with the house, and out of the proceeds to pay the wife during her widowhood an annuity of 54*l.* 10*s.* instead of one of 20*l.*, and subject thereto trusts were declared for the benefit of the children :—Held, that the widow's right to reside in the house ceased upon the sale. *Chapman* v. *Gilbert*, 4 De G. M. & G. 366.

Clear Gift not controlled by Subsequent Inconsistent Words.]—A will contained a gift to children and the issue of deceased children, in language which clearly did not vest it in any till the youngest child should have attained twenty-one. In a subsequent part there was a declaration as to the vesting of the shares, expressed with much obscurity, and partially inconsistent with the language of the gift :—Held, that it must be rejected, and the clear gift must take effect. *Bickford* v. *Chalker*, 2 Drew. 327 ; 2 W. R. 502.

When there is an express gift in a will, and there is a subsequent clause inconsistent with the first, but with only an implied revocation, the prior gift takes effect. *Kerr* v. *Clinton* (*Baroness*), L. R. 8 Eq. 462 ; 17 W. R. 980.

A testator having real estates subject to mortgages, for which he was not personally liable, devised his personal estate for payment of his debts, and the surplus to his wife absolutely, and in a subsequent devise of his real estate directed that his trustees should raise by sale thereof so much as his personal estate should prove insufficient for payment of the existing mortgages and charges upon the estate, and subject thereto he devised the estate to his sons :—Held, that this was not a revocation of the prior gift, and that the mortgage debts were not payable out of the personal estate. *Ib.*

The clear expression of a bequest, after the death of the tenant for life, to the children then living, held not to be controlled by other general expressions in the will, so as to vest any interest in one dying before the tenant for life. *La Roche* v. *Davies*, 3 Y. & C. 612, n.

A clear gift to surviving children will not be extended so as to include deceased children on account of a slight ambiguity, not amounting to an inconsistency, in the bequest. *Crosse's Will, In re*, 1 N. R. 419 ; 32 L. J., Ch. 344 ; 9 Jur. (N.S.) 429 ; 8 L. T. 299 ; 11 W. R. 396.

A testator gave to his wife, so long as she should continue his widow and until all his four daughters by his former wife should attain twenty-one or die under twenty-one, an annuity of 800*l.*, and a further annuity of 100*l.* in respect of each of such daughters who should for the time being be under twenty-one, such annuities to be employed by her in maintaining herself and his said daughters, and in educating the daughters. After all his four daughters had attained twenty-one or died, he bequeathed to his wife during widowhood 600*l.* a year, and after her future marriage 200*l.* a year: and if he should have any children by his then wife, he bequeathed to his wife in respect of each of such children who should for the time being be under twenty-one a further annuity of 150*l.*, to commence after all his said four daughters should have attained twenty-one or died, to be applied by his wife in maintaining and educating such children, and to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months from his decease. He gave his residuary estate among such of his children by both wives as being sons should attain twenty-one, or being daughters attain that age or marry, in equal shares, subject to a provision for making the share of each child by the second wife exceed the share of a child by the former wife by 3,000*l.* There was the usual clause of maintenance, subject to a proviso that the power of giving maintenance should not be exercised as to any child while the annuity bequeathed to his wife in respect of such child was payable,

unless the trustees thought the annuity insufficient. At the testator's death several of the daughters by the first wife were under twenty-one :—Held, by Jessel, M.R., that the annuities of 150*l.* became payable from the testator's death, and were not postponed till all the daughters by the first wife had attained twenty-one or died, on the ground that, having regard to the scope of the will, the former of the two inconsistent clauses was to be rejected rather than the latter, independently of the rule that of two inconsistent clauses in a will the latter is to be preferred; but held, on appeal, that this was not a case of two inconsistent gifts, but of a gift of something to arise at a future time, with a subsequent direction as to the time of payment which was inconsistent with the terms of the original gift, and that such subsequent direction could not enlarge the gift, but must be rejected as inconsistent with it. *Bywater, In re, Bywater* v. *Clarke*, 18 Ch. D. 17; 30 W. R. 94.

Held, that evidence that the latter of the two clauses was left in the will by mistake, and contrary to the testator's express instructions, was not admissible. *Ib.*

Where a testator, using a common printed form of will, gave, devised, and bequeathed all his real and personal property and estate to Albert Twiddy Hart, with certain exceptions, and then, after a blank, came a full residuary clause in print unto Edmund Twiddy Hart, Amelia Collins, and Albert Dalby and John Collins, to and for their own use and benefit absolutely :—Held, that nothing remained upon which the second gift could operate, and that the first gift prevailed. *Spencer, In re, Hart* v. *Manston*, 54 L. T. 597; 34 W. R. 527.

A testatrix left all her property to J., subject to the payment of debts and funeral expenses and certain legacies, and willed that whatever residue (if any) should remain undisposed of at the decease of J. should go to T. J. died before the testatrix :—Held, that the gift to J. being absolute, that to T. was void for repugnancy; and that, as the gift to J. had lapsed, there was an intestacy as to the residue. *Jenkins' Trusts, In re*, 23 L. R. Ir. 162. See *Stretton* v. *Fitzgerald*, ante, col. 385, and *Corbett* v. *Corbett*, 58 L. J., P. 17; 14 P. D. 7; 60 L. T. 74; 37 W. R. 114—C.A.

Direction that particular legacies to children shall be paid at particular time is not altered by direction subsequent that all legacies should be paid at another time. *Adams* v. *Clarke*, 9 Mod. 154.

Upon the construction of a will :—Held, that the effect of general words of charge at the commencement was not cut down by subsequent words. *Jones* v. *Williams*, 1 Coll. C. C. 156; 8 Jur. 373.

A testator gave to G. an annuity of 400*l.* to be paid to him by the trustees of the will during his life, by equal half-yearly payments in every year, and directed a competent part of his property to be set apart to answer the annuity; and after the decease of G. he gave "the principal moneys so set apart, and also such part of the annuity as might then remain unapplied as aforesaid," to S., and made S. his residuary legatee. At the time of the will (though it did not appear on the will) G. was non compos mentis, and, though never so found by inquisition, continued in that state till his death. The trustees set apart a fund to answer the annuity, but did not apply the whole of the dividends in his maintenance; and on his death there was in value more than 1,000*l.* accumulated unapplied dividends :—Held, that these accumulations did not pass by the gift in remainder to S., which was repugnant to the gift of the entire annuity to G. in the first instance. *Sanderson's Will, In re*, 3 Jur. (N.S.) 809; 5 W. R. 864.

—— **Gift controlled by Recital.**]—A. bequeaths 1,000*l.* to such children as his daughter should leave at her death; B., her husband, receives it, and by his will, reciting that A. had promised to give it rather differently, but that he (B.) was, nevertheless, desirous to make good A.'s intent and will, bequeaths it equally between his sons C. and D.; D. alone survives his mother :—Held, that C.'s representatives were not entitled, and that A.'s will would have prevailed even if B. had intended to make a variation. *East* v. *Cook*, 2 Ves. 30.

Intention Prevails—Inconsistent Words Rejected or Corrected.]—Where the words of a will are so inconsistent that they cannot be reconciled, the court must reject those that are the least consistent with the testator's intent; and the same words in the same will, though in a different clause, ought to have the same sense; and, therefore, where the testator intended survivorship among his children in the personal, he must mean it in the real estate also. *Haws* v. *Haws*, 3 Atk. 524; 1 Ves. 13; 1 Wils. K. B. 165.

A videlicet shall be rejected if repugnant, not if it can be reconciled and made restrictive. *Wilson* v. *Mount*, 3 Ves. 194.

Repugnant words in a will may be rejected or transposed. In this case the court rejected a repugnancy by interlineation. *Boon* v. *Cornforth*, 2 Ves. 277.

L., in 1803, devised her freehold estates to the use of her grandson for his life, with remainder to the use of his children as therein mentioned, and, in default of such issue, to the use of her four granddaughters (naming them), their heirs and assigns, for ever, as tenants in common, and not as joint tenants. The testatrix also bequeathed her leaseholds to trustees after the death of her grandson, and in default of issue as above mentioned, upon trust for her four granddaughters and their issue equally, in such manner, shares, and proportions as she had thereinbefore directed respecting her freehold estate :—Held, that the gift of the leaseholds was absolute to the four persons mentioned, the words "and their issue" being inconsistent with the general intention apparent in the bequest of leaseholds. *Buckingham* v. *Sellick*, 26 L. T. 764.

A direction to divide residuary estate into as many shares as the testator should have children living "at the death or second marriage of his wife, which should first happen," or then dead leaving issue, was followed by immediate absolute gifts of two shares and contingent gifts of other shares :—Held, that the words fixing the time of distribution were inconsistent with the intention of the testator gathered from the whole will, and must be disregarded; and that all the shares vested at the testator's death. *Smith* v. *Carpenter*, 25 W. R. 824.

Annuity, part out of general assets, part specific, upon intention out of funds, some of which were perpetual, others temporary, to be divided equally between A., B., and C., and their heirs or the survivor of them, "in order as they are now mentioned" :—Held, that the annuity

was limited only with reference to the temporary funds, with an absolute power of disposition; and that, A. dying in life of testatrix, her share goes to B. and C. equally, the concluding words "in order," etc., being rejected as repugnant. *Smith* v. *Pybus*, 9 Ves. 566.

Testator devised his real estates to the children of his sister, then or thereafter to be born, who should live to attain twenty-one, and the issue of such of them as should die under that age leaving issue living at their decease, and their heirs; and if no child of his sister should attain twenty-one, *or dying without leaving issue*, or dying under that age, should not leave such issue, or such issue dying under age as aforesaid, then over. The testator's sister had one child who attained twenty-one, and afterwards died without issue:—Held, that the child took an absolute estate in fee on attaining twenty-one. The words in italics were interlined in the original will, probably by mistake, and were rejected by the vice-chancellor. *Lunn* v. *Osborne*, 7 Sim. 56.

A testator directed his trustees to sell and convert his property, and "to pay the moneys and the investment for the time being, representing the same, to my wife during her life upon trust for all my children" at twenty-one or marriage. He also provided that, "after the death of my wife, or previously thereto, if she shall so direct in writing," the trustees should have powers of advancement and maintenance, and that if he had no child who attained twenty-one or married, "then from and after the death of my wife, and such default or failure of children," he gave the money over:—Held, that the widow took a beneficial interest in the fund for her life. *Greenwood* v. *Greenwood*, 47 L. J., Ch. 298; 5 Ch. D. 954; 37 L. T. 305; 26 W. R. 5.

Inconsistent expressions corrected. *Tillard* v. *Smith*, 1 Jur. 331.

General words controlled, in order to make the whole will consistent. *Whitmore* v. *Trelawney*, 6 Ves. 129.

—— **When Repugnant Gift Over.**]—Semble, though the events in which a gift over is expressed to take effect do not correspond with those in which the previous estate will fail, the intention is generally only to give the estate over in the event of the previous limitation not taking effect, and the court will so construe a gift. *Hillersdon* v. *Lowe*, 2 Hare, 355; 12 L. J., Ch. 321; 7 Jur. 482.

The testator gave his real and personal estate in trust to his nephew John for life, and, after his death, to be conveyed and transferred to the eldest son of John on his attaining twenty-one, with limitations over in like manner, if there was no such son of John, to two other nephews of the testator and their sons successively; and in case none of them (the said three nephews) should have a son who should survive the survivor of them, and attain twenty-one, the testator then devised the estate in like manner to a fourth nephew and his sons, with remainders over to their respective daughters:—Held, that the words of devise over to the fourth nephew took effect only in case none of the first three nephews should leave a son surviving his parent and attaining twenty-one, a different construction being repugnant to specific directions as well as to the general scheme of the will; and that, therefore, a son of John, surviving his father and attaining twenty-one, was entitled to an absolute conveyance and transfer of the real and personal estate. *Ib.*

A devise to A., B., and C. in fee, as tenants in common, "and in the event of any of them dying before having heirs of their body, or making a particular disposition of his or her property," then over:—Held, that "or" was to be read "and," and that the gift over was void for repugnancy. *Greated* v. *Greated*, 26 Beav. 621; 28 L. J., Ch. 756; 5 Jur. (N.S.) 454; 7 W. R. 367.

A. and B. having died in the lifetime of the testator, their shares held to have lapsed, and fallen into the residue. *Ib.*

—— **Whole Will to Stand when possible.**]—A testator gave various specific portions of personal estate to his wife for and during her natural life, if she should so long continue his widow; but at her death, or in case she should marry again, then he gave all the things before given, adding the words, "and effects, and also all my household furniture, which I hereby give to her for her sole use and benefit for and during the term of her natural life, if she shall so long continue my widow," to be equally divided among the children that he then had, or might thereafter have, by his said wife; but in case his wife should not marry again after his decease, he gave her "all and every his personal estate and effects whatsoever" for her life, and the same to be equally divided to and amongst such of his children as should be living at her decease, share and share alike. The testator died within three weeks after making his will:—Held, that the two clauses were not repugnant, but the first was intended to apply to the case of the widow marrying again, and the second to the case of her not marrying again; and the latter event being that which happened, the children living at the death of the widow were alone entitled, to the exclusion of representatives of deceased children. *Wiggins* v. *Wiggins*, 2 Sim. (N.S.) 226; 21 L. J., Ch. 742.

Devise on Condition void for Remoteness.]—A testator bequeathed a sum of 2,000*l.* to the trustees of the General Assembly of the Presbyterian Church for the erection of a mission-hall, and if the trustees of certain premises would sell them and hand the proceeds to the Assembly trustees for purposes specified in the will, then he further devised certain freeholds to the said Assembly trustees:—Held, that the devise was void for remoteness. *Kingham* v. *Kingham*, [1897] 1 Ir. R. 170.

Gift on Condition which becomes Impossible.] A legacy charged on the real estate of a testatrix, conditional on the marriage of the legatee with the sanction of the testatrix, does not fail because the performance of the condition has become impossible by reason of the death of the testatrix before the marriage of the legatee, the condition being applicable only in the event of marriage in the lifetime of the testatrix. *Curren* v. *Corbet*, [1897] 1 Ir. R. 343.

—— **Condition which is Illegal.**]—Where a testator, having by his will given certain property to his daughter for life and afterwards to her children, in a codicil expressed a wish that his daughter should not marry, and directed that on her marriage or death the gifts to her and her children should go over:—Held, on the construction of the will and codicil, that the gift over of the children's interest was a conditional gift in general restraint of marriage, and therefore void,

The principle of *Morley* v. *Rennoldson* (2 Hare, 570) applied. *Morley* v. *Rennoldson*, 64 L. J., Ch. 485; [1895] 1 Ch. 449; 12 R. 158; 72 L. T. 308; 43 W. R. 518—C. A. *And see* CONDITION.

F. CHANGING, TRANSPOSING, OR SUPPLYING WORDS.

1. IN GENERAL.

Changing.]—One name may be substituted for another in the construction of a will where it is manifest not only that the name used was not intended, but that a certain other name was necessarily intended. *Dent* v. *Pepys*, 6 Madd. 350; 23 R. R. 239.

Notwithstanding all the parties are volunteers under a will, it is not necessary that the words must be taken as they are, but in many cases they may be varied. *Bagshaw* v. *Spencer*, 2 Atk. 577.

Where the court is obliged to depart from the words of a will, it should rather be to support than to frustrate the intention of the testator. *Ib.*

Though real and personal estates are joined in the same devise, yet the same words may be taken in a different sense with regard to the different estates to support the intention of the party, ut res magis valeat quam pereat. *Shelfield* v. *Orrery* (*Lord*), 3 Atk. 288. And see *Forth* v. *Chapman*, 1 P. Wms. 663.

In the construction of wills, the court will consider the intention of the testator, the state of the parties provided for, and, to remove inconsistencies, will read the word "future" as "former." *Pasmore* v. *Huggins*, 21 Beav. 103; 25 L. J., Ch. 251; 1 Jur. (N.S.) 1060: 4 W. R. 33.

The words "the said fourth schedule," in a will:—Held, to mean "the said fifth schedule," upon a consideration of all the provisions of the will and of the state of testator's property and family when the will was made, although the actual words involved no contradiction nor repugnancy to the other provisions of the will, except by making in one instance insufficient provision for the charges thereby created, having regard to the value of the property, and by making capricious and improbable dispositions, at variance with what appeared to be the general intention. *Hart* v. *Tulk*, 2 De G. M. & G. 300; 22 L. J., Ch. 649.

Testator gave the interest of a fund to his wife for life, and after her death to such of his four daughters as should be then living, in equal shares, during their respective lives; and from and after the several deceases of his four daughters, he gave one-fourth of the capital to their respective children. One of the daughters died before the widow, leaving a child:—Held, that the child became entitled, on the widow's death, to have one-fourth of the capital transferred to her. *Woodstock* v. *Shillito*, 6 Sim. 416.

A testatrix gave her real estate in trust for her grandchildren (by name) and their issue, as F. should appoint, and in default of such appointment, upon trust for "my aforesaid nephews and nieces and their respective lawful issue, and also the issue (if any) of F., and their several and respective heirs and assigns, for ever," as tenants in common. No nephews or nieces were mentioned in the will. F. died without appointing:—Held, that there was no gift by implication to the grandchildren and their issue; secondly, that the words "my aforesaid nephews and nieces" could not be read "my aforesaid grandsons and granddaughters"; thirdly, that the gift to the nephews and nieces was not void for uncertainty; and lastly, that they took in tail. *Campbell* v. *Bouskell*, 27 Beav. 325.

Striking out.]—The court may expound the words in a will, but cannot strike them out. *Southcot* v. *Wilson*, 3 Atk. 233.

In construing the autograph will of an illiterate man, the meaning of technical language may be disregarded, but no word which has a clear and definite operation can be struck out. *Hall* v. *Warren*, 9 H. L. Cas. 420.

Where the testator appointed three parties and their respective assigns his executors, and throughout the will all acts done were to be theirs and their respective assigns', etc., one having died, and the survivors having agreed to sell the real estate:—Held, that the word respective might, in order to carry into effect the intention of the testator, be rejected, and the survivors might convey and give a valid receipt for the purchase-money. *Jones* v. *Price*, 11 Sim. 557; 10 L. J., Ch. 195; 5 Jur. 719.

Transposing.]—The court will not, save in the last resource, transpose the words in a will. Therefore, when a possible but remote and improbable sense could be attributed to the testator in the will as it stood, the court refused to transpose the order of the words in order to give effect to a much more natural and probable intention. *Brown* v. *Walker* (2 L. J. (O.S.) Ch. 82) commented on. *Key* v. *Key*, 1 Jur. (N.S.) 372.

Courts of law and of equity will equally transpose words in instruments to make the limitation intelligible, and attain the party's clear intent, but never to defeat the instruments given, or let in more than expressed. *Marlborough* (*Duke*) v. *Godolphin* (*Lord*), 2 Ves. 74.

Order of words in wills not considered; if the intent better answered, it is otherwise. *East* v. *Cook*, 2 Ves. 32.

The words of a clause in a will are not to be added to, nor transposed, if they are susceptible of a reasonable construction as they stand. Amongst several gifts of sums of 300*l.* each to the grandnephews and nieces of the testator, some of which were to be paid at different ages, and others to be sunk in annuities for the lives of the respective legatees, occurred two bequests as follows: "Joseph Walker, 300*l.* annuity for life; Martha, 300*l.* an annuity for life":—Held, that Joseph and Martha were each entitled to annuities of 300*l.* for life. *Walker* v. *Tipping*, 9 Hare, 800; 16 Jur. 442.

It is a common rule of construction, that if the words of a gift are of themselves plain, distinct, and capable of having a legal effect, effect must be given to them, notwithstanding any improbabil ty which may arise from looking at the other parts of the will. On the other hand, if the words are ambiguous in expression or effect, they are not to be rejected for uncertainty, but you must collect, if you can, from the other parts of the will, an indication of what the testator meant by those words which by themselves appear to be ambiguous. *Wilson* v. *Eden*, 11 Beav. 289.

Where the words of a will are capable of a construction which will give effect to every

word, it is not within the competency of the court to alter their collocation. *S. C.*, 12 Beav. 454.

Supplying.]—When the testator expresses his intention incorrectly, the court will effect it by supplying proper words. *Dodson* v. *Hay*, 3 Bro. C. C. 404. And see *Gordon* v. *Gordon*, L. R. 5 H. L. 254.

The court may supply words in a will, where the context shews, by a necessary implication, what are the words omitted, and unless they are supplied there would be an intestacy. *Hope* v. *Potter*, 3 K. & J. 206; 5 W. R. 389.

So where there is a gift by will, and then a gift over, not commensurate with the original gift, the court will curtail the general words of the gift over, by supplying words of reference: as where the first gift is to A.'s children and the gift over is in default of issue of A. The court will read the gift over as though it were in default of "such" issue. *Ib.*

But where there was a devise of a particular property to the testator's daughter A., her heirs and assigns, and if she should die under the age of twenty-five years, "without having left any child or children," over, and subsequently, a devise of other real estate to trustees in fee, in trust for A., for her separate use; and after her death, in trust to convey the same "unto and equally amongst such children of A., as tenants in common, the rents and profits in the meantime to be applied for their maintenance; and in case A. should die without leaving any child or children, or leaving such child or children, all should die under twenty-one," over:—Held, that the court could not, after "such children of A," supply the words, "as should attain twenty-one," but was at liberty, as against the testator's heir, to construe the word "such," as relating to all the children of A., as they had been mentioned in the previous limitation. *Ib.*

In construing a will words may be supplied, changed, and transposed, whenever the context requires it. *Abbott* v. *Middleton*, 21 Beav. 143; 25 L. J., Ch. 113; 1 Jur. (N.S.) 1126; 4 W. R. 69. Affirmed, 7 H. L. Cas. 68; 28 L. J., Ch. 110; 5 Jur. (N.S.) 717.

Bequest to testator's widow for life, and on her decease to his son for life, and on his demise the principal to become the property of any children he might leave. Then followed a gift over, in case the son died before his mother (omitting the words "without leaving children"). The son predeceased both his father and mother, leaving an only child, who survived them:—Held, that such child was entitled to the principal sum after the grandmother's death; and that to effectuate the intention of the testator, the words "without leaving any child" must be implied, after the word "dying." *Ib.*

The principles on which the court acts in supplying by inference an omission in a will discussed. An omission may be supplied in the case of independent gifts to strangers, as well as in the case of a series of gifts to children of a testator, or to members of a class. *Mellor* v. *Daintree*, 56 L. J., Ch. 33; 33 Ch. D. 198; 55 L. T. 175.

A testator devised and bequeathed his real and residuary personal estate to trustees, on trust as to one moiety of the personalty and a specific part (being about half in value) of his realty to accumulate the income until B. should attain twenty-five or die, whichever should first happen in case either of such events should happen within twenty-one years from his own death, but, in case that period should expire before either of such events should happen, upon trust to pay the income to B., if living, from the expiration of such period until he should attain twenty-five or die, whichever should first happen, and, subject as aforesaid, the testator directed that the moiety should be held in trust for B. absolutely in case he should attain twenty-five, and in case he should die under twenty-five, leaving a son or sons him surviving, who, or any one of them, should attain twenty-one, the moiety was, subject as aforesaid, to be held in trust for the only, or, if more than one, the first surviving son of B. who should attain twenty-one. And the testator directed that the second moiety of the personalty and the rest of the realty should be held on trust to accumulate the income until D. should attain twenty-five or die, whichever should first happen within the period of twenty-one years from his own death, and in case that period should expire before either of such events should happen, then upon trust to pay the income to D. (if living) from the expiration of such period until he should attain twenty-five or die, whichever should first happen, and, subject as aforesaid, the testator directed that the moiety should be held in trust "for such only surviving son, or, if more than one surviving son, for the eldest of such surviving sons absolutely." But, in case D. should leave no son him surviving, the property was to be held in trust for R. absolutely. B. was a stranger in blood to the testator; D. was the testator's nephew. D. attained twenty-five:—Held, that, having regard to the whole scheme of the will, an absolute gift of the second moiety to D. at twenty-five must be implied. *Ib.*

When it appeared beyond doubt from the general scope of a will that there had been an unintentional omission of words carrying over the share of the testator's estate in which one of his daughters took a life interest to her children, the court supplied the omission. *Redfern, In re, Redfern* v. *Bryning*, 47 L. J., Ch. 17; 6 Ch. D. 133; 37 L. T. 241; 25 W. R. 902.

A father, having two sons and five daughters, by his will directed the residue of his real and personal estates to be divided, as a mixed fund, into sevenths, and bequeathed one-seventh to one son, and another to the other son. He then bequeathed the remaining five-sevenths upon trust during the respective lives of his daughters, Elizabeth, Sarah, Eliza, Mary, and Hannah, to invest and pay the income into the proper and respective hands of his daughters (again naming them) in equal shares for their separate use. He then, from and after the death of Elizabeth, gave one-fifth of the fund to the children of Elizabeth; from and after the death of Sarah, another fifth to the children of Sarah; from and after the death of Eliza, another fifth to the children (not of Eliza, but) of Mary; and from and after the death of Hannah, another fifth to the children of Hannah. He further gave directions until the part or share of the trust moneys of the issue of any of his said daughters should become payable, to apply the same by way of maintenance. The court, holding that a clause giving to the children of Eliza an interest in one-fifth of the trust fund similar to that which was given to the children of the other four daughters, and giving the children of Mary a like interest on the death not of Eliza but of Mary, had been accidentally

omitted, declared that the will must be read as if it contained the omitted clause. *Ib.*

A husband directed his trustees to convert his property and invest the proceeds, then went on: "And I declare that the trustees or trustee may vary the stocks, funds, shares and securities at their or his discretion, and shall pay the moneys and the investment for the time being representing the same to my wife during her life upon trust for all my children or any child who being sons or a son shall attain the age of twenty-one, or being daughters or a daughter shall attain that age or marry, and if more than one in equal shares." He then empowered the trustees, after the death of his wife or previously by her direction, to raise any sums not exceeding half the expectant share of any child for his or her advancement, and to apply the income of each child's expectant share for maintenance after the death of his wife; and if no child, being a son, should attain twenty-one, or, being a daughter, attain that age or marry, the fund was given over after the death of the widow:—Held, that the widow took a beneficial interest for life in the fund. *Greenwood* v. *Greenwood*, 47 L. J., Ch. 298; 5 Ch. D. 954; 37 L. T. 305; 26 W. R. 5.

Upon a will devising lands to be conveyed and settled to the use of the devisor's eldest son for his life, remainder to his second, third, fourth, fifth, and all and every other the son and sons of the body of L. lawfully to be begotten, severally and successively and in remainder, one after another, as they and every one of them should be in seniority of age and priority of birth, and the heirs male of their bodies respectively:—Held, upon the words and context of the will, making provision inconsistent with the intention that a first son of L. should be excluded, such first son took an estate in tail male. *Langston* v. *Langston*, 8 Bligh (N.S.) 167; 2 Cl. & F. 194.

Where a will gave to A. an estate for life, with remainder to the first son of the body of A. lawfully begotten, severally and successively, in tail male, the words "and other sons" were introduced, in order to prevent the words "severally and successively" from being struck out of the will; and A. took an estate tail by implication. *Parker* v. *Tootal*, 11 H. L. Cas. 143; 11 Jur. (N.S.) 185; 12 L. T. 89; 13 W. R. 442.

A testatrix, in making her will, used a law stationer's form, which was partly in print, blanks being left in it which were to be filled up by the person who made use of it. After directing that her debts and funeral and testamentary expenses should be paid by her executrix thereinafter named, the testatrix gave all her property, both real and personal, "unto to and for her own use and benefit absolutely, and I nominate, constitute, and appoint my niece, Catherine Hellard, to be executrix of this my last will and testament":—Held, that there was an effectual gift of the residue to Catherine Hellard. *Harrison, In re, Turner* v. *Hellard*, 55 L. J., Ch. 799; 30 Ch. D. 390; 53 L. T. 799; 34 W. R. 420—C. A.

By his will dated in 1860, a testator, who died in 1861, gave certain property to trustees upon trust to pay the income thereof to the widow of the testator's son for life, and after her death "in trust for all the children of my said son, who being a son or sons shall live to attain twenty-one years, or being a daughter or daughters shall marry under that age with their mother's consent, to be divided between them share and share alike." The will contained powers of maintenance and advancement applicable to all children:—Held, that daughters who attained twenty-one were entitled to share in the fund, although they had not married under that age; for even if the admission in the common form did not render the remainder of the clause meaningless, still, the intention dominating the form was the expression of the limitation of attaining twenty-one, and the powers of maintenance and advancement afforded some indication that this was the testator's intention. *Hunt, In re, Davies* v. *Hetherington*, 62 L. T. 753.

W. by will gave all residuary estate to trustees upon trust to pay and divide equally amongst all the children of his deceased father's brothers and sisters, and proceeded, "I desire that the child or children of any one of such brothers and sisters as may be dead shall take his, her, or their deceased parent's share":—Held, that the testator's intention clearly was that the children of the children of his cousins should take their parents' share, and that the words of the residuary gift as they stood, without supplying any words, could be construed as if the word "child" were inserted after the words "any one." *Wroe, In re, Frith* v. *Wilson*, 74 L. T. 302.

—— **Particular Word — "Respective."**] — Bequest of residue, the interest to be paid to C. and J. equally for their lives, and "at their death" the principal to be divided between the children of C. and J.:—Held, that the words "at their death" meant "at their respective deaths," and that, on the death of C., the moiety to the interest of which C. had been entitled became divisible among his children. *Wills* v. *Wills*, 44 L. J., Ch. 582; L. R. 20 Eq. 342; 23 W. R. 784.

—— **Where either of Two Words Possible.**] —Residuary bequest "to all the children of my brother R. and my sister M., to be equally divided amongst them." This brother and sister were placed in exactly the same position in other parts of the will. The court, therefore, preferred to introduce the word "of" rather than the word "to" before the words "my sister," and held accordingly, that the children of M., and not M. herself, took equally with the children of R. *Mason* v. *Baker*, 2 K. & J. 567.

—— **Limitation to avoid Intestacy.**] — A testator gave legacies upon certain trusts for each of his daughters for life, and, after her death, for her husband and children, and subject thereto he directed that each legacy should "sink into and form part of my residuary estate and be applied and disposed of as hereinafter mentioned." He gave his residue to his children equally, "the shares of daughters to be paid to the same trustees respectively and to be settled upon the same trusts" as their respective legacies. One of the daughters having died unmarried:—Held, that the direction for settlement of daughters' shares of residue being executory, the court, in framing a settlement of such a share, would modify the ultimate gift over by inserting a limitation in favour of the other residuary legatees excluding the particular daughter, and that the share of the deceased daughter of the testator was divisible accordingly among the other residuary legatees.

Humble v. *Shore* (7 Hare, 247; 1 H. & M. 550, n.), *Crawshaw* v. *Crawshaw* (14 Ch. D. 817), and other cases considered. *Ballance, In re, Ballance* v. *Lamphier*, 58 L. J., Ch. 534; 42 Ch. D. 62; 61 L. T. 158; 37 W. R. 600.

Testator by his will bequeathed an absolute interest in his residuary estate amongst four persons, including M., in certain shares. By a codicil he altered the gift in the will as to M.'s share by restricting it to an interest for her life only, and directed that, upon M.'s death, "the same should fall into and form part of" his residuary estate; and in all other respects he confirmed his will:—Held, that there was no intestacy as to the remainder expectant on the death of M. in her one-fifth share of the residue, because, on the true construction of the will and codicil read together, such remainder had been effectually given to the other residuary legatees. *Humble* v. *Shore* (7 Hare, 247) overruled. *Palmer, In re, Palmer* v. *Ainsworth*, 62 L. J., Ch. 988; [1893] 3 Ch. 369; 2 R. 619; 69 L. T. 477; 42 W. R. 151—C. A.

When Words imported from preceding Clause.]—A testator devised his real estate to his three daughters equally in remainder, and he provided that "if any of them should die and leave issue, then such issue should succeed to the mother's share in that his will." He afterwards gave the residue of his estate and effects to the same daughters and to his two sons in possession:—Held, that the issue of the daughters took no interest in the daughters' share in the residue. *Tibbs* v. *Elliott*, 34 Beav. 424.

A testator seised of houses and lands for lives, renewable for ever, and of no other real estate, devised to trustees all his freehold messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, upon certain trusts, viz. to permit and suffer his daughter during her life to receive an annuity of 100*l.*, to be issuing and payable out of all and every other his freehold estate or estates situate (here the houses and lands above named were mentioned), to her separate use, and without power to alien or mortgage it, and after her decease the annuity was to stand to the heirs of her body lawfully issuing, in such shares as she should by will appoint, and in default of appointment, then to her said children share and share alike. And the testator directed that 50*l.* per annum should be applied in the maintenance of his daughter until she attained twenty-one or married, and that upon either of those events, the trustees were to assign the annuity of 100*l.* and all interests and dividends due thereon, and all securities wherein the same should be placed out or invested, to her, for her own sole use and benefit absolutely for ever, with the usual powers of distress and entry upon the devised premises, and every or any part thereof. After a bequest of certain plate and household furniture to his daughter, and of a small annuity to another person, the will contained this clause: "And in further trust, that in case my said daughter shall happen to die before she attain twenty-one and unmarried, I give, devise, and bequeath said annuity of 100*l.*, and all and every other my freehold estates wheresoever, as aforesaid, unto my brother E. C. for and during the term of his natural life; and from and immediately after his decease, unto and to the use of his right heirs for ever, in such manner as by his last will he should direct, limit, and appoint"; and the testator bequeathed all his personal estate, subject to his debts, to E. C. The testator's daughter survived him, and attained twenty-one. Upon a petition presented under the eleventh section of the Court of Chancery Regulation Act, on behalf of the children and devisees of E. C., who died almost immediately after his brother the testator, the court was of opinion, that upon the context of the will the words of contingency "in case my daughter should happen to die before she attain twenty-one, or marriage," must be confined to the annuity of 100*l.*, and that accordingly E. C. and his children took estates, to the exclusion of the testator's daughter, in the freehold property of the testator immediately upon his death; but the case was sent for the opinion of a court of law. *Campbell* v. *Campbell*, 1 Ir. Ch. R. 503.

Testatrix gave the residue of her personal estate to twelve persons, or such of them as should be living at her decease; she then directed her real estate to be sold at a certain time, and gave the produce to the same twelve persons and three others, or such of them as should be then living; she then added a proviso, that the share or proportion of S., one of the twelve legatees, should be settled to her separate use for life:—Held, upon the construction of the whole will, that the proviso applied as well to S.'s share in the residue of the personalty as to her share in the produce of the realty. *Cockrill* v. *Pitchforth*, 1 Coll. C. C. 626; 9 Jur. 223.

Testatrix, being obliged to secure an annuity to A. for life, purchased an annuity on the life of B., and insured the latter life, and by her will, reciting that on the death of B. the amount of the policy would be recovered to her estate, directed that in the event of B. dying before A., the executors should provide for A.'s annuity out of her estate, but in the event of A. dying before B., she gave the purchased annuity to C., he paying the premium, and on the death of B. she gave the amount of the policy to C.; B. died in the lifetime of A.:—Held, that C. was not entitled to the policy. *Leckie* v. *Hogben*, 7 Beav. 502.

A. devises to B. and C., his wife's children, as he called them (not owning them to be his), ten shillings apiece and no more; and gave the children that he owned considerable legacies. B. and C. shall come in for a share of the undisposed surplus, for the words of exclusion must be taken strictly. *Vachell* v. *Jefferys*, Pre. Ch. 170.

Devise to the children of A., B. and C., who should be living when the youngest attained twenty-one, with a direction that "the present yearly rents" should be paid to the persons who brought up the children of C.:—Held, upon the context, that until the contingency happened, the rents were to be paid to such person in trust not only for the children of C., but of A. and B. *Sanders* v. *Miller*, 25 Beav. 154.

When Application confined to last Antecedent Clause.]—Two bequests were made to the same person in successive sentences, and in the latter the words "for life" were added:—Held, that the limitation applied to the second gift only, and that the legatee took the first absolutely. *Gower* v. *Towers*, 26 Beav. 81.

Devise to A., so long as she remains unmarried, and, after her decease or marriage, in trust to sell and divide the proceeds between "B., C. and A., if living":—Held, that the words "if

living" applied to A. only. *Bellamy's Trust, In re*, 1 N. R. 191.

On construing an appointment of stock in these words: "Unto and among my said brother and my sisters and my nephews and nieces living at the decease of my wife, in equal shares and proportions"; it was held, that the qualification of living at the death of his wife attached only to the nephews and nieces, the last antecedent. The direction as to the shares and proportions in which the legatees are to take the property does not affect the construction of the words which describe the persons who are to take. The legatees took per capita. *Baker* v. *Baker*, 6 Hare, 269; 11 Jur. 585.

Where no Indication to Justify Addition.]—A testator devised his freehold estates to certain uses. The will contained a name and arms clause and powers of leasing and sale and exchange. He then devised his copyhold and leasehold estates upon trusts to correspond with the uses declared of the freeholds. By a codicil to his will he varied the uses declared concerning the freeholds, but made no mention of the copyholds and leaseholds. He directed that the codicil should be taken as a part of and added to his will. All the circumstances of the case rendered it exceedingly inconvenient that the copyholds and leaseholds should devolve in a different way from the freeholds:—Held, that the trusts of the copyholds and leaseholds declared by the will were not revoked by the codicil, and that the copyholds and leaseholds passed according to the trusts declared by the will, and the freeholds according to the uses declared by the codicil. *Martineau* v. *Briggs*, 45 L. J., Ch. 674; 33 L. T. 283; 23 W. R. 899—H. L. (E.)

Held, that though it was in the highest degree probable that the testator intended the copyholds and leaseholds to go with the freeholds, and it was productive of great inconvenience that they should not do so, yet, as there were no words in the codicil to give effect to such intention, the court could not supply them, and the copyholds and leaseholds must go as originally declared by the will. *Ib.* S. P., *Langdale* v. *Briggs*, *Bacon*, *Ex parte*, 28 L. T. 467; 21 W. R. 620.

A testator, after giving specified legacies to his "brother D., his sister M., the widow of his late brother J. C., and the eight children of D. J.," gave the residue of his estate upon trust for the "said D. M. and J. C. and the eight children of the said D. J. in equal shares as tenants in common":—Held, that the words "the widow of" could not be inserted before J. C. in the gift of the residue, although the testator had noticed the fact of J. C.'s death in the preceding bequest. *Clarke* v. *Clemmans*, 36 L. J., Ch. 171; 15 W. R. 250.

See also Cases under MISTAKE AND MISDESCRIPTION, ante, col. 681.

2. "AND" CONSTRUED "OR."

Principle—To effect Intention.]—Whether the instrument in which the word occurs is a will or a deed, "or" may be construed to mean "and," and "and" may be construed to mean "or," if such a construction is necessary to give effect to the intentions of the party by whom the word is used. *White* v. *Supple*, 2 Dr. & War. 471; 1 Con. & L. 525.

"And" is construed "or" where one member of the compound sentence is included in the other, and would be superfluous unless disjoined. This construction is generally made in favour of vesting, not to defeat a previously vested gift. *Day* v. *Day*, 1 Kay, 703; 18 Jur. 1013; 2 W. R. 700.

If the court can give a possible sense to the words used by a testator, it will not transpose the words actually used by him so as to give to his will a more natural and probable intention. Observations upon the case of *Brown* v. *Walker* (infra, col. 716); and remarks as to the words "or" and "and." *Key* v. *Key*, 1 Jur. (N.S.) 372.

The construction of the word "and" as "or" is only admissible when the context of a will makes it evident, or, at all events, furnishes very strong grounds for presuming, that it was so intended. *Coates* v. *Hart*, 3 De G. J. & S. 504. And see *S. C.*, 32 Beav. 349.

In a residuary clause, "and" read "or," to effectuate the plain intention of the testatrix. *Stubbs* v. *Sargon*, 2 Keen, 255; 6 L. J., Ch. 254; Affirmed, 3 Myl. & Cr. 507; 7 L. J., Ch. 95; 2 Jur. 150.

The word "and" construed "or," in order to give effect to the obvious meaning. *Maynard* v. *Wright*, 26 Beav. 285.

A testator devised a freehold in trust, to accumulate the rents for periods of not less than ten years successively at a time, at the expiration of which the accumulations to be paid to the testator's sons and daughters, or such of them as should be living at the respective periods of division; and the issue of such of them as shall have died leaving lawful issue, such issue taking their deceased parents' share to be vested interests in the same respectively, at the age of twenty-one, and so on from time to time until the expiration of twenty-one years after the decease of the survivor of his children. And from and after the expiration of the term of twenty-one years he devised the same premises unto such of his grandchildren, and their issue, as should then stand, in respect to him, in equal degree of consanguinity, and their heirs, as tenants in common:—Held, that "issue" was to be read "children," and the word "and" to be read "or," and that the devise was neither void for remoteness nor uncertainty. *Ib.*

A testator bequeathed a sum of money to his wife for life, and after her decease for A., M. and W., or such of them as shall be then living, and shall attain twenty-one or marry; and there was a power to the trustees to advance to A., M. and W., "not exceeding the share of each of them, my said three children." A., M. and W. all survived the testator, and attained twenty-one; but A. died in the lifetime of the tenant for life:—Held, that she took nothing under the above gift, the court declining to construe "and" as equivalent to "or." *Malden* v. *Maine*, 2 Jur. (N.S.) 206.

A testator (tenant for life under a settlement of the B. H. estate, and other lands, remainder to his first and other sons in tail male, with several limitations over), by his will gave certain specific things to be enjoyed by the person or persons who, for the time being, should be entitled to the freehold "or" inheritance of the family estate at Stapleton, as and in the nature of heirlooms. He gave his furniture, plate, &c., to his brother A. He directed a sum of 1,000*l.*, secured to him on the B. H. estate and other estates, to sink into the freehold and inheritance of the said estates,

that the same might merge them, and the rents, and arrears of rent, with timber felled and other annual profits due to him at the time of his decease from the B. H. estate, unto the person or persons who should be entitled to the freehold "and" inheritance of the same estate in possession on his decease. He gave his residue to his two brothers, B. and C., and he appointed his brother A. his sole executor. B. died in the testator's lifetime:—Held, that in the gift of the rents, &c., the word "and" must be read "or"; and that they passed to A., although he was entitled only to the freehold. *Stapleton* v. *Stapleton*, 2 Sim. (N.S.) 212; 21 L. J., Ch. 434.

A power of sale and exchange was given to trustees of a settlement, at the request of the person for the time being "seised of the freehold and inheritance of the manors":—Held, that reading the word "and" conjunctively, the power could not be exercised at the request of a tenant for life who (subject to intervening limitations) had the ultimate remainder in fee. *Malmesbury* (*Earl*) v. *Malmesbury* (*Countess*), *Phillipson* v. *Turner*, 31 Beav. 407.

Held, also, that the word "and" could not be read disjunctively as "or." *Ib.*

Power to testator's widow to appoint to children if they conduct themselves to her satisfaction up to the age of twenty-five, and marry with her approbation:—Held, she had a discretionary power which she might exercise after a child attained twenty-five, though unmarried. *Davidson* v. *Rook*, 22 Beav. 206.

See also *Hawes* v. *Hawes*, 1 Ves. 13; *Jackson* v. *Jackson*, 1 Ves. 217; *Burleigh* v. *Pearson*, 1 Ves. 281; *May* v. *Wood*, 3 Bro. C. C. 472; *Seccombe* v. *Edwards*, 28 Beav. 440; 6 Jur. (N.S.) 642; 8 W. R. 595; *Hetherington* v. *Oakman*, 2 Y. & C. C. C. 299; 7 Jur. 570; *W*—— v. *B*——, 11 Beav. 621.

In Gift over—On Death unmarried and under Age.]—A testator gave his trustees all his residuary estate for his two daughters in equal shares, subject as thereinafter mentioned. He declared that the shares of his children should be vested interests in them at the age of twenty-four or marriage with consent. The trustees were to pay the dividends to his daughters during their lives without anticipation. Each daughter was to have power to dispose of her share by will on attaining twenty-four. In case of the death of a daughter intestate her share was to go to the other. The trustees were to apply the dividends of the share of a daughter whose interest had not become vested for her maintenance, &c. The testator then declared that in case his daughters should both die under twenty-four and unmarried as aforesaid, then he gave the whole of his residuary estate equally amongst his brothers and sisters. One of the daughters died an infant, and without having been married. The other attained twenty-one and married, but had not attained twenty-four:—Held, that the gift over could not any longer by possibility take effect, the court refusing to change "and" into "or" or to give "unmarried" any other than its primary sense of never having been married. *Gonne* v. *Cook*, 15 W. R. 576.

—— **On Death unmarried and without Issue.**]—Limitation over the death of a person unmarried and without issue, unmarried, in its usual sense, meaning never having been married: "and" was construed "or," to afford a reasonable construction. *Maberly* v. *Strode*, 3 Ves. 450; 4 R. R. 61.

Words of a survivorship, added to a tenancy in common in a will, are to be applied to the death of the testator, unless an intention to postpone the vesting is apparent. *Ib.*, 451.

Bequest to testator's three children, to be equally divided between them, share and share alike; but in case of the death of any, without being married and having children, the share of such child so dying to be divided between the surviving children; and so if one only should survive. One having been married, and having had a child, her share vested: "and" construed "or," to give effect to all the words. *Bell* v. *Phyn*, 7 Ves. 453, 458; 6 R. R. 148.

Testator gave legacies to his three children, payable after the death of his executrix, and directed that if any of the children should die unmarried and without issue, before the death of the executrix, the legacy should go to the surviving children. One of the daughters married, but died without issue in the lifetime of the executrix. The legacy survived to the other children. *Hepworth* v. *Taylor*, 1 Cox, 112.

Gift over, in case A. should die "before marriage and leave no issue":—Held, to take effect only on the happening of both events. *Seccombe* v. *Edwards*, 28 Beav. 440; 6 Jur. (N.S.) 642; 8 W. R. 595.

Gift of a legacy upon trust for A., a son of the testator, for life, remainder to any wife he might marry, for life, remainder to his children absolutely, with a gift over, "in case he should die unmarried and without issue, to B., C. and D., or such of them as should be living at his decease absolutely." A. died a widower, and without having had any children. B., C. and D. all died in A.'s lifetime:—Held, that "and" would not, without absolute necessity, be read "or." *Sanders, In re*, L. R. 1 Eq. 675; 12 Jur. (N.S.) 351; 14 W. R. 576.

Held, that the interests of B., C. and D., though depending on a contingency, were transmissible, and that their representatives were entitled to their shares. *Ib.*

A settlement contained a gift over of the children's shares of accumulations arising from the settled property in the event of all the children but one "dying unmarried and without issue." If there were more children than one, the children's shares were to be as the husband and wife, or the survivor of them, should appoint; and in default of appointment, in equal shares, and to vest at twenty-one or marriage. There were fourteen children of the marriage. Two of them married, four died infants and unmarried, and all the surviving children but one had attained twenty-one. The wife died. The father appointed a share to the plaintiff, one of his sons who had attained twenty-one:—Held, that the words "dying unmarried" meant dying without having been ever married. *Heywood* v. *Heywood*, 29 Beav. 9; 30 L. J., Ch. 155; 7 Jur. (N.S.) 228; 3 L. T. 429; 9 W. R. 62.

Held, also, that the plaintiff's share was vested, and that he was entitled to a transfer of it to him. *Ib.*

A testator made his will as follows:—"I leave to my son S. all my landed property in the county K., also the policy of assurance effected on the life of my sister C. for 1,500*l.* It is my desire that should the said S. die unmarried and without legal issue, that all my property bequeathed to him should go share and share

alike between my daughters J. and E. I give power to my son S. to settle a jointure out of the said property not exceeding 100*l.* a year on the woman he may marry. . . . I do appoint my son S. as residuary legatee." The testator made a codicil to his will as follows: "I hereby give and bequeath to my daughter E. the sum of 400*l.*, to be paid to her when the insurance on the life of my sister C. is paid in." S. died leaving a widow, and never had any issue:—Held, that in the executory gift to testator's daughters, "should the said S. die unmarried and without legal issue," the word "and" must be read "or," and that, therefore, upon S.'s death without issue, though leaving a widow, the testator's lands in the county K. passed under the executory gift to J. and E. subject to a jointure of 100*l.* a year which S. had charged thereon for his widow. *Long* v. *Lane*, 17 L. R., Ir. 11—C. A.

—— **On Death under Age and without Issue.**]—Devise to trustees in fee, if B. attains twenty-one, or has issue, to B. and heirs of his body; but if B. dies before twenty-one, and without issue, over; B. attains twenty-one, and dies without issue; an estate tail vested in B. at twenty-one, on having issue, and the limitation over, a remainder which takes place on failure of issue of B. *Brownsword* v. *Edwards*, 2 Ves. 245. This case may be considered as overruled by *Doe* d. *Usher* v. *Jessep*, 12 East, 288; 11 R. R. 380. See *Malcolm* v. *Taylor*, 2 Russ. & M. 416, where Lord Brougham says the reading of "or" for "and" is rarely sanctioned. *Ib.*, 446.

A testator devised to trustees his estates at H. and S., subject to annuities, &c., upon trust for R. and the heirs of his body; but in case he should die under the age of twenty-one, and without issue, then the estate at H. should be in trust for A. and the heirs of her body; but in case she should die under the age of twenty-one, and without issue, the last-mentioned premises should be upon such and the same trusts as thereinafter declared concerning his (the testator's) estate at S.; and the testator directed that if R. should die under the age of twenty-one, and without issue, then that his trustees should stand seised of the estate at S. for the benefit of the testator's son R. for his life, and after his decease for the benefit of his daughter-in-law M. during her life; and subject thereto the estate at S. should be in trust for D., R. W. D. and E. D., in equal shares, as tenants in common. R. and A. both attained twenty-one, but died without issue:—Held, that R. took absolutely on attaining twenty-one, and that such a limitation over would not take effect unless the double contingency happened, that he died both under twenty-one and without issue; that to read it otherwise would be to reject the words "under the age of twenty-one" entirely, and thereby withhold the natural ordinary meaning from the testator's words. *Doe* v. *Jessop* (12 East, 288; 11 R. R. 380) and *Brownsword* v. *Edwards* (supra) discussed and commented upon. *Grey* v. *Pearson*, 6 H. L. Cas. 61; 26 L. J., Ch. 473; 3 Jur. (N.S.) 823; 5 W. R. 454.

Bequest to A. for life, then to his eldest son, but in case A. should die under age and without issue then to B.:—Held, that "and" was not to be read as "or," and that A. having attained twenty-one, a son of his then living had acquired an indefeasible interest. *Malcolm* v. *Malcolm*, 21 Beav. 225.

A testator gave to each of four persons, when and as they respectively attained twenty-one, one-fourth of his residue for life, and in case either of them "should happen to die under the age of twenty-one years, and without leaving lawful issue," then he gave his share to the survivors for life. And from and after the decease of either of the legatees leaving lawful issue surviving, he bequeathed his share to such issue. And if all four legatees should die without leaving lawful issue, there was a gift over. One of the legatees attained twenty-one and died without issue:—Held, that her share was undisposed of, the court being of opinion that "and" could not be read "or." *Coates* v. *Hart*, 32 Beav. 349.

A testator directed his residuary estate to be invested, and when and as A., B., C. and D. severally attained their respective ages of twenty-one, he gave to each of them severally the interest of one-fourth of the invested residue for their lives, and in case either of them should die under twenty-one, and without leaving lawful issue, then he gave the interest to which such deceased legatee was entitled to the survivors or survivor of them for her, his, and their several and respective lives; and from and after the decease of either of these four legatees leaving lawful issue her or him surviving, the testator bequeathed the principal to the interest whereof such deceased legatee had been entitled in her or his lifetime amongst such issue; and he also gave to such issue the share and interest of the principal to the interest whereof their deceased parent would have been entitled in case he or she had lived to survive any other of the four legatees who should afterwards die without issue. And in case all the four legatees should die without either of them leaving lawful issue, he gave the whole of his residuary estate over. A. died in the testator's lifetime a minor and without having been married. B. survived the testator, attained majority, married, and died without having had a child:—Held, that C. and D. were entitled by force of the will to the entire income of the residue for their joint lives as from the death of B., and that there was no intestacy as to such income. *S. C.*, 3 De G. J. & S. 504.

A testator devises leaseholds upon trust for his son T. D., and all his (the testator's) children, by his then wife, who should be living at his decease, as tenants in common; but if T. D. should die under twenty-one, and without leaving issue, and if the testator should have no other children by his then wife, living at his decease, who should attain twenty-one, then upon trust for J. C. D. for life, and after his decease for his children in equal shares; and if J. C. D. should die under twenty-one, and without leaving issue living at his decease, then upon certain trusts over. T. D. dies under twenty-one, and without issue: afterwards J. C. D. dies, having attained twenty-one, but not leaving issue:—Held, that, there being a balance of intention upon the words of the will, the court will not change "and" into "or"; and, therefore, that the ultimate limitations over did not take effct. *Brown* v. *Walker*, 2 L. J. (O.S.) Ch. 82.

A testator, by will made in 1850, directed that all his real and personal estate (after payment of his funeral and testamentary expenses) should, at the time his youngest child had attained twenty-one, be valued, and divided into three equal parts, "one part to be for my wife,

one part for my daughter Mary Ann, and one part to my daughter Maria"; and after his wife's decease he directed that her share should be divided between them equally; and then the will proceeded: "And provided that either of my two children named should die before a division of the property shall have been made as above described, and having no surviving issue, then the part of the deceased shall be given to her surviving sister; but if either of them shall die, and leave surviving issue, then the part of her so dying shall be equally divided amongst her surviving children, in equal shares." By a codicil to his will, without date, he provided as follows:—"Should both my children die in their minority, and leave no issue, then in such case, and in such case only, I give to my wife the whole of my property for her life, or so long as she shall remain my widow, and at my wife's decease or marriage, which shall first happen," there was a gift over. One of the daughters attained twenty-one, and died without leaving issue, and the other died under that age, also without leaving issue:—Held (affirming 4 Kay & J. 709) that the gift over had failed. *Maddison* v. *Chapman*, 28 L. J., Ch. 450; 5 Jur. (N.S.) 277; 7 W. R. 214—L.JJ.

On Death without leaving Issue and without Appointing.]—A testator bequeathed his residuary real and personal estate to trustees for his nephew, C., for life, and after his decease, "providing he shall leave any child or children him surviving, upon trust for such persons, and for such ends and purposes as my nephew shall by his will direct or appoint, give, devise, or bequeath the same; but if my nephew shall die without leaving any child or children him surviving, and shall not previous to his decease make any such appointment, gift, or bequest as aforesaid, then upon trust for other persons. C., by will appointed, or assumed to appoint, the whole real and personal estate mentioned in his uncle's will to trustees, upon the trusts declared respecting his own residuary estate. Upon the decease of C., without leaving any child or children surviving:—Held (following *Seccombe* v. *Edwards*, 28 Beav. 440), that the word "and" could not be read as "or"; but that as the nephew had died without leaving a child, no power had arisen, and therefore no appointment had been made, and consequently that the gift over took effect in favour of the persons named in the uncle's will. *Barker* v. *Young*, 33 Beav. 353; 3 N. R. 350; 33 L. J., Ch. 279; 10 Jur. (N.S.) 163; 12 W. R. 659.

—— **On Death in Testator's Lifetime and before receiving Benefit.**]—A testator bequeathed personalty for his wife for life, and after her death to be divided between his brothers and sisters; and he declared, that in case any or either of his brothers or sisters should die in his lifetime, and before they should have received any benefit from the bequest, then the share of him or her so dying should go over. The court refused to change the word "and" into "or," but held the second clause of the declaration to be explanatory of the first. *Kirkbride, In re*, L. R. 2 Eq. 400; 15 L. T. 51; 14 W. R. 728.

—— **On Death in Lifetime of A. and without Issue.**]—A gift over in case A. dies in the lifetime of the testator's wife and without issue will fail, if A. survives the wife, though he dies without issue. *Reed* v. *Brathwaite*, 40 L. J., Ch. 355.

—— **On Death in Lifetime of A. and B.**]—Testator, after giving legacies to nephews and nieces, provided that in case any or either of them died in the lifetime of his wife and his brother without leaving lawful issue, the legacy given to such nephew or niece should lapse and be absolutely void:—Held, that "and" could not be read as "or" in the disjunctive, and that the period in which the limitation over was to take effect was the joint lives of the testator's wife and brother. *Day* v. *Day*, 1 Kay, 703; 18 Jur. 1013; 2 W. R. 700.

3. "OR" CONSTRUED "AND."

Principles.]—In what case the disjunctive "or" shall be taken to mean the conjunctive "and." *Walsh* v. *Patterson*, 9 Mod. 444.

Difference between this and changing "or" into "and." *Key* v. *Key*, 1 Jur. (N.S.) 372. See also *Pawson* v. *Pawson*, 19 Beav. 146; 23 L. J., Ch. 954.

The word "or" in a will may be read "and" to give effect to the manifest intention, and where the literal reading would be unjust and repugnant to the intention and object of the testator. *Maude* v. *Maude*, 22 Beav. 290.

Whether the instrument in which the word occurs is a will or a deed, "or" may be construed to mean "and," and "and" may be construed to mean "or," if such a construction is necessary to give effect to the intention of the party by whom the word is used. *White* v. *Supple*, 2 Dr. & War. 471; 1 Con. & L. 525.

Testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews, George and Charles, and the principal to be applied either in binding them apprentices at the age of fourteen, or to be reserved till they attained twenty-one, to commence business. "In the event of George and Charles (both or either of them) being settled before this will comes in force, I provide that the next boy (James or Henry) have the benefit, and so on." George and Charles survived the testatrix, but died under twenty-one:—Held, that James and Henry were entitled to the residue. *Prestwidge* v. *Groombridge*, 6 Sim. 171.

A disjunctive, at the end of a period, shall not make all the precedent sentences so, if the intention appears against it. *Framlingham* v. *Brand*, 3 Atk. 391. See also *Nichols* v. *Tolley*, 2 Vern. 389.

Gift to A. or his Children.]—Devise of a trust to all his daughters or their children, living at the testator's son's death; some of the daughters were living at the son's death, and had children, and others of the daughters were dead, leaving children:—Decreed, all the children, as well of the living daughters as of the dead, should take. *Richardson* v. *Spraag*, 1 P. Wms. 434.

A testator bequeathed his residue to his three sons in trust, to be divided between his three sons and his daughter, and he directed his daughter's share to be kept in the hands of his sons, for her "or" her children's sole use, free from the control of her husband. The daughter survived:—Held, that she took absolutely. *Whitcher* v. *Penley*, 9 Beav. 477.

Bequest to two persons or their children:—Held, to give children an interest by way of

substitution only, not concurrent. *Crooke* v. *De Vandes*, 9 Ves. 197.

Bequest to "my son William or his children": —Held, that the son who survived was absolutely entitled, and that the children could only take by substitution, in case of the death of their parent. *Penley* v. *Penley*, 12 Beav. 547.

Bequest of stock to trustees in trust, after the death of A., to transfer the same to and amongst all and every the nephews and nieces that should be then living; to wit, the said J. B. or her children, and the said P. B. or his children, and D. L. or his children, and P. L. or his children; under this bequest a nephew not expressly named is not entitled to any share; and the fund is equally divisible amongst such nephews and nieces, and their children, as were living at the time of the death of A. *Eccard* v. *Brooke*, 2 Cox, 213; 2 R. R. 31.

A testator bequeaths a sum of stock to each of five nephews and nieces, or to their respective child or children; should any die without child, such share to revert to the residuary legatee; each of the nephews and nieces who survive the testator takes his or her legacy of stock absolutely. *Montagu* v. *Nucella*, 1 Russ. 165; 25 R. R. 25.

The same testator appoints as a residuary legatee E. P. M., his child or children; in case of his death, without any such, the residuary interest to invest in the other five nephews and nieces then alive, share and share alike, and as before to each of their respective child or children, and in case of either of their deaths without any such issue, then his or her share to be divided amongst the survivors: E. P. M., having survived the testator, takes the residue absolutely. *Ib.*

A testator, by his will, gave 1,000*l.* to his sister for her "or" for her children's sole use and benefit for ever. By a codicil to his will he recited that he was desirous of making further bequests in relation to his sister and her family, and then gave, amongst other benefits, a further sum of 1,000*l.* to his trustees to pay the dividends to his sister for life, and then for her children: —Held, that the word "or" was to be taken disjunctively, and that the 1,000*l.* bequeathed by the will was given absolutely to the testator's sister, but not for her separate use. *Chipchase* v. *Simpson*, 16 Sim. 485; 18 L. J., Ch. 145; 13 Jur. 90.

Bequest to A. of an annuity for her life, and after her death the annuity or the value unto B. and C. or their children, share and share alike. B. and C. survived A.:—Held, that their children took no interest in the annuity. *Sparks* v. *Restall*, 24 Beav. 218.

Devise of real estate to A. for life, subject to payment of 2,000*l.* apiece to B., C. and D., or to their respective lawful issue, twelve months after the death of the testator, and devise of the same estate in remainder on the death of A. to his children, as he should appoint, charged with a further sum of 3,000*l.* apiece to B. and D., or to their respective lawful issue; B., C. and D. survived the testator; B. died without issue in the lifetime of A.; and C. and D. died in the lifetime of A., leaving issue:—Held, that the legacies to B., C. and D. vested in the legatees, subject to be divested in favour of their children, in case of their death, leaving children, and therefore that B. took both the legacies absolutely, and C. and D. took the legacies of 2,000*l.* each absolutely, and the children of C. and D. took the legacies of 3,000*l.* by substitution for their parents. *Salisbury* v. *Petty*, 3 Hare, 86; 7 Jur. 1011.

Bequest to a class equally, with a substituted gift, as to the shares of any who predeceased the testator, to his "children or remoter issue," per stirpes of "their parents' or grandparents'" shares:—Held, that the grandchildren could not claim a share, by substitution, in competition with children, but that the children alone were entitled, to the exclusion of grandchildren. *Amson* v. *Harris*, 19 Beav. 210.

A testator gave his real and personal estate to his wife for life, and then to be divided equally between his four children, "or their child or children, share and share alike." But in case any of his children should die without leaving any child or children, then his, her or their share or shares to be divided between "the survivor or survivors of him, her or them, or his, her or their child or children, share and share alike":—Held, that the gift to the grandchildren was substitutionary; and upon the death of one of the children, unmarried, in the lifetime of the widow, the surviving children took as tenants in common. *Blundell* v. *Chapman*, 34 Beav. 648; 33 L. J., Ch. 660; 10 Jur. (N.S.) 332; 10 L. T. 152; 12 W. R. 540.

A gift to the children or grandchildren of A.:—Held, substitutional, so that all the children being in esse the children only were entitled to the trust funds. *Margitson* v. *Hall*, 10 Jur. (N.S.) 89; 9 L. T. 755; 12 W. R. 334.

A testator gave 1,600*l.* unto and amongst such one or more of the children "or" grandchildren of his daughter A. as should be living at her death, equally to be divided among them, share and share alike. The testator's brother afterwards made a voluntary increase in the above provision by a bond in favour of all and every the child and children "or" grandchildren of A. that should be living at her decease, in such shares and proportions as she should by will appoint; with a proviso that each and every the children "and" grandchildren of A. that should be living at her decease, should be entitled under such will to receive a share at least equal to the amount of the share to which he or she would have been entitled under the will of the testator. A., by will, appointed to her four daughters (three of whom were married and the fourth of whom married before her death), who were her only children, in equal shares; and in the event of the death of any one of her married daughters, her share to be divided between the children of such daughter. At her death all four were living, and three had issue living:—Held, that the word "or" in the will must be construed strictly as excluding the grandchildren of A., and that the four daughters took absolutely in equal shares. *Ib.*

A father devised lands to his daughter in fee, and by codicil he ordered that the lands given by his will to his daughter should be not so given, but to all her children, or legal issue, to be divided amongst them in equal shares, after the death of his daughter and her husband. She had ten children, one of whom died in the lifetime of the testator, and three, who survived him, died in her lifetime:—Held, that the children of the daughter who were living at the death of the testator, and those who were born afterwards, took vested interests in fee, to the exclusion of grandchildren and great-grandchildren. *Holland* v. *Wood*, L. R. 11 Eq. 91.

Gift to A. or his Heirs.]—On appeal, devise of land on contingency to R. or "his heirs." R., before the contingency happens, conveys "all his right, title, claim, and demand" therein by deed to his younger son and his heirs as a provision, and dies. The contingency happening, R.'s heir cannot claim this against his father's act. "Or" construed "and." *Wright* v. *Wright*, 1 Ves. 409.

Testator, by a will made since the statute 1 Vict. c. 26, after directing payment of his debts, and bequeathing several specific articles of plate to his sister L., desired that all his other plate, jewellery, books, pictures, and other property, except freehold and leasehold property, should be sold, and the produce, after deducting funeral and other expenses, be divided in equal parts amongst L., M., N., O. and P. He then directed that his freehold house and his leaseholds, some of which were held for years, and others for years determinable on lives, should be kept in hand and let to the best advantage, and the produce be divided every half-year among the above-named L., M, N., O. and P., or to their lawful heirs; and in case of there being no heirs, the share or shares to be divided in equal parts among the surviving legatees. The testator at his death left L. his heiress-at-law and sole next of kin; M., N., O. and P. were not related to L., but were related to and capable of inheriting from each other; M. died unmarried in the testator's lifetime:—Held, first, that M.'s share of the residuary personal estate lapsed for the benefit of the next of kin; secondly, that M.'s share of the freehold property did not lapse, but went to the surviving devisees, the words "heir and lawful heirs" referring to heirs of the body, and "or" being construed "and"; thirdly, that M.'s share of the leaseholds for years lapsed and fell into the residue, the words "there being no heir" referring to an indefinite failure of issue, and the word "surviving" meaning "other." *Harris* v. *Davis*, 1 Coll. C. C. 416; 9 Jur. 269.

A testator devised one-fifth share of his freeholds to each of his five children in fee. He then bequeathed personal estate to them, share and share alike, and he said, "Should either of my children die without issue, I give and bequeath such share and shares amongst my surviving children equally," and should either depart this life leaving children or child, then that child "to inherit his parent's share," and if more than one, "the share" to be equally divided amongst their "heirs" and assigns:—Held, that the gift over referred to the last antecedent, the personalty, and did not affect the realty. *Adshead* v. *Willets*, 29 Beav. 358; 9 W. R. 405.

A testator devised all his manors "to my son for his natural life, and at his decease" to trustees, "their heirs and assigns, in trust to preserve" (this devise in trust was repeated whenever necessary) "for the son or sons, daughter or daughters, the males taking first of my said son till they attain the age of twenty-one years, or the days of their marriage, and no farther; the elder son to inherit before the younger, but the daughters to take equally and in common as joint heiresses." He empowered his son to give "any part, or even the whole, of these estates" to any or either of his sons, but not to his daughters, "as my said son may, from their conduct to him (their father), think deserving of preference." But if the eldest grandson should turn out ill, the testator left him an annuity of 200*l.* chargeable on his landed property, "and to the eldest son of such undeserving grandson I leave and bequeath my landed property, estates," &c. "I will, therefore, that the before-mentioned estates should in such instance descend to my son's grandson, but still subject to any entail of the same which my son may make." If the son died without issue, the trustees were to preserve the estates for the testator's four daughters during their lives, free from the control, &c., "the estates being equally divided between them or their heirs," and he gave the "estates and property to them through the said trustees," &c., whom he empowered to raise 10,000*l.* for the daughters, chargeable on all his estate:—Held, that the son took only an estate for life; that the trustees took an estate in fee in remainder expectant on the determination of the life estate of the son, and that on the son's death without issue the estates went over to the daughters as tenants in common in tail. No gift in the will was void for uncertainty or remoteness. *Watkins* v. *Frederick*, 11 H. L. Cas. 358.

Bequest of 40*l.* per annum to A. for life, and after her decease to B. or his heirs:—Held, that "or" must be construed disjunctively, and that therefore B. did not take an absolute interest in the annuity. *Girdlestone* v. *Doe*, 2 Sim. 225.

Gift to A. or the Heirs of his Body.]—"And" must be construed "or" where it is necessary to put a reasonable construction on the will. As where the interest with the principal of the residue of a testator's estate was directed to be settled on his daughter "or" the heirs of her body, as the executors shall think fit; the word "or" shall be construed "and," for the executors are not empowered to give it from the daughter to the grandchildren. *Read* v. *Snell*, 2 Atk. 643.

Testator devised his estate to A. in case his daughter should die leaving no heirs of her body:—Held, a gift to the daughter for life, with contingent remainder to such heir of her body as should be living at the time of her death. *Ib.*, 646.

"Leaving" is a participle of the present tense, and relates to the time of the daughter's dying. *Ib.*

No weight has been laid on the want of the words "for life" when the intention of the testator has otherwise appeared, especially in the case of a trust executory, for then a court of equity is bound to see a settlement made agreeably to the intention of the testator. *Ib.*, 648.

Gift to A. or his Issue.]—Testator gave in trust to his brother E. the remainder of his property of whatsoever kind to assist him to bring up, educate, and provide for the children of his late brother J., whom he named. "When my youngest nephew attains his age of twenty-one years, it is my will that all my property be equally divided amongst my nephews or their lawful issue, share and share alike; the division, however, is not to take place, although my youngest nephew have attained the age of twenty-one years, until the decease of my wife, my sister J., and my brother E.":—Held, that the interests of the nephews were not contingent on their living until the youngest of them should attain twenty-one, but vested on the testator's death; and that the word "or" was to be construed conjunctively, and consequently that the nephews took estates tail in their shares of the testator's real property, and absolute interests in

their shares of his personal property. *Parkin* v. *Knight*, 15 Sim. 83; 15 L. J., Ch. 209; 10 Jur. 23.

The testator directed the application of the surplus income of his estate for the maintenance of his children during their minority or apprenticeship, and the application of certain sums for their advancement; and after his youngest child should have attained twenty-one years, he directed his executors to divide any surplus in their hands every three years during his wife's life or widowhood, and, after her death or marriage, every year equally amongst his children or their heirs, instead of any one that might happen to be dead, until the expiration of fifty years from the time of his death; and that at the end of the said fifty years his executors should sell his remaining estate, and pay, discharge, or divide the money for the same amongst his children (naming them), or any of their heirs in their stead; and if any of his said children should die without lawful issue, such share or shares of those so dying to belong to the survivors or their lawful heirs equally:—Held, that the court could not read "or" as "and" where the purpose was manifestly substitution of objects, and not succession; that the word "heirs" must be construed "issue," and not "children"; and that it was not a ground for departing from such meaning that the consequence of adhering to it would be to render the will void for remoteness. *Speakman* v. *Speakman*, 8 Hare, 180.

A gift to the sisters of the testator living at a particular time, or the issue of any or either then dead, is not a substitutionary, but a substantive gift to the issue. *Attwood* v. *Alford*, L. R. 2 Eq. 479; 14 W. R. 956.

Gift to such of the children of A., B. and C. as should be living at the testatrix's death, or the issue of such of them as should be married, in equal shares. The word "or" construed to mean "and," and the children and grandchildren held to be equally entitled. *Horridge* v. *Ferguson*, Jac. 583; 23 R. R. 148.

Bequest to a class of objects with a proviso expressive of the testator's intention that "the children or remoter issue" of any of the class who should die in the lifetime of the testator should stand in their parents' or grandparents' place, and take per stirpes the share which their parents or grandparents would have taken:—Held, that where one of the class had died in the lifetime of the testator, leaving children and grandchildren, the children were alone entitled to the parents' share. *Amson* v. *Harris*, 19 Beav. 210.

Legacy to A. or her issue:—Held, all descendants of A. entitled per capita. *Davenport* v. *Hanbury*, 3 Ves. 257; 3 R. R. 91.

Gift in Remainder to a Class or their Heirs.]—Gift by the testator to his wife for her life, or until her second marriage, of the interest of his real and personal estate, which, whether arising from rents or public securities, was to be applied for the benefit of herself and children; and if she married again, he declared that her power and benefit under his will should cease; and when thirty years were expired, he ordered all his property, both freehold and leasehold, to be sold, and two-thirds to be divided among his children living at that period or their heirs, and one-third to be invested for the benefit of his wife; and after her decease he bequeathed such third to his children then living and to their heirs:—Held, that the gift at the end of thirty years was not liable to objection on the ground of remoteness; that there was no substitution of the legatee created by the gift to the children, "or to their heirs," but that the word "or" must be read "and"; and that the children of the testator living at the end of thirty years (who were also the same children as were living at the death of the widow) were entitled to the proceeds of the sale of the estate, and also to the intermediate rents after the death of the widow and before the expiration of the thirty years. *Lachlan* v. *Reynolds*, 9 Hare, 796.

A testator directed that certain stock should after the death of his wife be divided among his "children then living, or their heirs." Two of the children were dead at the date of the will; three survived the testator and died in the lifetime of his wife; and two survived her:—Held, first, that the "heirs" of the children who predeceased the wife (including the two who were dead at the date of the will) were entitled to share in the fund along with the children who survived her. *Philps, In re*, L. R. 7 Eq. 151; 19 L. T. 713.

Held, secondly, that by "heirs" were meant the statutory next of kin of the children. *Ib.*

Held, thirdly, that such next of kin were to be ascertained, in the case of the children who survived the testator, at the time of the death of each child, but in the case of the children who predeceased the testator at the time of the testator's death. *Ib.*

A testatrix by her will, dated in 1836, gave all her personal property and also her real property to trustees on trust for payment of her debts and legacies, and subject thereto she gave "all her personal and real property as aforesaid" between her five sisters, nominatim, and the survivors of them, in equal shares during their lives and spinsterhood, and upon the death or marriage of all her said sisters she directed that her "property should be divided into equal proportions or shares between her brothers and sisters then living or their heirs." She had twelve brothers and sisters, of whom one brother died before the testatrix was born, one sister died before the date of the will, two brothers and one sister died in her lifetime after the date of the will, and the rest survived her. The last survivor was one of the five sisters named in the will, who died a spinster:—Held, first, that (notwithstanding the will was before the date of the Wills Act) the word "or" in the gift in remainder could not be read "and," and that there was no intestacy. *Wingfield* v. *Wingfield*, 47 L. J., Ch. 768; 9 Ch. D. 658; 39 L. T. 227; 26 W. R. 711.

Held, secondly, that the word "heirs" must be construed distributively so as to mean heirs-at-law as to the real estate, and statutory next of kin (including widows) as to the personal estate. *Ib.*

Held, thirdly, that such heirs-at-law and next of kin were to be respectively ascertained as regarded brothers and sisters who predeceased the testatrix at the death of the testatrix, and as regarded those who survived her at their respective deaths. *Ib.*

—— **To a Class or their Issue.**]—A testator gave his residuary estate to trustees upon trust to pay the income thereof to all his brothers and sisters living at the time of his decease equally

during their lives, and from and after the decease of the survivor of them to pay the principal unto, between, and amongst all the lawful issue of his said brothers and sisters who should attain twenty-one, &c., or unto, between, and amongst the issue (if any) of such of them as should be then deceased, so that such [each ?] class of issue, whether in the first or second degree, should take only as amongst themselves the share or shares to which his, her, or their deceased parent or parents would have been entitled if living :—Held, first, that the children of the brothers and sisters took per stirpes ; secondly, that the word "or" must be read as "and," and that therefore a son of one of the testator's brothers (who survived the testator) having died in the testator's lifetime leaving children living at the time of distribution, these children took their grandfather's share. *Shand* v. *Kidd*, 19 Beav. 310.

—— **To a Class or their Families.**]—A husband, who died in 1854, gave all his property to his wife for life, and after giving pecuniary legacies and annuities, devised and bequeathed to his son C. all the residue after his mother's death, and to his heirs ; and in case his son should die leaving no issue, then his freehold estate was to be equally divided between his (testator's) surviving children or their families. All the children of the testator survived their mother, who died in 1861, and, excepting one, all (two without issue, two leaving children, one leaving a child, and the issue of another child) died in the lifetime of C., who died, in 1869, a bachelor and intestate :—Held, a gift on the death of C., without leaving issue living at his death, to the other children of the testator then living, and to the families of such of them as were dead. *Burt* v. *Hellyar*, 41 L. J., Ch. 430 ; L. R. 14 Eq. 160 ; 26 L. T. 833.

—— **To a Class or their Personal Representatives.**]—Stock was bequeathed in trust for testator's brother and the brother's wife for their lives successively, and after their decease in trust to be divided equally amongst the testator's nephews and nieces, children of the brother then living, or their legal personal representatives :—Held, that the representatives of nephews and nieces, dying in the lifetime of the surviving tenant for life, took shares, and that such representatives were the next of kin, and not the executors or administrators of the nephews and nieces. *King* v. *Cleaveland*, 4 De G. & J. 477 ; 28 L. J., Ch. 835 ; 4 Jur. (N.S.) 702 ; 6 W. R. 602.

Power to Appoint to A. or B.—Implied Gift to A. and B. in Default of Appointment.]—Testator bequeathed a leasehold estate after an estate for life to his nephew A., and the heirs male of his body lawfully begotten, and in default of such heirs to one of the sons of his nephew B., as A. shall direct by a conveyance in his life, or by his last will. Another leasehold estate he bequeathed to A. upon trust, subject to certain charges, to employ the remainder of the rent to such children of B. as A. shall think most deserving, and that will make the best use of it, or to the children of his nephew C., if any such there are or shall be. A. dying in the testator's life, the bequest of the latter estate was established in favour of all the children ; quære, as to the former. *Brown* v. *Higgs*, 4 Ves. 708. Affirmed, 5 Ves. 495 ; 8 Ves. 561 ; 4 R. R. 323.

Bequest to executors in trust, that they shall pay, &c., unto and amongst the testator's two brothers and his sisters, or their children, in such shares, &c., as the trustees or the major part of them, or the survivor, his executors, &c., shall think fit. All the children living at the death of the testator held entitled with the parents, per capita, the court not having a discretion. *Longmore* v. *Broom*, 7 Ves. 124.

Testator bequeathed a sum of 6,000*l.* in trust for his daughter for life, "and on her decease I give the said 6,000*l.* to the children, or their descendants, of T. F. in such proportions to each as my daughter may direct." The daughter died without having made any appointment :—Held, that the children of T. F. were entitled to the fund, to the exclusion of their issue. *Jones* v. *Torin*, 6 Sim. 255.

Testator gave all his property to his mother for life, and directed that at her decease it should be divided amongst his three sisters, or their children, in such proportions as she should appoint. The mother and one of the sisters died in the testator's lifetime ; the deceased sister left no issue, but one of those that survived had children :—Held, that "or" must be read "and," and that, under the circumstances of the case, the property must be considered as given to the three sisters and their children in equal shares. *Penny* v. *Turner*, 15 Sim. 368 ; 2 Ph. 493 ; 17 L. J., Ch. 133 ; 10 Jur. 768.

Bequest to trustees for A. for life, and if he should die childless, upon trust to apply the sum to the benefit of such of the testator's children, or their issue, as the trustees should think fit, for the interest and good of the testator's family, with no gift in default of appointment. No appointment having been made, and the tenant for life having survived the donees of the power and died childless :—Held, that children and remoter issue took in equal shares per capita, and that the period for ascertaining the class was the death of the tenant for life. *White's Trusts, In re*, Johns. 656.

Power to appoint amongst testator's present or future grandchildren, or their respective issues, does not authorise the donee to exclude the children of a deceased grandchild, who were living at the donee's death. *Garthwaite* v. *Robinson*, 2 Sim. 43 ; 29 R. R. 54.

A testator directed that certain stock should stand in his name, and certain real estates remain unalienated "until the following contingencies are completed" ; and, after giving life interests in such stock and estates to his two children, with remainder to their issue, he declared that, in case his two children should both die without leaving lawful issue, the same should be disposed of as after mentioned ; that was to say, the survivor of his two children should have power to dispose by will of his real and personal estate "amongst my nephews and nieces, or their children, either all to one of them, or to as many of them as my surviving child shall think proper" :—Held, that a trust was created in favour of the testator's nephews and nieces and their children, subject to a power of selection and distribution in his surviving child. *Burrough* v. *Philcox*, 5 Myl. & Cr. 72 ; 5 Jur. 453.

Where a fund is given to A. to be applied for the benefit of B. or C., as A. shall think fit, and A. does not make any appointment, the bequest is void for uncertainty. *Salusbury* v. *Denton*, 3 Jur. (N.S.) 740.

A mother bequeathed a fund to her daughter

for life, and after her death "to and amongst my other children or their issue in such parts, shares, and proportions, manner and form, as my daughter shall by deed or will appoint":—Held, that the daughter's power was exclusive, and not distributive merely. *Veale, In re*, 25 W. R. 122. Affirmed, 46 L. J., Ch. 799; 5 Ch. D. 622; 36 L. T. 634—C. A.

In Gift Over—On Death or want of Issue.]—Bequest to J. A. for life, remainder to his eldest son for life, and to remain entailed on the eldest son of J. A. and his posterity for ever, but in case of the death or want of issue of J. A. to M. (a brother of J. A.) and his descendants as above mentioned from one generation to another for ever. J. A. survived the testator and died a bachelor:—Held, that the bequest over to M. and his descendants was void for remoteness. *Monkhouse* v. *Monkhouse*, 3 Sim. 119; 30 R. R. 135.

—— **In event of not Marrying, or Dying.**]—Testator gave a sum of money to trustees, in trust only and for the use and benefit of his daughter, which he desired might be paid to her, and be settled on her during her life, in case of her marriage; or, in case she did not marry, then the interest of the money, being vested in government securities, to be paid to her, and in the event of her not marrying or dying then the money to go to his nephews. The daughter married, and shortly afterwards died without issue:—Held, that her husband, who had taken out administration to her, and not the testator's nephews, was entitled to the fund. *Hawkins* v. *Hawkins*, 7 Sim. 173.

—— **In event of not Intermarrying nor having Children.**]—A testator gave a fund to A. absolutely, but that only the interest should be paid to her for her separate use for life, and after her death the property should go to her children, and in the event of her not intermarrying, nor having children, the property to be at her disposal by will or otherwise. A. being a widow, sixty-four years of age, and never having had any children, filed a bill for the transfer of the fund:—Held, that she was entitled to it. *Mackenzie* v. *King*, 17 L. J., Ch. 448; 12 Jur. 787.

—— **On Death Unmarried or without Issue.**]—A testator gave a share of his estate to L., subject to the condition that L. should receive for professional services 150*l.* in some one year, and the executors were to invest the principal, and pay L. the interest; "and in the event of his death, he being at the time unmarried, or not leaving legal issue, or not having fulfilled the above condition," then there was a gift over. L. never fulfilled the condition, but died leaving lawful issue:—Held, that his representatives took the share. *Law* v. *Thorp*, 25 L. J., Ch. 75; 1 Jur. (N.S.) 1082; 4 W. R. 69.

—— **On Death without having Issue or making Disposition of Share.**]—A testator devised real estate to his children and their heirs as tenants in common, with a gift over to the survivors "in the event of any of them dying before having heirs of their body, 'or' making a particular disposition" of his share:—Held, that "or" must be read "and," and that the children took in fee, but that the gift over in the event of making no disposition was repugnant and void. *Greated* v. *Greated*, 26 Beav. 621; 28 L. J., Ch. 756; 5 Jur. (N.S.) 454; 7 W. R. 367.

—— **On Death without Heir or Will.**]—The testator bequeathed a leasehold house and premises, with the furniture and plate, to his son, and added, "and should he die without heir or will, the profits of the said house to be equally divided between all my grandchildren, by the consent of his mother":—Held, that "or" should be read "and," and that the son took an absolute interest in the house. *Green* v. *Harvey*, 1 Hare, 428; 11 L. J., Ch. 290; 6 Jur. 704.

—— **On Death or Neglect to Claim.**]—A testatrix, after bequeathing certain legacies, directed that if these legatees should be dead at the time of her decease, or should not be heard of to be then living, or should not respectively claim their respective legacies within twelve months after her decease, then the legacies given to such of the legatees as should be dead, or should neglect to claim within the time aforesaid, should sink into the residue:—Held, that one of the legatees, who did not claim her legacy within the time limited by the will, had no right thereto after that time, although she lived at a distance from the residence of the testatrix, and had not previously heard of the bequest in her favour, or of the testatrix's decease. *Hawkes* v. *Baldwin*, 9 Sim. 355; 7 L. J., Ch. 297; 2 Jur. 698.

—— **On Death of A. or B.**]—Gift of an annuity "after the death of my mother, 'or' the second marriage, death, or forfeiture of my wife." The mother predeceased the testator:—Held, that the annuity was payable from the testator's death, and that "or" could not be read "and." *Hawksworth* v. *Hawksworth*, 27 Beav. 1.

—— **On Death before A. or under Age.**]—Bequest of residuary personal estate in trust for testator's wife for life, and on her death to pay, &c., to his son A. on his attaining twenty-one; but if he should depart this life before the wife, "or" before attaining twenty-one, then in trust for the defendant. Maintenance to and a power to advance A. were also given. A. attained twenty-one, but died in the wife's lifetime:—Held, that "or" was to be read "and," and that the son took an absolute vested interest on attaining twenty-one. *Bentley* v. *Meech*, 25 Beav. 197.

—— **On Death in Lifetime of A. or under Age and without Issue.**]—Testator bequeathed his real and personal estate to trustees, in trust to pay an annuity to his wife, and to raise and pay to each of his children 2,000*l.* on their attaining twenty-one, and to accumulate the surplus income of the trust property during the life of his wife, and, after her death, to sell the property, and divide the proceeds among his children on their attaining twenty-one, and in case all his children should die in the lifetime of his wife, or under twenty-one, and without leaving issue, then, after his wife's death, to sell the trust property and divide the proceeds amongst certain other persons:—Held, that "or" ought to be read as "and," and that the children, having attained twenty-one, were absolutely entitled to the property, though their mother was living. *Miles* v. *Dyer*, 5 Sim. 435; 8 Sim. 330.

—— **On Death under Age or without Issue.**]—A testator, after certain legacies, devised as follows:—"In case my daughter should have no lawful issue, after her death I will that my property that shall be remaining do return to

my relations, viz. to my nephew J. 100*l.*; likewise I leave, in case my daughter has no issue, to my nephew S. and my niece A. 80*l.* each; the remainder of my personalty I leave to my daughter's disposal, if she lives to maturity. As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real and all my other property to my brothers, equally between them; but in case my daughter shall have lawful issue, then I leave the whole of my property, real and personal, to her and her heirs":—Held, that the word "or" should be read "and," and that the daughter, on attaining twenty-one, took an estate in fee simple. *Johnson* v. *Simcox*, 31 L. J., Ex. 38; 4 L. T. 836; 9 W. R. 895—Ex. Ch. Affirming 6 H. & N. 6.

A. B. devised to his son J. M. an estate in fee, and willed that he should have possession of the property on his attaining twenty-one. By a codicil, the testator "willed that if his son J. M. should die without issue, or before he should attain the age of twenty-one, then the estate which he had devised to him should go over to his son W. M. and his heirs." J. M. attained twenty-one years of age, and contracted to sell the estate:—Held, that the word "or" must be read "and"; and that in the event which had happened, of J. M. having attained twenty-one years of age, he took an indefeasible estate in fee simple. *Morris* v. *Morris*, 1 Eq. R. 167; 17 Beav. 198; 17 Jur. 966; 1 W. R. 377.

A testator, W., devised his real estates to trustees, upon trust, to receive the rents, and on his son John arriving at the age of twenty-five years, to let him into possession, but neither he nor his heirs to the third generation were to sell or mortgage the same, it being the testator's desire that the property should remain in the W. name. If John should die without leaving lawful issue, it was the testator's will that his daughter Ann should have his share, subject to the same limitations. If John and Ann should die under age, or without leaving issue, the testator devised the property, after deducting a certain sum from the produce in favour of his (the testator's) daughter Elizabeth, to and for the benefit of the plaintiffs. The testator had the three children named in his will living at his death, and no more. Elizabeth died at the age of two years: Ann survived her, and died at the age of nineteen years, unmarried; and John, the last survivor, died, aged thirty years, leaving children, who all died unmarried, and without issue. John, by his will, devised part of the father's real estate to the defendants:—Held, first, that the devisees of John, the son, took no estate in the hereditaments of W., the father, devised by his will; and, secondly, that the plaintiffs took the estates in the hereditaments of W., the father, and in such manner as given to them by the will of W., the father. *Mortimer* v. *Hartley*, 3 De G. & Sm. 316.

One devises, if his son die before twenty-one, or without issue, that the land shall go to J.: the son dies before twenty-one, but leaves issue. J. shall have the land. *Jenning* v. *Hellier*, cited 2 Vern. 377.

—— **Issue male.**]—Devise to A. for life, when he attains thirty-one, and after his death to his eldest son in fee. In case A. should not live to that age "or" not have any son, then in trust for B. for life, on attaining thirty-one, and after his death to his eldest son in fee, and in case of failure, to the eldest son of the testator's daughter in fee. A. attained thirty-one, and died without having had issue:—Held, that "or" could not be read "and," and that the eldest son of the daughter took the estate. *Cooke* v. *Mirehouse*, 34 Beav. 27.

Testator bequeathed 5,000*l.* to A. if he attained twenty-one, but if he should not attain that age, or die without leaving issue male, then over:—Held, that the 5,000*l.* vested, absolutely, in A. on his attaining twenty-one. *Mytton* v. *Boodle*, 6 Sim. 457.

—— **On Death under Age or Unmarried.**]—One devises several parcels of land to his several children in tail, and if any of them die before twenty-one or unmarried, such child's part to go to the surviving children; if any of the children die unmarried, though above the age of twenty-one, his share shall go to the surviving child, but such survivor shall have such share for life only; what goes over on one child's death shall not go over again a second time. *Woodworth* v. *Glassbrook*, 2 Vern. 388.

Gift over if A. died under thirty-one or unmarried. Word "or" construed as if it were "and," where requisite to give effect to intent of testator. *Grant* v. *Dyer*, 2 Dow, 73, 87; 14 R. R. 118.

A testator gave a share of his residuary real and personal estate to his daughter, her heirs, executors, administrators, and assigns, to be paid at twenty-one or on the day of her marriage, provided it should take place with the consent of his widow. There was a gift over in case of death "without having attained twenty-one years or being so married as aforesaid." The word "or" construed "and." *Collett* v. *Collett*, 35 Beav. 312, 315; 12 Jur. (N.S.) 180; 14 L. T. 94; 14 W. R. 446.

Residuary bequest for A. and B., in trust till they come of age, or marry, the interest to be received in the meantime and paid to them, but if one of them die before marriage, or twenty-one, then to survivor and children; if both die, leaving no issue, then I give them power to leave it by will as they think proper. One legatee married, and the other attained twenty-one:—Held, that both acquired vested interest. *Thackeray* v. *Hampson*, 2 Sim. & S. 214; 25 R. R. 186. *S. C.*, nom. *Thackeray* v. *Dorrien*, 3 L. J. (O.S.) Ch. 89.

Devise to the use of my son "if he shall attain the age of twenty-three years, or shall be married with consent of the trustees for the time being of my will, which shall first happen, and to his heirs and assigns absolutely for ever":—Held, that the word "or" might be construed "and," and that the son took an estate tail or in fee (but a case sent for the opinion of C. P.). *Grimshaw* v. *Pickup*, 9 Sim. 591; 3 Jur. 286.

A testator devised and bequeathed his interest in his freehold and chattel property to his grandson, C.; "but in case my grandson should happen to die before he attains the age of twenty-one, or married," then over:—Held, that "or" should be read "and," that C. had acquired an absolute estate, having attained twenty-one, though he had not been married. *Clegg, In re*, 14 Ir. Ch. R. 70.

A testator bequeathed a sum of money to his two daughters, share and share alike, to be paid to them by his executors in twelve months after their respective marriages, with the consent of

his executors; and he directed that his daughters should be paid a yearly sum, less than the interest of their shares, until their respective marriages; and that from their respective marriages, each of them should be paid the full legal interest; the remainder of the interests on their fortunes to go to his son until their respective marriages; and in case his daughters, or either of them, should die before twenty-one or day of marriage, her share of the sum bequeathed to her should go to his son; and in case both should die, the entirety of the sum to go to his son:—Semble, the legacies to the daughters did not vest till marriage. *Cantillon, In re*, 16 Ir. Ch. R. 301.

Held, that "or" should be read "and," and therefore that the legacies did not go over to the son on the death of the daughters unmarried, but were undisposed of by the will, and divisible among the testator's next of kin. *Ib.*

A father bequeathed his residuary estate in trust for all his children in equal shares as tenants in common, as to sons absolutely, and to daughters in the manner thereinafter specified, and the will contained a clause of accruer in the event of sons dying under twenty-one, and daughters dying under that age or without having been married. And the father directed that the share or shares of any daughter should be held in trust for such daughter for her separate use for life, and after her death for a surviving husband for his life, and after the death of such daughter and her husband for the benefit of the children of such daughter. The testator left five children, all of whom attained twenty-one. A daughter died without having been married:—Held, that she took one-fifth of the residuary estate absolutely. *Carter* v. *Smith*, 25 L. T. 555.

—— **Under Age or without Husband living.**]—Bequest to A., her executors, &c., provided that, in case she shall die under twenty-one, or without having any husband living, it shall go over:—Held, vested at twenty-one, upon intention, the word "or" being construed "and". *Weddell* v. *Mundy*, 6 Ves. 341.

—— **On Death under Age or Marriage without Consent.**]—Legacy to be paid on marriage with consent, and given over in case of death before twenty-five "or" such marriage with consent:—Held, that the legacy was only intended to go over, in the event of death before twenty-five "and" such marriage with consent. *Malcolm* v. *O'Callaghan*, Coop. t. Brough. 73.

A testator by his will gave to each of two daughters the sum of 1,000*l.*, as and when they should respectively attain the age of twenty-five years, or be married with the consent of his executors; but in case either should die under the age of twenty-five years, or should marry without consent, he directed that the legacy to such one as should die under that age or marry without consent should, after such decease of them respectively, or their respectively marrying without consent, fall into the residue of his estate:—Held, that the legacies vested respectively on the happening of either alternative, and were not contingent on the happening of both alternatives, namely, marrying with consent, and attaining twenty-five. *Thompson* v. *Teulon*, 9 Hare (App.) xlix.; 22 L. J., Ch. 243; 1 W. R. 12, 97.

G. PARTICULAR WORDS.

Accumulation.]—A testator having appointed trustees for the purpose of carrying on his trade of a bleacher, directed them to pay the profits of his business into a bank for accumulation and investment, until his daughters and their issue could have along with the other sums he had directed to be invested on their behalf 5,000*l.* each for their portions. He afterwards directed that any money which might be paid into the bank on account of such portions should be for the equal benefit of his daughters and their issue, and the interest should be equally divided amongst his daughters:—Held, that the testator used the word accumulation as meaning not the addition of income to the capital, but the constant addition of fresh amounts from the profits de anno in annum arising from the business. *Pilkington* v. *Myers*, 8 L. T. 720.

Trust of Heirlooms for Person entitled to "Actual" Possession of Realty.] — Chattels bequeathed as heirlooms upon trust to go along with, and be enjoyed by the person for the time being entitled under a settlement to the "actual" possession of, settled real estate do not vest absolutely in a tenant in tail of the real estate who dies in the lifetime of the tenant for life. *Lord Scarsdale* v. *Curzon* (1 J. & H. 40; 29 L. J., Ch. 249) considered and applied. *Angerstein, In re, Angerstein* v. *Angerstein*, 65 L. J., Ch. 57; [1895] 2 Ch. 883; 73 L. T. 500; 44 W. R. 152.

In Addition.]—Whether the words "in addition," in any case, add to the effect of a bequest without those words. *Lee* v. *Pain*, 4 Hare, 218.

The argument on the omission of the words "in addition" answered by referring to the words "in substitution." *Ib.*, 221.

Aforesaid, As before, and other Referential Expressions.]—*See* post, cols. 1398, *et seq.*

Along with.]—"Along with other sums" construed to mean "in addition to those sums," not "including those sums." *Pilkington* v. *Myers*, 8 L. T. 720.

And—Or.]—*See* ante, col. 711.

"Are" in Future Sense.]—A testatrix gave money to the children of her brother B. living at his decease, and gave benefits to other nieces, some married and some not, and afterwards directed that "the legacies of such of my nieces as are married shall be to their separate use." One of the daughters of B. was unmarried at her death, but was married at the death of B.:—Held, that the testatrix had used the word "are" in a future sense, and that she intended that such of her nieces as should be married at the time when their legacies and shares became payable should take to their separate use. *Bayliss's Trusts, In re*, 17 Sim. 178; 13 Jur. 1090.

As to.]—The recurring use of the words "as to" at the commencement of several devises is not necessarily an indication of the commencement of a devise complete in itself, and separate and independent from other limitations. *Gordon* v. *Gordon*, L. R. 5 H. L. 254.

Bankruptcy—Colonial Bankruptcy—Domicil.] Where a legacy is vested in trustees upon trust for a domiciled Englishman for life, or until he shall become a bankrupt or do or suffer anything

whereby the same would become payable to some other person, and he is adjudicated a bankrupt in New Zealand, but the legacy never becomes payable to the official assignee in that colony, no forfeiture of the life interest will be effected by such a bankruptcy. *Blithman, In re* (35 L. J., Ch. 255; L. R. 2 Eq. 23), applied and followed. *Hayward, In re, Hayward* v. *Hayward*, 66 L. J., Ch. 392; [1897] 1 Ch. 905; 76 L. T. 383; 45 W. R. 439; 4 Manson, 130.

Begotten.]—*See* post, col. 890.

Bequeathed.] — The word "bequeathed" (though not in itself a technical word) is primarily applicable only to property passing under a testamentary disposition. The testatrix, a married woman, had under her marriage settlement an absolute power of appointment over certain funds. By her will in 1867 she specifically appointed such funds, and then proceeded as follows: "I constitute and appoint E. M. my residuary legatee to any property which has been bequeathed to me and which is not mentioned in this will." The father of the testatrix, by his will in 1873, bequeathed to her a certain sum of stock, but he subsequently determined to give it to her in his lifetime, and accordingly transferred it to the trustees of her marriage settlement:—Held, that this sum of stock did not pass to E. M. under the residuary gift contained in the will of the testatrix. *Armstrong, In re, Marescaux* v. *Armstrong*, 49 L. J., Ch. 53; 42 L. T., 823.

Born.]—*See* post, col. 890.

"By"—Expression of Trust.]—Devise of all real and personal estate "in trust," "by" "B., C., D.," &c., must be construed by the subsequent acts to be done by them, and amounted here to a devise "to" them. *Bullock* v. *Stones*, 2 Ves. 521.

"Charging"—Appointment of Receiver by Court where Costs ordered to be paid.]—The fact that a contingent reversionary interest to an estate was acquired under a will which contained a forfeiture clause upon the reversioner charging the same, or upon becoming bankrupt, is not sufficient ground for discharging a receiver appointed in respect of the reversioner's interest, and such appointment does not, of itself, constitute a charge within the clause. *Campbell* v. *Campbell*, 72 L. T. 294.

"Be Deprived or be liable to be Deprived"—Act of Bankruptcy—Death of prior Tenant for Life—Adjudication and subsequent Annulment of Bankruptcy.]—Property was by will given, subject to a prior life interest therein, upon trust to pay the income thereof to a person for his life, with a proviso that if he should do or suffer anything whereby or in consequence whereof, either directly or by operation of law, he would, if absolutely entitled for life to such income, "be deprived or be liable to be deprived" of the beneficial enjoyment thereof, the trustees should apply the income as in the will mentioned. He committed during the lifetime of his father, the first tenant for life, an act of bankruptcy on which a bankruptcy petition was presented. After the death of the father the son was adjudicated a bankrupt, but on appeal the petition was dismissed. In the interval between the death of the father and the adjudication in bankruptcy the trustees had in hand income applicable under the trusts of the will in favour of the son:—Held, that the forfeiture clause thereupon came into operation. *White* v. *Chitty* (L. R. 1 Eq. 372) followed; *Samuel* v. *Samuel* (12 Ch. D. 153) discussed. *Loftus-Otway, In re, Otway* v. *Otway*, 64 L. J., Ch. 529; [1895] 2 Ch. 235; 13 R. 536; 72 L. T. 656; 43 W. R. 501.

"Dying."]—The word "dying" held not to import futurity in regard to the date of the will, or death of the testatrix, but a contrary interpretation was given to the expression "shall die." *Coulthurst* v. *Carter*, 15 Beav. 421; 21 L. J., Ch. 555; 16 Jur. 532.

Ejusdem generis.]—*See* post, col. 1245.

Elder—Eldest.]—*See* YOUNGER CHILDREN.

Become entitled.]—These words mean primâ facie "entitled in possession, and have the beneficial enjoyment of the estate." *Chorley* v. *Loveland*, 33 Beav. 189; 9 L. T. 596; 12 W. R. 187.

Equally—Equal Shares.]—*See* post, cols. 1367–70, 1382.

Et cætera.]—*See* post, col. 1248.

"Free" from Liabilities of other Persons—"Full Power" of disposing.]—A testator declared that any money to which any of his daughters should become entitled under his will should be settled free from any liabilities of any other person, and with full power of disposing of same by will:—Held, that each daughter's share should be settled upon her for life for her separate use, with restraint on anticipation, and on her death her share should be held for such person or persons as she should by will appoint, and, in default, for her next of kin as if she had died unmarried. *Kingham* v. *Kingham*, [1897] 1 Ir. R. 170.

Hereinafter.]—The word "hereinafter" construed "herein." *Bengough* v. *Eldridge*, 1 Sim. 173; 27 R. R. 184.

Testatrix gives, by her will, legacies to all her nephews and nieces, except those thereinafter named; she desires her executors to look upon all memorandums, &c., in her own hand as parts of or a codicil to her will, and bequeaths by will her residue to the children of her sisters, E., J., &c. By a codicil she gives legacies to some other nephews and nieces:—Held, that the children of E., J., &c., the residuary legatees under the will, were excluded from the legacies; but that the legatees under the codicil were not, and were entitled to both. *Fuller* v. *Hooper*, 2 Ves. 242.

If.]—*See* VESTED, CONTINGENT, AND FUTURE INTERESTS.

Improvements.]—A testator devised his estates, in trust, after deducting out of the rents, taxes, repairs, "improvements," &c., and "all other necessary outgoings," to divide the surplus between A. B. and other persons for life:—Held, that an expenditure for new farm buildings, &c., not stated to be with a view of improving the rents or to secure the continuance of the old tenants, was not within the term "improvements." *Walpole* v. *Boughton*, 12 Beav. 622.

In estimating lasting improvements, old buildings pulled down, if incapable of repair, to be valued as old materials only. *Robinson* v. *Ridley*, 6 Madd. 2.

In the first place.]—The words in a will in trust "in the first place" are merely words of method and order, and do not imply priority of payment. *Nash* v. *Dillon*, 1 Moll. 236.

Inherit.]—Construed in the sense of succession by descent. *East* v. *Twyford*, 9 Hare, 729.

Issue living—Child "en ventre sa mère."]—A testator, by his will, gave real and personal estate to his wife for life, and after her death one-half of the same to his daughter, Mrs. C., absolutely, in case she had issue living at the death of his wife. Mrs. C.'s first child was born one day after the death of the testator's wife:—Held, that Mrs. C.'s child en ventre sa mère was issue living at the death of the testator's wife, and that Mrs. C. took absolutely. Dictum of Lord Eldon in *Thellusson* v. *Woodford* (post, col. 751) adopted, and *Blasson* v. *Blasson* (post, col. 893) distinguished. *Burrows, In re, Cleghorn* v. *Burrows*, 65 L. Ch. 52; [1895] 2 Ch. 497; 13 R. 689; 73 T. 148; 43 W. R. 683.

Item.]—W. devised his lands to his wife for life, and after her decease to D., his wife's niece, and then said: "Item, I give the use of 500*l.* stock for her natural life, but after her decease I give the 500*l.* among my wife's brothers and sisters":—Held, the wife, and not the niece, is entitled to the 500*l.* stock for life, for it is not necessary the word "item" should be construed as independent of the preceding clause, and the wife is the person the testator naturally meant by the word "her," and is also the person the testator was principally taking care of. *Castledon* v. *Turner*, 3 Atk. 257. *Tomkins* v. *Tomkins*, cited 2 Ves. Sen. 564. *Sleech* v. *Thorington*, 2 Ves. Sen. 564. *Stebbing* v. *Walkey*, 2 Bro. C. C. 85.

A testator, after giving several annuities for lives, each gift commencing with the word "item," proceeds thus: "Item, I give to my wife 1,200*l.* a year during her life, and also my furniture and house, and after her decease to S. S. and his heirs":—Held, that S. S. was entitled to the fund for payment of the annuity, as well as the house and furniture. *Oldman* v. *Slater*, 3 Sim. 84.

Legacy—What is.]—The word "legacy," primâ facie, has reference to personal estate only, unless the context clearly shows that the testator intended to apply it to real estate. *Windus* v. *Windus*, 6 De G. M. & G. 549; 26 L. J., Ch. 185; 3 Jur. (N.S.) 1101.

"Residue" is not a "legacy" in the ordinary sense of the term, though the person taking it is a residuary legatee. *Ward* v. *Grey*, 26 Beav. 485.

A testatrix directed a sum which she said she owed to A. and B. on her promissory note, and her other debts, to be paid. She directed the residue of her estate to be applied towards establishing a school in connection with a certain chapel for the time being, and to pay the same over to the treasurer, for the time being, of such school now or hereafter to be built. The testatrix did not in fact owe the money to A. and B., but intended it to be held by them on a secret trust for the use of the existing chapel. She did not tell them of this in her lifetime, but told her executor, and A. and B. never knew of the intention till after the testatrix's death:—Held, that whether there was a valid debt or not on the promissory note to A. and B. was a question of law, but if there was no debt, it was good as a legacy. *Longstaff* v. *Rennison*, 1 Drew. 28; 21 L. J., Ch. 622; 16 Jur. 557.

Such a question is not one which can be decided by the assistance of a common law judge. *Ib.*

Bequest of annuity of 200*l.* for use of A. and her children, to be paid out of general effects, until it is convenient to executors to invest 5,000*l.* in funds, in lieu thereof, for her and their use, and to longest liver, subject to an equal division of the interest while more than one alive:—Held, an annuity, and not an absolute legacy. *Innes* v. *Mitchell*, 9 Ves. 212.

Testator by his will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his will. The schedule contained both the names of the creditors and the debts due to them respectively:—Held, that the parties so named in the schedule were not to be considered as legatees, but strictly as creditors, and consequently that the representatives of such as died in the testator's lifetime, were entitled to the benefit of the will. *Williamson* v. *Naylor*, 3 Y. & C. 208.

A. mortgaged an estate in 1774; he left by his will in 1775 an annuity to his widow, in lieu of dower. W., the original mortgagee, subsequently mortgaged his interest in this estate to Messrs. R. & Co. In 1786 Messrs. R. & Co. filed a bill against W., and the real and personal representatives of A., for the purpose of obtaining a foreclosure. By a decree in this suit in 1791, a declaration was made that the widow having relinquished her title to dower, became a bonâ fide purchaser of the annuity, and was entitled to be paid it out of the mortgaged estate. This suit not having been prosecuted, and the widow having died in 1794, her representatives in 1822 filed a bill against the heir of W., and other persons claiming under him, and the heirs and devisees of A., for the payment of the arrears of the annuity during her lifetime, or that the estate should be sold and the arrears paid out of the proceeds:—Held, on appeal, that the annuity not having been expressly charged on the real estate of A., was a mere pecuniary legacy, and that the decree of 1791 was erroneous, in declaring that the widow was entitled to be paid it out of the mortgaged estate. *White* v. *Parnther*, 1 Knapp, 179.

A legacy payable as soon as legal proceedings connected with the fund out of which it is to be paid should be terminated, is neither a reversionary interest nor a contingent legacy. *Luff* v. *Lord*, 34 Beav. 220.

In an abstract of legacies bequeathed by will, the testator added in the outer margin to his daughter's legacies, "I intend to make this up British money":—Held, this is an immediate gift in augmentation of the legacies, and not merely a memorandum indicating intention to augment them by future acts. The words contain the essential requisites of a gift; the amount of the bounty and the objects are certain; they do not import fluctuation of mind, or future

deliberation, as suspending testator's purpose: they are therefore capable of being considered a declaration of his immediate and fixed intention that the legacies should be augmented, and that is sufficient to constitute a bequest. *Mason* v. *Mason*, Beat. 322.

Legatee.]—Where the will bequeathed the residue proportionally amongst the legatees, legatees under a codicil were held not to be entitled to share in the residue. *Hall* v. *Severne*, 9 Sim. 515.

A gift of one shilling to a brother followed by a direction to pay him a certain sum annually, if he should ever be unfortunate, does not make him a legatee. *Taniere* v. *Perks*, 1 L. J. (O.S.) Ch. 79.

"Legal Disability"—Bankruptcy subsequently annulled—Beneficial Interest liable to make good Breach of Trust.]—A testator gave a share of his residuary estate, subject to the life interest of his wife, to his son, but in case of the son being at the death of the survivor of the testator and his wife "under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal and exclusive benefit," then he gave the same to the wife and children of the son:—Held, that "legal disability" meant some disability imposed on the legatee by law, in consequence of which he would be deprived of his property, such as that caused by bankruptcy, or conviction for felony, or (per Lindley, L.J., and Lopes, L.J.) attainder for treason, or lunacy; and did not include an inability to receive the property caused by a charge created by the legatee, or imposed by a judgment of a court in respect of a debt due from him. *Carew, In re, Carew* v. *Carew*, 65 L. J., Ch. 686; [1896] 2 Ch. 311; 74 L. T. 501; 44 W. R. 700—C. A.

An adjudication in bankruptcy obtained by the legatee on his own petition a few hours before the death of the tenant for life, and subsequently annulled on the ground that it ought never to have been made, would not be regarded as causing a disability within the meaning of the clause. *Ib.*

Likewise.]—A devise commencing with the word "likewise":—Held, to be subject to the contingency mentioned in the preceding gifts of the same estate. *Paylor* v. *Pegg*, 24 Beav. 105.

Living.]—*See* **Issue living,** supra, col. 735.

Maturity.]—Testator gave to his daughter M. 1,000*l.*, and the residue of his property to the child with whom his wife was then pregnant; and in case said child should not be born alive, or not arrive at the age of maturity, he directed the property allotted to it to be given to his daughter M.; and in case M. should die before marriage, then her portion to the child with whom his wife was pregnant; and in case they both died without arriving at the age of maturity, then over to the third persons. The posthumous child was born alive, and M., who survived, died before sixteen, and both unmarried:—Held, that in this case maturity meant marriage, and that the gift over took effect. *Bergin* v. *Woodlock*, Ll. & G. t. Sugd. 140.

"Named" meaning "Described."]—A testator gave legacies to various legatees by name, and some to classes described, but the persons composing which were not named; he gave his residue to his legatees specially named, except one of the classes described:—Held, that this shewed that by the words specially named the testator meant described or mentioned; and that all the legatees, whether named or only described, took shares. *Holmes' Trusts, In re*, 1 Drew. 321; 22 L. J., Ch. 393.

Now.]—*See* post, col. 1266.

Or, And.]—*See* ante, cols. 711, 718.

Other.]—Trustees who had a power to sell and mortgage and manage and receive the rents of an estate were directed to pay a life annuity out of the rents or any other moneys held by them upon the trusts:—Held, that "other moneys" referred to those ejusdem generis, and that the annuity was payable out of the income only, and not out of capital. *Clifford* v. *Arundell*, 27 Beav. 209.

A testator bequeathed to his wife absolutely 100*l.*, his leasehold furniture, &c., and then bequeathed to her the interest of moneys invested by him in certain loan societies, and all his other property, during her life. He afterwards bequeathed all moneys belonging to him in a friendly society, and in all other societies, to his wife absolutely:—Held, that the expression "all other societies" meant societies ejusdem generis with that which had been just mentioned, and that as to the moneys payable by the loan societies the widow took a life interest only in them. *Marks* v. *Solomons*, 2 Hall & Tw. 323; 19 L. J., Ch. 555.

Outgoings.]—A testator by his will settled certain estates and bequeathed to each person who at his death should become entitled to the possession or the receipt of the rents and profits of any of such estates all arrears of rents and profits which at the testator's death might be due to his estate, and also all proportions of the same accruing due before but payable after his death, but so nevertheless that all outgoings properly chargeable against such arrears and proportions, and not discharged in his lifetime, should be paid out of such arrears and proportions. The court of appeal held that such outgoings were not confined to rates, taxes, tithes, tithe rent-charge, and other outgoings (if any) recoverable by process of law as against or in respect of the hereditaments out of which the rents were derived, as Kekewich, J., had decided, but included agents' salaries, the costs of repairs and improvements and other wages of workmen employed on the estates, and, in fact, all expenses which in the ordinary course of management would require to be made in order to maintain the estates in a fit state to earn rent or which would be proper deductions before ascertaining the net rents receivable as income. *Cleveland's (Duke) Estate, In re, Wolmer* v. *Forester*, 63 L. J., Ch. 115; [1894] 1 Ch. 164; 7 R. 328; 69 L. T. 807—C. A.

Precatory Words.]—*See* post, TRUSTS.

Premises.]—The word "premises," where it is not used in its primary meaning of "præmissa," is equivalent to appurtenances. *Read* v. *Read*, 15 W. R. 165.

Provided always.]—The words "provided always" are to be considered as words of reference to all that has gone before them. They constitute a qualification of the preceding limita-

tions. *Martelli* v. *Holloway*, 42 L. J., Ch. 26; L. R. 5 H. L. 532.

Residue.]—A residuary bequest following upon a gift of the remainder of an estate does not operate to defeat the gift of the remainder, the word "residue" meaning anything or nothing, as the event may prove. *Kilvington* v. *Parker*, 21 W. R. 121.

"Residue" is not a "legacy" in the ordinary sense of the term, though a person taking it is a residuary legatee. *Ward* v. *Grey*, 26 Beav. 485.

"Residue" of personal estate is that which remains after payment of the testator's debts, funeral and testamentary expenses, and the cost of the administration of his estate, including the costs of an administration suit. *Trethewy* v. *Helyar*, 46 L. J., Ch. 125; 4 Ch. D. 53.

Residuary Legatee.]—The term "residuary legatee" is not of an invariable nature; it must be fashioned and moulded by the context of the will. *Singleton* v. *Tomlinson*, 3 App. Cas. 404; 38 L. T. 653; 26 W. R. 722—H. L. (Ir.)

Respectively.]—*See* VESTED, CONTINGENT, AND FUTURE INTERESTS.

Said.]—This word applies to the immediate antecedent. *Willomier, In re*, 16 Ir. Ch. R. 389.

A testator directed his household furniture, &c., to be sold, and the produce, with other moneys, to be laid out in stock, the interest to be paid to his wife for her life, and after her death the stock to be sold, and the half of the produce to be paid to C., eldest son of his niece E., and the other half to be divided equally between the children of E. Secondly, he left all stock, &c., of which he should die possessed, to his wife during her life, and after her death he directed the same to be sold, and 3,000*l.* of the produce to be paid to C., and the remainder to be divided equally between all the other children of his niece E., and he appointed executors. Thirdly, he devised his lands in France to his wife for life, and after her death the one-half to go to C., and the other half to be divided equally between all the other children of his niece E., and he appointed an executor of his property in France; and he directed that his executors should not be liable for any loss which might happen in placing out his property according to the direction of his will, except for wilful neglect; and in case C. should die before he attained twenty-one, he directed that the said property and effects should go to his (the testator's) nearest heirs on his mother's side equally. E., the testator's niece, was his nearest heir both on his father's and mother's side, and his next of kin. C. died under age:—Held, that "my said property and effects" in the third clause did not mean all the property of the testator, but was confined to the portion of it bequeathed and devised to C. *Ib.*

Held, secondly, that it applied to all the property which C. would have taken, and was not confined to the third clause. *Ib.*

There is no invariable rule of construction which refers the word "said" to the last antecedent, if it be at variance with the context of the will so to apply it. *Healy* v. *Healy*, Ir. R. 9 Eq. 418.

A. gave all his real and personal estate to U. and A., whom he appointed his executors. He then gave a house in B. to the inhabitants for a hospital, with one or two directions relating to the management, and directed that his executors should call a meeting of the inhabitants to appoint a committee and trustees to carry out the same, appointing his godson one of the trustees, and leaving the inhabitants to appoint as many more as they pleased; but in the event of the inhabitants not appointing a committee, or not being willing to carry out the scheme, he gave all his property so given to such asylum to his godson absolutely. The testator appointed the "said trustee or trustees" to be his residuary legatees, and made several gifts of houses to different persons for life, with remainder to his "trustee or trustees," or his "said legatee or legatees," for the asylum. The devises to charity being void ab initio, and in 9 Geo. 2, c. 36, the meeting of the inhabitants was never held, nor any committee appointed:—Held, that the gift over to the godson did not comprise the whole of his residuary real and personal estate, but only the house in B. *Hall* v. *Warren*, 7 Jur. (N.S.) 1089; 5 L. T. 190; 10 W. R. 66—L.JJ. Reversing 28 L. J., Ch. 70.

See also post, cols. 1066 and 1406.

Same, Same time, Same manner as.]—*See* post, cols. 1398 et seq.

Seised.]—"Seised," being a purely technical word, can have no other than its technical meaning in a will if no contrary intention is expressed by the testator; and therefore a devise of land of which the testatrix may die seised does not pass land to which she was entitled, but into possession of which she has never entered, and which is at her death in the wrongful possession of strangers. *Leach* v. *Jay*, 47 L. J., Ch. 876; 9 Ch. D. 42; 39 L. T. 242; 27 W. R. 99.

Shall.]—Devise to A. until B. shall attain forty years; B. dies before forty; A.'s estate ceases; secus if the devise to A. be made a fund to pay debts or portions which cannot be raised until B. shall have attained his age of forty, in which case the word "shall" is taken for "should." *Lomax* v. *Holmeden*, 3 P. Wms. 176.

Sole.]—The word "sole" in a will has not a fixed technical meaning, throwing on the person who contests that meaning the necessity of shewing, by implication, that it is not used in the particular instrument in its strict technical sense. *Massy* v. *Rowen*, L. R. 3 H. L. 288.

In a marriage settlement it may, from the circumstances of the case, have a particular and exclusive meaning attached to it. *Ib.*

"Sole and Unmarried."]—A testatrix, by her will made in 1860, bequeathed a fund to trustees, on trust to pay the income to her husband for his life, and on his death to divide the fund into four equal parts, and, as to one of the parts, "upon trust to pay the same to J. H., spinster, if she be then sole and unmarried, but, if she be then married," the testatrix directed her trustees to pay the income of the fourth part to J. H. for her life, for her separate use, and after her death to hold it on trust for her children. In June, 1878, the testatrix died, and her husband died in April, 1883. In April, 1861, J. H. married, and in November, 1878, a decree absolute was made for the dissolution of her marriage. There were

three children of the marriage. J. H. did not marry again :—Held, that the words "then sole and unmarried" meant "not having a husband" at the time of the death of the tenant for life, and that, in the events which had happened, J. H. was absolutely entitled to the one-fourth share. *Lesingham's Trusts, In re*, 53 L. J., Ch. 333 ; 24 Ch. D. 703 ; 49 L. T. 235 ; 32 W. R. 116.

So specifically.]—The proviso in a will is a limitation, and must be so construed. "Specifically" means the same thing, whether used in a devise of land or of chattels. "So" is merely descriptive, and is the same as "hereinbefore." "So specifically" is therefore merely descriptive. *Giles* v. *Melsom*, 42 L. J., C. P. 122 ; L. R. 6 H. L. 24 ; 28 L. T. 789 ; 21 W. R. 417.

A proviso being at the end of all the devises in a will must have a meaning applicable to all, and not be treated as if placed at the end of one, and thus made applicable to one only. *Ib.*

"Specifically Bequeathed."] — "Specifically bequeathed" may be construed "bequeathed expressly, and not by reference." *Jackson* v. *Hosie*, 27 L. R., Ir. 450—C. A.

"Such."]—Bequest for benefit of testator's three daughters, and in case either of them should leave issue, then she should appoint her share unto such child or children in such manner and form as she should choose ; and in default of any child or children of any of his daughters, then, &c. ; and in case all his daughters should die without issue, then, &c. :—Held, that the expression "such child or children" did not refer to the preceding phrase so as to limit the objects to issue left by a daughter, but meant such child, &c., as she should choose. *Harley* v. *Mitford*, 21 Beav. 280.

See also VESTED, CONTINGENT, AND FUTURE INTERESTS, and post, cols. 1037–41, 1046, and 1066.

"Tenant for Life"—Where Joint Tenants for Life.]—A testator devised his freehold estate to M. and B. (two married female relatives) in such terms as to constitute each of them tenant for life of an undivided moiety of the estate, with remainder, as to the share of each, to her first or other son in tail male, and in default of such issue of either, then to the survivor, with remainder to her first or other son in tail male. Then, "as to the entirety of said real and freehold estate on failure of all the limitations hereinbefore expressed," the testator devised same to H. for her life, and after her death to her son C. for life, with remainder to his first or other son in tail male. In default of such issue there followed similar limitations in succession in favour of the other sons of H. and the sons of X. On the failure of the issue of such persons, the testator provided that the estate should go back to the female line, with limitations in tail to the daughters of M. and B., with cross-remainders ; then there were remainders to the daughters of H. and X., with an ultimate remainder in fee to the testator's right heirs. The testator devised his lands and tenements held for terms of years to trustees, to pay rents, &c., and subject thereto to permit the same to be enjoyed as nearly as allowable according to the limitations and provisions declared of his real and freehold lands. After giving a power of jointuring to every tenant for life in possession, the will provided :—"I also empower every tenant for life of my lands and tenements, whether freehold or chattel, when in possession . . . by deed or will to charge same with any sum or sums, not exceeding in the whole by any one tenant for life the sum of 5,000*l.*, for the portion or portions of his younger child or children." The testator also empowered "every such tenant for life when in possession" to grant certain leases. There was also a "name and arms" clause in the will :—Held, that B. as tenant for life in possession of the moiety of the lands, &c., had power to charge the same with a sum of 5,000*l.* in favour of her children, and that she had power to appoint, in unequal shares or exclusively in favour of one or more child or children, such sum or sums not to exceed in the whole 5,000*l.* *Wybrants* v. *Maude*, [1895] 1 Ir. R. 214.

Testament.] — This word includes a will, codicils, &c. "Instrument" signifies the will alone. *Fuller* v. *Hooper*, 2 Ves. Sen. 242.

Then.]—The word "then" used twice in the same sentence in a will construed in the first instance as pointing to the event, and in the second as an adverb of time. *Gill* v. *Barrett*, 29 Beav. 372.

The word "then" construed as pointing to the event, and not to the time. *Gundry* v. *Pinniger*, 14 Beav. 94 ; 20 L. J., Ch. 635 ; 15 Jur. 1147. And see *S. C.*, 1 De G. M. & G. 502 ; 21 L. J., Ch. 405 ; 16 Jur. 483.

Bequest of personalty to A. for life, remainder to B., and in the event of B., or any heir of his, not being living, then between the brothers of testator equally ; the remainder over on the death of B. in the lifetime of A. supported as not too remote against the claim of B.'s personal representative. The court availing itself of slight expressions to effectuate the intention, the word "then" was construed as an adverb of time, not of contingency. *Baker* v. *Lucas*, 1 Moll. 481.

Then Living.]—*See* VESTED, CONTINGENT, AND FUTURE INTERESTS.

Thereafter.]—A married woman, having a power of appointment by will, appoints 4,000*l.* to her husband or such persons as he should by will appoint ; and he appoints to his nephews and niece equally at twenty-one or marriage, to be transferred to them within twelve months after the same should happen, without the dividends due thereon, provided neither event happened within such twelve months, and if so, in twelve months next thereafter, with a gift of the residue :—Held, that the intention was that the legatees should not take the first year's dividends, "thereafter" applying to testator's death. *Rose's Settlement, In re*, 2 W. R. 629.

Unmarried—"Unmarried and without leaving Lawful Issue."]—By his will, dated in 1838, a testator, who died in 1840, bequeathed a fund upon trust to pay the income to his two daughters for their respective lives for their separate use without power of anticipation, and after their respective deceases the principal of their respective shares was to be in trust for the children or child of each daughter, as she might appoint, and in default of appointment equally ; and if there should be no such child, then in trust for the executors, administrators, and

assigns of each of his said daughters respectively; but in case of the decease of either of his said daughters "unmarried and without leaving lawful issue," then the testator bequeathed the share of the one so dying unmarried and without issue to the surviving sister. The plaintiff, one of the testator's two daughters, had married, but had had no children, and she was a widow over seventy years of age. The question was, whether she was now absolutely entitled to her share of the fund:—Held, that the plaintiff was not absolutely entitled, the words "unmarried and without leaving lawful issue" meaning not under coverture at the time of her death. *King, In re, Salisbury* v. *Ridley*, 62 L. T. 789. *And see* ante, cols. 727–30, and post, cols. 828 and 880.

Use and Occupation.]—*See* post, cols. 1156, 1169.

Vested.]—*See* VESTED, CONTINGENT, AND FUTURE INTERESTS, and post, cols. 1098–1100.

When.]—*See* VESTED, CONTINGENT, AND FUTURE INTERESTS.

"Which" construed "as."]—Direction in a will that "all such and every such sums of money which I have already advanced or may hereafter advance to my children as will appear in a statement in my handwriting" should be brought into hotchpot:—Held, that a subsequent unattested statement in the testator's handwriting was admissible in evidence of advances; the court construing "which" as meaning "as," and the clause "as will appear, &c.," as mere words of reference forming no part of the identification of the subject. *Whateley* v. *Spooner*, 3 K. & J. 542.

With.]—A. gives by a codicil to B., during her natural life, his house in G., with all the household goods found therein at the time of his decease. The word "with" so conjoins the house and goods that the devisee can have no larger interest in the one than in the other. *Leeke* v. *Bennett*, 1 Atk. 470.

Younger.]—*See* YOUNGER CHILDREN. *See also* post, col. 1120.

H. DEVISEES AND LEGATEES.

1. GIFT TO WHAT PERSONS.

a. Wife or Husband.

Wife of Testator.]—A testator domiciled in Jamaica became, during a temporary residence at Frankfort, engaged and betrothed to a lady; and by a codicil, after mentioning her name, and alluding to his intended marriage with her, he gave 3,000*l.* to his wife. During the engagement, but before the marriage, the testator died:—Held, that the lady was entitled to the legacy. *Schloss* v. *Stiebel*, 6 Sim. 1.

A bequest by a husband "to his beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the will, and is not to be extended to an after-taken wife. *Garratt* v. *Niblock*, 1 Russ. & M. 629.

A testator by his will gave the proceeds of sale of his residuary estate to trustees, on trust to pay to his wife E. C., within one month after his decease, a legacy of 200*l.*, and in addition thereto to pay to his said wife, "so long as she shall continue my widow and unmarried," an annuity of 300*l.*, commencing from the date of his decease, "or otherwise in lieu and in substitution of the said annuity, at the option of my said wife, if she shall prefer it, a legacy of 2,000*l.*; and I direct that the provision hereby made for my said wife shall be in lieu and satisfaction of any dower or thirds to which she might be entitled out of my estate." After the date of the will the marriage was, in a suit in the divorce court instituted by the wife, declared void ab initio, on the ground of the impotency of the testator. He died without altering his will:—Held, that the late wife was entitled to a legacy of 200*l.*, but that she could not claim the annuity, inasmuch as she, never having been in law the wife of the testator, never could be or continue his widow, and the annuity was therefore given for a period which could never come into existence. *Boddington, In re, Boddington* v. *Clairat*, 53 L. J., Ch. 475; 25 Ch. D. 685; 50 L. T. 761; 32 W. R. 448—C. A.

Held, also, that she could not take the 2,000*l.* which was given in substitution for the annuity to which she was not entitled. *Ib.*

Reputed Wife.]—A wrong description of a legatee will not defeat a legacy; but where the character, on account of which the legacy is given, has been fraudulently imposed upon the testator, the legacy will fail. A testator gave certain legacies "to his wife Anne." In the year 1817 the testator had married the plaintiff, who was the person thus alluded to; but it turned out that her first husband was then, and at the hearing of this cause, still living. The court, being of opinion that no fraud had been practised on the testator, determined that the plaintiff, notwithstanding the misdescription, was entitled to the benefits given her by the will. *Penfold* v. *Giles*, 6 L. J., Ch. 4.

C. E., in the lifetime of her husband, contracted a second marriage with the testator, and after his death with J. C. The testator, believing C. E. to be his wife, bequeathed to her all his property, and appointed her his executrix; she proved his will, and J. C., as her husband, possessed part of the estate of the testator. The next of kin having filed a bill against C. E. and her real husband, impugning the validity of the will and seeking an account of the testator's estate:—Held, that the husband of C. E., though he had not interfered, was a necessary party, but that J. C., her supposed husband, was not. *M'Kenna* v. *Everitt*, 1 Beav. 134; 8 L. J., Ch. 42.

Where a legacy has been given to a legatee in a character which has been fraudulently assumed by her, and the existence of which character may be considered to be the sole motive of the testator's bounty, the legacy fails. *Wilkinson* v. *Joughin*, 35 L. J., Ch. 684; L. R. 2 Eq. 319; 12 Jur. (N.S.) 330; 14 L. T. 394.

A testator gave the income of his real and personal estate to a woman whom he described in his will as, and supposed to be, his wife. A marriage ceremony had been performed between the testator and such woman, but when it took place she knew she had a husband living:—Held, that the bequest was void by reason of the fraud practised on the testator. *Ib.*

A testator also gave a legacy to his stepdaughter S. W., the daughter of the above woman:—Held, that such legacy was valid, the supposed motive for the gift not being due to any fault on the part of S. W. *Ib.*

A false character, attributed by a testator to a legatee, will not affect the validity of the legacy, unless the false character has been acquired by a fraud which has deceived the testator; and where the testator and legatee have a common knowledge of an immoral or criminal act, by which the legatee has acquired the false character, the rights of the legatee, as such, will not be affected, it being no part of the duty of courts of equity to punish parties for immoral conduct, by depriving them of their civil rights. *Giles* v. *Giles*, 1 Keen, 685; 5 L. J., Ch. 46.

A married woman, who had been separated for nineteen years from her husband, married the testator by the description of a widow. She had about that time heard a report that her husband was living and had made some loose inquiries, but believed he was dead. The testator having made bequests "to his wife," and the court being of opinion that the evidence showed no fraud on her part towards the testator:—Held, that she was entitled to the legacies. *Petts, In re*, 27 Beav. 576; 29 L. J., Ch. 168; 5 Jur. (N.S.) 1235; 1 L. T. 153; 8 W. R. 157.

A testator had been separated from his lawful wife, whose name was Elizabeth. He subsequently went through the marriage ceremony with another female, whose name was Sarah. At the time of his death he was cohabiting with the latter as his wife. He bequeathed the income of his property to "his wife Sarah" for life:—Held, that although not his lawful wife, Sarah was entitled to the yearly income. *Dilley* v. *Matthews*, 2 N. R. 60; 8 L. T. 762; 11 W. R. 614.

A testator bequeathed the residue of his property to "my wife." He had separated from his wife by mutual consent, and in her lifetime went through the ceremony of marriage with another woman whom he always treated as his wife:—Held, that the second "wife" took under the words "my wife." *Howe, In goods of*, 33 W. R. 48; 48 J. P. 743.

A testator, who had gone through the form of marriage with his deceased wife's sister in 1851, gave his plate, &c., "unto my wife" for her own use. He then devised and bequeathed his real and personal estate in trust "to my wife" for her life, and after her decease, "for all and every my children hereafter to be born." He had no children at the date of his will, but his reputed wife had a child by him two days afterwards. Both the reputed wife and child survived him:—Held, that the reputed wife was entitled, but that the gift to the child as one of a class of children "hereafter to be born" was void. *Pratt* v. *Mathew*, 22 Beav. 328. Affirmed, 25 L. J., Ch. 686; 2 Jur. (N.S.) 1055; 4 W. R. 772—L.JJ.

Effect of Decree of Nullity.]—A testator, after giving a legacy of 200*l.* to his wife, directed his trustees "in addition thereto to pay to my said wife, so long as she shall continue my widow and unmarried, an annuity of 300*l.*, or otherwise in lieu and in substitution of the said annuity, at the option of my said wife, if she shall prefer it, a legacy of 2,000*l.*" After the date of the will the marriage was declared null by the divorce court in a suit brought by the wife against the testator. After this the testator died leaving the lady surviving. Fry, J., held that she was entitled to the legacy of 200*l.*, but she was not entitled either to the annuity or the 2,000*l.* She appealed from this decision so far as it was unfavourable to her:—Held, that although if the lady had been the testator's wife at his decease the words "shall continue my widow and unmarried," might have been in substance the same as "shall continue unmarried," the reference to widowhood could not on that ground be treated as surplusage, but was the principal part of the condition, and that, as the lady did not at the testator's death fill the position of the testator's widow, she could not take the annuity. Held, further, that she could not take the 2,000*l.*, for that an option to take a legacy instead of an annuity could not exist if there was no right to take the annuity; and, moreover, that a gift by way of substitution for another is subject to the same conditions as the original gift. *Rishton* v. *Cobb* (infra) doubted. *Boddington, In re, Boddington* v. *Clairat*, 53 L. J., Ch. 475; 25 Ch. D. 685; 50 L. T. 761; 32 W. R. 448—C. A.

Husband of Testatrix.]—If a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the rule of the civil law is adopted, and the legacy fails; therefore, where a legacy was given by a woman to a man, in the character of her husband, which she supposed him to be and described as such, but who, at the time of the marriage ceremony with her, had a wife living, the court, in respect of his conduct, held him not entitled; but inclined to think it would be otherwise, where from circumstances not moving from the legatee himself, the description is inapplicable, as where a testator gives a legacy to a child from motives of affection, supposing it his own, but is imposed upon in that respect. *Kennell* v. *Abbott*, 4 Ves. 802; 4 R. R. 351.

Wife of Third Party—Reputed Wife.]—A legacy was given to Lady F. C., widow of Sir N. C., so long as she shall continue single and unmarried. At the date of the will she had married again, but her husband was abroad, and she continued to use her former name, and kept the testator in ignorance of her real situation:—Held, that the wrong description did not invalidate the legacy. *Rishton* v. *Cobb*, 9 Sim. 615; 9 L. J., Ch. 110. Affirmed, 5 Myl. & Cr. 145; 4 Jur. 261.

A testator bequeathed a life interest in a legacy to H. the present wife of his son, J. B. There was a woman named C. H. living with J. B., and they had falsely represented to the testator that they were married:—Held, that C. H. was entitled to the legacy, there being no evidence that the representation had been made for the purpose of obtaining the legacy. *Turner* v. *Brittain*, 3 N. R. 21.

Gift to the wife of A. B. held not to pass the subject-matter to a woman who had cohabited with A. B., and been introduced by him to testator's family as his wife, though never personally known to testator. *Davenport's Trust Estate, In re*, 1 Sm. & G. 126; 17 Jur. 314; 1 W. R. 103.

Bequest of stock, after the death of the testator's widow, upon trust to pay the dividends to G. for life, and then to his wife for life, and after the decease of the survivor to divide the capital among the children of G. G. had, from a time previous to the date of the will up to the death of the testator, been living with a woman who was believed to be his wife, and by whom he had several children. G. was never married; he died

after the death of the testator, in the lifetime of the testator's widow :—Held, that the description in the will applied to a lawful wife and children whom G. might have had after the date of the will, and to no others. *Ib.*

—— **Second Wife.**]—Devise to trustee to pay the rents to F. for life, and after his death, leaving his wife surviving, to pay the rents to such wife. The first wife of F., who was married at the date of the will, died after the testator's death, and F. married a second wife who survived him :—Held, that she was not entitled to the rents. *Firth* v. *Fielden*, 22 W. R. 622.

Held, the gift to the wife of B. applied to the wife who was living at the time of the will, and not to any wife whom B. might at any time afterwards marry. *Burrow's Trust, In re*, 10 L. T. 184.

A bequest of annuity to the testator's nephew for life, or until his bankruptcy or insolvency, and after his decease, bankruptcy, or insolvency, to be paid to his wife for the personal support of herself, her husband, and his children, during the life of his nephew and his wife, and the survivor of them : and in case they, or either of them, should attempt to alienate the annuity, the trustees to be empowered to apply it towards the support of the children. The first wife of the nephew, to whom he was married before the date of the will, survived the testator, and the gift of the annuity was held not to extend to the widow of the nephew, who was his second wife. *Boreham* v. *Bignall*, 8 Hare, 131 ; 19 L. J., Ch. 461 ; 14 Jur. 265.

Money bequeathed to be laid out in land to be settled upon the testator's nephew A. for life, remainder to the wife of A. for life, with remainders in tail to the sons and daughters of A. by such wife. A. was not married till after the death of the testator :—Held, to extend to a second wife. *Peppin* v. *Bickford*, 3 Ves. 570 ; 4 R. R. 103.

A testator left his property to trustees in trust, as to different portions of it for each of his children for life, and after the death of each child for its issue, with a gift over of the share of any child dying without issue to the other children and their issue, and declared that if any of his sons should become bankrupt, his life estate should cease as if he were dead, and during the remainder of his life the trustees should apply the income to which, but for such forfeiture, he would have been entitled, for the benefit of the wife and children of such son in such manner as the said trustees should think fit. One of the testator's sons was married at the time of his death ; he subsequently became bankrupt ; his wife died, leaving him without issue ; and he married again and had two children :—Held, that the trust for the wife and children of the bankrupt son revived as soon as there came to be any wife or child to to take under it. *Longworth* v. *Bellamy*, 40 L. J., Ch. 513.

Under a bequest of a fund to the testator's son (then married) for life, and after his decease the fund to be divided equally between the wife of the said son, if she should survive him, and all and every the child or children of the said son :—Held, that no particular wife was designated, and that an after-taken wife who survived the son was entitled to share in the gift over. *Lyne, In re*, 38 L. J., Ch. 471 ; L. R. 8 Eq. 65 ; 20 L. T. 735 ; 17 W. R. 840.

Husband of Third Person.]—A testator bequeathed money to trustees in trust for his daughter E. for her separate use independent of her husband, and after the death of E. to her husband for his life, with remainder to all and every the children of E. by her present or any future husband. After the testator's death E.'s husband died, and she married again. E. died, leaving her second husband surviving. On a bill filed by him against the trustee of the will :—Held, that the benefit of the gift was confined to the husband living at the date of the will, and the death of the testator, and did not extend to the second husband. *Franks* v. *Brooker*, 27 Beav. 635 ; 29 L. J., Ch. 292 ; 6 Jur. (N.S.) 87 ; 8 W. R. 205.

Testatrix gave legacies to her son, John Bryan, and to her daughters, Ann, the wife of James Winson, Harriet, the wife of William Darnborough, and Mary, the wife of William Dadley, and she gave her stock in the bank to her said daughter, Mary Dadley, for life, and, after her death, to be equally divided between the husbands of her said daughters and her son, or such of them as might be living at Mary Dadley's decease. All the husbands named in the will survived the testatrix, but William Darnborough was the only one of them who survived Mary Dadley. Ann Winson, however, married a second time, and her second husband was living at Mary Dadley's death, and he claimed a share of the stock. But the court held, that by the words "the husbands of my said daughters," the testatrix meant their husbands whom she had named ; and, therefore, that William Darnborough was exclusively entitled to the stock. *Bryan's Trust, In re*, 2 Sim. (N.S.) 103 ; 21 L. J., Ch. 7.

A gift to an unmarried woman for life, with remainder in fee to her husband, gives an indefeasible vested remainder to her first husband. *Radford* v. *Willis*, L. R. 7 Ch. 25 ; 25 L. T. 720 ; 20 W. R. 132. Reversing 40 L. J., Ch. 484.

A father gave his estates and the rents upon trust for his two daughters A. and L., to receive the same equally as tenants in common for their lives independent of the control of any husband or husbands with whom they might intermarry ; and after their death, he directed that the trustees should stand seised of the estates, and convey the whole unto the respective husbands of his daughters, provided that if either daughter should die unmarried the share of such daughter should accrue and belong to the survivor for life, and on her death the whole should devolve on and be conveyed to her husband. A. died, leaving a husband surviving. L. married P., who by his will gave to his wife all the estate to which he was entitled under the will of her father absolutely. P. died, leaving his wife surviving. A party at an auction purchased three lots of the estates, but refused to complete on the ground that P. was not entitled to an absolute interest in remainder on the death of L. :—Held, that the title of L. was such as could be forced on a purchaser. *Ib.*

Effect of Divorce.]—A testator devised property to his daughter for life, and after her death in trust for "any husband with whom she might intermarry, if he should survive her, for his life." The daughter married the defendant, and was divorced from him on his petition, and he married again and survived her :—Held, that the defendant was entitled to the property devised for his life. *Bullmore* v. *Wynter, Bullmore, In re*, 52

L. J., Ch. 456; 22 Ch. D. 619; 48 L. T. 309; 31 W. R. 396.

A testator bequeathed a share of his residuary personal estate in trust for his son for life, and after his decease in trust to pay unto or permit any wife of his son to receive the annual income of his share during her life. The son married a woman from whom he was afterwards divorced on his petition. He died without having married again:—Held, that the woman was not entitled to the income of the son's share. *Bullmore* v. *Wynter* (supra) observed upon. *Morrieson, In re, Hitchins* v. *Morrieson*, 58 L. J., Ch. 80; 40 Ch. D. 30; 59 L. T. 847; 37 W. R. 91.

Husband and Wife—Unity of Person.]—A testator gave his residue to A. and B. his wife, C. the wife of X., D. the wife of Y., E., F. and G. his wife:—Held, that the residue was divisible into sevenths, A. and B. his wife, and F. and G. his wife taking separately. *Warrington* v. *Warrington* (2 Hare, 54) followed. *Jupp, In re* (39 Ch. D. 148) commented on. *Dixon, In re, Byram* v. *Tull*, 42 Ch. D. 306; 61 L. T. 718; 38 W. R. 91.

b. Children.

i. *Legitimate.*

Of what Marriage.]—Bequest of 3,000*l.* of stock to W., the testator's son by a first marriage (his second wife and a son by her being living), the interest to be appropriated to his maintenance, under the direction of trustees, till he attained twenty-four, and of the residue of the testator's personal estate (the interest being given to his wife during her widowhood), after her decease or marriage, "unto any child or children I may have by my wife, to be equally divided between them that attain the age of twenty-one years, the survivor of my children to possess what is here bequeathed to the other; but should not either of my children attain the age of twenty-one years, or live to possess what is here bequeathed to them, I then bequeath to the children of my sister the 3,000*l.* stock": the son of the second marriage dying in the life of the testator, and there being no other issue of that marriage, W. is entitled to the stock and to the residue. *Hill* v. *Smith*, 1 Swanst. 195; 1 Wils. Ch. 154.

A testator having made gifts to the three children of his first marriage, gave his residue to his wife for life, with remainder to the five children of his second marriage (by name) "and such other child or children as should be living at the time of his death":—Held, that the children of the first marriage were not included in the residuary gift. *Lovejoy* v. *Crafter*, 35 Beav. 149.

A testatrix by a codicil to her will bequeathed 1,500*l.* upon trust "for the child, or, if more than one, for all and every the children of A., whether by her present or any future husband." A., at the death of the testatrix, had a child living by a former husband. She was then married to a second husband, but there had been no children of that marriage:—Held, that the word "whether" was not be read as exclusive, and that the child by the former husband took the legacy. *Pickup, In re*, 1 J. & H. 389; 30 L. J., Ch. 278; 4 L. T. 85; 9 W. R. 251.

After a bequest of residue, except certain settled property in favour of H. and her children, whether by her present or any former husband, testator appointed the settled property to his sister G. H. for life, and the capital to go to her children "whether by her present or any future husband." At the date of the will G. H. had a family by her then present husband, and also two children by a former husband. She was then at the age of sixty-five:—Held, that the two children by the first marriage were entitled to share in the settled property. *Passmore* v. *Huggins*, 21 Beav. 103; 25 L. J., Ch. 251; 1 Jur. (N.S.) 1060; 4 W. R. 33.

A. devises several leasehold estates to two trustees in trust if his granddaughter married without their consent to convey the premises to two other trustees in trust for her separate use during her life, and after her death for the use and benefit of her issue. Though she has no children by the first husband, whom she married without the consent of the first trustees, she has only a right for her life, for the issue of any husband are provided for by this settlement. *Champion* v. *Pickax*, 1 Atk. 472.

A devise of real estate to all the younger children of the testator's daughter, as tenants in common, with a devise over in case they should all die under twenty-one, or be married without consent, would give a vested interest, subject to be devested in that event, unless a different intent appeared from the subsequent part of the will. The first husband of the daughter was living at the time of making the will, and at the death of the testator, and although it was plain that the testator had not in his contemplation a second marriage of his daughter, yet, the gift over being in case the daughter should leave no issue behind her, the children of the second marriage took equally with the children of the first marriage. *Critchett* v. *Taynton*, 1 Russ. & M. 541; 8 L. J. (O.S.) Ch. 143.

Bequest to a married daughter for life, and if she survived her husband and children to transfer it to her; but if she left children, then to her husband, Captain U., for life, with remainder to her children, with a gift over in the event of her dying in the life of her husband without having children. She died, leaving children by Captain U., and by a second marriage:—Held, that the latter were not entitled to participate in the fund. *Stopford* v. *Chaworth*, 8 Beav. 331; 9 Jur. 639.

A. B., a widower, settles lands to raise 100*l.* a year for his eldest son, and 100*l.* apiece for his younger children, and afterwards he marries again and has children by his second wife; decreed, the children by the second wife were equally entitled with the other younger children; though the portions of the younger children were by the settlement to be paid according to their seniority, yet, in case of a deficiency, they shall be paid in average. The portions of the younger children, who died in the life of their father, not to be raised in favour of the administrators; otherwise, if any of the daughters had married in the lifetime of their father and afterwards died. *Brathwaite* v. *Brathwaite*, 1 Vern. 334.

Testator bequeathed a residuary personal fund to trustees, upon trust to apply the dividends for the maintenance of his children, until the youngest should attain twenty-one, and then to divide the same equally between B., D., E., and F., children by his former wife, and G. and H., children by his present wife, and such other child or children as might be living or as his said wife might be enceinte with at his decease. The testator, at his death, left two other children

besides those named in his will, viz. A. and C., who were children by his first marriage :—Held, under all the circumstances of the case, that they took no interest in the fund. *Stavers* v. *Barnard*, 2 Y. & C. C. C. 539 ; 7 Jur. 1080.

A bequest to all and every the child and children of A., includes every child born before the period of distribution ; which in this case was the attainment of twenty-one by the eldest, the marriage of daughter, or death of child under twenty-one leaving issue. Upon the general rule, a child by subsequent marriage was included notwithstanding strong implication in favour of children of prior marriage. *Barrington* v. *Tristram*, 6 Ves. 345 ; 5 R. R. 322.

A testator, in 1877, left to his trustees a sum of 10,000*l*. railway stock, in trust for the "children" living at his decease of his deceased niece Margaret Kerr. Some years before the date of the will the niece mentioned had married a second time, under circumstances which very much displeased the testator, who had in consequence declined to hold any communication with her, and always refused to recognise her by any other surname than that of Kerr, her first husband's. There were five children of the first marriage, and one of the second, who survived the testator. Within three weeks after the date of the will the testator wrote a letter to one of the five children of the first marriage, from which it appeared that he intended to confine the gift of the 10,000*l*. to them, as he stated therein that he had by his will left them 2,000*l*. each. He also caused a similar letter to be written and sent about four years later. The testator died in 1883 :—Held, that the word "children" must bear its primâ facie meaning, so as to include the children of both marriages, and that there was no latent ambiguity as to its signification. *Andrews* v. *Andrews*, 15 L. R., Ir. 199—C. A.

Infant en ventre sa mère.]—The law is clear that a devise to an infant en ventre sa mère is good, though he be born after the death of the testator, and he shall take by way of executory devise when he is born. *Anon.*, 1 Freem. 293. S. P., *Taylor* v. *Bydall*, *Id.* 243.

A child en ventre sa mère may be vouched, may be an executor, may take under the statute of distributions, by devise, under a charge for portions, may have an injunction and a guardian. *Thellusson* v. *Woodford*, 11 Ves. 112 ; 8 R. R. 104—C. A.

One devises, in case he have no son at the time of his death, to S. The testator dies, leaving his wife privement enceinte with a son ; this posthumous son is a son living at the testator's death, and S. not entitled. *Burdet* v. *Hopegood*, 1 P. Wms. 486.

Testator devised freehold fee-simple estates to trustees during the life of his son J., upon certain trusts, remainder to his son's children, and their issue, in the same words as in the above devise, to his daughter's children, and in default of such issue, to all and every the child and children of his daughter S., &c. (in the same words as before) :—Held, that only six of the nine children of S. took under the devise ; viz. five who were born, and one who was en ventre at the death of J. *Mogg* v. *Mogg*, 1 Mer. 655 ; 15 R. R. 185.

Children construed to include Grandchildren.]—Under bequest to children, grandchildren are not entitled, except from necessity ; as if the will would otherwise be inoperative ; or when by other word, as "issue," it clearly appears that the word "children" was used not in the proper but in the more extensive sense. *Radcliffe* v. *Buckley*, 10 Ves. 195 ; 7 R. R. 383.

Grandchildren entitled under the description of children in a will, the intention upon the whole clause being children, or the issue of those who should be dead. *Royle* v. *Hamilton*, 4 Ves. 437.

Grandchildren may take under the description of children, if there can be no other construction ; not otherwise. *Reeves* v. *Brymer*, 4 Ves. 693.

Devise of 1,500*l*. in trust for the children of A., A. has only one child, and several grandchildren, the child only shall take, and not the grandchildren ; but if there had been no child of A. living, the grandchildren might have taken. *Crooke* v. *Brooking*, 2 Vern. 107.

Bequest to children, held to extend to grandchildren, there being no children. *Gale* v. *Bennet*, Ambl. 681.

Clear words in the operative part of a clause, not controlled by ambiguous words in the introduction. *Oxford* (*Earl*) v. *Churchill*, 3 V. & B. 67.

Where there is a total want of persons properly answering the description, others, who do not so completely answer it, may be let in ; grandchildren, for instance, under a liberal construction of the word "children," if there are none ; but no such instance, if there are children. *Ib.*

Where a testator bequeathed a fund in trust for the children of his late sister A. (the issue of her daughter B. excepted), and of his sisters C. and D. per stirpes :—Held, that grandchildren of C. were entitled to participate. *Crawhall's Trusts*, *In re*, 8 De G. M. & G. 480.

A testator, having appointed three trustees, and made moderate provisions for his three sons, directed all the furniture, &c., in his mansion-house at B. to be sold, "except such parts thereof as his said trustees should think necessary to be kept for receiving any of them, or of the testator's sons, who should choose to go and spend a little time there occasionally" ; and he bequeathed the great bulk of his property upon land to be accumulated, and at the end of the period of accumulation to be divided between the eldest male lineal descendants of his three sons respectively. In a subsequent clause a power of appointing new trustees was given under the direction of the court. A liberal establishment had been maintained at B., at the expense of the estate :—Held, that the privilege of residing occasionally at the mansion-house at B., and of enjoying the benefit of the establishment there, was confined to trustees and to the sons of the testator, and could not be extended to a grandson of the testator, nor to an infant great-grandson, who was the person presumptively entitled to a share of the property at the expiration of the period of accumulation ; and that this privilege was not confined to the individuals named as trustees in the will, but extended to trustees substituted in the place of those individuals. *Thellusson* v. *Woodford*, 5 Russ. 100.

The word "children" in a will containing bequests by a testator to his children primâ facie does not include grandchildren, unless the context shews that such was the intention. *Martin* v. *Lee*, 4 L. T. 657 ; 9 W. R. 522.

Gift by a testator to the children of his late brother John, and in another clause there was a gift to the issue of his said brother. The brother

John had only one son, who died in the testator's lifetime, leaving four children :—Held, that these four grandchildren were entitled, there being no children. *Berry* v. *Berry*, 3 Giff. 134 ; 7 Jur. (N.S.) 752 ; 4 L. T. 635 ; 9 W. R. 889.

Testatrix bequeathed 1,300*l.* to trustees in trust, as to one-third, for such of the children of A. S., then deceased, as should be living at the testator's death ; and in trust, as to the remaining two-thirds, for the children of S. T. and T. P. living at the same time. S. T. had grandchildren, but no child living either at the date of the will or at the testator's death ; but A. S. and T. P. had, each of them, children living at those times : —Held, that the grandchildren of S. T. could not claim under the description of children. *Moor* v. *Raisbeck*, 12 Sim. 123.

A devise to the children of A. All the children were dead at the date of the will, but there were several grandchildren and great-grandchildren : —Held, that the grandchildren were entitled, to the exclusion of the great-grandchildren. *Fenn* v. *Death*, 23 Beav. 73 ; 2 Jur. (N.S.) 700 ; 4 W. R. 828.

The case of *Moor* v. *Raisbeck* (supra) observed upon. *Ib.*

Where there was a proof that a testatrix was aware of the state of the family :—Held, that the word "children" would not include grandchildren. *Loring* v. *Thomas*, 1 Dr. & Sm. 497 ; 30 L. J., Ch. 789 ; 7 Jur. (N.S.) 1116 ; 5 L. T. 269 ; 9 W. R. 919.

A. the grandchild of C., and B., the widow of a child of C. : — Held, under the circumstances, entitled to a bequest made to A. and B., widow, described as "children of C." *Blackman, In re*, 16 Beav. 377.

Gift by will, made in 1805, of a testator's residuary personal estate, upon trusts for investment and accumulation, for the benefit of such child or children as his nephews W. and T., and his niece D., should leave at the time of their deceases, the child or children of each taking one-third ; and in case either of them (his said nephews and niece) should die without leaving any children or child, then he directed that such third part should be paid to the children or child of the other or others leaving children or a child, in equal proportions ; "and in case all of them (his said nephews and niece) should happen to die without leaving any issue lawfully begotten," then he directed that the whole of the residue of his estate should be paid to the three children of G. in equal shares. W., T. and D. all survived the testator, but W. and T. both died without leaving any issue, while D. died without leaving any child living at her death, but she left grandchildren surviving her :—Held, that the words "children" and "child" must be read in their ordinary acceptation, and that they did not mean grandchildren or remoter issue. *Pride* v. *Fooks*, 3 De G. & J. 275 ; 28 L. J., Ch. 81 ; 5 Jur. (N.S.) 158 ; 7 W. R. 109.

It is a rule that in a will the word "children" must be construed in its literal sense, unless from the will itself and the context it appears that the word is intended to have a wider meaning ; and for this purpose it is not right to take into consideration outside circumstances. A testator left residue to trustees upon trust to divide it into four parts, and pay one part "to the children of his late brother W. equally" ; the other part "to the children of his late brother J. equally" ; the other part "to the daughters of his late brother A. equally" ; and the remaining part to a certain nephew. J. had had three children, and no more, all of whom were dead at the date of the will. The testator knew this. J. left, however, both grandchildren and great-grandchildren who survived the testator :—Held, on the above principle, that there was an intestacy as to the share given to J.'s "children," there being nothing in the context or within the four corners of the will to justify the meaning being extended ; it being clear, on the contrary, that the word "children" was used in its literal sense in the gift to W.'s children. *Kirk, In re, Nicholson* v. *Kirk*, 52 L. T. 346.

A testator gave his residuary real and personal estate to trustees in trust for sale, and to divide the proceeds into six shares, and to pay one of such shares to the "children" of his deceased sister ; and he gave the other five-sixths in similar terms to the "children" of five deceased persons. At the date of the will there were no children of the sister living, but there were two grandchildren, and these facts were well known to the testator. Both the grandchildren survived the testator :—Held, that the two grandchildren took the one-sixth given to the "children" of the deceased sister. *Radcliffe* v. *Buckley* (supra, col. 752) distinguished. *Smith, In re, Lord* v. *Hayward*, 56 L. J., Ch. 771 ; 35 Ch. D. 558 ; 56 L. T. 878 ; 35 W. R. 663.

Grandchildren Construed to include Great-grandchildren.]—Construction of a will and settlement as not comprehending great-grandchildren under the description of children and grandchildren. *Orford (Earl)* v. *Churchill*, 3 V. & B. 59.

Devise to grandchildren, great-grandchildren held under the circumstances to take ; but held the devise will not extend to grandchildren by marriage. *Hussey* v. *Dillon*. Ambl. 603. *S. C.* nom. *Hussey* v. *Berkeley*, 2 Eden, 194.

The term grandchildren, in a clause of a will devesting legacies in a given event, extended so as to include great-grandchildren who had been previously named. *Strutt* v. *Finch*, 7 L. J. (O.S.) Ch. 176.

Bequest to the children of A. equally. A. and all his children were dead at the date of the will, but there were grandchildren and great-grandchildren of A. living :—Held, that the grandchildren living at the death of the testatrix, to the excluding the great-grandchildren, were entitled. *Fenn* v. *Death*, 23 Beav. 73 ; 2 Jur. (N.S.) 700 ; 4 W. R. 828.

Children construed Issue.] — Grandchildren and great-grandchildren included by the term "issue," and the word "children" following it, explained as meaning issue likewise. *Wyth* v. *Blackman*, 1 Ves. Sen. 196.

The word "issue" may be restricted so as to mean children, and conversely the word "children" may, from the context, be enlarged so as to be construed "issue" ; each case depends on the peculiar expressions used, and the structure of the sentences. If the case be doubtful, the court prefers that construction which will most benefit the testator's family, on the supposition that this must more nearly correspond with his intentions. *Farrant* v. *Nichols*, 9 Beav. 327 ; 15 L. J., Ch. 259.

"Child or children" may mean "issue." A testator bequeathed property to trustees upon trust to pay the income thereof to his daughter

during her life, and directed that, in case she should leave any issue living at her death, the property should be disposed of, and the produce thereof paid to and amongst such child or children as she should appoint, and in default of appointment to and amongst such issue as tenants in common, or if there should be but one child the whole to be paid to such one; and if there should be no issue of his daughter living at her decease, or they should die infants, then over:—Held, that the words "child or children" must be construed "issue," and therefore that an appointment to the exclusion of the grandchildren was void. *Dalzell* v. *Welch*, 2 Sim. 319; 29 R. R. 110.

Where the words "children" and "issue" are used interchangeably in a will, the operation of the word "children" may be extended to issue generally, to effectuate the intention. *Harley* v. *Mitford*, 21 Beav. 280.

A testator declared, that in case his daughters should "leave issue" they might appoint a fund "unto such children" in "such manner" as they should choose, and in default of any child, they might appoint it to their sisters and their children; "and in case all his daughters should die without issue," then over:—Held, that "children" must be construed "issue," and that an appointment to a grandchild was within the power. *Ib.*

Held, also, that the word "such" did not refer to the issue a daughter might leave, but to such of the class as she might choose. *Ib.*

"Children" — Word not used in Primary Meaning — Surrounding Circumstances — Stepchildren.]— Although primâ facie the word "children" in a will means legitimate children, there may be sufficient explanation in the light of surrounding circumstances that the word is not used in its primary meaning. "Children" held to mean stepchildren. *Haseldine, In re, Grange* v. *Sturdy* (31 Ch. D. 511), *Deakin, In re, Starkey* v. *Eyres* ([1894] 3 Ch. 565), followed. *Jeans, In re, Upton* v. *Jeans*, 13 R. 627; 72 L. T. 835.

Children, Class of, when Ascertained.]—*See* post, col. 896.

ii. *Illegitimate.*

Primâ facie not included under Children.]— "Child," &c., primâ facie, means legitimate. *Wilkinson* v. *Adam*, 1 V. & B. 462; 12 R. R. 255.

The word "children," legally construed, is confined to legitimate children. *Bell* v. *Phyn*, 7 Ves. 458; 6 R. R. 148.

The word "children" in a will means primâ facie "legitimate children," as much so as if the word "legitimate" had been introduced before it, unless, when the facts are ascertained, some repugnancy or inconsistency would result from so interpreting it, and not merely some violation of a moral obligation, or of a probable intention, would result from their exclusion. The probable intention of the testator cannot be taken into account. *Dorin* v. *Dorin*, 45 L. J., Ch. 652; L. R. 7 H. L. 568; 31 L. T. 281; 23 W. R. 570.

When, therefore, a person who had two illegitimate children by a certain woman married her, and the day after his marriage made a will in which, after leaving her his real and personal property for life, he said, "I leave her at liberty to direct the disposal of the property amongst our children by will at her death in such manner as she shall think fit, and should she make no will, I desire that the property existing at her death shall be divided, as far as it may be practicable to do so, equally between my children by her," and had not any child born after the date of the will, but lived for some time after making it, and always treated the two illegitimate children as his own children:—Held, that the real and personal estate of the testator was, subject to the interest given to the widow for her life, undisposed of by the will. *Ib.*

A testator bequeathed a portion of his estate in trust for C. P. W. for life, and, after his death, "the interest for the maintenance of C. P. W.'s wife and education of his children; at his wife's death the principal to be equally divided among his children then living." C. P. W., at the date of the codicil, was unmarried, but had illegitimate children, of which fact it was assumed the testator was cognisant:—Held, that such children were excluded. *Warner* v. *Warner*, 20 L. J., Ch. 273; 15 Jur. 141.

An illegitimate child not entitled under the description of a child in a will, though testator knew there were no legitimate children in the family. *Godfrey* v. *Davis*, 6 Ves. 43; 5 R. R. 204.

Testator gave legacies with maintenance to his two illegitimate children, naming them, by C. B., and to all the other children he might have by her 6,000*l.* each, and, after other bequests, the residue among his said children. By codicil he directed maintenance of another child born since, also interlining his name with those of the other children, in the first part of the will only. That child entitled only to maintenance and a share of the residue, not the legacy of 6,000*l.* *Arnold* v. *Preston*, 18 Ves. 288.

A father, in 1839, gave property to trustees in trust to pay the income to his "daughter A., the wife of J. H.," for life, and to divide the principal between all the children of his daughter when they should attain twenty-one in equal shares, and in case all the children of his daughter should die under twenty-one without issue there was a gift over in favour of a son. For some time prior to the date of the will and the death of the testator in 1840, J. H. and the daughter were living together as man and wife at B., where the testator resided until within a few months of his death. They were married in 1845. Three children were born before the marriage, one before the testator's will and two after his death. One child was born after the marriage:—Held, that the legitimate child only was entitled to the bequest. *Ayles's Trusts, In re*, 45 L. J., Ch. 223; 1 Ch. D. 282; 24 W. R. 202.

Illegitimate children, unless expressly mentioned, cannot be included in a class. *Edmunds* v. *Fessey*, 29 Beav. 233; 30 L. J., Ch. 279; 7 Jur. (N.S.) 282; 3 L. T. 765; 9 W. R. 365.

Bequest to "A. and her daughters" equally. A. had an illegitimate daughter at the date of the will, and never had any other daughter. A. predeceased the testator:—Held, that legitimate daughters alone could take under this bequest, and that the construction was not altered by the circumstance that, in the same will, there was a bequest to B. and her son John, the son John being illegitimate. *Kelly* v. *Hammond*, 26 Beav. 36.

A testator made a bequest to his illegitimate son T. by name, and he divided the proceeds of his residuary estate into seven parts, one of which he gave to his wife for life, with remainder among his children, to whom he gave the other six parts; and he gave such six parts among all his children, except his son T. Besides T. the testator left six children, of whom one daughter, A., was also illegitimate:—Held, that she was not entitled to a share as one of the testator's children. *Wells, In re*, 37 L. J., Ch. 553; L. R. 6 Eq. 599; 18 L. T. 462; 16 W. R. 784.

An illegitimate child not entitled to a share under a devise to children generally, notwithstanding a strong implication in the will in favour of that child. *Cartwright* v. *Vawdry*, 5 Ves. 530; 5 R. R. 108.

A testatrix left a fund upon trust to pay the income to E. S. for life, and after her death for "all and every the child and children of E. S." E. S. left one legitimate and two illegitimate children living at the date of the will and of the testatrix's death. The trustee, after the death of E. S., was about to pay the fund to the three children, but on his solicitor's advice paid the fund into court, as there were adverse claims. The eldest illegitimate child offered to send the certificates of birth of all the children, but the trustee did not accept the offer, and made no inquiries:—Held, that as there was no evidence from the words of the will to include the illegitimate children, the legitimate child only was entitled. The fund was improperly paid into court, and the trustee ordered to pay costs of the petition, for which he had his remedy against the solicitor for improper advice. *M'Naughtan, In re*, 33 L. T. 774.

A. married B. on the 6th July, 1865. In September, 1865, they voluntarily separated, but the marriage was never dissolved by sentence of divorce, nor was there any judicial separation. A child was born on the 13th May, 1866. B. went to live with another man, R., in November, 1866, and lived with him as his wife until shortly before her death in April, 1876. She had three children, born in 1868, 1870, and 1873 respectively, who were described in their baptismal certificates with the surname of R., and were supported by him and reputed his children. On a petition by the child born in May, 1866, to have a fund in court carried over to his separate account as being solely entitled under a gift in a will "in trust for all the children or any the child of B.":—Held, that though all the children above mentioned were alive at the date of the will, yet, it being possible for B. to have future legitimate children, only legitimate children could take, so that the petitioner, being the only legitimate child, was entitled to the whole of the trust fund. *Yearwood, In re*, 46 L. J., Ch. 478; 5 Ch. D. 545; 25 W. R. 461.

Where Legitimate Children could not take.]—Illegitimate children cannot take under a gift to a class of children, unless it is clear that legitimate children never could have taken under the gift. *Pratt* v. *Mathew*, 22 Beav. 328. Affirmed, 25 L. J., Ch. 686; 2 Jur. (N.S.) 1055; 4 W. R. 772—L.JJ.

Where there is a gift to children as a class, unless the words necessarily apply to and include illegitimate children, or exclude any but such children, the gift includes legitimate children only. Where, therefore, a gift by will was to divide a capital sum after the death of a legatee for life between all his children and the children of M., the wife of W. B., and M. had six illegitimate children only:—Held, that they were not entitled, and that it made no difference that the testatrix knew that M. had children whom she believed to be legitimate, and that M. was aged forty-nine at the date of the will; held, also, that *Beachcroft* v. *Beachcroft* (1 Madd. 430; 16 R. R. 242) and *Fraser* v. *Pigott* (1 Younge, 354) have been overruled by other authorities. *Overhill's Trust, In re*, 1 Sm. & G. 362; 22 L. J., Ch. 485; 17 Jur. 342; 1 W. R. 208.

Wherever the general description of children in a will would include legitimate children, it cannot also be extended to illegitimate children. A testator devised a leasehold in trust for his grandchild, Elizabeth, the only surviving child of his son William, and gave the residue of his property, after the death of his wife and daughter, to all the children of his sons James and William, and of his daughter Sarah, in equal share; Elizabeth was illegitimate, and William had no other child:—Held, that Elizabeth did not take any share of the residue. *Bagley* v. *Mollard*, 1 Russ. & M. 581; 8 L. J. (O.S.) Ch. 145. And see *Lery* v. *Solomon*, 37 L. T. 263.

A. by his will bequeathed a sum of stock in certain events to his grandchildren, being children of his sons, William and John, whether born in wedlock or not; and, after certain specific bequests, he gave the residue of his personal estate to his sons William and John, as tenants in common; but if either of them should die in his (the testator's) lifetime, the moiety of such deceased son should go to his children; but if both his sons should die in his lifetime, then he gave such residue to and among all their children, as tenants in common. The testator's two sons died in his lifetime, one leaving legitimate and illegitimate children, the other illegitimate children only:—Held, that the legitimate children of the son having both descriptions of children, and the illegitimate children of the other son, took the residue; and that the illegitimate children of the first-mentioned son took no interest. *Fraser* v. *Pigott*, 1 Younge, 354.

Illegitimate children, born at the date of the will, are entitled under a bequest to children as a class, the testator having had no other children. *Dilley* v. *Matthews*, 11 Jur. (N.S.) 425; 12 L. T. 488; 13 W. R. 676.

Rule not applied to Gift Over.]—A testator by his will, made in 1847, gave to his eldest daughter, naming her, a freehold estate. The testator in the will twice called her his eldest daughter. He disposed of his furniture and continued, "I particularly direct that, should any of my children die without having any children of their own lawfully begotten, their share, whether land or money, shall be divided equally among my surviving children, and none of the land shall ever be sold." The testator died on the 14th December, 1854; his eldest daughter was illegitimate, and died intestate without having had any children. An action was brought for partition of the real estate, and the chief clerk found that the persons entitled to the interest of the eldest daughter in the freehold estate devised to her were the surviving children of the testator. On summons issued by the attorney-general claiming the estate on behalf of the crown:—Held, that the rule of law, that where there is a gift to children an

illegitimate child cannot take pari passu with legitimate children in the absence of special directions, does not apply to a gift over; and that on the death of the eldest daughter the estate went to the other children of the testator. *Smith* v. *Jobson*, 59 L. T. 397.

Where Intention Clear.]—In construing a will, a gift to "children" may include existing illegitimate children, if from expressions in the will, or from the state of testator's family at the date of the will, the probability that he intended them to take is sufficiently strong, and this although the gift may be capable of being extended to future legitimate children, so that such future legitimate children would take with the illegitimate children as a class under the same gift. *Hill* v. *Crook*, 42 L. J., Ch. 702; L. R. 6 H. L. 265; 22 W. R. 137. Affirming 24 L. T. 488.

A father by his will left property for his daughter, whom he described as Mary the wife of John Crook. Mary was not in law the wife of John Crook, though she had gone through the ceremony of marriage with him, he being the widower of her deceased sister. The property was to be held in trust for her for life to her separate use, "independent of her present or any future husband," with remainder to her "children." There was issue of the union between Mary and John Crook four children, of whom two were living at the date of the will, and were always recognised by the testator as his grandchildren:—Held, that the two children living at the date of the will took under the bequest to the children of Mary Crook. *Ib.*

Evidence of Intention—What is Sufficient.]—By his will, dated in 1862, a testator divided his residuary estate into certain shares, and gave one of such shares in trust for his son G. for life, and after his death in trust "for the children" of G. In 1845 G. had married abroad, and lived with his wife until 1848. In that year he came to England, where he remained until his death in 1888. His wife refused to accompany him, and he never saw her again. She died in 1878, aged seventy-four. She never had any children, and at the date of the testator's will was fifty-eight years of age, and therefore past child-bearing. In 1851 G. cohabited with a woman, by whom he had four illegitimate children, born between the years 1851 and 1858. In 1851, after the birth of G.'s eldest illegitimate child, the testator became aware of the condition in which G. was living, but the testator recognised and treated all the four children as the children of his son:—Held, that, although it was possible that the testator might have intended to include the illegitimate children, mere probability was not sufficient, and that, if he had the intention, he had failed to express it adequately, and, therefore, that the four illegitimate children did not take any interest under the residuary gift. *Browne, In re, Raggett* v. *Browne*, 61 L. T. 463.

To enable an illegitimate daughter to take under a bequest in favour of daughters as a class, it is not sufficient to shew that there was, at the date of the will, no possibility of legitimate daughters, and that the claimant was a reputed daughter; but evidence must be given from which the testator's knowledge of these facts may be inferred. *Herbert, In re*, 1 J. & H. 121; 29 L. J., Ch. 870; 6 Jur. (N.S.) 1027; 8 W. R. 660.

A testator bequeathed trust funds and moneys "in trust for all the children, to be equally divided amongst them, their respective executors, administrators, and assigns, of my brother H. M. W., of my nephew A. W. D., of my sister H. C. D., and of my niece M. B., of Jamaica, and my nephew G. D. himself (if he shall be then living, but not otherwise, G. D. taking a share with all such children), and the respective shares of such children to be absolutely vested on my decease." H. M. W. was dead at the date of the will. He left three illegitimate children only, who survived testator. There was enough in the case to enable the court to presume that the testator was aware of the state of H. M. W.'s family:—Held, that the children of H. M. W. could take under the bequest. *Milne* v. *Wood*, 42 L. J., Ch. 545.

A testatrix by her will, dated in 1867, gave to her executors a sum of stock upon trust to pay the income to her niece Martha M. (wife of Walter John M.) during her life, and after her death to pay the same income to the said Walter John M. during his life, and after the death of the survivor to divide the stock between the children of her said niece, the same to be vested interests at twenty-one. At the date of the will Martha M. had eight children. She had for many years prior to the date of the will lived with Walter John M. as his wife, and all the children were born before her marriage with him, which took place shortly before the date of the will. The testatrix always believed that her niece and her husband were married before they commenced living together, and that the children were legitimate. She always took great interest in the children, and paid their school and other expenses. At the date of the will Martha M. was fifty years of age, and she had not had a child for six years:—Held, that the children were not entitled to the fund. *Brown, In re, Penrose* v. *Manning*, 63 L. T. 159.

A direction in a will that the testator's brother should be his executor to arrange, dispose of, and settle his affairs, and the appointment of the brother to be the guardian of the testator's daughter and only child, who was afterwards discovered to be illegitimate, do not amount by implication to a bequest of the personal estate in favour of the daughter. *Davis* v. *Davis*, 1 Russ. & M. 645; 1 L. J. (O.S.) Ch. 155.

A testator gave the residue of his estate to B., the interest to be paid to her until her first-born son should attain the age of twenty-one years, one-half of the said principal sum then to be paid to her aforesaid son, the other half to be paid to his mother. Should his mother die before the said son, the whole to be paid to him; should the aforesaid son die before his mother, his share to go to her. B. had one illegitimate son at the date of the will, who was maintained by the testator:—Held, that this son was not entitled under the above bequest. *Durrant* v. *Friend*, 5 De G. & Sm. 343; 21 L. J., Ch. 353; 16 Jur. 709.

The testator, in 1860, was seized with paralysis at the house of his sister-in-law, M. A. L., and her husband, and remained there till his death. M. A. L. had been married seven years, and had by her husband three children, aged sixteen, thirteen, and eleven, born before her marriage with him, but treated as legitimate. The testator was intimate with them. Being worse, he was advised by his medical attendant to make his will, and made one dated the 7th of

October, 1860, containing the following dispositions :—"I give and bequeath the following legacies to the following persons (that is to say)," after which followed gifts of legacies to persons named, "and to each of the children of M. A. L. the sum of 5*l.* for mourning, the same to be paid into the hands and on the receipt of the said M. A. L., their mother, for them, notwithstanding their coverture and their minority." On the 5th of August, 1861, he made a codicil, by which he bequeathed 400*l.*, on the death of an annuitant, "unto and equally between all the children who shall be then living of M. A. L., share and share alike," and confirmed his will except as varied by the codicil. He died two days afterwards. M. A. L., who was aged forty-four when the will was made, never had any legitimate child. On the death of the annuitant in 1884, the three children claimed the 400*l.*, and the executors, one of whom was the residuary legatee, took out an originating summons to have the point decided. It was held that the children were not entitled, but gave the costs of all parties out of the 400*l.* The children appealed :—Held, by Cotton, L.J., that the appellants were not entitled, for that no repugnancy or inconsistency in the will would result from giving to the word "children" its proper sense of legitimate children; that the three children, therefore, were not entitled to the 5*l.* legacies, and whether, if they had been so entitled, the word "children" in the distinct gift in the codicil ought to be construed in the same way as in the will, quære. But held, by Bowen and Fry, L.JJ., that there was enough in the will, as explained by the surrounding circumstances, to shew that the testator used the word "children" in a sense which would apply (whether exclusively or not) to the existing children, and that the word must have a similar interpretation in the codicil, and that the appellants, therefore, were entitled to the 400*l.* :—Held, that the costs of the proceedings must be borne by the residuary estate. *Haseldine, In re, Grange* v. *Sturdy*, 31 Ch. D. 511; 54 L. T. 322; 34 W. R. 327; 50 J. P. 390—C. A.

Illegitimate children not entitled, under the description of "children" in a will, the intention not being sufficiently apparent upon the face of the will. *Harris* v. *Lloyd*, Turn. & R. 310; 24 R. R. 68.

Bequest to the children of A. described "spinster," and nothing on the face of the will shewing that illegitimate children were intended, inquiry whether she left illegitimate children refused. *Osmond* v. *Tindall*, 5 Ves. 534.

Illegitimate children of an unmarried sister of the testator described in the will by her maiden name are entitled to shares in a legacy to her "and her two youngest daughters." *Savage* v. *Robertson*, L. R. 7 Eq. 176.

A testatrix, who was never married, describing herself as a spinster, bequeathed her property in trust for her children. She had four illegitimate children at the date of will, three of whom and an after-born child were living at her death, and in a codicil she described her children by name :—Held, that the children, and not the next of kin of the testatrix, were entitled to her property. *Clifton* v. *Goodbun*, L. R. 6 Eq. 278.

Description, how far sufficient.]—A natural daughter being included by description in a prior class of daughters was held entitled to take with legitimate daughters under a subsequent general gift to "my daughters." *Worts* v. *Cubitt*, 19 Beav. 421; 2 W. R. 633.

Under a first bequest of a fund in moieties to the children of A. and B. respectively, at the death of the testator A. had six legitimate and two illegitimate children, and B. had one legitimate and three illegitimate children, who, in relation to another bequest, were named :—Held, that the illegitimate children of A. were not entitled, but that the children of B., as well legitimate as illegitimate, were entitled to share in the bequest. Under a second bequest to A. and her children, including a daughter by name who was illegitimate, but A. had no other daughter of that name :—Held, that the daughter was entitled to share in the fund. *Meredith* v. *Farr*, 2 Y. & C. C. C. 525; 7 Jur. 797.

A testator, after appointing J. L. B. one of his executors and trustees, describing him as "my son-in-law," and making various devises and bequests of his property to his three sons nominatim, gave other property to his trustees upon certain trusts for his two daughters respectively, describing them as "my daughter M. A. M., the wife of the said J. L. B.," and "my daughter A., the wife of W. W." He then devised and bequeathed his residuary real and personal estate to his trustees upon trust for such of his "children" living at his decease, and such of the issue then living of any child or children of his dying in his lifetime. M. A. M. B. was illegitimate :—Held, that the will shewed a sufficient expression of intention on the part of the testator to include M. A. M. B. under the term "children," and that she was therefore entitled to a share in the residue. *Brown, In re, Walsh* v. *Browne*, 62 L. T. 899.

A testator described R. W. and another person (who was a legitimate nephew of the testator) as "my two nephews." He gave his residuary estate upon trust for the "children" of his brothers E. H. and T. H., and of his sister J. W., and of his late sister S. B., in equal shares, with a gift over if any one or more of his "nephews and nieces" should die before him leaving children. R. W. was an illegitimate child of J. W., who had four legitimate children, three sons and one daughter :—Held, that the circumstance that R. W. was described by the testator as "nephew" was not sufficient to entitle him to share under the gift to the children of J. W. *Hall, In re, Branston* v. *Weightman*, 56 L. J., Ch. 780; 35 Ch. D. 551; 57 L. T. 42; 35 W. R. 797.

A testatrix bequeathed to A., "the eldest daughter of my deceased daughter, S., my gold watch." And she bequeathed other property to trustees "in trust for such of the children of my said deceased daughter, S., who shall attain twenty-one, absolutely, equally, share and share alike, the shares of such of them as shall be daughters to be for their sole and separate use." S. had two legitimate children, a son and a daughter, and she had also an illegitimate daughter, who was the person spoken of in the will as "A., the eldest daughter of S." :—Held, that there was a sufficient indication of an intention that A. should be included in the description of "the children of S." *Humphries, In re, Smith* v. *Millidge*, 24 Ch. D. 691; 49 L. T. 594.

A testator gave specific legacies and the residue of his personal estate to his children nominatim, payable to them at twenty-one or marriage. He

also gave the residue of his real estate, subject to the payment of an annuity to his wife, and other trusts, between all his said children (not naming them), share and share alike; and directed, in case any of his children by his second wife should die without issue, before he or she should attain twenty-one, that the interest of each in his, the testator's, last-mentioned real and personal estate, together with the therein-before-mentioned legacies bequeathed to them respectively, should go between his said second wife and such of his children by her as should be living, &c.:—Held, that one of the said legatees, who was an illegitimate daughter of the testator by his second wife, was entitled to share with their legitimate children in the residue of the testator's property. *Evans* v. *Davies*, 7 Hare, 498; 18 L. J., Ch. 180.

A testator, by his fourth codicil, made gifts to M., his wife, and E., their child, and also to a boy, F., and in this codicil he spoke of E. and F. as "the children," and appointed his wife their guardian. By the fifth codicil he bequeathed 4,000*l.* to M. "for her own and the children's benefit." The marriage of the testator with M. turned out to be invalid:—Held, that by the term "children" in the fifth codicil E. and F. were meant. *Hartley* v. *Tribber*, 16 Beav. 510.

Gift to a woman, designated by the testator as his wife, for herself and the children's benefit:—Held, by reference to a previous codicil, to include the child of another woman, though that woman repudiated the guardian appointed by the testator for her child. *Hart* v. *Tribe*, 22 L. J., Ch. 890.

A testator gave a legacy to a woman whom he had deceived by pretended ceremonies of marriage, to be used for her own and the children's benefit, and he appointed her their guardian:—Held, with reference to a former codicil, to comprise her child and the child of another woman, both of whom were specifically named in the former codicil. *Ib.*

A testator, at the date of his will, had a wife living by whom he never had issue, but by another woman who was commonly supposed to be his wife he had then had three children (only one of whom survived him), and after the date of his will he had by her another child who survived him. All these children were known by his name, and were supposed to be legitimate. By his will, in which the mother of these natural children was throughout referred to as his wife, he directed his residuary estate after her death or "second" marriage to be divided among all his children equally, and in case there should be only one, then the whole to go to such child:—Held, that the child, born before the date of the will and surviving the testator, was sufficiently designated, and was entitled to the whole fund. *Lepine* v. *Bean*, 39 L. J., Ch. 847; L. R. 10 Eq. 160; 22 L. T. 833; 18 W. R. 797.

A father bequeathed moneys in trust after the decease of his daughter for "all the children of his daughter, whether by her present putative husband or by any other person whom she might marry, who should attain the age of twenty-one, their executors, administrators, and assigns. But in case his daughter should die leaving no issue either by her putative husband or by any other person, who should attain the age of twenty-one," then over. The father, at the date of his will, knew that his daughter had an illegitimate son by B., with whom she was then living, and he recognised this son as his grandchild. After his death his daughter married B., but had no other child:—Held, that the illegitimate child was sufficiently designated by the will, and he having acquired a vested interest on attaining twenty-one, and his mother being sixty-seven years of age, that they were entitled to have the fund transferred to them. *Brown, In re*, 43 L. J., Ch. 84; L. R. 16 Eq. 239; 28 L. T. 616; 21 W. R. 721.

A testator gave to "my grandson J. (the son of my daughter Alice Jane, and who is now residing with me)" the sum of 500*l.*, to be paid to him if and when he should attain twenty-one, with power to apply the income in the meantime for his maintenance; but if he died under twenty-one the 500*l.* and the unapplied income was to go in augmentation of the legacy of 2,000*l.* "hereinafter bequeathed in favour of the children and issue of my said daughter Alice Jane." The testator gave to trustees 2,000*l.* to be accumulated till the expiration of twenty-one years, or the death of Alice Jane, whichever might first happen, and then directed the fund and its accumulations to be divided amongst all the children of Alice Jane who should be then living, and the issue of such of them as should be then dead per stirpes. He gave two sums of 2,500*l.* upon trust for the children and the issue of his two other daughters respectively, corresponding with the trusts of the 2,000*l.* The grandson was illegitimate. He attained twenty-one, and survived his mother:—Held, by the Master of the Rolls, and by the court of appeal, that the grandson J. was not entitled to participate in the 2,000*l.* *Meyson* v. *Hindle*, *Hindle, In re*, 15 Ch. D. 198; 43 L. T. 551; 28 W. R. 866.

Testator by his will bequeathed to M. B. B., "daughter of my nephew, J. B.," 200*l.*; and to T. B., "son of the said J. B.," 100*l.* He directed his trustees to stand possessed of his residue upon trust for "all and every the children and child" of R. C. and J. B. respectively. By a codicil testator revoked the bequest of 200*l.* "to my great-niece," M. B. B., and the bequest of 100*l.* "to my great-nephew," T. B., and instead thereof bequeathed to M. B. B. 100*l.*; to T. B. 100*l.*; and to A. B., "another daughter of my nephew, J. B.," 100*l.* M. B. B. was illegitimate; T. B. and A. B. were legitimate:—Held, that M. B. B. was sufficiently indicated as one of the persons who was to participate in the residue. *Meyson* v. *Hindle* (supra) distinguished. *Bryon, In re, Drummond* v. *Leigh*, 55 L. J., Ch. 30; 30 Ch. D. 110.

A testator by his will, dated in 1868, directed his trustees to pay the income of a certain share in a trust fund "to my sister Charlotte, the wife of Thomas H.," during her life, and after her death to pay and divide the share unto, between and amongst "all her children" who should be living at her death, and the "representatives" of such of them as should have died in her lifetime who should have attained twenty-one, equally, share and share alike. Charlotte never was the wife of Thomas H., he having previously to 1845 married another woman who at the date of the will and down to his death in 1875 was his lawful wife. In 1845 Charlotte left her home, and thenceforth cohabited with Thomas H. until he died. At the date of the will she had had four illegitimate children by him, the two survivors of whom were then living, aged respectively twenty and eighteen; and she had not had a child for seventeen years, and was

presumably past child-bearing. Charlotte died in 1885. These were the only children she ever had, and only one of them survived her. The testator was well aware of the connection of his sister with Thomas H., visited at the house where they resided, and recognised the children of his sister by Thomas H. as his own nephews and nieces:—Held, that the testator in describing his sister Charlotte as the "wife" of Thomas H., when he knew she was not so, and in using correlatively with that the expression "children" to describe the offspring of a woman whom he knew not to be lawfully married, had shewn that he did not use the term "children" in its strict legal sense; and that, applying the principles laid down in *Hill* v. *Crook*, supra, col. 759, the illegitimate children of Charlotte were intended, and were entitled to take under the gift in the testator's will. *Hill* v. *Crook* and *Dorin* v. *Dorin* (supra, col. 755) explained. *Ayles' Trusts, In re* (supra, col. 756), *Ellis* v. *Houstoun* (infra), and *Megson* v. *Hindle* (supra), considered. *Horner, In re, Eagleton* v. *Horner*. 57 L. J., Ch. 211; 37 Ch. D. 695; 58 L. T. 103; 36 W. R. 348.

A testator bequeathed his residuary estate in trust for his four children by name, including "A. J. H. the wife of J. H.," and declared that his trustees should stand possessed of the share thereinbefore given to the said A. J. H., upon trust to invest the same and pay the income to the said A. J. H. during her life, and so that "during any coverture" she should not have power to anticipate the same, and, after her death, in trust for "the children or child of the said A. J. H.," who being a son or sons should attain twenty-one, or being a daughter or daughters, attain that age or marry, and if more than one, equally. J. H. had married a sister of the testator, who died in the testator's lifetime, and after her death had gone through the ceremony of marriage with the testator's daughter A. J., and had had a child by her. The testator was aware of these facts. After the death of the testator, two other children of J. H. by the testator's daughter A. J. were born. She afterwards died:—Held, on the authority of *Horner, In re* (supra), that the child born before the date of the will was entitled to the share. *Harrison, In re, Harrison* v. *Higson*, 63 L. J., Ch. 385; [1894] 1 Ch. 561; 70 L. T. 868.

See also PERSONÆ DESIGNATÆ, post, col. 858.

Reputed Children.]—Under a devise by a married man, having no legitimate children, "to the children which I may have by A., and living at my decease," natural children who had acquired the reputation of being his children by her before the date of the will, entitled, as upon the whole will intended, and sufficiently described; rejected as a description of the devisees passages in a written book, unattested, of which probate was admitted under a reference in the will to "the observations and directions which I shall leave in a written book." Whether, if there were also legitimate children by the same mother, they could take together under the same description, and whether future illegitimate children can take under any description in a will, quære. *Wilkinson* v. *Adams*, 1 V. & B. 422. Affirmed, 12 Price, 470; 12 R. R. 255.

Bastard may take by purchase, if sufficiently described, and having acquired the reputation of the child of that person. *S. C.*, 1 V. & B. 466.

But cannot take by the description of child of his reputed father, until he has acquired the reputation of being such child. *S. C.*, 1 V. & B. 452; 12 R. R. 255.

A testator devised certain property to his wife for life, and after her death to A. L., who then lived with him, for life, provided she so long continued single and unmarried. Then he devised part of his estate (except what he had given to his wife and A. L.) to trustees for thirty-one years, upon certain trusts, and after the expiration of such term to the children which he might have by A. L., and living at his death, or born six months after, and in default of such children, to his nephew. The wife died, and the testator published his will after her death:—Held, by the judges and house of lords, that the children of A. L. who had previously acquired the character of reputed children of the testator by A. L. took an estate in the lands demised. *S. C.*, 12 Price, 478; 12 R. R. 255.

Where J. S., who had contracted a marriage, which was void ab initio, and had from that marriage one son, made his will, and gave the residue of his personal estate to all his children by his reputed wife:—Held, that a son born at the time of the making of the will, having the reputation of being the testator's child, was entitled, although illegitimate. *Bailey* v. *Snelham*, 1 Sim. & S. 78; 1 L. J. (o.s.) Ch. 35.

Parol Evidence, when admitted.]—A testatrix gave a sum of stock to trustees to pay the dividends to her brother Charles and his wife Elizabeth for their lives, and after the decease of the survivor the capital to be divided between all the children of her brother. The brother had three children by his first wife, two children by his second wife Elizabeth before marriage, and one child after marriage, which were facts well known to the testatrix, who promised, as the claim alleged, that if he married his wife Elizabeth she would provide for all his children by her, and she in fact treated all the children equally as her nephews and nieces, and it was further alleged that the testatrix gave instructions that her will should be so drawn as to provide equally for both classes of children, and that she believed such to be the effect of the words of the will:—Held, upon demurrer, that the illegitimate children must be excluded from the bequest; and that the words of the will being distinct, no extrinsic evidence could be received to shew what the intention of the testatrix was. *Ellis* v. *Houstoun*, 10 Ch. D. 236; 27 W. R. 501.

Under a bequest by unmarried man "to my children, &c., each," parol evidence allowed to shew who testator considered in character of children, and they having obtained a name by reputation admitted to take as a class, though illegitimate and not named in the will. *Beachcroft* v. *Beachcroft*, 1 Madd. 430; 16 R. R. 242.

Under the description of "children" in a will illegitimate children existing at the date of the will not entitled, unless proved by the will itself to be intended, and evidence can be received only for the purpose of collecting who had acquired the reputation of children. An only legitimate son therefore held entitled as devisee. *Swaine* v. *Kennerley*, 1 V. & B. 469; 12 R. R. 269.

Where there are not, nor ever were, nor can by

any possibility be, any persons strictly answering the description of children, it is necessary to resort to evidence dehors the will for the purpose of finding whether there were any who had acquired the reputation of children, and it is possible for illegitimate children to acquire that reputation. *Woodhouselee (Lord)* v. *Dalrymple*, 2 Mer. 419; 16 R. R. 193.

Gift to "Natural" Children.]—A. B., in 1857, bequeathed the whole of her estate to E. B., then living with her as her husband, for his use for life; and after his death to be equally divided between the natural children of E. B. which might be then living. E. B. lived with the testatrix as her husband, but was not married, and there were living with him and the testatrix two natural or illegitimate children which she had had by him, and he had no other natural children:—Held, that the description of the objects of the testatrix's bounty was sufficient, and that the two natural children of the testatrix, in case they survived E. B., would be entitled to the fund. *Bentley* v. *Blizard*, 4 Jur. (N.S.) 652.

Bequest to A. and B. for life, and afterwards to their surviving children (which gift failed), and in default to the "children legitimate or illegitimate, of my brother H.," equally. H. had five illegitimate children at the date of the will, two of whom predeceased the testator, and he had nine legitimate children after the testator's death:—Held, that the gift was valid, and that the property was divisible amongst the three illegitimate and the nine legitimate children. *Barnett* v. *Tugwell*, 31 Beav. 232; 31 L. J., Ch. 629; 8 Jur. (N.S.) 787; 7 L. T. 121; 10 W. R. 679.

Gift of income for "my wife Ann, my natural daughter Ann, and all my other daughters," followed by a gift of the capital "to be divided among my said wife and all my daughters":—Held, that the latter gift included the natural daughter. *Worts* v. *Cubitt*, 19 Beav. 421; 2 W. R. 633.

Gift to Children not In Esse at Date of Will.]—It is settled that a bequest cannot be made by a man to his future illegitimate children, for they can have acquired no title by repute; but it is not settled whether a gift can be made to the future illegitimate children of a woman. *Pratt* v. *Mathew*, 22 Beav. 328. Affirmed, 25 L. J., Ch. 686; 2 Jur. (N.S.) 1055; 4 W. R. 772—L.JJ.

A testator having married his deceased wife's sister, and while living with her as his wife made his will, whereby he gave all his real and personal estate "to my wife" for life, and after her death, upon trust "for all and every my children hereafter to be born." At the date of the will he had no children whatever, but two days after a son was born:—Held, that the gift "to my wife" was good, but that the son could not take under the gift to his children hereafter to be born." *Ib.*

Bequests to illegitimate children, in esse, will take effect when they are appropriately described; but a prospective gift to future illegitimate children of a woman is wholly void. *Medworth* v. *Pope*, 27 Beav. 71; 28 L. J., Ch. 905; 5 Jur. (N.S.) 996.

A devise of two houses and hereditaments to "such other child, if any, that may be born of my housekeeper, in my lifetime, or in due time after my death":—Held, that a natural child of the testator by his housekeeper, born after the date of the will, could not take. *Ib.*

The children of a marriage between a man and his deceased wife's sister, born after the date of the instrument of gift, are equally, with any other illegitimate children, excluded from participating under a gift to a class. *Howarth*, otherwise *Mills* v. *Mills*, L. R. 2 Eq. 389; 12 Jur. (N.S.) 794; 14 L. T. 544.

Semble, a bequest to future illegitimate children is void; and there is no distinction between illegitimate children described as the children of a particular mother, without reference to their paternity, and those who are described as the children of a particular father.

Bequest of a sum of money to a trustee in trust to pay to A. N. the interest during her life, or until she married, for the support of her children, W. and R., and in case of her death or marriage to apply it to the use of her children; and on their coming to the age of twenty-one, to divide the said sum between them. The children of A. N. born after the date of the will, and in the lifetime of the testator, do not take under this bequest. *Connor, In re*, 2 Jo. & Lat. 456; 8 Ir. Eq. R. 401.

A testator by his will gave to trustees 1,000*l.* stock on trust to pay the dividends to his nephew for life: and after his decease, in case his nephew's wife should survive him, to pay the same to her for life, and afterwards on trust to pay the capital among his nephew's children. The nephew died unmarried, but left surviving a woman with whom he had cohabited for many years, who was supposed by the testator to be his wife, and was frequently referred to as such:—Held, the gift was void. *Davenport's Trust, In re*, 1 Sm. & G. 126; 17 Jur. 314; 1 W. R. 103.

One devises 3,000*l.* to all the natural children of his son by J. S.: the bastards born after making the will shall not take; though in the principal case the money was to be paid by the executors, as the testator by deed should appoint, and the testator afterwards made the deed of appointment, the deed of appointment referring to the will was held as part of the will. *Metham* v. *Devonshire (Duke)*, 1 P. Wms. 529. *See* 8 Price, 22; 22 R. R. 691.

A testator devises his real and personal property to trustees upon trust for four children of M. D., whom he described by their respective names, "together with every other child or children of the body of M. D., alive at my decease, or born within nine months afterwards, share and share alike." M. D. had two other children born after the date of the will, but before the date of a codicil to it, and these, as well as the four previously born, were all illegitimate. The children born after the date of the will are not entitled to any share of the property. *Mortimer* v. *West*, 3 Russ. 370; 5 L. J. (O.S.) Ch. 181; 27 R. R. 98.

Testator, believing that his brother J. was married to B., gave to each of J.'s children, "except his eldest son E. J., and his daughter, M. L., 100*l.*" He gave a fund on trust to apply the income for the benefit of J., "or of his wife, or all or any of his children," during J.'s life, and after his death to pay the income to the "present wife," of J., "if she shall become his widow," for life, with remainder in trust for all the children of J., "except his eldest son E. J., and his daughter M. L." Elsewhere in his will he spoke of his "nephew E. J.," and of the "brother of the said E. J.," and "all the other children"

of J. He gave his residuary personalty to his "niece M. L., daughter of" J. The will was dated in 1889. J. died in 1890. The testator died in 1891. J. had been married many years before, and his wife died in 1875, leaving two daughters, M. L. and another, who both survived the testator. J. subsequently cohabited with B., by whom he had seven illegitimate children, including E. J., one of whom was born after the will, and all of whom survived the testator:—Held, that all the gifts were valid, except that the illegitimate child born after the date of the will could not take. *Lowe, In re, Danily* v. *Platt*, 61 L. J., Ch. 415; 40 W. R. 475.

Children to be in esse at Testator's Death.]—An illegitimate child or illegitimate children in esse as a class may take under a gift to a child or children as a class, if it appears certainly from the context, or proper evidence, that they are the persons meant by the word "child" or "children." But illegitimate children unbegotten at the time of the testator's death cannot under any circumstances be entitled under such a description. *Holt* v. *Sindrey*, 38 L. J., Ch. 126; L. R. 7 Eq. 170; 19 L. T. 669; 17 W. R. 249.

A person who had gone through the ceremony of marriage with M. L., his deceased wife's sister, who had two daughters, C. and E., by him, and who was enceinte with a third at the date of the will, gave a moiety of his property to trustees in trust for M. L. for life, and after her death for his reputed children C. and E., and all other children which he might have or be reputed to have by M. L., then born or thereafter to be born. The third child was born before the testator's death, and was acknowledged by him as his child:—Held, that the after-born child was entitled to share with her sisters under the will. *Occleston* v. *Fullalove*, 43 L. J., Ch. 297; L. R. 9 Ch. 147; 29 L. T. 785; 22 W. R. 305.

H. by his will gave a trust fund "in trust for my four natural children by M. E. M., viz., J., C., E., and J. H., and all and every other children and child which may be born of the said M. E. M. previous to and of which she may be pregnant at the time of my death, share and share alike." Besides the four children named in the will, there were three other children born of M. E. M. after the date of the will and before the death of the testator, all of whom were known by his surname:—Held, (1) that upon the construction of the will the word "children" must be taken to include illegitimate children, and was not void for uncertainty; and (2) that, being a gift by will to illegitimate children of the testator to be in esse before the death of the testator, it was a good gift within the rule laid down in *Occleston* v. *Fullalove* (supra), and that the children who came into esse after the date of the will and before the death of the testator were entitled to share in the gift. *Hastie's Trusts, In re*, 56 L. J., Ch. 792; 35 Ch. D. 728; 57 L. T. 168; 35 W. R. 692.

A gift by a testator or testatrix to his or her unborn child by a particular person, not being the wife or husband of the testator or testatrix, is good provided the child has acquired the reputation of being such before the death of the testator or testatrix. *Goodwin, In re*, 43 L. J., Ch. 258; L. R. 17 Eq. 345; 22 W. R. 619.

When, therefore, a testatrix who had gone through the ceremony of marriage with the husband of her deceased sister bequeathed her residuary estate upon trust for all her children by him, and died eight years after the date of the will, leaving two children, one of whom was born at the date of the will, and the other only a few weeks before the death of the testatrix:—Held, that the second child, having before the death of the testatrix acquired the reputation of being her child by the husband of her deceased sister, was entitled to share in the estate. *Ib.*

The ultimate limitation in a settlement was to all the children, as well those already born as hereafter to be born, of A. and B., his wife. B. was the settlor's sister, who had been married to A. five years before the date of the settlement. They never had any legitimate children, but before their marriage B. had several children still living, who were reputed to be children by A.:—Held, that these children were entitled to the property under the limitation. *Gabb* v. *Prendergast*, 1 K. & J. 439; 3 Eq. R. 648; 24 L. J., Ch. 431; 1 Jur. (N.S.) 900; 3 W. R. 395.

Semble, the construction of these words in a will would exclude illegitimate children born at the date of the will, because of the possibility that legitimate children might have been born before the testator's death. *Ib.*

C., after the death of his second wife, went through the ceremony of marriage with M. L., her niece, by whom he had two children, one posthumous. By his will he gave to trustees all his estate, to sell and convert, and pay the interest of 3,000*l.* to his wife, M. L. C., for her life, in case she should so long continue his widow, and subject thereto to all and every his children (naming them), and all and every other child and children that he might have by his said wife M. L. C. The testator left children by each wife:—Held, that M. L. C. and her child born before the testator's death took, but not the posthumous child. *Smith* v. *Charles*, 11 L. T. 533; 13 W. R. 224.

A testator bequeathed money upon trust for his reputed daughter for life, and after her death to her children. He was aware that she was living in concubinage and had illegitimate children:—Held, that her illegitimate children, one of whom was born after the testator's death, took under the will. *Williams, In re*, 10 L. T. 405; 12 W. R. 818.

A testatrix gave all her property to trustees, in trust for life, and then to pay and divide the fund "to and among all the children of N., born or to be born," who should live to attain twenty-one or marry. N. could not be proved to have been married. At the time of the will she was living with a man supposed to be her husband, and by common reputation in the neighbourhood they were man and wife. There were three children of N. living at the date of the will, and also at the death of the tenant for life, all well known to the testatrix, and all of whom lived to attain twenty-one. N. never had any other child. On the application of these three children, after notice to all persons claiming in default of them, and no opposition nor suggestion as to their illegitimacy, the fund was ordered to be paid to them, without any further proof of N.'s marriage beyond common reputation. *Nixon, In re*, 2 Jur. (N.S.) 970.

Children en ventre sa mère.]—Bequest to a natural child en ventre sa mère:—Held, good if there is not affixed to gift by construction of will a condition precedent that it must be ascertained

to be the child of testator. *Evans* v. *Massey*, 8 Price, 22; 22 R. R. 691.

Under a bequest "to such child or children, if more than one, as A. may happen to be enceinte of by me," a natural child of which she was then pregnant cannot take, though a bequest to the natural child of which a woman was enceinte, without reference to any person as the father, would probably be good, having no uncertainty. *Earle* v. *Wilson*, 17 Ves. 528; 11 R. R. 130.

Bequest to the natural child of which a woman was enceinte, without reference to any person as the father:—Held, good, there being no uncertainty in the object described. *Gordon* v. *Gordon*, 1 Mer. 141; 15 R. R. 88.

An illegitimate child may take by particular description before its birth. *Dawson* v. *Dawson*, 6 Madd. 292.

One devises 3,000*l.* to all the natural children of his son by J. S.; the bastards born after making the will shall not take; nay, the child en ventre sa mère shall not take. And though in the principal case the money was to be paid by the executors, as the testator by deed should appoint, and the testator afterwards made the deed of appointment, the deed of appointment referring to the will was held as part of the will. *Metham* v. *Devonshire* (*Duke*), 1 P. Wms. 529. *And see* 8 Price, 22; 22 R. R. 691.

A testator, who had married his deceased wife's sister, gave his real and personal estate to trustees for "my wife" for life, and after her decease for all and every "my children" hereafter to be born. The testator had no children at the date of his will, but his then wife was enceinte, and shortly afterwards a son was born:—Held, that there was a sufficient designation in the will to entitle the wife to a life interest in the estate; but that, the gift being to a class, the restrictions upon such marriages did not permit his son to be considered one of that class, and that there was no sufficient designation by which he could take. *Pratt* v. *Mathew*, 22 Beav. 328; 4 W. R. 418. Affirmed 25 L. J., Ch. 686; 2 Jur. (N.S.) 1055; 4 W. R. 772—L.JJ.

A gift to "children" (meaning illegitimate children) includes a child en ventre sa mère at the date of the gift. *Crook* v. *Hill*, 46 L. J., Ch. 119; 3 Ch. D. 773; 24 W. R. 876.

A bequest in favour of a woman's illegitimate child en ventre sa mère at the date of the will, though not born until after the testator's death, is not contrary to public policy. *Ib.*

A father, whose daughter M. had with his knowledge gone through the ceremony of marriage with J. C., her deceased sister's husband, and had had two children by him, made his will at a time when he knew she was again enceinte. He thereby gave leaseholds to trustees on trust for "my daughter M., the wife of J. C.," for her life, with remainder to "the child or children of my daughter M. C." as she should appoint, and in default for her child or children equally, and if none, then over. The testator died three months before the third child was born. M. appointed to the two children born at the date of the will, the child of which she was then enceinte, and a former child begotten and born after the testator's death. The house of lords having decided that the two children born at the date of the will were sufficiently designated, and that they took under the gift in the will:—Held, that the child en ventre sa mère at the date of the will also took under the gift, but that the child begotten and born after the testator's death could not take. *Ib.*

A father directed the income of one-half of his residuary estate to be paid to his son during his life and afterwards to his lawful issue; one of the issue was en ventre sa mère at the date of the death of the tenant for life, but his parents were not married till after that date, though before the birth of the child:—Held, that such child was not entitled to share in the distribution of the half of the residue. *Corlass, In re*, 45 L. J., Ch. 118; 1 Ch. D. 460; 33 L. T. 630; 24 W. R. 204.

O., by his will, dated the 9th July, 1868, bequeathed property to trustees for his reputed children, C. O. and E. O., "and all other the children which he might have, or be reputed to have, by M. L." (his deceased wife's sister, with whom he had gone through the ceremony of marriage), "then born or thereafter to be born." At the date of the will M. L. was enceinte; and six months later she had a child, who was named M. O., otherwise M. L., and was born on the 6th January, 1869. The testator died on the 25th December, 1870:—Held, that M. O., otherwise M. L., was entitled to share in the bequest. *Occleston* v. *Fullalove*, 43 L. J., Ch. 297; L. R. 9 Ch. 147; 29 L. T. 785; 22 W. R. 305.

G. B. went through the ceremony of marriage with J. A. C., whose husband had deserted her and gone abroad many years before and was believed to be dead, but G. B. was aware that there was no certain information of his death. Shortly afterwards G. B. made his will, by which he gave "to my dear wife J. A. B., formerly J. A. C.," an interest in certain chattels during her widowhood, and also gave to her the income of his residuary personalty during widowhood, and after her decease or remarriage he gave the corpus to "all and every my child and children," as therein mentioned, and in default of children to his nephews and nieces. G. B. and J. A. C. cohabited for more than a year and a half after the date of the will, when G. B. died leaving J. A. C. enceinte of her only child. She enjoyed the income of the residue till her death, upon which event the nephews and nieces claimed the property under the gift over, and proved that J. A. C.'s child was illegitimate, her former husband having been alive at the time of her marriage to the testator:—Held, that the child could not take. *Occleston* v. *Fullalove* (supra) leaves untouched the rule that there cannot be a valid gift to a future illegitimate child described solely by reference to its paternity. *Goodwin's Trust, In re* (L. R. 17 Eq. 345), observed upon. *Bolton, In re, Brown* v. *Bolton*, 55 L. J., Ch. 398; 31 Ch. D. 542; 54 L. T. 396; 34 W. R. 325; 50 J. P. 532—C. A.

Whether an illegitimate child en ventre sa mère at the testator's death, but not en ventre sa mère when the will was made, can take as the reputed child of the supposed father, quære. *Ib.*

Children of Women past Child-bearing.]—Bequest of stock upon trust to pay the dividends to one for life, and then to divide the capital equally "between all the children of G. and the children of M., the wife of W. B., who should be alive at the respective deaths of the said G. and M." M. was married at the date of the will; she died after the testatrix without lawful issue, but leaving several illegitimate children, all born before the date of the will, and whom the testatrix believed to be legitimate. The court admitted evidence of all facts in the testatrix's knowledge

at the time she made her will; but upon the result of this evidence, there being a possibility that M. might have had legitimate children after the date of the will, and there being nothing on the face of the will to confine the description to the illegitimate children who were in existence at the date of it:—Held, that the illegitimate children took nothing. *Overhill's Trusts, In re*, 1 Sm. & G. 362; 22 L. J., Ch. 485; 17 Jur. 342; 1 W. R. 208.

A testator, after giving a share of his property by his will upon trust for his niece B. and her husband, and for her child, if only one, or all her children, if more than one, gave another share upon such trusts in favour of his niece C. and her husband, and her child or children, as should correspond with the preceding trusts in favour of B. C. had only one child, born before her marriage, and illegitimate. She was fifty years old at the date of the will, and fifty-seven years old at the date of a subsequent codicil:—Held, that, on the death of C., her illegitimate child was not entitled. *Paul* v. *Children*, L. R. 12 Eq. 16; 25 L. T. 82; 19 W. R. 941.

H., having been married to R. (who was ignorant that his first wife was alive), had nine children by him. S., the sister of H., knowing that H. was fifty-seven years old, made her will, leaving certain property to the children of H., mentioning one by name as her niece, and referring to them as "born or to be born":—Held, that there was a sufficient indication of an intention, upon the knowledge which the testatrix had, to entitle the children of H. to the benefit of the gift as personæ designatæ. *Robinson* v. *Neal*, 19 L. T. 142.

Children of a Deceased Person.]—Legacy "to the children of the late C. K. who shall be living at the testator's decease"; C. K. being dead at the date of the will, leaving illegitimate children (of whom three were living at the death of testator), and not having at the date of the will, nor having ever had, any legitimate children, the three illegitimate children were held to be entitled. *Woodhouselee* (*Lord*) v. *Dalrymple*, 2 Mer. 419; 16 R. R. 193.

Where there are not, nor ever were, nor can by possibility be, any persons strictly answering the description of children, it is necessary to resort to evidence dehors the will for the purpose of finding whether there were any who had acquired the reputation of children; and it is possible for illegitimate children to acquire that reputation. *Ib.*

A testator gave a legacy to "every of the sons and daughters of his late cousin"; his cousin left one legitimate daughter, and one son and one daughter illegitimate; the latter are not entitled under the will, nor is evidence admissible of the intention of the testator. *Hart* v. *Durand*, 3 Anstr. 684.

Under the description of children in a will, illegitimate children, existing at the date of the will, not entitled unless proved by the will itself to be intended, and evidence can be received only for the purpose of collecting who had acquired the reputation of children. An only legitimate son, therefore, held entitled as devisee. *Swaine* v. *Kennerley*, 1 V. & B. 469; 12 R. R. 269.

A testatrix gave a share of her residuary estate to the children of M. G., deceased. M. G. left two children, one legitimate and the other illegitimate. Evidence was admitted to prove that the illegitimate child had acquired the reputation of being the child of M. G., that the testatrix well knew that fact, and that M. G. left only those two children. *Gill* v. *Shelley*, 2 Russ. & M. 336.

A. gave "to each of the sons and daughters of his late cousin 100*l.* apiece." There were three sons and a daughter, one son and the daughter being illegitimate:—Held, that the gifts were made to a class, and that the illegitimate son could not take any legacy, as there were sons to answer the description; but that the daughter, being the only one, was entitled to her legacy by express description. *Edmunds* v. *Fessey*, 29 Beav. 233; 30 L. J., Ch. 279; 7 Jur. (N.S.) 282; 3 L. T. 765; 9 W. R. 365.

A testator gave his property equally among all the children of his late nephew L. who should be living at the testator's decease, and who should attain twenty-one or marry; and if but one such child, to such child solely. Three children of L., two illegitimate and one legitimate, survived the testator. He had treated all three as being equally the children of L., and they were generally so received:—Held, that, L. being dead at the date of the will, there could never be legitimate "children" to answer the description; and that the gift was to the two illegitimate children, as well as the one legitimate child; but that the case would have been different if L. had been living at the date of the will. *Leigh* v. *Byron*, 1 Sm. & G. 486; 1 Eq. R. 519; 22 L. J., Ch. 1064; 17 Jur. 822; 1 W. R. 407.

A testator gave property by will to B., and after his death to B.'s children, "share and share alike; the two children of the late Ann B. to take the share that would have fallen to their mother had she been living, to be divided between them, share and share alike, if more than one survive; but if only one of them be then surviving, then and in such case the surviving child to take the whole of the mother's share." The testator also directed that if the wife of B. survived her husband, she should enjoy the property for her life, and the division should not take place till after her death. After the testator's death B. married a second wife, who survived him. He had three children, viz., George, Mary, and Ann, the first of whom only survived him. Ann died unmarried before the date of the testator's will, leaving two illegitimate children:—Held, that the gift to the children of Ann applied to her illegitimate children; that the words of survivorship in the will applied exclusively to the children of Ann, and that all the children of B. took vested interests. *Burrow's Trusts, In re*, 10 L. T. 184.

Held, also, that the gift to the wife of B. applied to the wife who was living at the time of the will, and not to any wife whom B. might at any time afterwards marry. *Ib.*

A testatrix bequeathed to A., "the eldest daughter of my deceased daughter S., my gold watch"; and she bequeathed other property to trustees "in trust for such of the children of my said deceased daughter S. who shall attain twenty-one, absolutely, equally, share and share alike, the shares of such of them as shall be daughters to be for their sole and separate use." S. had two legitimate children, a son and a daughter, and she had also an illegitimate daughter, who was the person spoken of in the will as "A., the eldest daughter of S.":—Held, that there was a sufficient indication of an intention that A. should be included in the

description of "the children of S." *Humphries, In re, Smith* v. *Millidge*, 24 Ch. D. 691; 49 L. T. 594.

Children of Illegitimate Children.]—Where a testator in his will calls the son of his own illegitimate son his grandson, having no legitimate son, after giving his property to be divided between his son and daughter's children, and if there should be no grandchildren, then a gift to his nephew:—Held, that a legitimate daughter of the testator's illegitimate son was within the description of grandchildren. *Allen* v. *Webster*, 2 Giff. 177; 6 Jur. (N.S.) 574; 2 L. T. 206.

R. S. bequeathed the residue of his personal estate upon trust after the death of his wife for "all and every the children lawfully begotten of my nephews and nieces, equally to be divided between them share and share alike." The testator had only one nephew, W. A., who was legitimate, but there was another child of the same parents, namely J. A., who was born before the marriage of the parents; and the testator had no nieces properly so called, the only persons who could be so called being the wives of W. A. and J. A. In part of the will J. A. was spoken of as the testator's nephew. On the question of what class of persons took the residue:—Held, that the children of J. A. as well as the children of W. A. were entitled. *Tugwell* v. *Scott*, 3 Jur. (N.S.) 653.

iii. *Son, Eldest Son, &c., as Words of Limitation.*

Realty—Where Gift Over on Default of Sons.]—Devise to L. for his natural life, and no longer, provided he takes the name of R., and after his decease to such son as he should have lawfully begotten, and for default of such issue to W. and his heirs for ever:—Held, that upon the true construction of the will, and to effectuate the manifest general intent of the testator, L. must be construed to take an estate in tail male. *Robinson* v. *Hicks*, 3 Bro. P. C. 180.

A. devised all his lands, &c., to his wife, and if it should happen that she should have no son nor daughter by him begotten upon her body, and for want of such issue, then the said premises to return to his heirs for ever, paying to two other brothers 150*l.* within a year after the wife's death. Decreed to be an estate tail in the wife, and not an estate for life only; that by "no son nor daughter" must be understood "no issue"; and that she ought not to be restrained from committing waste. *Wyld* v. *Lewis*, 1 Atk. 432.

Under a devise to trustees upon trust to permit A. to receive the rents for his life, and after his decease upon trust to permit his first son and the heirs of his body "to receive the rents for their respective lives, severally and successively in tail male," and in default of such issue over, A. takes an estate in tail male, and not merely a life estate. *Hugo* v. *Williams*, 41 L. J., Ch. 661; L. R. 14 Eq. 224; 26 L. T. 901.

Devise in trust for A. for life, and after the decease of A. in trust to permit such one child of A., and the heirs of his or her body, to receive the rents as A. should appoint by deed or will, and in default of appointment to go to his eldest son and the heirs of his body; and in case there should be no son, to and amongst his daughters, and to the heirs of their bodies, share and share alike; and in default of such issue, in trust for B., C., and D. successively for their lives, with similar remainders respectively to them as to A.'s sons and daughters, with remainder over in fee, and a residuary devise to A. A. by will appointed to his eldest son, who died without issue in his lifetime:—Held, first, that A. took an estate tail in remainder, after the estate devised to his eldest son, in default of appointment. *Bell* v. *Bell*, 15 Ir. Ch. R. 517.

Held, secondly, that the words, "in case there shall be no son," did not give an estate by implication to the other sons of A. *Ib.*

Direction that any property might be sold except Glencoe, which was to remain in the family as long as there was a lineal son descendant of before-named sons, and if no lineal male descendant from the eldest, the next to be entitled, and so on:—Held, that this clause created an estate tail in possession in the eldest named son. *Mannox* v. *Greener*, L. R. 14 Eq. 456; 27 L. T. 408.

A testator by his will directed the trustees therein appointed to call in a certain sum of money to which he was entitled, and invest the same in the purchase of freehold estates in lands or hereditaments of a clear estate of inheritance for the use of his son A. for and during his natural life, and after his death to the use of his first and other sons according to seniority of age and priority of birth; and in case A. should happen to die without issue male, then in trust for his second son, B., and the heirs male of his body, according to seniority of age and priority of birth; and desired that his sons and the several persons who should be in possession of such estates should have a power to make leases not exceeding three lives or thirty-one years:—Held, that A. was entitled to an estate tail in the lands to be purchased. *Herbert* v. *Blunden*, 1 Dr. & Wal. 78.

—— **Where Estate for Life expressly given.**]—A. devised his real estate to his son F. during his life, remainder after his decease to his eldest son that should be then living, remainder over; F. suffered a recovery, and declared the use to himself in fee:—Held, that F. took only an estate for life, and that the recovery was bad: for where a particular estate is expressly given, it shall not be altered by any implication from subsequent words, especially where such implication, if admitted, defeats the general intent of the will. *Foord* v. *Foord*, 3 Bro. P. C. 124. And see *East* v. *Twyford*, 4 H. L. Cas. 517.

Where Words used importing Succession.]—A testator declared his will to be, that his property be inherited by his nephews, C. and T., and the sons of his late brother A. during their lives, and after the decease of C. and T. that the eldest son of C. and the eldest son of T. inherit the said property during their lives, and so on, the eldest son of each of the two families to inherit the same for ever; and that each two of the succeeding inheritors should inherit the said property free from incumbrances:—Held, that C. and T. took estates for their lives, with remainder to their eldest sons respectively for their lives, with remainder to C. and T. in tail male. *Forsbrook* v. *Forsbrook*, L. R. 3 Ch. 93; 16 W. R. 290. Affirming 12 Jur. (N.S.) 285; 14 L. T. 282.

Bequest of property (moneys to be laid out in land) to L., and afterwards to his eldest lawfully begotten son, &c., remainder to others in succession, with a direction that in case of the decease of an eldest son in any of the cases, then

the property to go to the second son, and so on according to primogeniture; but in every case a grandson to inherit before a younger son, and before next named in the entail, or any of his sons:—Held, upon the language of the whole will, that the testator did not regard L. as the stock or stirps, but looked to the sons of L. as the parties from whom the property was to devolve in succession; and that L. took an estate for life only. *East* v. *Twyford*, 9 Hare, 713; 4 H. L. Cas. 517.

The fact, that wherever a limitation occurred in the will in favour of sons, it was accompanied by the provision that they should take in order of primogeniture, and that there was no such provision as to grandsons:—Held, to indicate that the sons were intended to take by particular description, and the grandsons as a class. *Ib.*

The authorities which establish that a son or sons may be construed as a word of limitation, to effectuate the intention of a testator, do not therefore or necessarily lay down any rule by which the court can be guided in determining upon such intention. *Id.*, 9 Hare, 730.

The question is, whether "son" or "sons" be be used as nomen collectivum; upon which a subsequent limitation in favour of grandsons has an important bearing. *Ib.*

Personalty—Life Interest—Remainder to First and other Sons.]—Bequest of personal estate to A., "and to his first and other sons after him, in the usual mode of succession:"—Held, that A. took for life only. *Sparling* v. *Parker*, 29 Beav. 450.

A testator bequeathed moneys, lent on mortgage, to A. for life, with remainder to his "first and other sons." The will also contained devises of fee simple, freehold and chattel lands to the first and other sons of A. successively:—Held, that the first son of A. took the whole mortgage money absolutely. *Staunton, In re*, 14 Ir. Ch. R. 98.

—— **To A. and B.—Remainder to their respective Eldest Sons, and so on in Succession.**]—A testator bequeathed the life use of all his funded property, moneys, and securities for money, to his sons A. and B., share and share alike for their lives, with power to them to invest it; and after their respective deaths he directed the issues and profits to arise therefrom to go to their respective eldest sons born in wedlock, share and share alike, for and during each of their natural lives and life, and so on to the eldest sons of the eldest sons born in wedlock in succession, share and share alike, on their attaining their respective ages of twenty-one, subject to certain bequests, with cross limitations to A. and B., if they both died without male issue, among their female issue as they should respectively appoint. There was no son of A. born at the testator's death:—Held, to carry out the general intent, that the will must be construed to give the eldest son of A., who was born after the testator's death, an estate tail in real estate, and therefore that he took an absolute interest in his share of the testator's personal property. *Cleary, In re*, 16 Ir. Ch. R. 438.

iv. *Children as a Word of Limitation.*

Realty—Gift to Parent and Children—Rule in Wild's Case.]—A devise to J. and his children; if he has then children, they take with their father; but if he has none, it is an estate tail. *Cook* v. *Cook*, 2 Vern. 545.

When there is a devise of land to "A. B. and his children," and at the time of the devise he has no child, the word children is primâ facie a word of limitation, and the first taker shall have an estate tail; if he has children it is primâ facie a word of purchase, and gives a joint estate to him and his children as purchasers. But either of these constructions may be defeated by the plain intention of the testator, to be collected from the whole of the will. *Byng* v. *Byng*, 10 H. L. Cas. 171; 31 L. J., Ch. 470; 7 Jur. (N.S.) 1135; 7 L. T. 1; 10 W. R. 633. Affirming *S. C.*, nom. *Webb* v. *Byng*, 8 De G. M. & G. 633; 2 K. & J. 669.

A testatrix, in a holograph will, gave "in trust to my executors for my niece, B., and her children, all my Quendon Hall estates in Essex, provided she takes the name of Cranmer and arms, and her children, with my mansion-house, furniture, plate, books, linen, Archbishop Cranmer's portrait by Holbein, India cabinet, striking watch, and my diamond earrings as heirlooms, with my estate." The niece died before the testatrix, leaving several children:—Held, that children was a word of flexible meaning, and that on the whole context of this will it must be read as a word of limitation, so that the eldest son of the niece took an estate tail in the devised property. *Ib.*

Observations on *Wild's Case* (6 Co. Rep. 17). *Ib.*

A testator by a will made in 1823 gave "the whole of my landed property, situate, &c., to my eldest son H. W., and to his children lawfully begotten. In case of his dying without issue male or female I give the same landed property to my second son C. In case of C. dying without children or child lawfully begotten, I give the same landed property to my daughter Harriet and to her child or children lawfully begotten; and should she have no children, she shall have a power of bequeathing it to whomsoever she pleases. I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property, to dispose of it by their will and testament to one, or to each, of their children, in such manner and in such proportions as to each of them, my children, shall seem meet and right and proper. My reason for this is that as there is a title of baronet in the family the eldest son ought to possess something more than the others, and also that I never wished to encourage disobedient children, therefore I leave the power of punishing or rewarding, as each of them coming into possession of the property, and having children, shall think right." H. W. never had a child. C. died during the life of his elder brother, but left a daughter. H. W. after entering into possession disentailed the estate, and devised it to his wife's nephew:—Held, that H. W., by virtue of the rule in *Wild's Case* (6 Co. Rep. 17) took an estate tail under the will; that the existence of the power did not affect the application of the rule, nor was it affected by the use of the word "children"—in one instance applicable to the sons and daughter of the testator, and in the other instance meaning their sons and daughters. *Seale* v. *Barter* (2 Bos. & P. 485; 5 R. R. 676) approved. *Clifford* v. *Koe*, 5 App. Cas. 447; 43 L. T. 322; 28 W. R. 633—H. L. (Ir.)

The rule in *Wild's Case* (6 Co. Rep. 17), even

if only a rule of construction, is not now to be departed from. *Ib.*

It is consistent with that case that the primary sense of the word "children" is issue of the first generation. That primary sense is displaced when circumstances render the rule in *Wild's Case* (6 Co. Rep. 17) applicable, on which the word becomes a word of limitation and not of purchase. *Ib.*

The rule in *Wild's Case* (6 Co. Rep. 17) is not inflexible, and will not be applied where its application would defeat the manifest intention of the testator as collected from the whole will. *Grieve* v. *Grieve*, 36 L. J., Ch. 932; L. R. 4 Eq. 180: 16 L. T. 201; 15 W. R. 577.

Devise of house to A. and B., and to their children, and if they have not any, to C. and his children, the furniture to go with the house. A. and B. had no children at the date of the will:—Held, that having regard to the terms of the will, and particularly to the direction as to the furniture, to apply the rule in *Wild's Case*, and thereby give A. and B. estates tail, would defeat the intention of the testatrix; that in such case it was not imperative to apply the rule; and that A. and B. took the house and furniture for their respective lives, with remainder to the children of each coming into esse during such lives. *Ib.*

—— **Where construed Estate for Life and Remainder.**]—Devise to M. J., and to all and every the child and children, whether male or female, of her body lawfully issuing, and unto his, her, and their heirs as tenants in common:—Held, M. J. took estate for life, with remainder to her children as tenants in common. *Jeffery* v. *Honywood*, 4 Madd. 398.

On a devise of lands to testator's sisters, M. and L., share and share alike, "and, in case of their demise, their respective shares to be equally divided amongst their children or lawful heirs":—Held, that they took an estate only for life, with the remainder to their children in fee as tenants in common, and as to one of them, not married, her share, not being disposed of, would, in the event of her not having any child, descend to the heir-at-law. *Bowen* v. *Scowcroft*, 2 Y. & C. 640; 7 L. J., Ex. Eq. 25.

Lands held under leases for lives perpetually renewable were devised in 1853 to M. (who did not marry till after the death of the testatrix), and to any child or children she might have, in such shares, &c., as she should appoint; and in default of appointment, among such children equally, if more than one, as tenants in common, "and to their respective heirs and assigns," and if but one, to such one, his or her heirs and assigns, upon sons attaining twenty-one, and daughters twenty-one or marriage; "and in default of any such issue," or, there being such, all should die under age or unmarried as aforesaid, over absolutely. By a codicil the testatrix vested her lands in trustees "to preserve the several contingent remainders in my will mentioned," and to procure renewals or fee-farm grants of the premises:—Held, that M. took only an estate for life. *Moyles, In re*, 1 L. R. Ir. 155.

A testator bequeathed all his estate (which consisted wholly of personalty, or of real estate distributable as personalty) to his wife absolutely, "for the benefit of herself and children"; and appointed her executrix. He left his wife and six children surviving. The widow proved the will and died. During her lifetime one of the children, a daughter, married and died:—Held, that the children took as joint tenants whether in remainder or otherwise, and semble, that the wife took only an estate for life. *Armstrong* v. *Armstrong*, 38 L. J., Ch. 463; L. R. 7 Eq. 518; 20 L. T. 776; 17 W. R. 570.

Where a testator devises property to his wife, for the benefit of his wife and children, the court will anxiously lay hold of any slight circumstance which will enable it to construe the gift as an estate for life to the wife, remainder to the children, and not as creating a joint tenancy. *McVickers' Contract, In re*, 25 L. R. Ir. 307.

—— **Fee Simple and Executory Devise.**]—Where there was a devise to R. B. and J. B., as tenants in common, "and in their respective proportions to their children, or according to their wills"; and at the date of the will J. B. had children, but R. B. had none:—Held, not to be a devise of estate tail, or a gift to the children together with their parent, but to be a gift in fee simple to R. B. and J. B. as tenants in common, with a superadded executory devise at the death of each to his children or to his devisees. *Buckmaster's Estate, In re*, 47 L. T. 514.

Personalty—Gift to Parent and Children—Rule.]—Where there is a gift to parents and children, and there are children living at the time, it is a gift to all (per capita) as tenants in common. If there be no children living, the parents take for life, with remainder to the children. *Paine* v. *Wagner*, 12 Sim. 184.

Where a testator gives property to a parent and his children simpliciter, and he has children then in esse, the parent and children take together, either jointly or in common; but if there be superadded words importing a settlement, the parent takes for life, with remainder to his children. *Mason* v. *Clarke*, 17 Beav. 126; 22 L. J., Ch. 956; 17 Jur. 479; 1 W. R. 297.

Bequest "to A." (who was enceinte at the time) "and her children":—Held, that A. and her children took as joint tenants, and no child having survived the testator, that A. was absolutely entitled to the legacy. *Ib.*

Children is a word of purchase, and not of limitation, except it is to comply with a testator's intention, and it can take effect no other way.

Where testator devised four parts of his personal estate to B., and the children born of her body, and B. had no child at the date of the will, but had one child born afterwards, and B. died in testator's lifetime:—Held, that the legacy was not lapsed, for B. did not take an estate tail but as a joint tenant with the child, and that the child took the whole by survivorship. *Buffar* v. *Bradford*, 2 Atk. 220.

—— **When Parent and Children take Jointly.**]—Where the will contained a clause, "observing that F. B. and his family are my residuary legatees for all but cash or moneys so called":—Held, that F. B. and his children took the residue as joint tenants, and that long annuities, Columbian bonds, and a promissory note were not within the exception of cash, &c. *Beales* v. *Crisford*, 13 Sim. 593; 13 L. J., Ch. 26; 7 Jur. 1076.

A husband gave all his real and personal estate to his wife for the use and benefit of

herself and all his children, whether born of his former or of his present wife, and he appointed his wife and three other persons his executors:—Held, that the wife and children took as joint tenants. *Newill* v. *Newill*, 41 L. J., Ch. 432; L. R. 7 Ch. 253; 26 L. T. 175; 20 W. R. 308.

Held, that a bequest of 30*l.* a year to A., together with her children B., C. and D., and for their joint maintenance, was a bequest of that annual sum to the mother and her children, as joint tenants, for the life of the longest liver of them. *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372; 12 L. J., Ch. 420; 7 Jur. 572.

A testator gave to his wife all his copyhold, freehold, and personal estate for her absolute fee for ever and ever, and to her heirs, executors, administrators, and assigns, also all his personal, leasehold, and general possessions to and for her use, and for the use of his children, and authorised her to appropriate any part for her immediate use, and for that of her children:—Held, that the wife and children were joint tenants, with a power to the wife to appropriate the property on the testator's death for a pressing exigency. *Curtis* v. *Graham*, 10 L. T. 734; 12 W. R. 993.

A testator gave all his property for the use and benefit of his wife and children, as his trustees should think proper, during the widowhood of his wife; nevertheless it was his desire, subject to a sum to be set apart for his daughters, that all the rest should be equally divided between his wife and children on their severally attaining the age of twenty-one, and his wife continuing his widow and unmarried. The testator left his wife and nine children:—Held, that the property was divisible into tenths, each of the children being entitled to one-tenth upon their respectively attaining twenty-one, the widow during widowhood receiving the income of the shares of minors, and applying them for their benefit. *Salmon* v. *Tidmarsh*, 5 Jur. (N.S.) 1380.

—— **When Parent takes for Life.**]—The rule in *Wild's Case* (6 Co. Rep. 17) is not applicable to personal estate. *Audsley* v. *Horn*, 1 De G. F. & J. 226; 29 L. J., Ch. 201; 6 Jur. (N.S.) 205; 8 W. R. 150. Affirming 26 Beav. 195.

Personalty was bequeathed to the testator's daughter during her life, and at her death, to her daughter, and to the granddaughter's children, but if they should die without issue then over. The granddaughter was unmarried at the dates of the will and of the testator's death, and had no child till after the death of the testator's daughter:—Held, that the granddaughter took a life interest in the subject-matter of the bequest, with remainder to her children. *Ib.*

Where both a parent and his children are objects of a bequest of personalty the tendency of modern decisions is to construe the limitations as a gift to the parent for life, with remainder to his children. *S. C.*, 26 Beav. 195.

Testator by his will, which was not attested so as to pass real estates, declared that his property, with what she was entitled to, should produce for his wife an annuity of 100*l.*; to each of his two daughters 100*l.* per annum, for "themselves and their children"; and bequeathed the residue of his property to his son W. Subsequently M., one of the daughters, died, and by a codicil the testator directed the 100*l.* per annum, &c., provided for M., to be equally divided between W. and J. L., the other daughter. By a second codicil he directed that, in the event of W.'s death without issue male, then after the decease of his (the testator's) wife and J. L., his remaining property should go over. J. L. had no children at the date of the will, or at the time of the testator's death, nor did she take any other benefit under the will and codicil than those mentioned:—Held, that J. L. took only a life interest in the respective gifts to her. Semble, that if it had rested on the will alone she would have taken a perpetual interest in it. *Heron* v. *Stokes*, 3 Dr. & War. 89; 1 Con. & L. 270; 4 Ir. Eq. R. 284.

Semble, the rule in *Wild's Case* (6 Co. Rep. 17) is inapplicable to bequests of personal estate. *Ib.*

Bequests "to A. and her children," expressed in another part of the will as a gift "to A. and her family":—Held, that A. took for life. *Ward* v. *Grey*, 26 Beav. 485; 29 L. J., Ch. 74; 7 W. R. 569.

Legacies to A. and "to the heirs of his body"; to B., "to be secured to her and the heirs of her body"; to T., and "to her issue," are absolute legacies; but legacies to S., and "to her heirs (say children)," give S. only a life interest. *Crawford* v. *Trotter*, 4 Madd. 361; 20 R. R. 312.

Testator gave to his daughter and her children 5,000*l.*, 3,000*l.* to be paid in one year after his decease, and 2,000*l.* after the decease of his wife, and appointed A. B. trustee of those sums for his daughter and her children. The court declared the 5,000*l.* to be in trust for the daughter for life, and after her decease for all her children, whether born in the testator's lifetime or after his decease. *Morse* v. *Morse*, 2 Sim. 485; 29 R. R. 147.

Held, that under a bequest of 40,000*l.* to Lord H., and his children, to be secured for their benefit, Lord H. took for life with remainder to his children, and not as joint tenant with them. *Vaughan* v. *Headfort (Marquis)*, 10 Sim. 639; 9 L. J., Ch. 271; 4 Jur. 649.

A father directed that the share of his daughter should accumulate during the life of her husband and after his death, if there should be any children living, "it should be secured for their benefit and that of their mother;" if no children, that it should go to the daughter absolutely:—Held, that after the death of her husband the daughter was entitled to the income for life, and with remainder to her children. *Combe* v. *Hughes*, 41 L. J., Ch. 693; L. R. 14 Eq. 415; 27 L. T. 366; 20 W. R. 793.

A mother gave 1,400*l.* to trustees in trust to pay the income to M. for life, and the capital to her children (excluding her two eldest sons) who should survive her and attain twenty-one. She also gave 1,500*l.* to each of her two eldest sons, and the residue to M. and such of her children, including the two eldest sons, as should attain twenty-one:—Held, that the wife took a life estate in the residue, with remainder to such of her children as should attain twenty-one. *Owen, In re*, L. R. 12 Eq. 316; 25 L. T. 489.

Bequest of money in the funds to A., in trust for B., an infant, and for such younger son or sons as B. shall have, equally to be divided between them; and, in case there shall be but one younger son, then the whole to him:—Held, that B. took only a life interest, subject to which his younger children took the whole. *Garden* v. *Pulteney*, 2 Eden, 323; Ambl. 499.

A husband who died in 1853, possessed of

chattels real, and leaving a widow and seven children, of whom six were minors, by his will of 1837 bequeathed all his property to her, should she continue unmarried, for the benefit of herself and his family. If she married again, she was to receive 100*l.*, and the remainder of his property was to be divided share and share alike among his children and the survivors of them. He appointed his wife to execute his will according to the real meaning and spirit of what was thus specified, and recommended her to be guided by the advice of the Rev. H. H. in all matters relating to the disposal of his property and the education of the children, and the advancement of their well-being in society :—Held, that the children took no interest in possession, but that the widow took a life interest during widowhood, with a power of appointment, among the children, who, in default of appointment, would take as tenants in common. *Mill* v. *Mill*, Ir. R. 11 Eq. 158—C. A.

H. devised an estate at L. to M. for life, with remainders over (which failed), with an ultimate remainder to M.'s own right heirs. On the death of H., M. entered into possession, and in 1839 part of the estate was taken by a poor-law union, under the compulsory powers of the 5 & 6 Will. 4, c. 69, and the purchase-money paid into court. M. devised her estates at L. to W. for life, with remainder to her own right heirs, W. being such right heir ; and M. then bequeathed the dividends of the fund in court to W. for life, and after bequeathing legacies, and referring to the surplus of her effects and moneys, she, subject to the payment of debts and to the life estate, bequeathed the same to the children of W., as tenants in common, to be paid to them at twenty-one :—Held, that W. had only a life interest in the fund in court, and that on his death his nine children were entitled to it. *Horner's Estate, In re*, 5 Jur. (N.S.) 996 ; 7 W. R. 595.

—— **When Parent takes Absolute Interest.**] —Bequest of 1,000*l.* to A. S., and the children that may be lawfully begotten of her body ; A. S., being unmarried at the death of the testatrix, takes the legacy absolutely. *Read* v. *Willis*, 1 Coll. C. C. 86 ; 8 Jur. 165.

On a bequest to the testator's daughter for life, and on her death to his son and his children ; the son had no child at the death of the testator but had children living at the death of the daughter :—Held, that the son was entitled absolutely, and that his children were neither joint tenants nor entitled in remainder after him. *Scott* v. *Scott*, 15 Sim. 47 ; 14 L. J., Ch. 439 ; 9 Jur. 580.

Testator gave 200*l.* to each of his nieces and their children, to be paid within nine months after the death of his wife, amongst his nieces and their children as his wife should by will appoint. The wife died without having made any appointment. The executors, within nine months after her death, paid the legacies to her nieces. They afterwards died without having had any children :—Held, that the payment was properly made. *Pyne* v. *Franklyn*, 5 Sim. 458 ; 2 L. J., Ch. 41. And see *Crawford* v. *Trotter*, supra, col. 782.

Personalty—Gift to Parent for Separate Use.] —Testator gave 500*l.* "to the sole uses of N., or of her children for ever." N. took an interest for life in the 500*l.*, and it belonged to her children after her death. *Newman* v. *Nightingale*, 1 Cox, 341.

A testator gave a sum of money in trust for his daughter, a married woman, so as not to be subject to the debts, acts, or control of her husband ; and gave an equal sum to a second daughter (also married), "in trust, as aforesaid, for the use of herself and children" :—Held, that the second daughter took an estate for her separate use for life, with remainder to her children. *French* v. *French*, 11 Sim. 257.

Testator directed that the legacies given by his will to females, married or single, should be for their own benefit and their children, and should never be subject to the control of their respective husbands :—Held, that the females took for their lives, for their separate use, with remainder to their children. *Bain* v. *Lescher*, 11 Sim. 397.

The testator, by his will, gave to his niece E. G., wife of Captain G., the sum of 7,000*l.*, and "to her heirs, for her separate use ; this sum of 7,000*l.* to be invested in consols in the names of A. and B., who were appointed trustees of the donation, to receive the interest of the stock, and to be answerable for the stock, for the use of E. G. and her children, and to apply it most conducive to their interest ; E. G. to pay her mother during her life the sum of 40*l.* per annum" :—Held, that E. G. was entitled for life, with remainder to her children born at and after the death of the testator. *Ogle* v. *Corthorn*, 14 L. J., Ch. 337 ; 9 Jur. 325.

Bequest to a married woman for the benefit of herself and such children as she then had, or might thereafter have by her then husband, free from the control of her husband :—Held, that she took for life, with remainder to such children. *Jeffery* v. *De Vitre*, 24 Beav. 296.

A testator, having by her will given a legacy of 5,000*l.* to a married daughter, made a codicil revoking the legacy, and, in lieu thereof, gave 2,500*l.* to her husband, and 2,500*l.* in trust for the daughter and her children, free from all debts or liabilities of her husband :—Held, that the daughter was entitled to the income of 2,500*l.* for her life, with remainder to all her children as to the capital. *Froggatt* v. *Wardell*, 3 De G. & Sm. 685 ; 14 Jur. 1101.

Bequest of the interest of 500*l.* to A. for life, and as to the principal after the death of A., and as "to all other property belonging to me that I may die seised and possessed of or entitled unto, in trust for the use, benefit, and behoof of" B. and her children, "without the control or intermeddling of her husband, and to be paid in such manner as my trustees shall in their discretion think fit" :—Held, that B. took a life interest in all the property, with remainder to all her children born in A.'s lifetime, before and after the death of the testatrix. *Scott* v. *Scott*, 11 Ir. Ch. R. 114.

Testator bequeathed his residue in trust for his daughter Sarah and her children, independently of her husband, and her receipts alone, notwithstanding her coverture, to be from time to time a sufficient discharge :—Held, that the daughter and her children living at the testator's death were entitled to the residue in joint tenancy. *De Witte* v. *De Witte*, 11 Sim. 41 ; 9 L. J., Ch. 270 ; 4 Jur. 625.

A gift of residue to A., subject to the life interest in B., "for her own benefit and her children, or one only child, if she should have any," creates a joint tenancy between A. and her children, and not a life interest to her with remainder to children. *Fisher* v. *Webster*, 42

L. J., Ch. 156; L. R. 14 Eq. 283; 26 L. T. 765.

A testator directed the trustees of his will to convert and hold the proceeds of his residuary estate upon trust as to one moiety to pay one-fifth to each of four persons respectively, and the remaining one-fifth to the widow of his nephew, "for the sole and separate use of herself and her family by my late nephew," and directed that their, his, or her receipt in writing should be a sufficient discharge for the payments aforesaid; the trustees brought into court the share left to the widow, and she petitioned for payment out of the fund:—Held, that she and her children took as joint tenants, and that she was entitled to only one-fifth of the fund, and to be paid the income of the remaining four-fifths for the maintenance and education of the children. *Newsom, In re*, 1 L. R. Ir. 373.

—— **When Words used importing Succession.**]—Devise of a copyhold to trustees and the survivor of them, and the executors and administrators of such survivor for ever, upon trust, out of the rents and profits, to pay certain yearly charges, and the residue to T. for life; and from and after his decease, to pay the residue as aforesaid to T.'s children, and so on for ever; and for want of children lawfully begotten, to the testatrix's daughters:—Held, that T. took an equitable estate tail under this devise. *Trash* v. *Wood*, 4 Myl. & Cr. 324; 9 L. J., Ch. 105; 4 Jur. 669.

Testator, by his will, directed that the profits of his share of a leasehold colliery should, during the time that the same was worked or workable, be equally divided amongst "his wife and children, and their children after them respectively":—Held, upon the construction of the whole will, that the words "their children after them respectively" were words of limitation. *Snowball* v. *Procter*, 2 Y. & C. C. C. 478; 7 Jur. 619.

Under a testamentary gift "to my brother B. and to his children in succession":—Held, that B. took an estate tail in the freeholds, and an absolute interest in the leaseholds and general personal estate. *Tyrone* (*Earl*) v. *Waterford* (*Marquis*), 1 De G. F. & J. 613; 29 L. J., Ch. 486; 6 Jur. (N.S.) 567; 8 W. R. 454.

A father gave freehold, copyhold, and leasehold estates to his daughter for life, and should she live to become marriageable, leaving a child or children, for the support and maintenance of such child, if there was only one, and if more than one in fair and equal proportions, "for and during the term of their natural lives, and in like manner to their children and children's children, each family having among them the father's or mother's share," with a gift over on the death under twenty-one or before marriage of his daughter:—Held, that the daughter took an estate for life only, and not an estate tail. The limitations after the daughter's life estate were not all void, but her children (if she left any) would take life estates. *Hampton* v. *Holman*, 46 L. J., Ch. 248; 5 Ch. D. 183; 36 L. T. 287; 25 W. R. 459.

Bequest of money to be invested in trust to "pay the dividends and premiums to accrue therefrom for the use of the children of my brother H., share and share alike, and after their decease to be continued to their children":—Held, that the children of H. took life estates only, and there being no gift over, the grandchildren took the principal sum. *Hyde* v. *Cullen*, 1 Jur. 100.

Gift over on Death without Children.]—A devise and bequest of freehold and chattel interests to M. M. for life, and in case he should die unmarried, or without children, to revert for the residue of their different periods to T. H.:—Held, that M. M. took an estate for life only. *Egan* v. *Morris*, Ll. & G. t. Plunk. 297.

A testator, the father of two daughters, who were his only children, gave his estate, real and personal property, equally between them, with a declaration that the share of his daughter A. should devolve, in case of her dying without children, to his daughter B. and her children. A. was married at the date of the will, but had no children; B. was at that time married and had two children. A. died without ever having had a child:—Held, that she was entitled to an estate tail in the real estate, and was absolutely entitled to the personalty. *Bacon* v. *Cosby*, 4 De G. & Sm. 261; 20 L. J., Ch. 213; 15 Jur. 695.

A testator, by his will dated in 1836, gave all his leaseholds and freeholds to his three daughters, share and share alike; but if either of his daughters should die leaving no lawful child or children, their share or shares to go to his surviving daughters, share and share alike, to them and his (the testator's) heirs for ever:—Held, that each daughter took an estate tail in her share of the freeholds, and an absolute interest in her share in the leaseholds. *Fenn* v. *Savory*, 2 W. R. 345.

c. Issue.

Issue construed Children.]—"Lawful issue" in a will held, upon the context, to mean "children," and that to the exclusion of "grandchildren" born prior to the period of distribution. *Edwards* v. *Edwards*, 12 Beav. 97.

The word "issue," in a will, may be held to mean children when such is the manifest meaning of the testator. *Ridgeway* v. *Munkittrick*, 1 Dr. & War. 84.

Upon a bequest of personal estate to the testatrix's sisters, or in case of any one dying and leaving issue, the share to go to such child or children equally; all the sisters died in the lifetime of the testatrix, without leaving any issue, except one, who left two grandchildren:—Held, that the word "issue" meant child or children, and that, in the events that happened, the estate of the testatrix was undisposed of. *Goldie* v. *Greaves*, 14 Sim. 348.

A devise to the issue of A., and for want of such issue to B.; A. has a son and a daughter: they shall take as persons described, but shall take only an estate for their lives. *Cook* v. *Cook*, 2 Vern. 545.

Testator directed his trustees to sell his real and personal estate, and to pay the interest of the proceeds to his daughter for life, and, after her death, to assign the principal and the parts of his real and personal estate remaining unsold (if any) to her children when they should attain twenty-one; and if his daughter should die without leaving issue, or leaving issue, all of them should die under twenty-one and without issue, then to assign the proceeds, and the parts of his real and personal estate remaining unsold (if any), to his personal representatives, his, her, or their heirs, executors, administrators, and assigns. The daughter, who was the testator's next of kin at his death, died without having had a child:—Held, that by "issue" the testator meant "children"; and that the persons who

were his next of kin at his daughter's death were entitled under the ultimate trust. *Minter* v. *Wraith*, 13 Sim. 52.

Where the testator by one clause gave one-sixth of the residue to and amongst the children of his late sister, and by a subsequent clause another one-sixth to her sister for her life, and after her death to and amongst her issue, in like manner as expressed before concerning the children of I. :—Held, that the word issue was to be construed to mean children, but that under neither clause could a grandchild take by way of substitution for its parent. *Peel* v. *Catlow*, 9 Sim. 372; 7 L. J., Ch. 273; 2 Jur. 759.

A testator provided that if "his daughter should have no issue male of her body living at her death, or no such issue male as should be entitled by the true meaning of that his will to his real estates thereby limited, then and in either of those cases he devised the estates" to the daughters of his daughter living at her death :—Held, that the daughters of the daughter did not take any estate under the limitations in the will, for that the words "living at her death" applied to both branches of the proviso, and that the contingency on which the daughters were to become entitled determined at the death of their mother. *Eden* v. *Wilson*, 4 H. L. Cas. 257. Reversing *Wilson* v. *Eden*, 12 Beav. 454.

A testator gave a moiety of his residuary estate, as well real as personal, upon trust to pay the income equally amongst all his children, who should be living when his youngest child attained twenty-one, for their respective lives, and after the death of any of them, as to an equal portion of the moiety proportionate to the number of his children then living, for the use of the issue of such child or children so dying, absolutely for ever: — Held, that the word "issue" included only children of the testator's children, to the exclusion of their more remote descendants. *M'Gregor* v. *M'Gregor*, 1 De G. F. & J. 63.

Testatrix bequeathed a fund upon trust, in the events which happened, for her son for life, and then "in trust for and to be equally divided between all and every my nephews and nieces who shall be living at the time of the death of my said son as aforesaid, and the issue of such of them as shall then be dead leaving issue as tenants in common, such issue nevertheless taking only the share or respective shares which the deceased parent or parents would have taken if living" :—Held, first, that "issue" ought to be confined to children; secondly, that the issue took as tenants in common inter se. *Smith, In re*, 58 L. J., Ch. 661.

A. conveyed freeholds to trustees and their heirs for his wife during widowhood, and afterwards to convey and divide "such estate and premises" amongst the children and the issue of their children who should be then living as tenants in common (the issue of any deceased child to take their parents' share) :—Held, that "issue" must be read children. *Tatham* v. *Vernon*, 29 Beav. 604; 7 Jur. (N.S.) 815; 4 L. T. 531; 9 W. R. 822.

A testator gave legacies to his nieces, with power to his executors to settle them on his nieces for life, and at their deaths for the benefit of their "issues." He also gave them his residue, with like power to settle it on his nieces, and for the benefit of "their respective children," as provided with respect to the legacies :—Held, that "issues" must be construed "children," and that the children of nieces took, to the exclusion of grandchildren. *Baker* v. *Bayldon*, 31 Beav. 209.

A testatrix gave a fund to trustees, upon trust to pay the dividends to her niece; and after her decease if her husband should survive her, and she should leave no "issue" living at her decease, then to the husband for life; but if she should leave "issue," then upon trust to pay a moiety of the dividends to the husband, and to apply the other moiety, during his life, for the benefit of "such issue" during their minorities. After the decease of the niece as to one moiety of the fund, and after the decease of the survivor of her and her husband then as to the whole of the fund, the trust was to transfer and divide the same unto and amongst the "children" of the niece, the shares of sons to be vested at twenty-one, and of daughters at that age or marriage with consent, with survivorship in case of the death of any child before his portion should become vested, with a provision for maintenance for "children" during minority; and in case the niece should die in the lifetime of the husband leaving issue, and all should die and unmarried, then the trust was to pay the whole of the dividends unto the husband, "and from and after the decease of my said niece and her husband, and the survivor of them, and failure of issue of my said niece, upon trust to transfer the fund to other persons" :—Held, that the word "issue" in previous parts of the will obviously meant "children," and that the gift over on failure of "issue" meant a failure of "children," and that the gift over took effect. *Bryan* v. *Mansion*, 5 De G. & Sm. 737; 22 L. J., Ch. 233; 17 Jur. 202.

A testator by his will gave a fund to trustees "in trust for the lawful issue of F. H. surviving him, equally to be divided between them if more than one, . . . and if but one then for such only child," with a gift over "in default of issue of F. H. becoming entitled." The issue of F. H. who survived him were a son, a daughter, four children of the son, and six children of a deceased daughter :—Held, that by the use of the word "child" the testator had himself interpreted the word "issue," and that the word "issue" must be restricted to children, and the fund go in moieties between the surviving son and daughter. *Hopkins, In re*, 47 L. J., Ch. 672; 9 Ch. D. 131; 26 W. R. 629.

—— **Construed all Descendants.**] — Upon a legacy to the issue of A., all descendants are entitled, and take per capita as joint tenants. *Davenport* v. *Hanbury*, 3 Ves. 257; 3 R. R. 91.

The word "issue," unconfined by indication of intention, includes all descendants. Intention necessary to restrain it to children; grandchildren therefore entitled with children per capita. *Leigh* v. *Norbury*, 13 Ves. 340.

Grandchildren entitled under a bequest to issue. *Freeman* v. *Parsley*, 3 Ves. 421.

Issue not confined to children, but includes grandchildren. *South* v. *Searle*, 2 Jur. (N.S.) 390; 4 W. R. 470.

Bequest to A. for life, and after her death, if she shall die leaving legitimate issue, upon trust to transfer the fund amongst such issue towards their education and maintenance at the discretion of the trustees, with a gift over if A. should die leaving no legitimate issue :—Held, that the word "issue" was not cut down to children, and that all the issue living at the death of A.

took per capita. *Jones's Trusts, In re*, 23 Beav. 242.

Gift to "issue" after the death of a tenant for life held to include issue of every degree. *Maddock* v. *Legg*, 25 Beav. 531.

Bequest to persons for life, and after their death unto their and each of their issue, and the survivor or the survivors of them, on their severally attaining twenty-one, in equal proportions. On the death of the last tenant for life, there were three generations of issue living:—Held, that all who survived and attained twenty-one participated in the fund. *Ib.*

A will made in 1794 contained the following gift over: "But if my daughter happens to die without issue, then in such case, at the decease of my daughter, I give and bequeath the said sum to my two daughters, S. and E., equally to be divided between them, share and share alike, if then living; but if either of my daughters, S. and E., should be then dead, then I give and bequeath the share of my daughter so dying to her issue, equally to be divided among them if more than one":—Held, that the word "issue" did not confine the gift to the children of the testator's daughters, but that the remoter issue were also entitled. *Weldon* v. *Hoyland*, 6 L. T. 96—L.C.

Bequest of leaseholds to four for life, remainder to their issue as tenants in common. Devise of other estates to the same four, remainder to their children as tenants in common:—Held, that "issue" must be construed children and grandchildren, and "children" confined to its strict signification. *Waldron* v. *Boulter*, 22 Beav. 284.

Bequest of a fund in trust for A. for life, and after her death to pay the capital among all the issue of A., in case she should marry, in equal shares, and in case she shall have no issue living at her death, then over:—Held, to be a gift to such of the children of A. as should survive her, and the issue of such of her children as should die before her. *Courthorpe* v. *Wood*, 2 Jur. 126.

Where there were bequests to L. for life, and after her death for her issue:—Held, that the children of the deceased children of L. were entitled to share with her surviving children in the property. *Louis* v. *Louis*, 9 Jur. (N.S.) 244; 7 L. T. 666.

A husband gave his residuary real and personal estate to trustees to convert and invest, and pay the income to his wife during widowhood, or until his son should attain twenty-two, and then to call in half the money invested and pay it to his son, and as to the other half to pay the income to the wife during widowhood, and then to his son for life, and afterwards to his lawful issue:—Held, that the children and remoter issue of the son living at his death took together as joint tenants. *Corlass, In re*, 45 L. J., Ch. 118; 1 Ch. D. 460; 33 L. T. 630; 24 W. R. 204.

Devise of lands to all the children of A. and B. his wife, "already or hereafter to be born" of their bodies, whether male or female, for and during their joint lives and the life of the survivor, but all the sons to take the name and arms of W. in addition to their own name, remainder to the trustees to preserve, &c.; and after their several deceases unto and equally between all their issue, male and female; and for want of such issue, over. That the word "issue" is nomen collectivum, and takes in the whole class of descendants, and that the words "in default of such issue" must refer to all such descendants; and consequently, rejecting the words which create a tenancy in common among the issue, the first taker would have an estate tail. *Woodhouse* v. *Herrick*, 1 K. & J. 352; 3 Eq. R. 817; 24 L. J., Ch. 649; 3 W. R. 303.

Bequest of leaseholds in trust for F. for life, and after his decease for the issue of the body of F. if any such there should then be. If F. died before twenty-one, or afterwards without issue, gift over:—Held, to confer a life interest in F. with a gift over to his issue, meaning descendants who should be living at his death as joint tenants. *Hill* v. *Nalder*, 22 L. J., Ch. 242; 17 Jur. 224.

B. devised copyholds to his sons G., J., and F., upon certain trusts during the life of his wife, and after her death upon trust to pay the rents equally between his three daughters, R., M., and H., or to sell the same and invest the produce as therein mentioned, and to pay it to his three daughters during their lives for their separate use, and upon further trust "that in case my daughters shall depart this life leaving lawful issue," then the trustees should appropriate "the share of such daughter or daughters to the maintenance and education of such child or children until the age of twenty-one," and directed that his copyhold estates or their produce should be divided amongst "the whole of my grandchildren, share and share alike, in case there should be no lawful issue but of one of my daughters, that is, the children of George, James, and Frederick, with the child or children of only one of my daughters, share and share alike," and directed that his trustees should then sell if they had not before done so, the produce to be divided amongst such grandchildren, share and share alike, and as they should respectively attain the age of twenty-one; but should he have no grandchildren or not one who should attain the age of twenty-one, then the estate was to go to K., and as to all the rest, residue, and remainder of his estate and effects, he devised and bequeathed the same to his wife for her own use. All the daughters survived their father; R. died without leaving children; H. died leaving children; M. died having survived her children, but leaving grandchildren:—Held, that the word "issue" was to be read in its widest sense, and would include grandchildren, and that the respective issue of M. and H. took their respective shares by implication, and that they took per capita. *Mitchison* v. *Buckton*, 32 L. T. 11; 23 W. R. 480.

A testator left property on trust for his widow for life, and after her death upon trust for his brothers and sisters A., B., C., D., and E., but in case any of them should die leaving lawful issue, he directed that the share or shares of him, her, or them so dying should go to his, her, and their respective issue. A. and B. died before the testator, leaving issue. D. and E. died after the testator, but before his widow, and left issue:—Held, that issue included remoter descendants as well as children. *Hobgen* v. *Neale*, 40 L. J., Ch. 36; L. R. 11 Eq. 48; 25 L. T. 681; 19 W. R. 144.

Issue of Issue Construed Children.]—Where, upon the decease of the testator's "children," the estate was given to the "issue" of such "children," and where it was given over in case the testator's "children" should die "without leaving issue," and in like uses of the word "issue," the word "issue" must be read "child or children,"

although in other parts of the will it might be necessary to read the word "issue" in a different sense. *Williams* v. *Teale*, 6 Hare, 239.

Gift of personal estate to C. during her life, and after her decease among all her children and their issue, such children and their issue to be entitled, as amongst themselves, to the benefit of survivorship, and accruer of surviving shares: —Held, that the children and grandchildren of C. took as tenants in common. *Law* v. *Thorp*, 27 L. J., Ch. 649; 4 Jur. (N.S.) 447; 6 W. R. 480.

A testator gave property unto and amongst all and every the children of his sister J. who should be then living, and the issue of such of her children as should be then dead leaving issue, share and share alike, but so as such issue should have no greater share thereof than such as their, his, or her parent would have had if living. The will contained a further proviso, that if any one or more of such issue should be then dead having left issue, then the issue of such issue as should be so dead should have and receive the part or share to which their, his, or her parent would have been entitled if living:—Held, that the issue of grandchildren of J. must be confined to children. *Heasman* v. *Pearse*, 41 L. J., Ch. 705; L. R. 7 Ch. 275; 26 L. T. 299; 20 W. R. 271.

Issue joined with Word "Parent" — Construed Children.]—Where in a will, after a bequest to certain persons and the lawful issue of such of them as should be dead, it is provided that such issue are to take only the share which their deceased parents would have been entitled to if living, "issue" will be read "children." *Pruen* v. *Osborne*, 11 Sim. 132.

Though the word "issue" will comprehend all descendants, upon construction of this will it was confined to "children." *Sibley* v. *Perry*, 7 Ves. 522; 6 R. R. 183.

The testator devised and bequeathed to eight persons by name during their respective lives, and if any of them should die leaving issue his share to go to "such issue if more than one, and if only one, to such only child"; during the life of the survivor he devised and bequeathed to the issue of the eight persons then living, and directed that they should not take equally, but only their parent's shares:—Held, that "issue" meant children, and that the children of any of the eight persons dying took an estate pur autre vie in their parent's share during the life of the survivor of the eight, and that at the death of the survivor of the eight the children of each then living took their parent's share to the exclusion of grandchildren. *Bradshaw* v. *Melling*, 19 Beav. 417; 23 L. J., Ch. 603.

The word "issue" includes all remote descendants of the person whose issue is referred to, and the burden of proof lies upon him who contends the contrary; but when the word "parent" is used in reference to his "issue," it is confined to his "children"; the word "issue" in reference to the word "parent" in a substitutional gift:—Held, from the context of the will, not limited to "children." *Ross* v. *Ross*, 20 Beav. 645.

Bequest to C. R. for life, with remainder to the children of C. R. who should be living at her decease equally, and the issue then living of such of her children as might have died in her lifetime, the issue to take the share which their parent would have been entitled to had he survived C. R.; and if but one, then to take "a child's share." There was a gift over on the death of C. R., "without leaving a child or issue" generally. One of C. R.'s children predeceased her, leaving no children, but only a grandchild, who survived C. R.:—Held, that he took a child's share with C. R.'s children. *Ib.*

The word "issue," when used with the word "parent" in a will:—Held, not to extend to grandchildren, but to include only children. *Sims's Trusts, In re*, 2 W. R. 578.

A testator devised his estate and effects to trustees to pay the proceeds to his wife for life, and "after her decease to distribute and divide the whole, &c., among such of my four nephews and two nieces" (naming them) "as shall be living at the time of her decease; but if any or either of them should then be dead leaving issue, such issue shall be entitled to their father's or mother's share":—Held, that "issue" here meant children; and that the words "should then be dead leaving issue" meant, should before then have died leaving issue. *Martin* v. *Holgate*, 35 L. J., Ch. 789; L. R. 1 H. L. 175; 15 W. R. 135. Reversing 34 Beav. 79; 5 N. R. 180; 11 Jur. (N.S.) 5; 11 L. T. 501.

A testator bequeathed his residue equally to his five cousins who should be living at the time of his decease, and to the issue of such of them as should be then dead leaving issue, share and share alike, "such issue respectively, nevertheless, taking between them a parent's share":—Held, that the word "issue" was to be construed "children," and that grandchildren were excluded. *Smith* v. *Horsfall*, 25 Beav. 628. And see *Merrick's Trusts, In re*, 35 L. J., Ch. 418; L. R. 1 Eq. 551; 12 Jur. (N.S.) 245; 14 L. T. 130; 14 W. R. 473.

A testator directed the interest of the residue of his property to be paid to his three surviving daughters and his son-in-law, the husband of his deceased daughter A., and as to the principal, he directed that the same should be vested (subject to certain bequests) for the issue of his late daughter A. and the issue of his other three daughters, so that after the decease of each of his respective daughters who should die and leave any issue, such issue which said daughters should leave should be entitled to receive the share of the interest of the property which his, her, or their mother respectively would be entitled to receive, and that the principal should be disposed of and given to such issue of his daughters respectively, share and share alike, on their respectively attaining the age of twenty-one years, or if female issue, on their attaining such age or marriage, with consent of their guardians thereinafter mentioned; and if any of his said daughters should happen to die without leaving any issue, then that the share of interest which said daughter so dying would be entitled to should go to the issue of his surviving daughters and the issue of his deceased daughter A.; and the share of the principal sum whereon the same arose should go to the child or children of his said daughters; and if any of his daughters should die leaving children, and any of them should die before being entitled to receive his proportion, the surviving child or children the issue of such daughter so dying should receive it; and he appointed guardians to his said grandchildren:—Held, that "issue" meant "children." *Black* v. *Campbell*, 14 Ir. Ch. R. 92.

Issue substituted for parents construed children. *Lamphier* v. *Buck*, 2 Dr. & Sm. 484; 6 N. R.

196; 34 L. J., Ch. 650; 11 Jur. (N.S.) 837; 12 L. T. 660; 13 W. R. 767.

A testator devised a freehold in trust, to accumulate the rents for periods of not less than ten years successively at a time, at the expiration of which the accumulations to be paid to the testator's sons and daughters, or such of them as should be living at the respective periods of division; and the issue of such of them as shall have died leaving lawful issue, such issue taking their deceased parents' share, to be vested interests in the same respectively, at the age of twenty-one, and so on from time to time until the expiration of twenty-one years after the decease of the survivor of the children. And from and after the expiration of the term of twenty-one years he devised the same premises unto such of his grandchildren, and their issue, as should then stand, in respect to him, in equal degree of consanguinity, and their heirs, as tenants in common:—Held, that "issue" was to be read "children," and the word "and" to be read "or," and that the devise was neither void for remoteness nor uncertainty. *Maynard* v. *Wright*, 26 Beav. 285.

The word "issue" construed "children" by force of the gift to the issue of the issue being of their "parents'" share. *Pope* v. *Pope*, 14 Beav. 591; 21 L. J., Ch. 276.

Bequest to A. for life, with remainder to B. for life, with remainder to "all and every the issue" of A. living at the death of the survivor of A. and B., but in the event of any of A.'s "issue" dying in the lifetime of A. and B. leaving "issue," such issue to stand in the place of their "parents":—Held, that the first-mentioned "issue" was to be construed "children," and there being one daughter only of A. and two of her children living at the death of the survivor of A. and B.:—Held, that such daughter was alone entitled to the fund. *Ib.*

Devise to A. for life, and after her decease to the lawful issue then living and the children of such of them as should be then dead, in equal shares, the children of such issue to take their parents' share:—Held, that the word issue was to be construed children, and that the children of A. and the children of A.'s children who predeceased her took for life only. *Fairfield* v. *Bushell*, 32 Beav. 158.

Gift "to survivors of a class and the issue of such survivor, such issue to take parents' share only," is a gift to the parents for life, with remainder to their children, and not a substitutionary gift. *Parsons* v. *Coke*, 4 Drew. 296.

—— **Construed All Descendants.**]—A. bequeathed his residuary personal estate to his nephew and niece equally, and after their respective deaths, amongst their issue, if there should be any children to take their parents' share. But in case the nephew or niece died without issue, or leaving such they should die under twenty-one without issue, then he gave his or her share to the other of them, or his or her issue, if he or she be then dead leaving issue as aforesaid. The niece died in 1811, leaving issue; the nephew died in 1862, leaving no issue:—Held, that issue in the first part of the will meant children, but in the latter part issue generally, and that on the death of the nephew all the issue of the niece then living took per capita. *Corrie, In re*, 32 Beav. 426.

A testator bequeathed legacies to his nephews and nieces, and directed that if any or all of his nephews and nieces should have legitimate issue, that issue respectively should have possession and enjoy the bequest which he made and intended for the parents of such issue respectively; but the sums bequeathed to such of his nephews or nieces respectively as should not leave issue should go to the survivors or survivor of his said nephews and nieces, and to the issue of the same:—Held, that "issue" meant all descendants, and that the survivors of the nephews and nieces, at the time of the death of one of them, took her share absolutely. *Kavanagh, In re*, 13 Ir. Ch. R. 120.

A testator bequeathed the income of his residuary estate to his wife for her life; and after her decease, the residuary estate was to be equally divided among his brothers and sisters and the brothers and sisters of his wife. And he directed that in case of the death of any of his residuary legatees before his or her share should become payable, leaving issue, such issue should take that share equally:—Held, that the grandchildren of any of the residuary legatees who died before his or her share became payable were entitled equally with the children. *Dodsworth* v. *Addy*, 11 L. J. Ch. 382; 6 Jur. 700.

Issue Male.]—In a will, the words "failing the male issue" were, upon the whole context, construed to mean "if there shall be no son then living." *Murray* v. *Addenbrooke*, 4 Russ. 407; 8 L. J. (O.S.) Ch. 79; 28 R. R. 144.

In the absence of words to control the technical meaning, a gift to "issue male" must be confined to "males claiming through males," and that males claiming through females were excluded, and this whether it be of real or personal estate. *Lywood* v. *Kimber* or *Warwick*, 29 Beav. 38; 30 L. J., Ch. 507; 7 Jur. (N.S.) 507; 9 W. R. 88.

Issue Begotten or to be Begotten.]—Bequest to testator's brother and sisters, A., B. and C. for their several lives, share and share alike; and after the decease of either of them, then, as to the share or shares of one or either of them so dying, the testator bequeathed the same to the issue of the body or bodies of him, her, or them so dying, begotten or to be begotten by their present husbands, share and share alike for ever. Assuming that A., B. and C. took life estates only in the fund, the court was of opinion that the words "issue of the body," &c., comprehended not only children, but grandchildren, and more remote descendants of A., B. and C. *Evans* v. *Jones*, 2 Coll. C. C. 516.

Issue construed in Different Senses in the Same Will.]—The word "issue" in a will:—Held, on the context, to have two different meanings, as to two moieties of a devised estate. *Carter* v. *Bentall*, 2 Beav. 551; 9 L. J., Ch. 303; 4 Jur. 691.

Though the word "issue" be, in one clause of a will, construed "children," it does not necessarily follow that it will receive the same construction in all the other clauses. *Hedges* v. *Harpur*, 9 Beav. 479; 10 Jur. 578.

A testator gave fourteen Phœnix shares on trust, to pay the produce of ten to his daughters for life, and afterwards to his son, and afterwards to the son's "children"; and he gave the other four shares to his son for life, and afterwards

to his "children"; and in default of "such issue" of his son, he gave all the shares to his "daughters" and their "issue," share and share alike, such issue not to be entitled to or take more than their deceased parents' share. The son died without issue:—Held, that the daughters took absolute interests, and that their children took only by way of substitution for their parents, and not by way of limitation or succession. *Ib.*

The word "issue" was used in a will on several occasions as equivalent to "children," and the issue were in some instances spoken of in reference to their "parent":—Held, that "issue" must receive the same construction throughout the will. *Rhodes* v. *Rhodes*, 27 Beav. 413.

It is a canon of construction that where a testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of it unless it violates the sense. *Ib.*

A father bequeathed a share of his residuary personalty to the issue of his daughter, and if his daughter should die without leaving "issue or issue of her issue" then over:—Held, that the word "issue" must have the same meaning throughout the will, and that as in the latter clause it was clear that "issue" meant "children," the gift to the issue must be confined to the children. *Livesay* v. *Walpole*, 23 W. R. 825.

It does not follow, because the word "issue" in one part of the will means children only, that it should have that meaning also in another part; and where, after a bequest to A. and B. and their issue, in the sense of children, the residue was given to A. and B. equally, and to be divided between them, with benefit of survivorship, upon the death of either under twenty-one; not to be subject to the control of their husbands, but to be held in trust for them and their issue respectively until they attained twenty-one, if unmarried, or if married until a proper settlement could be made upon them and their issue, so that they should receive the dividends exclusively of their husbands, and if they both died under twenty-one, and without issue, then over; both attained twenty-one, and one of them died leaving children and grandchildren:—Held, that both the children and grandchildren were entitled to her share per capita as tenants in common. *Head* v. *Randall*, 2 Y. & C. C. C. 231; 7 Jur. 298.

A testator bequeathed leaseholds equally to his four grandchildren, and after their decease, to "such lawful issue" as they, or any or either of them, should leave:—Held, that on the death of each grandchild, his issue of every degree, then living, became equally entitled to his one-fourth, and that issue was not to be read "children," though in a subsequent gift he had used that expression. *Waldron* v. *Boulter*, 22 Beav. 284.

A. bequeathed his residuary personal estate to his nephew and niece equally, and after their respective deaths, amongst their issue, if there should be any children to take their parents' share. But in case the nephew or niece died without issue, or leaving such they should die under twenty-one without issue, then he gave his or her share to the other of them, or his or her issue, if he or she be then dead leaving issue as aforesaid. The niece died in 1811, leaving issue; the nephew died in 1862 leaving no issue:—Held, that issue in the first part of the will meant children, but in the latter part issue generally, and that on the death of the nephew all the issue of the niece then living took per capita. *Corrie, In re*, 32 Beav. 426.

Issue as a Word of Limitation.]—Whatever be the primâ facie meaning of the word "issue" in a will, it is not a technical expression, and will yield to the intention of the testator to be collected from the words of the will; and therefore it requires a less demonstrative context to show the testator's intention in regard to the word "issue," than in regard to the technical expression "heirs of the body." *Lees* v. *Moseley*, 1 Y. & C. 589.

It is established, that in a will the word "issue" is as strong as the word "heirs." *Bagshaw* v. *Spencer*, 2 Atk. 582.

"Issue" is primâ facie equivalent to "heirs of the body"; but the court leans against so construing it when there are other expressions in the will to control that meaning. If words of limitation be superadded, as a gift to "issue and their heirs," the issue take as purchasers in fee simple, and a gift over on a general failure of issue operates nothing. *Kavanagh* v. *Morland*, 1 Kay, 16; 2 Eq. R. 771; 23 L. J., Ch. 41; 18 Jur. 165; 2 W. R. 8. *And see* post, cols. 1289 et seq.

Issue, Class of, when ascertained.]—*See* post, col. 917.

d. Descendants.

Construed All Descendants.]—Bequest to such of the children of J. as might be living at testatrix's death, and the descendants of such of them as might be dead, per stirpes, in equal shares:—Held, not J.'s grandchildren only, but his children's descendants in every degree entitled to shares. *Marshall* v. *Scales*, 3 W. R. 502.

A testator bequeathed "to each of the children, grandchildren, or other direct descendants of" A., who might be living at the testator's death, "100*l.* apiece." At the death of the testator there were living a child, grandchildren, great-grandchildren, and great-great-grandchildren of A.:—Held, that they were all entitled to receive 100*l.* apiece. *Cambridge* v. *Rous*, 25 Beav. 409.

A husband, who died in June, 1837, gave to trustees the whole of his property in trust for the payment of his debts, with full power to sell all or any part of his estates or to demise the same; and directed them out of the moneys produced or out of the rents to pay the testamentary expenses and debts, and then gave certain legacies, and directed that after the death of his wife and after the payment of all debts and legacies the whole residue of all his remaining property should be divided into twelve portions, and be given to the children of his late aunts "equally among them, the descendants, if any, of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive . . . and should there be no children or lawful descendants of any of his aunts remaining at the time the bequests should become payable, then the portions" were to fall into the residuary fund. The testator declared that it should not be incumbent on his executors to pay the legacies sooner than two years after his death; nor to divide the residue amongst his relatives until two years after the death of his wife, and made provision for payment of his wife's jointure. The wife died in 1876:—Held,

that the substitutionary gift to "descendants" of children of an aunt was not confined to children of those children. *Ralph* v. *Carrick*, 48 L. J., Ch. 801; 11 Ch. D. 873; 40 L. T. 505—C. A. Reversing 25 W. R. 530.

The word "descendants" is less flexible than "issue," and requires a stronger context to confine it to children:—Held, that if the word used in the present case had been "issue" instead of "descendants," the gift over would have prevented the court from confining the word to children. *Ib.*

Legacy to the descendants of A. and B. equally: all descendants (children and grandchildren) take per capita. *Butler* v. *Stratton*, 3 Bro. C. C. 167.

Under a devise to the descendants of F. T., in a certain district, grandchildren and great-grandchildren take per capita. *Crosley* v. *Clare*, 3 Swanst. 320, n. *S. C.*, nom. *Crossly* v. *Clare*, Ambl. 397.

Construed Children.]—Bequest to "descendants" of A., "in such proportions as each may be entitled" under the Statute of Distributions: Held, that a child of A. took in exclusion of grandchildren. *Smith* v. *Pepper*, 27 Beav. 86.

Upon a gift over, after an estate for life of residue real and personal, to "daughters of B., and their descendants, per stirpes, to hold to them, their heirs and assigns, for ever," paying an annuity to L. for her life; B. left three daughters, one of whom survived the testator, and died in the lifetime of the tenant for life without ever having had issue:—Held, that the residuary estate belonged to the two surviving daughters. The words per stirpes are to be taken in a distributive sense, and "descendants per stirpes" to be considered as words of purchase, giving an absolute estate to the children, who took, not concurrently with their parents, but by substitution. *Dick* v. *Lacy*, 8 Beav. 214; 14 L. J., Ch. 150; 9 Jur. 21.

A. bequeathed all the residue of his property, after the death of his widow, to the brothers and sisters of her and himself, and to their descendants, in such proportions as his wife should by her will appoint. The court declared that the persons entitled to take the property were those brothers and sisters of the testator and his wife who were living at the death of the tenant for life, and the children of such of them as were dead were entitled to take by way of substitution. *Tucker* v. *Billing*, 2 Jur. (N.S.) 483.

Collaterals included.]—In a will descendants mean persons upon whom an estate will descend; and failing lineals, collaterals are entitled. *Best* v. *Stonehewer*, 34 Beav. 66; 34 L. J., Ch. 26; 10 Jur. (N.S.) 1140; 11 L. T. 468; 13 W. R. 126.

A testator gave the proceeds of the sale of his estates, after the determination of certain life estates, "to such person or persons as shall at that time be the nearest in blood to me, as descendants from my great-grandfather, S., and whose kindred with me originates from him." At the date of the will the only lineal descendants of S. were the testator and his sister, a lady of about sixty years of age:—Held, that the objects of the gift were such persons as were nearest in blood to the testator out of a class composed both of the descendants of S. and the persons whose kindred with the testator originated from their being related to him. *S. C.* on appeal, 5 N. R. 500; 2 De G. J. & S. 537; 34 L. J., Ch. 349; 11 Jur. (N.S.) 315; 12 L. T. 195; 13 W. R. 566—C. A.

Male Descendants.]—A testator having made a provision for the necessitous "male children" of his nephews, and having shown his intention of making it a perpetual charity:—Held, that "male children" meant "male descendants." Held, also, that under the expression "male descendants," descendants claiming through the male line were alone entitled, and that those males who claimed through a female were excluded. *Bernal* v. *Bernal*, 3 Myl. & Cr. 559; C. P. Coop. 55; 7 L. J., Ch. 115; 2 Jur. 273. And see *S. C.*, 3 Myl. & Cr. 559, n.

Direct Descendants bearing Name.]—A testatrix bequeathed stock to trustees in trust for her brother R. G. for life, and after his decease in trust for his son J. R.-G., for life, and after the decease of both of them, upon trust for any immediate or direct descendants of her said brother or nephew who should bear the name of R.-G., for life, and from and after his or her decease, or in case of failure of any such immediate or direct descendants of her said brother or nephew who should bear that name, upon trust for certain charities, with a condition of forfeiture on abandoning the name of R.-G. Both R.-G. and his son J. R.-G. survived the testatrix, and J. R.-G. survived R.-G., but died without ever having had any issue. At the death of J. R.-G. the only descendant of R.-G. who bore the name of R.-G., was a descendant in the female line, C. G. R.-G., and he had assumed the name of R.-G. by royal licence after the death of R.-G.:—Held, that the gift to descendants was not confined to those whose family name or birth name was R.-G., but included descendants who assumed that name. That the gift to descendants was void for remoteness, and that the gift, as well to the charities as to the descendant who had assumed the name of R.-G., failed. *Roberts, In re, Repington* v. *Roberts*, 19 Ch. D. 520; 45 L. T. 450. Affirming on this point 50 L. J., Ch. 265.

Held, that the limitation to descendants was a gift for life to descendants living at the determination of the life interests and bearing the name of R.-G. as joint tenants. *Ib.*

Eldest Male Descendants.]—The designation of "eldest male lineal descendant":—Held, to be inapplicable to a male person claiming in part through a female. *Oddie* v. *Woodford*, 3 Myl. & Cr. 584; 7 L. J., Ch. 117.

A testator who had three sons, A., B. and C., directed an accumulation of his property for a certain period, at the end of which the trustees were to divide it into three lots, one of which was to be conveyed to "the eldest male lineal descendant then living of A." When the time for making the allotment arrived, there were two persons who claimed to be entitled to the first lot, a grandson of A.'s eldest son, and a son of A.'s youngest son; the former being "eldest" in line, the latter "eldest" in years among the male descendants of A.:—Held, that the will was not void for uncertainty. *Thellusson* v. *Rendlesham*, 7 H. L. Cas. 429; 28 L. J., Ch. 948; 5 Jur. (N.S.) 1031; 7 W. R. 563.

Held, also, that on the true construction of the words used by the testator, the grandson of A.'s eldest son was entitled to the first lot. *Ib.*

Under a devise, after the death of the survivor of several persons, to "the eldest male lineal descendant of A." then living, the court considered itself so fettered by the dicta in the house of lords, and of Lord Eldon and the judges in *Oddie* v. *Woodford* (3 Myl. & Cr. 584) as to suggest a decree without argument, which excluded male descendants claiming through females, and gave preference to a grandson of A., though younger in age, to a younger son of A., who was in age the eldest male lineal descendant of A. The decree was made accordingly. The court held the question of uncertainty and intestacy under the will of Mr. Thellusson to be already determined. *S. C.*, before the master of the rolls, nom. *Rendlesham* (*Lord*) v. *Robarts*, 23 Beav. 321. *And see* DISTRIBUTION PER STIRPES OR PER CAPITA, post, col. 987.

e. Family.

Construed Head of Family.]—Where devise is to the stock or family, the court confines it to the head of the family. *Crossly* v. *Clare*, Ambl. 397. See *S. C.*, nom. *Crosley* v. *Clare*, 3 Swanst. 322, n.

Construed Children.]—The primary meaning of the word "family" in a will is "children." *Pigg* v. *Clarke*, 45 L. J., Ch. 849; 3 Ch. D. 672; 24 W. R. 1014.

A husband directed the interest arising from all his real and personal property to be paid to his wife during her life, and after her decease to be equally divided amongst all his family that should be then living when they should attain the age of twenty-one years. At the date of his will he had seven children living, some over and others under twenty-one, and some married, with children:—Held, that under the word "family" children alone could take. *Ib.*

Under a disposition by will to A.'s and B.'s families, the children are entitled, exclusive of their parents, and per capita. *Barnes* v. *Patch*, 8 Ves. 604; 7 R. R. 127.

Testator gave all his property, both real and personal, to his wife for life, "and after the death of my wife my nephew is to be considered as heir to all my property; but I direct that whatever portion of my property may hereafter be possessed by him shall be secured by my executors for the benefit of his family":—Held, taking the whole of the will together, that the testator by the word "family" meant the children but not the wife of his nephew, and that the property ought to be settled on the nephew for life, and on his children after his death. *White* v. *Briggs*, 15 Sim. 17; 9 Jur. 678.

A testatrix in her will used the following expression: "Observing that F. Beales and his family are my residuary legatees for all but cash, or moneys so called." F. Beales had nine children living at the date of the will and at the testatrix's death, and the testatrix died possessed of a promissory note payable to herself or order, some long annuities, Columbian bonds and money, in her house and at her bankers:—Held, that by "Francis Beales and his family" the testatrix meant Francis Beales and his children, and that they took the note, annuities and bonds, as joint tenants, those articles being neither cash, nor moneys so called. *Beales* v. *Crisford*, 13 Sim. 592; 13 L. J., Ch. 26; 7 Jur. 1076.

A testatrix bequeathed her house, furniture, &c., to A. for life, and directed that the same should afterwards remain in the family of A. A. died, leaving five children:—Held, that the children of A. took as tenants in common. *Owen* v. *Penny*, 14 Jur. 359.

Testator bequeathed several legacies, and among others to S. W. 14,000*l.*, "and to the latter gentleman's family, 6,000*l.*" S. W. had six children, all living at the date of the testamentary instrument and at the death of the testator, and no other issue:—Held, that such six children were, as joint tenants, exclusively entitled to the legacy of 6,000*l.* *Wood* v. *Wood*, 3 Hare, 65.

The primary meaning of the word "family" is "children," and there must be some circumstance, either in the will or in the situation of the parties, to prevent that construction. *Terry, In re*, 19 Beav. 510.

Legacies were given to A. and B., and in case they should predecease the testatrix, to their respective "families." A. having died before the testatrix:—Held, that her children alone took under the word "family." *Ib.*

Testator bequeathed the residue of his personal estate to trustees, in trust for his wife during her widowhood, and, after her death or second marriage, in trust to be divided, share and share alike, among his five sisters and their respective families, if any:—Held, that each sister and her children living at the testator's death were entitled, in remainder expectant on the death or second marriage of the widow, to one-fifth of the residue as joint tenants. *Parkinson's Trust, In re*, 1 Sim. (N.S.) 242; 20 L. J., Ch. 224; 15 Jur. 165.

A. devised all the estates before specified to his sister's "family," and proceeded thus: "I give to D. (who was the sister's son) my Dalton estate, and the rest to be sold and divided equally":—Held, that the children of the sister, including D., took the produce of the sale equally. *Reay* v. *Rawlinson*, 29 Beav. 88; 30 L. J., Ch. 330; 7 Jur. (N.S.) 118; 9 W. R. 134.

The word "family" construed as children, and not descendants of a testator's children. *Burt* v. *Hellyar*, 41 L. J., Ch. 430; L. R. 14 Eq. 160; 26 L. T. 833.

A devise of freeholds to C. and his heirs, and "in case he should die leaving no issue, then equally between my surviving children or their families," is a gift (on the death of C. without issue) to the children of the testator, and the children of such of them as were dead, as to such children in joint tenancy. *Ib.*

A testator bequeathed to his executors a sum of 450*l.*, which he directed should be held by them in trust for his brother James's family, and should be by his said executors expended for the benefit of such family, in such a manner as to them should seem most expedient. The executors having paid the 450*l.* into court:—Held, that the word "family" in the above bequest meant "children," and that the parents were not entitled to any share in the fund. *Mulqueen's Trust, In re*, 7 L. R. Ir. 127.

A testamentary gift by a married man to his "family" should be read as a gift to his "children" to the exclusion of his wife. *Hutchinson, In re*, 8 Ch. D. 540; 39 L. T. 86; 26 W. R. 904.

A testator by his will appointed two trustees, and directed that all moneys due to him should be collected and placed to his trustees' account at a certain bank, in trust for his "family":—Held, that there was nothing in the context of

the will to deprive the word "family" of its primary meaning, i.e. children of the testator; and that, therefore, such children alone were entitled to share in the money in the bank. *Muffett, In re, Jones* v. *Mason*, 55 L. T. 671.

A testator bequeathed his property to his wife for life, and after her death "unto his brothers and sisters in equal shares and proportions, or unto the families of such of them as shall be then dead." All his brothers and sisters died in the lifetime of the testator's widow, leaving sons and daughters and also grandchildren:—Held, (1) that "families" did not include grandchildren; (2) that the sons and daughters of the testator's brothers and sisters took per stirpes; (3) that the words "in equal shares" applied only to the gift to the testator's brothers and sisters, and could not be extended to the substitutionary gifts, and that therefore the children of each brother and sister took as joint tenants inter se. *Battersby's Trusts, In re*, [1896] 1 Ir. R. 600.

See also *Elgood* v. *Cole*, 21 L. T. 880; 17 W. R. 953.

Construed All Descendants.]—Testator, by his will, gave personal property to his wife absolutely, for her own use and benefit. By a codicil, which was in the form of a letter to his wife, he said, "It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself; but I should be unhappy if I thought it possible that any one not of your family should be the better for what, I feel confident, you will so well direct the disposal of":—Held, that the word "family" was not confined to children, but included descendants in every degree; and that the wife was entitled to the property absolutely, and not merely for her life, with a power in the nature of a trust for her children. *Williams* v. *Williams*, 1 Sim. (N.S.) 358; 20 L. J., Ch. 280; 15 Jur. 715.

Construed Next of Kin.]—Where a donor recommends or directs that the donee, at her death, shall give personal property to such of his family, or such of his relations, as he shall think fit, the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin; but if the donee does not exercise the power, the word "relations" or the word "family," will be construed "next of kin," unless the special expressions of the donee have a different import. *Grant* v. *Lynam*, 4 Russ. 292; 6 L. J. (O.S.) Ch. 129; 28 R. R. 97.

A testator gave personalty to trustees for his wife for life, "and at her demise let the principal return to the good of my family, whoever survives the longest":—Held, a remainder vesting in the next of kin of the testator at the time of his decease. *Maxton, In re*, 4 Jur. (N.S.) 407.

Construed Blood Relations.]—Devise in fee to a brother of the testatrix, "on the condition that he never sells it out of the family":—Held, that "the family" meant the blood relations of the devisee, and that the condition was valid in law as a partial restraint on alienation. *Macleay, In re*, 44 L. J., Ch. 441; L. R. 20 Eq. 186; 32 L. T. 682; 23 W. R. 718.

"Nearest Family"—Construed Heir.]—A. devised to B. in tail, and for want of issue he empowered her to dispose of the estate to such persons as she thought fit by her will, "confiding" in her not to alienate the estate from his "nearest family." B. appointed to her husband for life, with remainders over:—Held, that B. had a power of appointing to the nearest family only, that nearest family must be construed "heir," and that the appointment to the husband was void. *Griffith* v. *Evans*, 5 Beav. 241; 11 L. J., Ch. 219.

Wife included.]—The word "family" admits of a variety of applications, and the construction to be put upon it, in a particular will, must depend upon the intention to be collected from the whole context of the will. Where a testator directed his business to be carried on by his wife and son for the mutual benefit of the family, and devised his property in trust, that, at his wife's decease, the whole of it, as well freehold as personal, should be equally divided among his children, it was held that the testator, in the words, "my family," intended to comprise his wife, and, as to the testator's property devised after his wife's decease, to his children, it was held upon the whole will, and what appeared to be the evident intention of the testator, that the wife took a life interest by implication as well in the real as in the personal estate. *Blackwell* v. *Bull*, 1 Keen, 176; 5 L. J., Ch. 251.

Father included.]—A. B., in September, 1842, devised and bequeathed, in trust for his wife, all his real and personal estate, except the real and personal estate which he might derive from his aunt, M. A. T., or any of her family. At the time of making his will, A. B. was entitled in remainder, under his maternal grandfather's will, to the C. estate, subject to the life estate of his aunt, M. A. T., and failure of her issue. In August, 1843, M. A. T. died without issue, and thereupon A. B. became absolutely entitled in possession to the C. estate. He died in November, 1843. Upon petition presented by his widow for a declaration that she was entitled to a life interest in the C. estate:—Held, that A. B. had included the C. estate in the exception under the words, "which he might derive from M. A. T. or any of her family":—Held, also, that the father of M. A. T. was a member of her family. *James* v. *Wynford (Lord)*, 3 Sm. & G. 350; 23 L. J., Ch. 767; 18 Jur. 868; 2 W. R. 607.

Illegitimate Child of Son included.]—A testator gave his estate to his widow "to be at her disposal in any way she may think best, for the benefit of herself and family." The widow by her will gave a part of the estate to an illegitimate son of one of the testator's sons:—Held, that the gift was valid. *Lambe* v. *Eames*, 40 L. J., Ch. 447; L. R. 6 Ch. 597; 25 L. T. 175; 19 W. R. 659—C. A.

Family as Word of Limitation—Estate Tail in Realty.]—A testator directed his freehold estate at A. to be equally divided between his two sons, who were to enjoy the interest thereof, and then go to their respective families according to seniority:—Held, that the two sons took as tenants in common in tail general, in equal undivided shares. *Lucas* v. *Goldsmid*, 29 Beav. 657; 30 L. J., Ch. 935; 7 Jur. (N.S.) 719; 4 L. T. 632; 9 W. R. 759.

Gift of Personalty to A. and Family—A. takes Absolute Interest.]—A testator gave the residue

of his estate to be equally divided among his two daughters, their husbands, and families :—Held, that the daughters took absolutely as tenants in common, the words "husbands and families" being rejected. *Robinson* v. *Waddelow*, 8 Sim. 134 ; 5 L. J., Ch. 350.

Gift to A. and B. for the good of their families :—Held, that A. and B. took absolutely as tenants in common. *Alexander* v. *Alexander*, 6 De G. M. & G. 593 ; 3 Jur. (N.S.) 28 ; 5 W. R. 28—C. A.

Gift to Family of a Particular Name.]—A bequest to the family of G. held not to be void for uncertainty ; but construed to be a gift to the children of G. (an uncle of the testator, known to and on terms of intimacy with him), as joint tenants, and not to include the parents or their grandchildren. *Gregory* v. *Smith*, 9 Hare, 708.

A. bequeathed a sum of 400*l.* to the family of G., formerly of S. :—Held, that the gift was not void for uncertainty, and that under the circumstances, the family of G., formerly of S., meant the family of Thomas G., formerly of S., who survived the testatrix. *Gregory* v. *Smith* (supra), followed. *Charitable Donations Commissioners* v. *Deey*, 27 L. R., Ir. 289.

f. Relations.

Construed Next of Kin.]—Where the word "relations" is used, the court has no other rule to go by but the Statute of Distributions. *Crossly* v. *Clare*, Ambl. 397. See *S. C.*, nom. *Crosley* v. *Clare*, 32 Swan. 322, n.

A legacy of personal estate to testator's wife for life, and after her decease to the testator's relations who shall be then alive, confined to relations within the Statute of Distributions. *Green* v. *Howard*, 1 Bro. C. C. 31.

Gift of a residue to be divided among persons related to the testator ; confined to relations within the Statute of Distributions. *Rayner* v. *Mowbray*, 3 Bro. C. C. 234.

A man devises his personal estate to the use of his relations without specifying any in particular ; it shall be distributed according to the Statute of Distributions. *Roach* v. *Hammond*, Pre. Ch. 401 ; 1 P. Wms. 327.

Under a gift to "relations" next of kin are generally entitled. *Craklow* v. *Norie*, 7 L. J., Ch. 278.

The word "relations" construed by reference to the Statute of Distributions. *Brandon* v. *Brandon*, 3 Swan. 319 ; 2 Wils. Ch. 14.

Testator expressing his will and desire that one-third of the principal of his estate and effects be left entirely to the disposal of his wife among such of her relations as she may think proper, after the death of his sisters : a trust for her next of kin at the time of her death, having made no disposition. *Birch* v. *Wade*, 3 V. & B. 198 ; 13 R. R. 181.

Legacy for a mourning ring to each of the testator's relations, by blood or marriage, confined to the Statute of Distributions, and those who have married persons entitled under it. *Devisme* v. *Mellish*, 5 Ves. 529.

A bequest of a fund to be at the disposal of the testator's widow by her will, therewith to apply a part to the foundation of a charity school, or such other charitable endowment for the benefit of the poor of a parish as she may prefer, and under such restrictions as she may prescribe, and the remainder to be at her disposal among the testator's relatives as she may direct : —Held, that although the widow might have exercised her power in such a manner as to include more distant relatives, still, as she had died without so exercising it, none could take as "relatives" but such as were capable of taking within the Statute of Distributions. *Salusbury* v. *Denton*, 3 K & J. 529 ; 26 L. J., Ch. 851 ; 3 Jur. (N.S.) 740 ; 5 W. R. 865.

Bequest to "near relations" means those within the Statute of Distributions. *Whithorne* v. *Harris*, 2 Ves. 527.

Bequest to "relations," confined to next of kin according to Statute of Distributions. *Crawys* v. *Coleman*, 9 Ves. 323 ; 7 R. R. 210.

Though upon bequests to "relations," with a power of selection, the party may go beyond those included in Statute of Distributions ; the contrary is adhered to whenever the execution devolves on the court. *Id.* 324.

Bequest to testator's relations, with power of selection is, if that power is not exercised, a trust for next of kin at death of party who had the power. *Id.* 325.

Testator directed the residue of his estate to be parted to "his next relations as sisters, nephews, and nieces." Testator left his three sisters, A., B. and C., and D., the only child of a deceased sister, and L., the only child of a deceased brother, his next of kin ; but at the time of his death his sister A. had two children living. The residue must go according to the Statute of Distributions. *Stamp* v. *Cooke*, 1 Cox, 234.

The words "relations or near relations," from their indefinite extent, confined to the next of kin under the Statute of Distributions. *Smith* v. *Campbell*, 19 Ves. 403 ; 13 R. R. 224.

Where a donor recommends or directs that the donee, at her death, shall give personal property to such of his family, or such of his relations, as he shall think fit ; the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin ; but if the donee does not exercise the power, the word "relations," or the word "family," will be construed "next of kin," unless the special expressions of the donee have a different import. *Grant* v. *Lynam*, 4 Russ. 292 ; 6 L. J. (O.S.) Ch. 129 ; 28 R. R. 97.

Devise to three sisters for life, and subject thereto the survivor to divide and devise "to such of my nieces and other relations as shall be unprovided for at the decease of such survivor, in such proportions as she, in the goodness of her heart, shall think fit" ; appointment by survivor to all her nieces living at her decease equally :—Held, that the nieces were entitled either as appointees or as the next of kin of the first testatrix. *Paelow* v. *Laurie*, 2 Jur. 204.

A testator having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her, and not doubting that she would, consider his near relations as he would have done if he had survived her :—Held, that there was no trust for the next of kin, but that the wife took the residue absolutely. *Sale* v. *Moore*, 1 Sim. 534 ; 27 R. R. 239.

Testator gave all the residue of his real and personal estate unto and equally between and amongst all his relations who might claim and prove their relationship to him by lineal descent.

He had no wife or issue at the time of making his will nor afterwards. He died leaving several first cousins his next of kin :—Held, that the first cousins were entitled to the residuary estate, both real and personal. *Craik* v. *Lamb*, 1 Coll. C. C. 489 ; 14 L. J., Ch. 84 ; 9 Jur. 6.

A father, after bequeathing a legacy to his daughter, left an annuity to his mother and sister for their lives, and directed that upon their deaths the residue of his property should be divided amongst his relations as his executors, his brothers, should think fit and most worthy to receive it. At the death of the testator, and at the deaths of his mother and sister, his daughter was his sole next of kin :—Held, that she was entitled to the residue. *Lawlor* v. *Henderson*, Ir. R. 10 Eq. 150.

Relations construed next of kin. *Lees* v. *Massey*, 3 De G. F. & J. 113 ; 7 Jur. (N.S.) 534 ; 4 L. T. 36 ; 9 W. R. 425.

Construed Blood Relations.]—An uncle, after giving legacies to various persons, describing their relationship, including a person described as his niece, but in reality illegitimate, and persons connected by affinity, directed that if the whole of his property made more than the whole amounts mentioned in his will, it should be divided "amongst my relations in proportion to their separate amounts" :—Held, that only such of the legatees as were blood relations were entitled under the residuary gift. *Hibbert* v. *Hibbert*, 42 L. J., Ch. 383 ; L. R. 15 Eq. 372 ; 28 L. T. 397 ; 21 W. R. 506.

Brother included.]—A. devised an estate to T. and his heirs, upon trust that he should convey it to such of the relations of the testator as he should think best and most reputable for his family. A. died without issue, and the heir-at-law, testator's brother, preferred a bill against defendant, praying to have the estate conveyed to him. Evidence was admitted of testator's dislike to plaintiff ; but if the trustee would give him the estate, plaintiff was not disabled to take it. *Clarke* v. *Turner*, 2 Free. C. C. 198.

Wife's Relations — Illegitimate Relations included.]—A testator by his will gave bequests to certain persons by name, describing some of them as his "cousins" and his "nieces," during their lives, and after their deaths for their children ; and directed his residuary estate "to be equally divided amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property." Some of the persons described as "cousins" were the children of an illegitimate brother and sister of the testator's mother, and the persons described as his "nieces" were in reality his wife's nieces :—Held, that the words "relatives hereinbefore named" in the residuary clause included (1) relatives by affinity ; (2) illegitimate relatives ; (3) persons described as children of legatees specially named, though not themselves named by their christian and surnames. *Seale-Hayne* v. *Jodrell*, 61 L. J., Ch. 70 ; [1891] A. C. 304 ; 65 L. T. 57—H. L. (E.) Affirming 38 W. R. 721.

A gift of residue to "my wife's relations as she may direct" confers upon the wife a non-exclusive or distributive power, notwithstanding the provisions of the Powers Law Amendment Act, 1874. *Deakin, In re, Starkey* v. *Eyres*, 63 L. J., Ch. 779 ; [1894] 3 Ch. 565 ; 8 R. 702 ; 71 L. T. 838 ; 43 W. R. 70.

The wife being to the testator's knowledge illegitimate, the persons among whom the property was divisible were the persons being legitimate who would have been her statutory next of kin at her death if she had been legitimate. *Standley's Estate, In re* (L. R. 5 Eq. 303), not followed. *Ib.*

Illegitimate Relations excluded.]—A testator gave a legacy to his relatives in such shares as his wife should appoint. She appointed part to children of the testator's illegitimate brother : —Held, that relatives are legitimate relatives, where there is nothing on the face of the will itself to lead to a different conclusion. *Saville, In re*, 14 W. R. 603.

Wife and her Relations excluded.]—J., seised in fee of land, devised the same to his wife for life, and after her decease to R. and the heirs of his body, and for want of such issue to be sold, and divided among his relations according to the Statute of Distributions :—Held, that the wife being no relation, the next of kin shall take the whole in exclusion of her both by the words of the will, and the intent of the testator. So where A. gave the residue of his personal estate to trustees to permit his wife to receive the produce for her life, and after her decease to such of his relations as would have been entitled under the Statute of Distributions in case he had died intestate, the wife is not to be considered as a relation. *Worseley* v. *Johnson*, 3 Atk. 758.

Relation, in dictionaries, signifies consanguineus and affinis, but a wife is no relation either by blood or affinity ; and of a wife, Calvin, in his Lexicon, says non affinis est, sed causa affinitatis ; affinis est ab eodem stipite. The Statute of Distributions means kindred, by blood only ; but the statute 21 Hen. 8, c. 5, s. 3, distinguishes more clearly between a wife and the next of kin than the Statute of Distributions ; the word "my" relations means exactly the same as "my own" relations. *Id.* 761.

Where in a will a wife not included in the word relations according to the Statute of Distributions. *Davies* v. *Baily*, 1 Ves. Sen. 84.

Bequest to relations does not include those by marriage. *Adair* v. *Maitland*, 7 Bro. P. C. 587 ; 3 Ves. 231.

"Nearest Relations."—Bequest by a testator in India "to my nearest surviving relations in my native country, Ireland," confined to brothers and sisters living in Ireland or elsewhere ; the addition of a mistaken description, viz., of the place of residence, not vitiating a gift to persons otherwise sufficiently described. Nephews and nieces included. *Smith* v. *Campbell*, 19 Ves. 400 ; 13 R. R. 224.

"Such of my nearest relations as my executors shall think the greatest objects of charity" :—Held, to extend only to such as would take under the Statute of Distributions. *Edge* v. *Salisbury*, Ambl. 70 ; 1 Ves. Sen. 230.

Devise to his nearest poor relations ; parol evidence admitted to show that testator knew he had such in S., but no farther ; not to prove from declarations or instructions whom he meant by written words of the will. *Goodinge* v. *Goodinge*, 1 Ves. Sen. 231.

Bequest to such of nearest relations as A.

should think poor and objects of charity confined to those within the Statute of Distributions under A.'s advice. *Ib.*

Bequest to "near relations" means those within the Statute of Distributions. *Whithorne* v. *Harris*, 2 Ves. Sen. 527.

Devise of real and personal estate in trust for the nearest relation "of the Pyots"; the latter held to be "nomen collectivum," and descriptive of that particular stock, and that this mixed fund should not go to the heir-at-law of that name. A change of the name of Pyot by marriage held not to exclude. *Pyot* v. *Pyot*, 1 Ves. Sen. 335.

Poor Relations.]—Who take under words "poor relations." *Anon.*, 2 Eq. Abr. 191.

Bequest to testator's wife for life, and after her death to his and her poorest relations:—Held, only those who were nearest of kin were entitled. *Isaac* v. *Defriez*, Ambl. 595.

Bequest "to the most necessitous of my relations" shall go according to the Statute of Distributions. *Widmore* v. *Woodroffe*, Ambl. 636; 1 Bro. C. C. 13, n.

Bequest to testator's mother's "poor relations," construed relations who are poor and objects of charity. *Brunsden* v. *Woolredge*, Ambl. 507; *S. C.*, nom. *Brunsden* v. *Woolridge*, Dick. 380.

Bequest to such of nearest relations as A. should think poor and objects of charity, confined to those within the Statute of Distributions under A.'s advice. *Goodinge* v. *Goodinge*, 1 Ves. Sen. 231.

Legacy to executor to be distributed amongst the poor relations of testator. A relation who was poor at the time of the testator's death, but became rich before distribution, not entitled. Poor relation dying before distribution, his claim not transmissible to his personal representative. Where a person has a power of distribution among poor relations, he may distribute amongst all poor relations, however remote; but where the court is called on to distribute, in failure of the person so empowered, it will confine itself to relations within the Statute of Distributions. *Mahon* v. *Savage*, 1 Sch. & Lef. 111.

The testator having given a sum to his widow, to be distributed amongst such of his "relations" as she should deem requiring and most deserving relief:—Held, not to include in that case the widows of the testator's relations, and that a relative showing no qualifications, and to whom no part had been appropriated, was not entitled to question the distribution by the testator's widow. *Harvey* v. *Harvey*, 5 Beav. 134. And see 4 *Id.* 215.

J. S. gave "all his real and personal estate" to trustees on certain trusts, remainder "to such of his relations on his mother's side who were most deserving, and in such manner as they should think fit," and for such charitable uses and purposes as they should also think most proper and convenient:—Held, per Master of the Rolls, that the limitation over the personal estate was good, and his honour (deciding by the known rule of equity) directed that one half of the said estates should go to the testator's relations on his mother's side, and the other half to charitable uses; his honour could not judge of the merits of the testator's relations, nor prefer the one to the other, but he should exclude those beyond the third degree:—Held, also, that the representatives of those relations who died in testator's lifetime could have no claim. *Doyley* v. *Att.-Gen.*, 4 Vin. Abr. 485 (C.) Pl. 16.

Distribution—In what Shares.]—A devise to relations is to be confined to such as would take by the Statute of Distributions, but their shares may not be the same as under that statute. *Thomas* v. *Hole*, Forrest. 251; Dick. 50.

Testator directed that a sum of stock, standing in his name, should be divided between and amongst the relations of his late wife, in such manner, shares, and proportions as would have been the case in case she had died possessed of it a spinster and intestate. The wife had sixteen next of kin living at her death. Five of them died before the testator:—Held, that the eleven survivors took only a sixteenth each, and that the other five shares lapsed into the residue, and ought to bear the costs of the petitioners and respondents. *Ham's Will, In re*, 2 Sim. (N.S.) 106; 21 L. J., Ch. 217; 15 Jur. 1121.

A gift of residue to be distributed "to my relatives, share and share alike, as the law directs," means a distribution under the Statute of Distributions, per stirpes and not per capita. *Fielden* v. *Ashworth*, L. R. 20 Eq. 410; 33 L. T. 197.

Relations, Class of, when Ascertained.]—*See* post, col. 919.

g. Cousins.

Who are included.]—Testator by his will gave legacies to several persons by name, describing each of them as his cousin. By a codicil he gave his residuary estate to all such of his cousins both on his father's and mother's side as should be living at his decease, and to all the children of such of his said cousins as might theretofore have died or might die in his lifetime. The testator left several first cousins and children of first and second cousins, and also one first cousin once removed, but all the persons named in the will were first cousins:—Held, that they alone, and the children of such of them as had died in testator's lifetime, were entitled to the residue under the codicil. *Caldecott* v. *Harrison*, 9 Sim. 457; 9 L. J., Ch. 331; 4 Jur. 885.

Bequest to "all my cousins who shall be living at my decease, in equal shares":—Held (reversing 1 Jur. (N.S.) 789; 25 L. J., Ch. 116; 3 Eq. Rep. 841; 3 W. R. 592), that in the absence of anything to explain the meaning of the testator, "cousins" must be construed to mean first cousins only. *Stoddart* v. *Nelson*, *Stanger* v. *Nelson*, 6 De G. M. & G. 68; 25 L. J., Ch. 116; 2 Jur. (N.S.) 27; 4 W. R. 109.

Under a bequest "to my cousins (descendants from my father's and mother's brothers and sisters) living at my death, and such of the issue living at my death of any cousins of mine (descendants as aforesaid) who shall have died in my lifetime leaving issue living at my death," "cousins" construed "first cousins," although the testator, by a codicil, provided by name for all his first cousins, and excluded them from all benefit under the will. *Stevenson* v. *Abingdon*, 8 Jur. (N.S.) 811; 6 L. T. 345; 10 W. R. 591.

A testator made his will in the following terms: "Knowing that without a will all relatives of equal degree would take equal shares, I wish on account of the unequal portions thus going to them to make additional gifts in favour of those hereinafter mentioned; that is to say, 3,000*l.* stock to each of those my cousins (naming six persons, who were all first cousins) in addition to and not as substitution for the shares they

would otherwise equally take with my cousins (naming persons, one of whom was a first cousin, and the others first cousins once removed), in New Brunswick or elsewhere. The residue of my property I give and bequeath unto all my cousins, in all respects" :—Held, that first cousins only were entitled to take under the residuary bequest. *Burbey* v. *Burbey*, 9 Jur. (N.S.) 86 ; 6 L. T. 573.

A testatrix gave a share of her residue to her "cousin, Harriet Cloak." She had no cousin of that name, but she had a cousin, T. Cloak, whose wife's name was Harriet :—Held (Bowen, L.J., dissenting), that "cousin" might be understood in a popular sense as the wife of a cousin ; and that Harriet, the wife of T. Cloak, was entitled to the share of the residue. *Taylor, In re, Cloak* v. *Hammond*, 56 L. J., Ch. 171 ; 34 Ch. D. 255 ; 56 L. T. 648 ; 35 W. R. 186—C. A.

"First Cousins."]—A bequest to the testator's "first cousins or cousins-german" does not include the descendants of first cousins. *Sanderson* v. *Bayley*, 4 Myl. & Cr. 56 ; 8 L. J., Ch. 18 ; 2 Jur. 958.

"First and Second Cousins."]—Under a bequest of a residuary fund to the testator's first and second cousins, and the children of his kinsman, G. C., which children were first cousins of the testator, twice removed, all persons related to the testator in the degree of second cousins are entitled. *Charge* v. *Goodyer*, 3 Russ. 140 ; 27 R. R. 42.

Legacies to first and second cousins includes first cousins once removed, and a grand-niece being more distant. *Mayott* v. *Mayott*, 2 Bro. C. C. 125.

"Second Cousins."]—Testator bequeathed a fund in trust for his second cousins :—Held, that a first cousin once removed was not entitled to a share. *Bridgnorth Corporation* v. *Collins*, 15 Sim. 541.

Testatrix bequeathed her residue to her second cousins of the name of S., and the issue of such of them as were dead (per stirpes). She had no second cousins, but had had three first cousins once removed of the name of S., two of whom were living at her death, and the other had died leaving children :—Held, that these two, together with the children of the one who was dead, were entitled, to the exclusion of first cousins twice removed, i.e. grandchildren of a first cousin, though standing in the same degree of relationship as second cousins. *Slade* v. *Fooks*, 9 Sim. 386 ; 8 L. J., Ch. 41 ; 2 Jur. 981.

A testator, after giving to his sister a life interest in the whole of his property, devised and bequeathed the same after her death upon trust for sale, and to divide the proceeds amongst "my second cousins." The testator had no "second cousins" either at the date of his will or at his death, or any born afterwards :—Held, that first cousins once removed were entitled. *Slade* v. *Fooks* (supra), followed. *Bonner, In re, Tucker* v. *Good*, 51 L. J., Ch. 83 ; 19 Ch. D. 201 ; 45 L. T. 470 ; 30 W. R. 58.

A testator gave one-third of his property to his first cousins and two-thirds to his second cousins. At his death he left first cousins, second cousins, and children and grandchildren of first cousins :—Held, that the term "second cousin" did not include children or grandchildren of first cousins. *Parker, In re, Bentham* v. *Wilson* 50 L. J., Ch. 639 ; 17 Ch. D. 262 ; 44 L. T. 885 ; 29 W. R. 855—C. A.

A testator gave the residue of the proceeds of the sale of his real and personal estate equally between all such of his first and second cousins, including his "reputed cousin" A. B., and his children, or reputed children, and the children of his "reputed cousin" S. G. as should be living at the time of the determination of the two life interests given by the will, and directed that if the said A. B. should be then dead, the share to which he would have been entitled if then living should be divided amongst his then surviving children. By a codicil he gave a legacy "to each of my cousins" J. B. and G. C., in addition to any sum to which they might be entitled under his will. The testator had no second cousins either at the date of his will or his death. He had at his death first cousins, first cousins once removed, and first cousins twice removed. A. B. and S. G. would, if legitimate, have been his first cousins. J. G. and G. C. were his first cousins once removed :—Held, that the persons to take were the testator's first cousins, and first cousins once removed. *Wilks* v. *Bannister*, 54 L. J., Ch. 1139 ; 30 Ch. D. 512 ; 53 L. T. 247 ; 33 W. R. 922.

"Nearest Male Cousin."]—In an ejectment on title, the plaintiff claimed under a will (made in 1861), whereby the testator devised the lands in question, which were of freehold tenure, "to my only son, during his natural life, and after his demise it is to revert to the most deserving of his male issue lawfully begotten of him, if he shall have such male issue, otherwise it is to revert to the nearest and most deserving male cousin, and a regular Power of the family." The testator's son died sine prole, having previously devised the lands in question to his only sister, one of the defendants in the present action ; the plaintiff claimed by virtue of the limitation over on the death of the testator's son without issue, as the eldest of three brothers, the only male cousins of the testator :—Held, that the plaintiff was entitled to recover. *Power* v. *Queally*, 4 L. R., Ir. 20.

Cousins, Class of, when Ascertained.]—*See* post, col. 922.

h. Nephews and Nieces.

Who Included—Parol Evidence.]—Parol evidence is admissible to explain the sense in which the word "nephew" is employed in a will. *Grant* v. *Grant*, L. R. 5 C. P. 727 ; 22 L. T. 233 ; 18 W. R. 576. Discussed in *Parker, In re, Bentham* v. *Wilson*, 50 L. J., Ch. 639 ; 17 Ch. D. 262 ; 44 L. T. 885 ; 29 W. R. 855—C. A. And see *Fish, In re, Ingham* v. *Rayner*, infra, col. 814.

—— **Half-Blood.**]—The description of nephews and nieces includes the child of a brother or sister of the half-blood. *Grieves* v. *Rawley*, 10 Hare, 63 ; 22 L. J., Ch. 625.

—— **Grand-Nephews.**] — Power to appoint among nephews and nieces does not extend to great-nephews, &c. ; and if part be appointed, not pursuant to the power, the money so appointed lapses into, and passes under, the appointment of the residue which was properly appointed. *Falkner* v. *Butler*, Ambl. 514.

Testator gives the residue, to be divided, after

his sister's death, amongst his nephews and nieces, and by a codicil gives to a great-niece, whom he calls his niece, 500*l.* over and above her share after the decease of his sister, in the body of his will treated of more at large :—Held, that none of the great-nephews or nieces were entitled to share in the residue. *Shelley* v. *Bryer*, Jac. 207; 23 R. R. 32.

Devise in remainder to the said T. B. for life, and after his decease to the said T. B., the son of my nephew S., and his heirs ; a nephew of the same name, T. B., not being before mentioned, and in every other instance the devisee being pointed out by reference and particular description of the degree of relationship, the great-nephew held to be intended in both limitations. *Chambers* v. *Brailsford*, 19 Ves. 652 ; 11 R. R. 214—C. A.

Testatrix bequeathed as follows: "To my niece M. M., daughter of my nephew T. M., 30*l.*; to A. L. and M. L., son and daughter of my late niece M. L., 30*l.* each." And she gave all the residue of her property not thereafter disposed of, unto and equally to be divided amongst all her nephews and nieces. Afterwards she gave a specific legacy to M. D., and described her as her niece :—Held, that by the words "my nephews and nieces" in the residuary bequest, the testatrix meant not only her nephews and nieces, but their children also. *James* v. *Smith*, 14 Sim. 214 ; 13 L. J., Ch. 376 ; 8 Jur. 594.

A testator devised an estate to one for life, and afterwards to be sold, and the proceeds to be equally divided between "his surviving nephews and nieces." He had, in another part of his will, designated A. and B. (who were really his great-nephew and great-niece) as his nephews and nieces :—Held, that A. and B. did not participate in the proceeds. *Thompson* v. *Robinson*, 27 Beav. 486 ; 29 L. J., Ch. 280 ; 5 Jur. (N.S.) 1196 ; 1 L. T. 121 ; 8 W. R. 34.

Under a gift to "nephews and nieces, being descendants of my brothers and sisters," alive at a certain period, grand-nephews and grand-nieces held not to be entitled. *Williamson* v. *Moore*, 8 Jur. (N.S.) 875 ; 10 W. R. 536.

A testator gave his residue to his nephews and nieces equally. Afterwards, by a codicil, he gave a pecuniary legacy to his great-nephew A., describing him as a nephew ; and by another codicil of even date he declared his meaning to be, that A. should have the pecuniary legacy in addition to his share of the residue :—Held, that the testator, under the words "nephew and nieces," intended to include great-nephews and great-nieces ; and consequently that A. and all other great-nephews and great-nieces were entitled to share in the residue. *Weeds* v. *Bristow*, 35 L. J., Ch. 839 ; L. R. 2 Eq. 333 ; 12 Jur. (N.S.) 446 ; 14 L. T. 587 ; 14 W. R. 726.

A testatrix gave "to each of the present nieces of A., for her own absolute benefit, the sum of 2,000*l.*, and in case any of them shall die in my lifetime, leaving a child or children who shall survive me, then and in every or any such case the legacy intended for her so dying shall go to her child or children in equal shares, if more than one." At the date of the will and death of the testatrix, there was only one niece of A. alive, but there were several grand-nieces :—Held, that the bequest was confined in its term to the niece of the first degree, and that the children of nieces who were dead at the date of the will were not entitled to take by substitution, grand-niece or grand-nephew being excluded from the term "niece." *Crook* v. *Whitley*, 7 De G. M. & G. 490 ; 26 L. J., Ch. 350 ; 3 Jur. (N.S.) 703 ; 5 W. R. 383—C. A.

A testator gave the proceeds of the sale of an estate to his grand-nephew G., and to such other of his nephews and nieces as should be living at his own or his sister's decease equally. In one place in his will the testator called one of his great-nephews his nephew, but in all other places he called them great-nephews :—Held, that nephews and nieces must be confined to their primary signification, so as not to include great-nephews and great-nieces. *Blower, In re*, 42 L. J., Ch. 24 ; L. R. 6 Ch. 351 ; 25 L. T. 181 ; 19 W. R. 666—C. A.

A testator gave legacies to "my niece, Elizabeth S." When he made his will he had a great-great-niece, named Elizabeth Jane S., who was known to him, and there was not then any other person at all answering the description. He formerly had had a niece, with whom he was intimate, and to whom he had, by a former will, made precisely the same bequests as those in question, but when he made his last will he knew that she had been dead some time :—Held, that Elizabeth Jane S. was entitled to the legacies. *Stringer* v. *Gardiner*, 4 De G. & J. 468 ; 28 L. J., Ch. 758 ; 5 Jur. (N.S.) 260 ; 7 W. R. 602.

—— **Nephews by Affinity.**]—Under a gift by a testator, who was married, to "my other nephews and nieces on both sides" :—Held, that the children of the brothers and sisters of the testator's wife were included. *Frogley* v. *Phillips*, 3 De G. F. & J. 466 ; 7 Jur. (N.S.) 349 ; 3 L. T. 718. Affirming 30 Beav. 168.

Bequest to the testator's grandchildren and nephews and nieces. The testator had no brothers or sisters, and therefore no nephews and nieces :—Held, that the nephews and nieces of his wife were entitled. *Hogg* v. *Cook*, 32 Beav. 641.

Residuary gift in trust for "my nephews and nieces living, and the issue, if any, of my nephews and nieces dead before me." The testator never had any nephew or niece of his own, nor had he any brother or sister living when he made his will :— Held, that the nephews and nieces of the testator's wife took under the gift, and that evidence of circumstances making it improbable that the testator intended to benefit them, but not tending to show that any other class was intended, was inadmissible. *Sherratt* v. *Mountford*, 42 L. J., Ch. 688 ; L. R. 8 Ch. 928 ; 29 L. T. 284 ; 21 W. R. 818—C. A.

A testator, after giving a legacy to each of several persons, whom he called respectively his nephews and nieces, gave the residue of his property to be divided between all his nephews and nieces equally, share and share alike. At the date of the will, he had one nephew and one niece, who were both mentioned in the will, and there was no possibility of his having future nephews or nieces. The other persons mentioned in the will, and therein respectively called his nephews and nieces, were, in fact, the nephews and nieces of his wife :—Held, that the nephews and nieces by affinity were included in the gift of the residue. *Adney* v. *Greatrex*, 38 L. J., Ch. 414 ; 20 L. T. 647 ; 17 W. R. 637.

A testator devised freehold property to be divided between the children of his sister-in-law

and A. and B., and "my niece M." (the last-named three devisees being nieces of his deceased wife). He gave other real property to trustees upon trust for sale, and to pay the income of the proceeds of sale amongst "all my nephews and nieces," for their lives and the life of the survivors of them, and bequeathed the capital to the survivor, and he gave other real property unto "all my said nephews and nieces" as tenants in common, and he gave his residuary realty upon trust to pay the income to "all my said nephews and nieces" for their lives and the life of the survivor, and then devised such residue to the survivor, and bequeathed his residuary personal estate equally amongst "all my nephews and nieces": — Held, that the circumstance of the testator having given property to his wife's nieces, and having even called one of them his niece, was not sufficient to include any of his wife's nephews and nieces in the subsequent gifts to all his nephews and nieces; and those only who were related by consanguinity were entitled to take. *Grant* v. *Grant* (L. R. 5 C. P. 480, 727) dissented from. *Foster, In re, Merrill* v. *Morton*, 50 L. J., Ch. 249; 17 Ch. D. 382; 43 L. T. 750; 29 W. R. 394.

A testatrix having given legacies to several persons by name, describing each as her niece, bequeathed her residuary personal property upon trust for her respective "nephews and nieces," in equal shares. Two of the legatees in the will called nieces were nieces not of the testatrix, but of her late husband:—Held, that the circumstance that the testatrix had, in her will, called these two her nieces, did not enlarge the meaning of the words "nephews and nieces" in the residuary bequest, so as to make it include all the nephews and nieces of her husband living at her death, nor even to include the two legatees whom she had called her nieces in the will. *Smith* v. *Lidiard*, 3 K. & J. 252.

A testatrix, after giving a specific bequest to A. B., who was her husband's niece, but whom she there described as "my niece, A. B.," afterwards gave the residue of her property thus, "unto all my nephews and nieces":—Held, that the nephews and nieces by blood of the testatrix were entitled to the residue, to the exclusion of A. B. *Wells* v. *Wells*, 43 L. J., Ch. 681; L. R. 18 Eq. 504; 31 L. T. 16; 22 W. R. 893.

Testator gave to S. and his wife, whom he called his nephew and niece, memorial rings. He also gave to each of certain other "nephews and nieces," naming them, a legacy of nineteen guineas. He gave his residuary estate in trust for all and every his nephews and nieces living at his death, to be equally divided between them, "including my nephews and nieces to whom I have given legacies aforesaid." S. and some of the others named were nephews and nieces of the testator's wife. The wife of S. was not the niece of the testator or of his wife. The court, holding on the construction of will that S. and his wife took as nephew and niece in the gift to the class, held, further, that they took each a share. *Gue, In re, Smith* v. *Gue*, 61 L. J., Ch. 510; 40 W. R. 553. Affirmed, 67 L. T. 823—C. A.

—— **Illegitimate Nephews.**]—A testator had only one illegitimate nephew (John), and only one legitimate nephew (William), and he had no nieces. By his will, he gave a legacy to John, whom he described as "his nephew"; and he gave his residuary estate "to the children lawfully begotten of his nephews and nieces":—Held, that the children of John participated in the residue. *Tugwell* v. *Scott*, 24 Beav. 141; 3 Jur. (N.S.) 653.

A. bequeathed to his "niece, Louisa B., the wife of W. B., 100*l.*," and after other dispositions of his property gave the residue to be divided equally between all his "nephews and nieces." The testator had but one legitimate niece; Louisa B. was illegitimate:—Held, that she was entitled to a share of the residuary estates, as one of his nieces. *Thomas* v. *Putt*, 22 L. T. 775; 18 W. R. 987.

Pecuniary legacies of the same amount were given to three persons, each of whom was described as "my niece." One of them was illegitimate:—Held, that the illegitimate niece was not entitled to any share in the residuary estate under the gift to "all my nephews and nieces living at my death." *Bryon, In re, Drummond* v. *Leigh* (30 Ch. D. 110) distinguished. *Brown, In re, Brown* v. *Brown*, 58 L. J., Ch. 420; 37 W. R. 472.

Where a testator gives the residue of his property in favour of "my niece E. W.," having no niece of that name, his wife having two grandnieces E. W., one of whom is illegitimate, evidence is not admissible to show that the illegitimate grandniece was designated. *Fish, In re, Ingham* v. *Rayner*, 63 L. J., Ch. 437; [1894] 2 Ch. 83; 7 R. 434; 70 L. T. 825; 42 W. R. 520—C. A.

Gift to "Male Nephews."]—Under a bequest to the testator's male nephews, nephews who were children of his brothers are entitled to exclusion of nephews, children of his sisters. *Lucas* v. *Cuday*, Ir. R. 10 Eq. 514.

Nephews and Nieces, Class of, when Ascertained.]—*See* post, col. 922.

i. Executors and Representatives.

Executors construed Strictly.]—A sum of money was bequeathed in trust for several tenants for life in succession, with remainder to such person or persons as one of them, who was a married woman, should by will appoint, and in default of such appointment "to and for the benefit of her executors or administrators." The lady died without making any appointment:—Held, that her personal representative took the reversionary interest in the fund, not beneficially nor in trust for her next of kin, but as part of her estate. *Att.-Gen.* v. *Malkin*, 2 Ph. 64; 10 Jur. 955.

A testator bequeathed a fund to such of his grandchildren who should be living at the death of A., and the executors or administrators of such of his grandchildren as should be then dead leaving a child or children living at the death of A., in equal shares, so that such executors or administrators of any such grandchild so dying, or leaving a child or children as aforesaid, should take the same share as such grandchild would have taken if he had been living at the time of the death of A. One of the grandchildren died in the lifetime of A. leaving a child, and having in his lifetime become bankrupt:—Held, that the share of the deceased grandchild passed, under the will, neither to his executors beneficially, nor to his next of kin, but that the words "executors or administrators" were words of limitation only; and that the share of the grandchild consequently vested in his assignees. *Seymour, In re*, 1 Johns. 472; 28 L. J., Ch. 765; 5 Jur. (N.S.) 1049; 7 W. R. 609.

A testatrix bequeathed "to the executors or

executrixes of A." 100*l*. A. left an executor and two executrixes, who all died in the lifetime of the testatrix :—Held, a bequest to the legal personal representatives of A. to hold on the trusts affecting A.'s estate. *Trethewy* v. *Helyar*, 46 L. J., Ch. 125 ; 4 Ch. D. 53. And see *Stocks* v. *Dodsley*, 1 Keen, 325.

Bequest of personalty in trust for the legatee for life, with remainder to her appointees by will, with remainder, in default of appointment, to her executors and administrators :—Held, that the legatee took the capital absolutely. *Devall* v. *Dickens*, 9 Jur. 550.

Where a testator bequeathed a fund in trust for his five daughters, share and share alike, for their respective lives, and if any daughter should die without issue, or leaving issue, if such issue should die under twenty-one, then upon trust to divide and pay the share of such daughter immediately, or as soon as could be after her decease, unto and amongst his son and the survivors of his daughters, to whom he gave the same, or to their personal representatives :—Held, that "survivors" must refer to the death of the tenant for life whose share was the subject of division. And that the words "personal representatives" were used in their ordinary sense, and referred to the possible death of one of the survivors between the time of her interest vesting and the time of actual payment. On the death of the last survivor of the five daughters without issue, her entire share ordered to be paid to the executors of the son. *Bates's Trust, In re*, 2 N. R. 265 ; 9 L. T. 226 ; 11 W. R. 768.

A bequest of personalty to A. for life, with remainder to his issue male and the survivors for their lives, with remainder to the issue female of A. and the survivors for their lives, with remainder "to the executors, administrators and assigns of the survivors of A., or such issue, male or female, who shall happen to be such survivor," is a bequest to a class, which is necessarily ascertainable within the limits prescribed by the rule against perpetuities, confers an absolute contingent interest in such one of that class as may be the survivor, and is not void for remoteness. *Avern* v. *Lloyd*, 37 L. J., Ch. 489 ; L. R. 5 Eq. 383 ; 18 L. T. 282 ; 16 W. R. 669.

Bequests to females, some of whom were married and some single, for their separate use for their respective lives, and after their decease to such persons as they should respectively appoint, and in default of appointment to their respective executors, administrators and assigns :—Held, that the legatees, whether married or unmarried women, were each entitled upon petition, without executing any formal appointment, to an immediate transfer or payment to themselves of the corpus of their shares of the fund. *Holloway* v. *Clarkson*, 2 Hare, 521 ; 6 Jur. 923.

A gift in a will to A., and in case of his death to his executors or administrators, passes to the legatee's personal representative as part of his personal estate. *Palin* v. *Hills* (infra) overruled. *Clay, In re, Clay* v. *Clay*, 54 L. J., Ch. 648 ; 52 L. T. 641—C. A. Affirming 32 W. R. 516.

A., by his will, directed his executors to pay over all the residue of his property to B., but in case of B.'s death, then to pay over the same to the "executors or executrixes which B. by her will might appoint." B. died before A., having by her will given the residue of her property to C., and appointed D. her executrix :—Held, on a bill filed by D. against C., that D. took the residue of A.'s estate as part of the personal estate of B., and that he was to hold it upon the trusts and for the purposes of B.'s will. *Long* v. *Watkinson*, 21 L. J., Ch. 844 ; 16 Jur. 235.

Where a bequest is made by A. to the executors of B., such executors hold it in trust, and to be administered as part of B.'s assets. The persons who take it beneficially take as cestuis que trustent, and not as personæ designatæ, and it may belong either to the creditors or the pecuniary or residuary legatee or next of kin of B., according to the circumstances. *S. C.*, 17 Beav. 471.

—— **Taking Beneficially.**]—A testator directed his executors to invest 200*l*., which was to arise from the sale of freeholds, in trust to pay the dividends to his brother W. D. for life, and after his death to pay and assign the same to the executor or administrator of his brother absolutely ; W. D. died in the lifetime of the testator :—Held, that W. D.'s administrator took the 200*l*. absolutely and beneficially. *Nurse* v. *Oldmeadow*, 5 L. J., Ch. 300.

Executors construed Next of Kin.]—A testator gave a legacy of 2,000*l*. to S. B., and, in case S. B. should die in his lifetime, he directed that the legacy should go and be paid to her executors or administrators. S. B. died in the lifetime of the testator, having made a will by which she appointed R. P. her residuary legatee :—Held, upon appeal, that at the death of the testator S. B.'s next of kin were entitled to the beneficial interest in the legacy of 2,000*l*., and not S. B.'s residuary legatee. *Palin* v. *Hills*, 1 Myl. & K. 470 ; 2 L. J., Ch. 142.

A testatrix bequeathed certain personal property to trustees in trust for her daughter for life, for her separate use ; and after the daughter's decease, upon trust to transfer the fund to the daughter's "executors or administrators, for his, her or their own use and benefit absolutely." The daughter, who lived separate from her husband, made a will and appointed executors, who, however, did not prove the will, but her husband obtained letters of administration to her effects :—Held, that the wife had no power to dispose of the stock, and that the husband was entitled to the trust fund, to the exclusion of his wife's executors, and also of her next of kin. *Wallis* v. *Taylor*, 8 Sim. 241 ; 6 L. J., Ch. 68.

Under a gift for the sole and separate use of A., independently of any husband she might marry, during her life, and in case she died without issue, "unto the executors or administrators or other legal representatives of A. of her proper own blood and kindred" :—Held, that the next of kin of A. took at her death, the intention being to confine the gift to the family of A. to the exclusion of any husband she might marry. *Morgan's Trusts, In re*, 2 W. R. 439.

Legal or Personal Representatives construed Executors.]—"Legal representatives" means "executors or administrators," unless contrary intention is manifest. *Price* v. *Strange*, 6 Madd. 159. And see *Crawford's Trusts, In re*, 2 Drew. 230 ; 2 Eq. R. 553 ; 23 L. J., Ch. 625 ; 18 Jur. 616 ; 2 W. R. 341.

The words "personal representatives" are to be understood in the ordinary sense of executors and administrators, unless controlled by the context of the will. *Saberton* v. *Sheels*, 1 Russ. & M. 587 ; Tam. 383.

E. compounded with his creditors; his widow, by her will, left a fund to pay the residue of the debts to the compounding creditors, "or their personal representatives"; the administratrix of a deceased creditor is entitled beneficially to his bequest, and not the next of kin, nor residuary legatee of the creditor. *Evans* v. *Charles*, 1 Anstr. 128.

The words "personal representative" or the words "legal personal representative" must ordinarily and primâ facie be taken to mean "executors or administrators." *Smith* v. *Barneby*, 2 Coll. C. C. 728; 10 Jur. 748.

Testator, after devising certain freehold estates in trust for A. in strict settlement, with remainder to B. in strict settlement, with remainder to his own right heirs, gave leasehold and copyhold property (of the nature of personalty) upon trusts similar thereto, yet so that the same should not vest absolutely in any child of a tenant for life, unless such child should attain twenty-one, "and so that in default of any person becoming entitled thereto under this my will, the same shall be in trust for my personal and not my real representative." And the testator gave the residue of his personal estate to his wife, and appointed her sole executrix of his will. Upon the death of all the tenants for life without issue, a question arose as to the devolution of the leasehold and copyhold estates between the next of kin of the testator at the time of his death, his next of kin at the time of the surviving tenant for life, and the representative of the widow:—Held, that the representative of the widow was entitled to the exclusion of both classes of next of kin. *Ib.*

The expressions "personal representatives" and "legal representatives" have in some cases been held to be identical in meaning, but they are not necessarily so. *Kilner* v. *Leech*, 10 Beav. 362; 16 L. J., Ch. 503; 11 Jur. 859.

A bequest of a sum, after the death of S., to such of testator's other children as should be living at her death, equally, if more than one, and if only one to such only child, "and if all his other children should be then dead" (which was the event), then to his personal representatives, with directions to the trustees to transfer accordingly. S. and his other children survived, and were his next of kin at his death:—Held, that their personal representatives, and not his next of kin at S.'s death, were entitled under the ultimate bequest after the death of S. *Nicholson* v. *Wilson*, 14 Sim. 549; 14 L. J., Ch. 351; 9 Jur. 389.

By a gift to "personal representatives" the executors and administrators are primâ facie entitled. *Atherton* v. *Crowther*, 19 Beav. 448; 2 W. R. 639.

A testator, in 1841, bequeathed 200 guineas to such of the representatives as might be alive at his death of Messrs. P. and H., then both dead, with whom, in 1793, he had had some business by which they were losers to the amount of about 200 guineas:—Held, that the legal personal representatives of P. and H. and not the partners in the firm at the death of the testator, were entitled; and, secondly, that such representatives took in equal moieties and not in the proportion of their shares in the partnership. *Leak* v. *M'Dowell*, 33 Beav. 238; 3 N. R. 185.

A bequest to the representatives of the late mercantile house of A. and K., or to such persons as should be entitled at testator's decease to their personal property, in satisfaction of a debt due by testator's father:—Held, claimable by the legal representative of the surviving partner, and not by the parties beneficially entitled to the properties of A. and K. *Kerrison* v. *Reddington*, 11 Ir. Eq. R. 451.

A testator, after the death of his daughter, gave real and personal estate to her "legal personal representative or representatives," to hold to them, their "heirs," executors, administrators and assigns, according to the nature of the property. She left a husband, who took out administration, and an only child:—Held, that the husband took both the real and personal estate. *Dixon* v. *Dixon*, 24 Beav. 129.

A husband bequeathed a fund to his wife and four children for their lives, and after the death of the survivor to his four other children for their lives and the life of the survivor, and then the fund was to be divided among "the legal representatives" of the last four, "to be equally divided among them, share and share alike":—Held, that the executors or administrators of the last-mentioned children were entitled, and not their next of kin. *Wing* v. *Wing*, 34 L. T. 941; 24 W. R. 878.

—— **Words of Limitation.**]—Testator, by will, directed his executors to place out upon government securities such a sum of money out of the interest thereof as should be sufficient to produce an annuity of 50*l.*, which he gave unto his daughter J. for her life; and after her decease, in case she should leave issue, he gave the principal unto and equally amongst his surviving children and their legal representatives, share and share alike. The testator had four children living at the date of his will and of his death, of whom the daughter J. was the survivor; she died without leaving issue:—Held, that the words "surviving children" meant children surviving the daughter J., and that the words "legal personal representatives" must be construed in their ordinary sense, and not as importing kindred or representatives in blood; consequently, that the fund, of which the testator's daughter was the tenant for life, fell into the testator's residuary estate. *Taylor* v. *Beverley*, 1 Coll. C. C. 108; 13 L. J., Ch. 240; 8 Jur. 265.

A testatrix directed the interest of 1,000*l.* stock to be paid to D. for life, and at D.'s decease directed the stock to be transferred to D.'s personal representatives:—Held, that D. took an absolute interest. *Alger* v. *Parrott*, L. R. 3 Eq. 328.

A testator directed real estate to be sold, the proceeds to go in equal moieties between A. and B. as tenants in common, and their respective heirs or representatives:—Held, that these were words of limitation, and that the share of A., who predeceased the testator, lapsed. *Appleton* v. *Rowley*, 38 L. J., Ch. 689; L. R. 8 Eq. 139; 20 L. T. 600.

A bequest of residue to be divided equally "amongst all the children of my late cousin E. and my cousin P. and their lawful representatives" is a bequest to the children of E. and to P. himself, and not to the children of P. *Lugar* v. *Harman*, 1 Cox, 540; 2 Bro. C. C. 85.

—— **Gift by Substitution after Life Interest.**]—Reversionary bequest to the testator's sons by name, and in case of the decease of all, or any of them, in the lifetime of the tenant for life, to their legal personal representatives:—Held, to take effect in favour of their executors, and not

in favour of their next of kin, although the words "executors and administrators" occurred in other parts of the will. *Hinchcliffe* v. *Westwood*, 2 De G. & Sm. 205; 17 L. J., Ch. 167; 12 Jur. 618.

In a bequest to brothers and sisters or their representatives in equal shares, representatives mean executors or administrators, and not the next of kin. *Chapman* v. *Chapman*, 33 Beav. 556.

A testator gave 500*l.* upon trust to pay income thereof to a daughter for life, and if she died without issue, then to pay the same sum and interest to his four sons (naming them), share and share alike; but in case any of his sons should be then dead, the testator directed that the part or share of him or them so being dead should be paid to his or their child or children, share and share alike if more than one; or if but one, then to such only child; but if there should be no child, then to his or their legal representatives. One of the sons died a bachelor, and the others leaving children, some of whom died in their parents' lifetime; others survived their parent, but died before the tenant for life; and others survived both their parent and the tenant for life:—Held, that legal representatives meant executors and administrators. *Turner, In re*, 2 Dr. & Sm. 501; 34 L. J., Ch. 660; 12 L. T. 695; 13 W. R. 770.

A. bequeathed stock to his aunt for life, and, after her death, to his father, "and in case of his death then to devolve on his brothers and sisters, or their representatives." The father and two brothers predeceased the aunt:—Held, that "representatives" meant executors or administrators, and not next of kin, and that they took as trustees, and not beneficially. *Henderson, In re*, 28 Beav. 656.

Investigation of the authorities, and general doctrine on the construction of the word representatives in a will. Testator gave a life interest in certain funds, with remainder "to be equally divided between all my cousins-german now existing, or their representatives":—Held, there being nothing in the rest of the will to control the primary legal meaning of the word representatives, that it meant executors, and not next of kin; and the fund went to the executors or administrators of the testator's cousins-german, as part of their personal estate. *Crawford's Trusts, In re*, 2 Drew. 230; 2 Eq. R. 553; 23 L. J., Ch. 625; 18 Jur. 616; 4 W. R. 341.

Legacy given to A., with a declaration that if he should depart this life in the lifetime of the testator the legacy "should not lapse, but should go to or devolve upon his personal representative":—Held, A., having died in the testator's lifetime, that the legacy went to A.'s personal representative, who was also his residuary legatee. *Hewitson* v. *Todhunter*, 22 L. J., Ch. 76; 1 W. R. 78.

Legal or Personal Representatives Construed Next of Kin.]—A testatrix, who died in 1885, by her will dated in 1884, after bequeathing certain specific legacies, gave all her real and residuary personal estate to her trustees upon trust to convert and to stand possessed of the proceeds to pay the legacies following, which she thereby bequeathed to the persons thereinafter mentioned "or to their respective legal personal representatives." Then followed numerous legacies. The testatrix disposed of the residue of her property by giving it to each of several persons named "or the legal personal representatives" of such of them respectively as might then be dead or should die in her lifetime. In the commencement of the will the testatrix had made a specific bequest of certain portraits to a legatee there named, "or to his executors or administrators." One of the pecuniary legatees having died in the lifetime of the testatrix, the question was who was entitled to his legacy under the words "legal personal representatives":—Held, that the primâ facie meaning of "legal personal representatives" was executors or administrators; but that there was reason here for departing from the primâ facie meaning of the words, because the testatrix had, in one instance, used the words executors or administrators in a similar alternate gift, and it was legitimate to infer a change of meaning where different words were used:—Held, therefore, that the legacy belonged to the next of kin of the deceased legatee; and that such next of kin were to be those who would have been next of kin, according to the Statutes of Distribution, if the legatee had died at the time of the death of the testatrix. *Thompson, In re, Machell* v. *Newman*, 55 L. T. 85.

—— **Where Direction to Distribute.**]—A testatrix gave real and personal estate to trustees in trust for M. for life, with remainder as she should appoint; and in default of appointment, in trust to convey the real estate to such person or persons as would be the heir-at-law of M., and to transfer and assign the personal estate to or amongst such person or persons as would be the personal representative of M. M. appointed only a part of the personal estate. The next of kin, and not the executors, were held to be entitled to the unappointed part of the personal estate. *Baines* v. *Ottey*, 1 Myl. & K. 465; 1 L. J., Ch. 210.

E. D., by settlement, declared that trustees should stand possessed of 4,000*l.*, as to a moiety for his daughter, A. J. D., and her children; and as to the other moiety for his other daughter, H. D., and her children; and that if both A. J. D. and H. D. should die without leaving issue living at the time or respective times of their decease, then that the trustees should divide the trust moneys among the personal representatives of E. D. in a legal course of administration. Both daughters died without having been married. E. D. did not leave a widow:—Held, that the persons intended to be benefited were the next of kin of E. D. living at his death. *Wilson* v. *Pilkington*, 16 L. J., Ch. 169; 11 Jur. 537.

The testator, after directing his personal estate to be invested, gave the income of the same and of his real estate to his wife for her life; and directed that after her death his trustees should sell his real estate, "and pay, distribute, and divide" the money thence arising and the money at interest; and he thereby gave and bequeathed one-third thereof unto his cousin J. S. "if he should be then living; but if he should be then dead, unto his legal representative or representatives, if more than one, share and share alike." J. S. died in the lifetime of the testator's widow, leaving a widow and children:—Held, that upon the death of J. S. his widow and children, as the persons who would, in case of intestacy, be entitled to his personal estate, according to the Statute of Distributions, took vested interests in the third of the residue in equal shares as tenants in common. *Smith* v. *Palmer*, 7 Hare, 225; 13 Jur. 94.

Stock was bequeathed in trust for testator's brother and the brother's wife for their lives successively, and after their decease in trust to be divided equally share and share alike, amongst the testator's nephews and nieces, children of the brother then living, or their legal personal representatives:—Held, that the representatives of nephews and nieces dying in the lifetime of the surviving tenant for life took shares, and that such representatives were the next of kin, and not the executors or administrators of the nephews and nieces. *King* v. *Clearland*, 4 De G. & J. 477; 28 L. J., Ch. 835; 4 Jur. (N.S.) 1044; 7 W. R. 602. Affirming 26 Beav. 166.

The words "legal representatives" held to mean next of kin, not executors or administrators. *Walker* v. *Camden* (*Marquis*), 16 Sim. 329; 17 L. J., Ch. 488; 12 Jur. 932.

A devise of real estate to a testator's widow for life, with remainder to his son if he should attain twenty-one; but in case he should die in the lifetime of his mother, then he directed his real estate to be sold, and one moiety of the proceeds he gave and bequeathed unto and equally amongst his (the testator's) legal personal representatives, in such and the like manner as if the same had been to be paid under the Statute of Distributions. He gave the other moiety unto and equally amongst the legal personal representatives of his wife. He left his widow and son alone surviving him. The son died in the lifetime of his mother:—Held, that under the gift to his legal personal representatives, the widow took one-third and the son two-thirds of the moiety. *Holloway* v. *Radcliffe*, 23 Beav. 163; 26 L. J., Ch. 401; 3 Jur. (N.S.) 198; 5 W. R. 271.

—— **Where Direction to Pay, and Executors appointed.**]—Testator gave 450*l.* to trustees, their executors, &c., in trust for his son for life, and after his son's decease to pay thereout two legacies of 100*l.* each to two of his daughters, and to pay the residue to the legal representatives of his son; and he gave the residue of his personal estate to his son, his executors, &c.:—Held, that the words "legal representatives" meant "next of kin." *Walter* v. *Meakin*, 6 Sim. 148; 2 L. J., Ch. 173.

Testator bequeathed 700*l.* to his daughter's husband, his executors, &c., in trust, to pay the interest to his daughter for her separate use for life, and after her death to such persons as she should appoint by will, and in default of appointment to her personal representatives. The daughter died without having made any appointment:—Held, that her next of kin, to the exclusion of her husband, were entitled to the 700*l.* *Robinson* v. *Smith*, 6 Sim. 47; 2 L. J., Ch. 76. S. P., *Styth* v. *Monro*, 6 Sim. 49.

Money settled in trust, to be paid according to the appointment of A., and in default thereof to his legal representatives, according to the course of administration. A., by will, in pursuance of the power, appoints to his legal representatives, according to the course of administration, and makes a residuary legatee, whom he appoints one of his executors. Upon the will, the next of kin are entitled. *Jennings* v. *Gallimore*, 3 Ves. 146; 3 R. R. 147.

—— **Substitutional Gift.**]—Bequest to A. or his legal representatives, A. being dead at the date of the will (which the testator did not know), having bequeathed his property on certain trusts:—Held, that A.'s next of kin, according to the Statute of Distributions, were entitled, to the exclusion of his legatees or executors. *Cotton* v. *Cotton*, 2 Beav. 67; 8 L. J., Ch. 349; 3 Jur. 886.

Bequest of residue to certain persons, and if they should die in the lifetime of the testatrix to their legal representatives. One died; his next of kin shall take the share of the residue; not his executor beneficially, or his residuary legatee. *Bridge* v. *Abbott*, 3 Bro. C. C. 224.

—— **Effect of Explanatory Words.**]—Leasehold property bequeathed in remainder, in trust for a child en ventre, if a son for life, and after his decease for such of his issue male as should be his heir-at-law at his death; if no such then living, for such persons as should then be the legal representatives of the testator. A son being born and dying without issue, the limitation over was established in favour of the next of kin according to the statute at the time of the distribution. *Long* v. *Blackall*, 3 Ves. 486; 4 R. R. 73.

A fund was settled upon a wife for life, with remainder to her husband for life, with remainder to her children, with remainder in default of children to the person or persons who should happen to be her legal personal representative or representatives at the time of her death:—Held, that "legal personal representative or representatives" meant next of kin according to the Statute of Distributions. *Robinson* v. *Evans*, 43 L. J., Ch. 82; 29 L. T. 715; 22 W. R. 199.

A testator bequeathed a legacy of 2,000*l.* upon trust for a married daughter, F., for life, then for her husband for life, and after the death of the survivor for such persons related by blood to F. as she should appoint; and in default of appointment to transfer the same to such persons as would be the personal representatives of F. in case she had died sole and unmarried. By a codicil the testator, in reciting the bequest, referred to these trusts as being trusts for the benefit of his daughter's relations and next of kin. F. died in testator's lifetime:—Held, that by the personal representatives of F. were meant the persons who were her statutory next of kin at the testator's death. *Grylls, In re*, L. R. 6 Eq. 589.

An appointment to the grandchildren of persons named, with a direction that in the event of their death their shares should, for the purpose of transmission, and not as conferring an interest in such deceased grandchild, go and belong to the person or persons who would be entitled thereto in case such share had formed part of the personal estate of such deceased grandchild immediately before his or her death, and to the intent that the same might follow the destination of such personal estate, but only as a disposition by virtue of the deed of appointment:—Held, a gift of each deceased grandchild's share to the persons who would have been entitled to his personal estate if he had died intestate. *Jackson* v. *Crick*, 19 W. R. 547.

Bequest of three several sums to the testator's three daughters for life, and in default of appointment the same to go and be paid to their next personal representatives:—Held, that by reason of the word "next" the ultimate limitation could not signify executors or administrators; and that the nearest of kin, and not the next of kin according to the Statute of Distributions, took

as joint tenants. *Stockdale* v. *Nicholson*, 36 L. J., Ch. 793; L. R. 4 Eq. 359; 16 L. T. 767; 15 W. R. 986.

"Representatives" Construed Legal Personal Representatives.]—A gift in a will to the "representatives" of a person is a gift to his legal personal representatives, in the absence of any context in the will showing that the word is to have a different meaning. *Crawford's Trusts, In re* (supra, col. 819), followed. *Ware, In re, Cumberlege* v. *Cumberlege-Ware*, 59 L. J., Ch. 717; 45 Ch. D. 269; 63 L. T. 52; 38 W. R. 767.

—— **Construed Descendants.**]—The word "representatives" construed to mean "descendants," the context of the will requiring it. *Styth* v. *Monro*, 6 Sim. 49.

Under a bequest to "personal representatives" of children to take per stirpes:—Held, first, that their executors and administrators were not entitled. Held, secondly, principally upon the terms of the gift over to the testator's "next of kin," if there should be no "representatives," that the descendants of the children were intended. *Atherton* v. *Crowther*, 19 Beav. 448; 2 W. R. 639.

Devise to A. and his wife for life, and after the death of the survivor upon trust to sell and apply the produce to and among all and every the same child or children of A. by his said wife, and their representatives equally; the fund belongs to the children surviving the testator, but the issue of a daughter who died in the life of A. are entitled as representatives against the claim of their father as administrator. *Horsepool* v. *Watson*, 3 Ves. 383.

A testator by his will, dated in 1868, directed his trustees to pay the income of a certain share in a trust fund "to my sister Charlotte, the wife of Thomas H.," during her life, and after her death to pay and divide the share unto, between and amongst "all her children" who should be living at her death, and the "representatives" of such of them as should have died in her lifetime who should have attained twenty-one, equally share and share alike:—Held, that the word "representatives" in the gift must be construed either as "next of kin" or as "descendants," and not as "executors or administrators." *Horner, In re, Eagleton* v. *Horner*, 57 L. J., Ch. 211; 37 Ch. D. 695; 58 L. T. 103; 36 W. R. 348.

"Personal Representatives" Construed Descendants.]—A testatrix, who died in 1827, by her will, dated in 1815, devised to her trustees therein named certain freehold hereditaments upon trust to apply the rents and profits thereof, in the first place, towards the discharge of certain debts and her funeral and testamentary expenses, and then to pay, apply, appropriate, and divide all and every such rents and profits unto and for the equal benefit and advantage of all her children and their respective families from time to time so long as any of her children should live; and from and after the death of the youngest liver of her children, upon further trusts, and she did thereby order and direct the heirs of her surviving trustee to sell and absolutely dispose of all her said real estate, and the moneys arising from such sale or sales to pay and divide unto and equally amongst all and every the "personal representatives" of her several children per stirpes:—Held, that the words "personal representatives" here meant the descendants of the testatrix's children; and that the issue living at the testatrix's death, and born before the death of the last surviving child of the testatrix, were entitled to share per stirpes. *Knowles, In re, Rainford* v. *Knowles*, 59 L. T. 359.

Gift to Executor Virtute Officii.]—The mere fact that the gift of the legacy precedes the appointment of the legatee as executor—or that the legacies to several persons appointed executors differ either in their amount or subject-matter—is not enough by itself to rebut the presumption, that a legacy given to a person who is appointed executor is annexed to the office. *Jervis* v. *Lawrence* (L. R. 8 Eq. 345) questioned. *Wildes* v. *Davies* (1 Sm. & Giff. 475) explained. *Appleton, In re, Barber* v. *Tebbit*, 54 L. J., Ch. 954; 29 Ch. D. 893; 52 L. T. 906; 49 J. P. 708—C. A.

—— **Whether Beneficial or not.**]—A testator died unmarried possessed of real and personal estate, his only next of kin being children of a deceased brother. By his will, after reciting that his lands could not be held by his heir without large capital, he devised them to his brother's eldest son on condition of his executing the injunctions of his will, of which he made him executor; he desired his successor to his lands to recover the arrears of rent from the tenants, and left legacies to certain persons on their giving up to his heir chattels which were in their care:—Held, that a sufficient intention appeared to satisfy the statute, and that the executor took the undisposed-of residue beneficially. *Harrison* v. *Harrison* (2 H. & M. 237) followed. *Fuge* v. *Fuge*, 27 L. R., Ir. 59.

Testator gave to each of his three executors a legacy for the trouble of carrying out his will, and also to mark his friendship and regard for them. He gave his residue among certain charities or such others "as my executors herein named may select." One executor renounced:—Held, that he was entitled to the legacy, and also to join in the selection of the charities. *Mainwaring, In re, Crawford* v. *Forshaw* or *Royal Infirmary*, 59 L. J., Ch. 348; 43 Ch. D. 643; 62 L. T. 63; 38 W. R. 412.

A testator, by his will, bequeathed legacies to three charities, and also to some individuals, after which he appointed E. N. and J. G. C. executors, to whom he bequeathed legacies of 50*l.* each. He then directed his houses and the stock in his shop to be sold, and then added the clause: "I will my executors shall apply the overplus, if any, as they think fit":—Held, that the executors did not take beneficially. *Fenton* v. *Nevin*, 31 L. R., Ir. 478—C. A.

A testator bequeathed the lands of K. (building ground) to his son F. J. N., whom he appointed executor. He directed the land to be built on according to certain plans, with power to F. J. N. to alter them, and power to make building leases. He appropriated the rents of the lettings for building and of other property for carrying out his general trust, which he did not clearly define, and gave his executors duties to perform of a continuing character, to keep the furniture and the house in which he had resided for his daughters and sisters-in-law, and supply the latter with clothes and pocket-money; and to continue to carry on a certain business in which he had himself been engaged, &c.:—Held, that the lands

of K. were bequeathed to F. J. N. as executor, and not beneficially. *Nugent* v. *Nugent*, 15 L. R., Ir. 321.

And see EXECUTOR AND ADMINISTRATOR.

k. Next of Kin.

Construed Nearest of Kin.]—A., by will, bequeathed a fund to trustees, upon trust to divide the same "equally amongst his next of kin":—Held, that the nearest of kindred in blood, and not the next of kin under the Statute of Distributions, were entitled. *Avison* v. *Simpson*, 1 John. 43; 5 Jur. (N.S.) 594; 7 W. R. 277.

The Master was directed to inquire who were the nearest in blood of a testator, ex parte paternâ, at a certain period:—Held, that "nearest of blood" and "next of kin" were synonymous terms; and as the suit related to personal estate, that the Master ought to follow the civil, and not the canon, law mode of computation in prosecuting the inquiry. *Cooper* v. *Denison*, 13 Sim. 290; 12 L. J., Ch. 404.

The words "next of kin" used simpliciter, and without explanatory context, must be taken to mean "nearest of kin." *Elmsley* v. *Young*, 2 Myl. & K. 780; 4 L. J., Ch. 200. Overruling *Phillips* v. *Garth*, 3 Bro. C. C. 64, and *Hinckley* v. *Maclarens*, 1 Myl. & K. 27.

Under a residuary bequest to the next of kin in equal degree, brothers entitled, excluding nephews and nieces. *Wimbles* v. *Pitcher*, 12 Ves. 433. See also *Anon.*, 1 Madd. 36.

A. gave his property, after the death of his wife, to his or her next of kin, in equal shares. The testator was illegitimate, and died without any next of kin:—Held, that the next of kin of the wife took to the exclusion of the Crown, and the nearest of kin to the exclusion of the more remote, and that the only surviving brother of the wife was entitled to the fund. *Rook* v. *Att.-Gen.*, 31 Beav. 313; 31 L. J., Ch. 791; 9 Jur. (N.S.) 9; 10 W. R. 745.

A testatrix by her will gave 2,000*l.* to trustees upon trust to pay the interest to H. during her life for her separate use, and after her death to pay the fund to such persons as H. should by will appoint, and in default of appointment to the next of kin of the testatrix living at the death of H.; and the testatrix directed that, in case H. should die without leaving issue who should attain twenty-one, the trustees should divide the 2,000*l.* between certain persons therein mentioned. H. died leaving one son who attained twenty-one, and without having exercised the power of appointment:—Held, that there was no gift by implication to the son, nor to H. absolutely; but that in the events which had happened the nearest in blood to the testatrix living at the death of H. were entitled to the fund as joint tenants under the first gift over in default of appointment. *Hayton's Trusts, In re*, 4 N. R. 55; 10 L. T. 336.

A husband bequeathed his personal estate equally between his wife and children, and directed that the share of his daughters should be vested in the bank in their own names, and the interest for life to be received by them, to remain as a jointure for their use in case of their marrying, untouchable by their husbands, "but to descend to their legal or next of kin":—Held, that "legal or next of kin" meant nearest of kin without regard to the Statute of Distributions, and that the daughters took only life estates. *Harris* v. *Newton*, 46 L. J., Ch. 268; 36 L. T. 173; 25 W. R. 228

See also Cases post, cols. 828–30.

Gift to "Nearest of Kin in the Male Line."]—A testator directed that a portion of his property should be invested, and the dividends paid among his brothers and sisters and their children; that the residue should accumulate for twenty-one years after his death, at the end of which time the accumulated fund (to which he gave the name of his "capital property") was to become the property of "the then nearest of kin to myself in the male line in preference to the female line." The inheritor of this capital property was to assume the testator's surname, "if not of that surname." At the date of the will and at the death of the testator he had two brothers and several sisters living. The brothers (unmarried), the unmarried sisters, and two of the married sisters, died within the twenty-one years, leaving one married sister and the sons and daughters of her married sisters and of herself surviving. B., the son of a paternal uncle of the testator, claimed the capital property of the testator, as being the only person who answered the description of "nearest of kin in the male line":—Held, that he was not entitled, the words of the will not restricting the gift to a male claiming through males; and the married sister was held entitled to the "capital property." *Sayer* v. *Bradly* or *Boys*, 5 H. L. Cas. 873; 25 L. J., Ch. 593; 2 Jur. (N.S.) 887; 4 W. R. 808.

—— **"Next Male Kin."**]—C. devised the rents of certain real estate to his wife for life, and after her death in certain proportions to H. and G. during their lives, and in the event of either dying, the deceased's share to revert to the next male kin:—Held, that next male kin must be taken to mean those of the testator's next of kin at his death who were males. *Chapman, In re, Ellick* v. *Cox*, 49 L. T. 673; 32 W. R. 424.

—— **"Nearest of Kin by way of Heirship."**]—Under a devise of land "to my nearest of kin by way of heirship":—Held, that the heir was entitled. *Williams* v. *Ashton*, 1 J. & H. 115; 3 L. T. 177.

—— **Next of Kin ex parte maternâ.**]—Bequest to A. B. for life, and afterwards to her children, but in default of children "to pay or assign and transfer" to C. D. if living, but if dead to his next of kin ex parte maternâ. C. D. died before A. B.:—Held, that the next of kin ex parte maternâ were not excluded because they also filled the character of next of kin ex parte paternâ. *Gundry* v. *Pinniger*, 14 Beav. 94. Affirmed 1 De G. M. & G. 502; 21 L. J., Ch. 405; 16 Jur. 488.

The testatrix devised and bequeathed the rents, issues, and profits of her real and personal estate to her sister for life, and upon and after her decease upon trust to sell the real estate and pay the money arising therefrom to such persons as the testatrix should by any codicil direct, and if she should not bequeath the same by any codicil, then to pay the same unto and amongst her next of kin; and by her codicil the testatrix revoked the former devise and bequest made by her will, and devised and bequeathed all the said real and personal estate to other trustees upon the like trusts, but directed that all the said residue

should be paid to her next of kin on the part of her mother, and not to any of her next of kin on the part of her father:—Held, that the testatrix died intestate as to the residuary personal estate; that the next of kin of the testatrix ex parte maternâ, at the death of the tenant for life, were under the codicil entitled to the proceeds of the real estate. *Say* v. *Creed*, 5 Hare, 580; 16 L. J., Ch. 361; 11 Jur. 603.

—— **Next of Kin of a Particular Name or Blood.**]—Devise to the devisor's sister A., then unmarried, for life, with remainder to her first and other sons in tail male; to her daughters in tail, as tenants in common; to his sister B., then married, for life, and to her first and other sons in tail; remainder to the first and nearest of his kindred, being male and of his name and blood, that shall be living at the determination of the estates before devised, and to the heirs of his body. A person claiming under the last limitation must be of the name as well as the blood; and the qualification as to the name is not satisfied by having the name taken by the King's licence previous to the determination of the preceding estates. *Leigh* v. *Leigh*, 15 Ves. 92; 10 R. R. 31.

A. M. devised certain estates to his nephew R. M. and his heirs, "not entertaining the least doubt but that he would in due time, and upon the first proper occasion, take care not only to have the said estates so devised to him by me, but my paternal estates, settled in such manner, that the said estates may continue in the male line of our family, and in our name and blood." At the death of the testator there were seven persons of the male line of his family and of his name and blood alive, one of whom was the plaintiff's paternal grandfather, who was descended from the paternal great-grandfather of the testator:—Held, that the objects were sufficiently defined and certain to enable the court to execute the trusts created by the words of recommendation in the will, and that the court, in executing the trust, might go into the ascending line, and was not confined to the descendants of the father of the testator; a general demurrer to the bill for want of equity was therefore overruled. *Malone* v. *O'Connor*, Ll. & G. t. Plunk. 465.

Under a bequest to next of kin of the surname of C. living at decease of A.:—Held, that a person whose maiden name was C., and who was sole next of kin at A.'s decease, but who had married after the death of the testator, was entitled. *Carpenter* v. *Bott*, 15 Sim. 606; 16 L. J., Ch. 433; 11 Jur. 723.

Devise of real and personal estate in trust for the nearest relation "of the Pyots"; the latter held to be nomen collectivum, and descriptive of that particular stock, and that this mixed fund should not go to the heir-at-law of that name. A change of the name of Pyot by marriage not to exclude. *Pyot* v. *Pyot*, 1 Ves. 335.

The testatrix, Miss R., had a brother, a widower advanced in life, who had assumed the name of R. G., and had two children, one a bachelor of unsound mind, the other a daughter. By her will she bequeathed a fund to trustees in trust to pay the income to her brother for life, then to his son for life, and from and after the decease of both of them upon trust to pay the income "for life unto any immediate or direct descendants of my said brother or nephew who shall bear the name of R. G. only, and from and after his or her decease, or in case of failure of any such immediate or direct descendants of my said brother or nephew who shall bear the name of R. G. only," upon trust for certain specified charitable societies. There was a clause for determining the interest of any descendants who, after becoming entitled to the receipt of the income, should abandon the name of R. G. Before the death of the nephew, a son, born after the death of the testatrix, of the daughter of the testatrix's brother, assumed by royal licence the name of R. G., and at the decease of the survivor of the brother and nephew there was no other descendant of either of them who bore that name:—Held, that the gift was not, as in *Leigh* v. *Leigh* (15 Ves. 92; 10 R. R. 31), confined to persons entitled to the name of R. G. by birth, and that the brother's grandson, as he bore the name of R. G. at the determination of the life interests, was entitled for life, and that on his decease the gift to the charities would take effect. *Roberts, In re, Repington* v. *Roberts-Gawen*, 19 Ch. D. 520; 45 L. T. 450—C. A. Affirming on this point 50 L. J., Ch. 265.

Claim of Illegitimate Next of Kin.]—A testator, who had none but illegitimate children, by his will, made five months before his death, devised and bequeathed all his real and personal estate to trustees, on the arrival of a future event, to sell the realty, and to divide the residue of the proceeds and of the personalty into four parts, and pay one to his son J., and if his son should die under twenty-one, and should not leave any child who should attain twenty-one or marry, the share was to be held in trust for such persons as would at his son's decease be his next of kin under the Statute of Distributions. The testator directed another share to be held upon certain trusts for the benefit of his daughter A. (a married woman), her husband, appointees, and children; and if she should leave no child or issue who should become entitled, he directed the share to be paid or assigned to such persons as would at A.'s death be her next of kin under the Statute of Distributions in case she had died intestate and unmarried. He directed the third and fourth shares to be held upon similar trusts for the benefit of his two other daughters, H. and E., then unmarried, their husbands, appointees, children, and next of kin. He then provided that any shares or moneys to which any or either of his three daughters should become entitled "by virtue of the provisions hereinbefore contained, as next of kin of the others or other of them," or of his son, should be held upon the like trusts as the original shares. The daughter H. having married and died without having had a child, and without having made any appointment, and her husband being also dead:—Held, that the phrase "next of kin" of H. could not be read as designating the surviving illegitimate children of the testator, and that there was an intestacy as to the share of H. *Standley, In re*, L. R. 5 Eq. 303.

Gift to Next of Kin of A. as if Dead Unmarried.]—A fund was devised to A. for life, and after her death to such persons as she should appoint, and in default of appointment to such persons as at the time of the death of A. would be entitled to her personal estate under the Statute for the Distribution of Intestates' Estates as if she had died intestate and unmarried. A.

subsequently married, and had eight children, but died a widow, and without having appointed the fund:—Held, that "unmarried" meant not having a husband at the time of her death, and therefore that the children of A., and not the persons who would have been entitled to A.'s personal estate if she had died without ever having been married, were entitled to the fund. *Day* v. *Barnard*, 1 Dr. & Sm. 351; 30 L. J., Ch. 220; 3 L. T. 537; 9 W. R. 136.

A testatrix gave a legacy to the sole and separate use of her daughter for life, with a power of appointment, and in default of appointment to her next of kin, "as if she had died sole and intestate, to the utter exclusion of her husband." This expression will not exclude a child of the daughter, but is to be considered as used for the sole purpose of excluding the husband. *Hardwick* v. *Thurston*, 4 Russ. 380; 6 L. J. (O.S.) Ch. 124; 28 R. R. 130.

A married woman by her will bequeathed her separate property upon trusts for the benefit of her son and daughter and their children; and in case her said son and daughter should die without leaving children who should attain a vested interest under the will, upon trust for the person or persons of the blood and kindred of the testatrix who would be entitled to the same as her next of kin in case she had died intestate and unmarried. Upon the death of the testatrix, leaving her son and daughter surviving:—Held, that the word "unmarried" was not to be construed "without having been married," so as to exclude the testatrix's children; and that, consequently, the next of kin of the testatrix other than her children were not necessary parties to a suit for the administration of the estate. *Coventry* v. *Lauderdale* (*Earl*), 10 Jur. 793.

A testator bequeathed the residue of his moneys to trustees, in trust as to one-fourth for such person as his daughter C., notwithstanding her coverture, should by deed or will appoint; and in default, in trust to pay the interest to C. for her separate use for life; and after her decease, in trust for such persons as at the time of her decease should have been entitled thereto as her next of kin in case she had died possessed or entitled to the same intestate and unmarried. C. was married at the date of the will. She died leaving her husband and three children her surviving. No appointment of the fund was ever made in pursuance of the power. The husband and the brothers and sisters of C. claimed the fund, and thereupon the trustees paid it into court:—Held, that the word "unmarried" was used by the testator only to exclude the husband from taking any benefit under the will, and that the children of C. were absolutely entitled. *Gratton, In re*, 26 L. J., Ch. 648; 3 Jur. (N.S.) 684; 5 W. R. 795.

A testator bequeathed the residue to his wife for life, with remainder to his children living at his death; and if there should be none (which happened), then he directed, "that immediately after his wife's decease it should become the property of the person who should then become entitled to take out administration to his effects, as his personal representative," according to the Statute of Distributions, and in the proportions thereby pointed out, in case he had died intestate and unmarried:—Held, that the next of kin at the death of the testator, and not those at the death of the tenant for life, were entitled. *Cable* v. *Cable*, 16 Beav. 507.

A testator gave a legacy to his daughter for life, and in default of issue in trust "for her next of kin in blood as if she had died unmarried." The daughter died without issue:—Held, that the only surviving sister of the daughter was entitled to the legacy in exclusion of children of deceased brothers and sisters, for that the words "as if she had died unmarried" did not point to the mode of distribution in cases of intestacy, and that next of kin, therefore, must be taken as meaning nearest relations, and not persons entitled as next of kin according to the statute. *Halton* v. *Foster*, 37 L. J., Ch. 547; L. R. 3 Ch. 505; 18 L. T. 623; 16 W. R. 683.

A bequest was made, in a certain event, which happened, to "A.'s next of kin in blood, as if A. had died unmarried." A. left surviving her a sister and several nephews and nieces:—Held, that the sister, being A.'s next of kin in blood, was solely entitled, to the exclusion of the nephews and nieces. *Ib.*

To entitle the next of kin according to the Statute of Distributions there must, in order to take the case out of the authority of *Withy* v. *Mangles* (10 Cl. & F. 215; 10 L. J., Ch. 391), be an express reference to the statute, and not one which has to be spelt out of the words of the will. *Ib.*

A testator by his will dated in 1883, after disposing of a sum of 20,000*l.* in favour of his son and others, made an ultimate gift of that sum to the persons who would be the next of kin of his (the testator's) late mother if she had "died intestate without having ever been married." The trustees of the will paid the 20,000*l.* into court under the Trustee Relief Acts. In the events which happened the whole of the fund was claimed by the first cousin once removed of the testator's mother. She had died leaving one lineal descendant only, who opposed the claims of her first cousins once removed:—Held, that the words "died intestate without ever having been married" were clear and unambiguous; and that effect must be given to them by directing that the lineal descendant of the testator's late mother was, by the terms of the bequest, excluded in favour of her collateral next of kin. *Watson's Trusts, In re*, 55 L. T. 316.

Next of Kin construed Statutory Next of Kin.]—M. M. gave and bequeathed all her real and personal estate to her daughter L. for her separate use for life, remainder to L.'s husband for life, and after the decease of both of them, then to such persons as L. should by deed or will appoint, and in default "unto and to the use of the person or persons who at the decease of my said daughter shall be her next of kin according to the Statute of Distributions of Personal Estate, and in the like shares and proportions as if she had died without being married." The will further directed L. to appoint two trustees for the purposes of the will in whom the property was to be vested, and power to appoint new trustees was given to L. L. died in the lifetime of her mother, M. M., leaving her husband her survivor, but leaving no issue. At the death of L. her next of kin according to the statute were her mother and a nephew, who was thereby child of the only sister of L.; and upon the death of M. M. this nephew was the only next of kin of L. then living, and as such he claimed the whole real and personal estate of M. M.:—Held, on demurrer to a bill filed by the nephew, that the gift to the next of kin of L. had not lapsed; that the gift to the "next of kin" did not mean nearest of kin, and

that the nephew was entitled to one-half of the property. *Nichols* v. *Haviland*, 1 K. & J. 504; 1 Jur. (N.S.) 891.

The term "nearest of kindred," with reference to the Statute of Distributions, has the same meaning as "next of kin." *Markham* v. *Ivatt*, 20 Beav. 57.

Testator, by will unattested, after, among others, charitable legacies, to be distributed by his executors, gave the remainder and residue of his estate, if any, and effects of what nature soever and wheresoever which he should be seised or possessed of, &c., "to next of kin or heir-at-law, whom I appoint my executor," after debts, &c., paid. He left one brother, and by deceased brothers a niece and several nephews, one of whom was heir-at-law. Distribution decreed according to the statute. *Lowndes* v. *Stone*, 4 Ves. 649; 4 R. R. 316.

Under a gift of residue to the testator's wife for life to her separate use, with an absolute power of appointing the principal by deed or will, and a gift, in default of such appointment, to her next of kin as in case of intestacy:—Held, that the gift of the principal had not lapsed by the death of the wife in the testator's lifetime, but that her next of kin according to the statute were entitled to the benefit of it. *Edwards* v. *Salaway*, 2 Ph. 625; 12 Jur. 487. Affirming 17 L. J., Ch. 329.

Exclusion of Husband or Wife.]—Residuary clause "to be divided amongst my next of kin as if I had died intestate" is a bequest to the next of kin as they would take under an intestacy; and the widow is not one of the next of kin in the ordinary sense, or in the sense in which the testator used the words. *Garrick* v. *Camden* (*Lord*), 14 Ves. 372; 9 R. R. 297.

Primâ facie bequest by a husband to his next of kin does not include his wife, nor does a similar bequest by a wife, under a power, include her husband. *Id.* 382.

Testator bequeathed 700*l.* to his daughter's husband, his executors, &c., in trust to pay the interest to his daughter for her separate use for life, and after her death to such persons as she should appoint by will, and in default of appointment to her personal representatives. The daughter died without having made any appointment:—Held, that her next of kin, to the exclusion of her husband, were entitled to the 700*l.* *Robinson* v. *Smith*, 6 Sim. 47; 2 L. J., Ch. 76.

Testator bequeathed the interest of 1,000*l.* stock to his granddaughter for life, and gave the residue of his personal estate to his wife. He then, after giving certain benefits to his daughter and granddaughter out of his real estate, directed that, in case both of them (his said daughter and granddaughter) should die without leaving children to attain twenty-one, the proceeds of the sale of the real estate, together with the said 1,000*l.* stock, should go to the persons who would have been entitled to his personal estate under the Statute of Distributions in case he had died intestate:—Held, that the right of the widow to the 1,000*l.* stock under the residuary clause was divested by the subsequent clause, although she was herself one of the persons who, by virtue of that clause, and in the event therein mentioned, were to share the 1,000*l.*; but held, also, that, until the event happened on which the gift was divested, she was entitled to all the dividends. *Martin* v. *Glover*, 1 Coll. C. C. 269; 8 Jur. 640.

Under a bequest, in the event of daughters dying without leaving issue, in trust for the persons who would at the time of the decease of such daughters respectively be entitled, as next of kin or otherwise, to the personal estate of such daughters respectively, under the statutes made for the distribution of intestates' effects:—Held, that the husbands of the daughters did not take. *Milne* v. *Gilbart*, 2 De G. M. & G. 715; 5 De G. M. & G. 510; 2 Eq. Rep. 999; 23 L. J., Ch. 828; 18 Jur. 611; 2 W. R. 611.

A testator disposed of his residue as follows: "The residue of my personal estate and effects not hereinbefore disposed of I propose to bequeath by a codicil to this my will, or otherwise to allow the same to go, to my next of kin, according to the Statute for the Distribution of Estates of Intestates." The testator made no codicil to his will. He left a widow and brothers and sisters, and the children of a deceased sister, surviving:—Held, that the testator showed an intention to die intestate in case he made no codicil, and that his widow took her moiety under the statute. *Ash* v. *Ash*, 33 Beav. 187; 10 Jur. (N.S.) 142; 9 L. T. 673; 12 W. R. 185.

Wife is not one of the next of kin under the Statute of Distributions. *Horn* v. *Coleman*, 1 Sm. & G. 169; 22 L. J., Ch. 779; 17 Jur. 408; 1 W. R. 194.

Bequest to A. for life, and afterwards to his children, and in default, "then" unto the persons "of the blood, or next of kin," of the testator "as would, by virtue of the Statute of Distributions, have become then entitled thereto in case the testator had died intestate." A. died without issue:—Held, that the class comprising the ultimate gift was to be ascertained on the death of the testator, and not of A., and that the class took as tenants in common, notwithstanding the exclusion of the testator's widow. *Downes* v. *Bullock*, 25 Beav. 54. Affirmed sub nom. *Bullock* v *Downes*, 9 H. L. Cas. 1.

Bequest upon trust for the testator's only child A. for her life, and after her death to be equally divided between his next of kin according to the Statute of Distributions:—Held, that the testator's widow did not take any share as one of the next of kin. *Lee* v. *Lee*, 1 Dr. & Sm. 85; 29 L. J., Ch. 788; 6 Jur. (N.S.) 621; 8 W. R. 443.

A father bequeathed a fund in trust for his daughter for life, with remainder to her next of kin according to the statute, but in exclusion of any husband. He also bequeathed a fund in trust for his son for life, with remainder to his next of kin according to the statute. The son died, leaving a widow and brothers and sisters:—Held, that as the testator had expressly excluded the husband of his daughter from sharing with her next of kin, but had not excluded the widow of his son, she was entitled to share with her husband's next of kin. *Collins, In re*, 36 L. T. 437.

Exclusion of one of Next of Kin taking Life Interest.]—A testator, after bequests of personal estate with a direction to convert, and a life estate to his daughter, gave as follows: "If there should be no child of my daughter who should live to attain twenty-one, or die under that age leaving lawful issue, then I give, devise, and bequeath the trust moneys and dividends unto my own personal representatives and next of kin for ever, to be assigned, distributed, and paid according to the directions of the

statute passed for the distribution of the estates of persons dying intestate." The daughter was the sole next of kin at his death. On her death:—Held, that her administrator was entitled to the fund. *Lang, In re*, 4 L. T. 577; 9 W. R. 589.

Where, after specific limitations, a testator gives his property to his next of kin, much weight is not to be attached to that, which is supposed to be the testator's intention in favour of or against particular persons as his next of kin; for infinite variations may take place in that class between his will and his death. It is probable that a testator in such cases means to provide for particular persons, and then adds that, if they fail, then the law may take its course. *Seifferth* v. *Badham*, 9 Beav. 370; 15 L. J., Ch. 345; 10 Jur. 892.

Testator devised and bequeathed his real and personal estate to D. and G. upon trust to pay the income to D. for life, and after his death to pay the income to F. for life; and at her decease he directed the principal to be divided between his (the testator's) next of kin; but if no claimant appeared within twelve calendar months after deaths of D. and F., he directed the money to be paid to certain charities. D. and F. survived the testator, and at his death were his next of kin; excluding them, G. was his next of kin. On the question as to which of the persons would be entitled under the gift to the next of kin:—Held, that D. and F. were not excluded from taking under the gift. *Gorbell* v. *Davison*, 18 Beav. 556.

Testator bequeathed his residue to his wife for life, remainder to his daughter absolutely; but if his wife survived his daughter, then, at his wife's death, one-third of the capital was to go according to her will, and the other two-thirds were to go and be paid "to any other of the next of kin of my paternal line." The daughter was the testator's sole next of kin at his death; and exclusive of her, the testator's brothers were his next of kin at the same time; at the death of the widow (who survived his daughter) the daughter's children were the testator's next of kin according to the statute, but they and the testator's brothers were his nearest of kin, all of them being his relations in the second degree:—Held, that the brothers as well as the children were entitled to the two-thirds of the residue. *Cooper* v. *Denison*, 13 Sim. 290; 12 L. J., Ch. 404.

Bequest upon trust for testator's only child A. for life, and after her death to be equally divided between his next of kin according to the Statute of Distributions:—Held, that A. was not precluded from taking as next of kin, and that A., as next of kin at the testator's death, was entitled to the reversion. *Lee* v. *Lee*, 1 Dr. & Sm. 85; 29 L. J., Ch. 788; 6 Jur. (N.S.) 621; 8 W. R. 443.

Exclusion of Named Persons.]—Certain property was bequeathed by will to be held by trustees, in events which happened, "in trust for such person or persons as under the statutes for the distribution of the estates of intestates shall, exclusive of my said daughter C. L., and of my said grandchild C. G. and her issue (if any), then be my next of kin; such persons, if more than one, to take in equal shares as tenants in common." When the events happened, there were living the above-named daughter and grandchild, and a sister of the testator, and two nephews, sons of his deceased brother:—Held, that the effect of the will was to exclude the daughter and grandchild, and that the sister and nephews took in equal shares per capita. *Taylor, In re, Taylor* v. *Ley*, 52 L. T. 839—C. A.

Whose Next of Kin intended.] — Testatrix devised lands "to the next of kin of her father and mother, both deceased, his or her heirs and assigns, and if more than one, in equal shares." The testatrix being unmarried, and the only child of her parents, and the parents being strangers in blood to each other, there could be no person who was next of kin to both:—Held, however, that the testatrix meant the next of kin of both parents. *Pycroft* v. *Gregory*, 4 Russ. 526; 6 L. J. (O.S.) Ch. 121.

A testator made certain bequests on the death of his wife, and directed that if the person entitled to claim any property by virtue of his will should die before he could prosecute his claim thereto, the property so falling to the deceased person should be divided amongst the nearest relations and next of kin:—Held, that the testator thereby intended not his own, but the next of kin of such legatee. *Robson* v. *Ibbs*, 6 L. J., Ch. 213.

Shares taken by Persons entitled.]—Where there is a bequest to persons who would have been entitled under the Statute of Distributions they take as if there had been an intestacy. *Bullock* v. *Downes*, 9 H. L. Cas. 1. Affirming 25 Beav. 54.

A father gave one-fourth of a fund to one of his four daughters by name for life, and after her death to her children then living; but if she left no child, then he directed that the interest should be paid to his other daughters then living and the survivors and survivor of them, and after the decease of the last survivor he directed the same fourth share to be divided among her children, "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the statutes for the distribution of intestates' estates." He declared similar trusts of the other fourth shares respectively in favour of his other three daughters respectively and their respective children, with the same ultimate limitations. One daughter died after the testator, leaving children; the other three afterwards died without issue:—Held, that the shares of the daughters who died without issue were divisible in fourths among the persons representing the four daughters. *Mortimore* v. *Slater*, 47 L. J., Ch. 134; 7 Ch. D. 322; 37 L. T. 520; 26 W. R. 134. Affirmed, sub nom. *Mortimore* v. *Mortimore*, 48 L. J., Ch. 470; 4 App. Cas. 448; 27 W. R. 575—H. L. (E.)

Bequest of 1,000*l.* stock in a certain event "to the person or persons who would, under the statute of distribution of intestates' effects, have been entitled to my personal estate in case I had not disposed of the same by will." The description of the legatees is not one of persons, but of interest, and therefore their shares will not be equal, but according to the statute. *Martin* v. *Glover*, 1 Coll. C. C. 262; 8 Jur. 640.

—— **As Joint Tenants.**]—Real estates were limited in remainder in trust for the next of kin of a married woman as if she had not been married:—Held, that next of kin took as joint tenants. *Lucas* v. *Brandreth*, 6 Jur. (N.S.) 945.

A bequest, after the termination of a life estate, to "such person or persons as shall happen to be

my next of kin according to the statute for the distribution of intestates' effects" :—Held, that those persons took who were next of kin at the testator's death, and did so as joint tenants. *Greenwood's Trusts, In re*, 3 Giff. 390 ; 31 L. J., Ch. 119 ; 8 Jur. (N.S.) 907 ; 5 L. T. 487 ; 10 W. R. 117.

A testatrix having three daughters, gave one-third of a fund to each for life, with remainder to their children respectively, with cross-remainders between them, with an ultimate limitation to her own "next of kin and legal personal representatives" :—Held, that the class of next of kin was to be ascertained at the death of the testatrix, and that they took as joint tenants. *Baker* v. *Gibson*, 12 Beav. 101.

A., after giving all his real and personal estate to trustees for his children, directed his trustees, when any of his daughters should attain twenty-one or marry, to raise and settle, not exceeding 5,000*l*., upon each such daughter, in part of her presumptive share, in trustees of her own nomination, in trust for her for life, with remainder for her children ; and if all such children should die under twenty-one, in trust for the testator's next of kin. One of the daughters, having attained twenty-one, settled her 5,000*l*. upon herself and children, with a trust in default of children for the next of kin of the testator, according to his will. She died without having had any child :—Held, that the next of kin of the testator living at his death were entitled to the fund as joint tenants. *Aspinall, In re*, 30 L. J., Ch. 321 ; 4 L. T. 176 ; 9 W. R. 269.

—— **As Tenants in Common.**]—On a devise of copyhold and leasehold in trust for the son for life, and afterwards to assign "unto and among the person or persons who at the son's death would be entitled to his personal estate in case he should die intestate":—Held, that the widow and four children of the son took as tenants in common in equal parts. *Richardson* v. *Richardson*, 14 Sim. 526 ; 9 Jur. 322.

A testator bequeaths personal estate upon trust for A. for life, and afterwards to B. (if he shall survive) for life, after the death of the survivor upon trust for such person or persons as should at A.'s death be entitled thereto as the testator's next of kin under the Statute of Distributions. At A.'s death there were two next of kin to the testator :—Held, that they took as tenants in common, and not as joint tenants, the statute 22 Car. 2, c. 10, in this respect determining the mode of taking as well as the persons entitled. *Horn* v. *Coleman*, 1 Sm. & G. 169 ; 22 L. J., Ch. 779 ; 17 Jur. 408 ; 1 W. R. 194.

Next of Kin, Class of, when Ascertained.]—*See* post, col. 924.

1. Heirs.

Rule of Construction.]—The meaning to be given to the word "heirs" when it is used by a testator in a signification other than its ordinary one, must be gathered from the words and tenor of the will. Where a will, in which the word "heir" is used in different places, is only intelligible by interpreting the word "heirs" differently in different places, such interpretation will be given in order to give effect to the will. *Powell* v. *Boggis*, 14 W. R. 670.

Heir at Common Law or in Gavelkind.]—A testator seised of lands in common socage, and of other lands in gavelkind, desired everything to remain in its then present position during his wife's life, for her use ; and after her decease, devised his real estate to his then male heir and his heirs, in strict tail male :—Held, that the lands in gavelkind, as well as those in common socage, passed to the testator's heir at common law. *Thorp* v. *Owen*, 2 Sm. & G. 90 ; 2 Eq. R. 392 ; 23 L. J., Ch. 286 ; 18 Jur. 641 ; 2 W. R. 208.

Devise of leaseholds of gavelkind premises of inheritance (in one gift) to the "right heirs" of the testator :—Held, that the heir-at-law was entitled. *Sladen* v. *Sladen*, 8 Jur. (N.S.) 1075 ; 10 W. R. 597.

A testator made devise of gavelkind lands for lives and in tail, with remainder to his right heirs :—Held, that on failure of the particular estates the lands passed to the heir at common law, and not to the gavelkind heirs. *Garland* v. *Beverley*, 47 L. J., Ch. 711 ; 9 Ch. D. 213 ; 38 L. T. 911 ; 26 W. R. 718.

Heir Male.]—A. devises lands in trust, after debts paid, to convey the premises to the heirs male of the body of B. ; the testator's great-grandfather C. is the heir male of the body of B., but not heir general, there being a daughter of an elder brother who is heir general :—Decreed trustees to convey to C. *Newcomen* v. *Barkham*, 2 Vern. 729 ; Pre. Ch. 442, 461 ; Gilb. Eq. Rep. 116.

On construction of a devise :—Held, that the words "heirs male of the body of his great-grandfather" are good words of purchase to pass the estate to him who is heir male, though not heir general. *Brown* v. *Barkham*, 1 Stra. 35 ; 2 Eq. Ca. Abr. 215, pl. 14.

Heir male takes by purchase, though he is not heir general from the manifest intention of the will. *Newcoman* v. *Bethlem Hospital*, Ambl. 8.

The general rule is, that a person who claims as heir male to another by purchase must be complete heir male ; but in the case of a devise there may be exceptions to this rule from manifest intention of the testator. *Id.* 785.

Where there is a devise to the heirs male of the body of any person, he shall take an estate tail. *Id.* 793.

Where a person may take by the name of heir, though not heir general. *Starling* v. *Ettrick*, Pre. Ch. 54.

One seised in fee, devised land to his granddaughter for life, remainder to his right heirs male for ever, and dies, leaving his granddaughter heir-at-law, and his deceased brother's son his next heir male ; the devise of the remainder is void. *Dawes* v. *Ferrers*, 2 P. Wms. 1 ; Pre. Ch. 589.

Heir of a Particular Name.]—A. devised his estates to B., his son, for life, remainder to the first and other sons of B. in tail, remainder to his daughters as tenants in common, remainder to C. for life, remainder to D., the son of C., if living at C.'s death, for life, remainder to the first and other sons of D. in tail, remainder to the male heir for the time being entitled to a certain family estate, remainder to the first and other sons of such male heir, remainder to the testator's own right heirs of his name ; and he directed the residue of his personal estates to be laid out in lands to be conveyed to the same

uses as his devised estates. B., his son and executor, did not lay out the personal estate as directed by the will, but by his will he directed that certain real and personal estates should be conveyed and assigned to the trustees under the will of A., upon the trusts of that will or such of them as could then be executed, adding, that he deemed such property an equivalent in value for the residuum of his father's personal estate; and he directed that the same should be settled and accepted accordingly. The real and personal estate were not conveyed or assigned according to the will. On the death of B. without issue, C. entered into possession of the real estate devised by both wills, and the personal estate bequeathed by the will of B. At the death of C. D. entered into possession of the same real and personal estate. D. died without issue, and at his death there was no male heir entitled to the said family estate:—Held, that the ultimate limitation in the will of A. to his right heirs of his name vested at his death, and not at the death of D.; that the co-heiresses-at-law of B. (or the parties claiming under them) were entitled to the real estate so devised by the wills of A. and B.; that, inasmuch as the estates were made equitable by the will of B., the court might properly send a case to a court of law, to try at the same time the right under the will of A. as well as under the will of B.; that the personal estate bequeathed by the will of B., though not actually converted, must be deemed to be converted into and to have descended as real estate. *Wrightson* v. *Macaulay*, 4 Hare, 487. And see *S. C.* at law, 14 M. & W. 214; 15 L. J., Exch. 121.

A testator having devised, after two life estates, "to my own right heirs of the name of H. T., if any such there shall then be":—Held, that a great-great-nephew named H. T., not being absolutely his right heir, though grandson of the right heir, did not take under the devise on the expiration of the life estates. *Thorpe* v. *Thorpe*, 8 Jur. (N.S.) 871; 10 W. R. 778.

Heir ex parte maternâ.]—One seised in fee, as heir of the mother's mother, devises the land to trustees in fee, in trust to pay several annuities, and the residue to go to the testator's right heirs on his mother's side for ever; the heirs of the mother's mother's side entitled to the estate and surplus of the profits after the annuities paid. *Harris* v. *Lincoln (Bishop)*, 2 P. Wms. 135.

Parol evidence admitted to prove which heir was intended, viz., whether the heir of the mother's mother's side, or the heir of the mother's father's side. *Id.* 136.

F., having an estate which came to her ex parte maternâ, on her marriage conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs. By will she directed the estate to be sold, the money to be laid out in the funds, and the trustees to permit the husband to receive the interest for life; then, after the deduction of 3,500*l.* to uses which vested in the plaintiff A., and after payment of 1,000*l.* to G., to pay the residue of the purchase-money to the three defendants, H.; by codicil, she gave the plaintiff, her husband, a power of appointing the 3,500*l.* in case A. should marry without his consent. G. died, living the testatrix, before the codicil made, but F. in the codicil took no notice thereof. The 1,000*l.* is real, not personal, and shall not go to the executors of G. (though given to her executors), nor to the personal representative of the testatrix, nor yet to the residuary legatee of the purchase-money, but to the heir-at-law ex parte maternâ (the side from which the estate came). *Hutcheson* v. *Hammond*, 3 Bro. C. C. 128.

H. devised all his freehold and copyhold estates to D., his heirs and assigns, upon trust to sell certain specified parts thereof, and to apply the proceeds as therein mentioned, and as to all the rest, residue, and remainder of such real estate, upon trust to pay the rents, &c., to A. for life, and after her death upon trust to convey such residue to such person as should answer the description of his (H.'s) heir-at-law. At the time of H.'s death he was seised of certain copyholds not specifically mentioned in the will, which had descended to him ex parte maternâ. On the question between the heir-at-law and the heir ex parte maternâ of the testator as to who was entitled to those lands:—Held, that the descent was broken by the devise of the whole fee-simple to a trustee upon trust to convey to the testator's heir; the trustee was bound to convey to the person who was heir of the testator according to the common law. *Davis* v. *Kirk*, 2 K. & J. 391; 2 Jur. (N.S.) 875.

Under a residuary disposition to the testator's right heirs on the part of his mother, his sister and a nephew by a deceased sister were held entitled against remoter relations claiming on the ground of an express provision, by an annuity for the separate use of the sister. *Forster* v. *Sierra*, 4 Ves. 766.

Devise and bequest of real and personal estate to trustees, upon trust for the testator's daughter for her life (with power of sale on her consent), and, after her decease, for such person or persons as his daughter should by will appoint; and in default of such appointment, a devise and bequest of such real and personal estate to the testator's heirs and assigns ex parte maternâ, as if he had died intestate; and power (by a codicil) to sink any part of the personal estate, or proceeds of the sale of the real estate, in the purchase of an annuity for the daughter:—Held, upon a claim of the daughter against the trustees for the conveyance of the real estate to her, that the heir ex parte maternâ was the heir at the death of the testator, and that the daughter was such heir; and the court directed a conveyance to her accordingly. *Rawlinson* v. *Wass*, 9 Hare, 673; 16 Jur. 282.

A testator directed his household furniture, &c., to be sold, and the produce, with other moneys, to be laid out in stock, the interest to be paid to his wife for her life, and after her death the stock to be sold, and the half of the produce to be paid to C., eldest son of his niece E., and the other half to be divided equally between the children of E. Secondly, he left all stock, &c., of which he should die possessed, to his wife during her life, and after her death he directed the same to be sold, and 3,000*l.* of the produce to be paid to C., and the remainder to be divided equally between all the other children of his niece E., and he appointed executors. Thirdly, he devised his lands in France to his wife for life, and after her death the one half to go to C., and the other half to be divided equally between all the other children of his niece E., and he appointed an executor of his property in France; and he directed that his executors should not be liable for any loss which might happen in placing out his property according

to the direction of his will, except for wilful neglect; and in case C. should die before he attained twenty-one, he directed that the said property and effects should go to his (the testator's) nearest heirs on his mother's side equally. E., the testator's niece, was his nearest heir both on his father's and mother's side, and his next of kin. C. died under age:—Held, that E., though heir and next-of-kin both on the father's and mother's side, took H. C.'s share under the third clause. *Willomier, In re*, 16 Ir. Ch. R. 389.

Held, also, "my said property and effects" in the third clause did not mean all the property of the testator, but was confined to the portion of it bequeathed and devised to C. *Ib.*

Held, also, that it applied to all the property which C. would have taken, and was not confined to the third clause. *Ib.*

Heir by Acknowledgment.]—The words in a will, "I acknowledge N., my second cousin, to be my next of kin and heir-at-law to all my real and personal property situate in the parish of M.":—Held, to be an effectual gift to N., who was, in fact, neither heir nor next of kin of the testator. *Parker* v. *Nickson*, 1 De G. J. & S. 177; 1 N. R. 298; 32 L. J., Ch. 397; 9 Jur. (N.S.) 451; 7 L. T. 813; 11 W. R. 533.

A codicil contained the following expression: "T. N., my second cousin, is my next of kin and heir-at-law, as my brother J. is dead, and has left no issue":—Held, that it could not be inferred from this that the testator was ignorant of the state of the family of another brother, who had left issue. *Ib.*

Heir Construed as a Persona Designata.]—Devise to the heirs male of S. begotten; S. having a son, and the testator taking notice that S. was then living, a sufficient description of the testator's meaning, and such son shall take, though, strictly speaking, he be not heir. *Darbison* v. *Beaumont*, 1 P. Wms. 229; Fortesc. 18.

Devise and bequest of real and leasehold estates to the devisor's widow and her heirs for ever, "in the fullest confidence that after her decease she will devise the property to my family":—Held, an estate for life only, with remainder in trust for the devisor's heir, as persona designata. *Wright* v. *Atkyns*, 19 Ves. 299—C. A. See also *S. C.*, Coop. 111; 1 V. & B. 313; Turn. & R. 143; 13 R. R. 199.

Lands are limited to the second son in fee, provided that, if the eldest son die without issue, the second son should, within six months after such death of the eldest son, pay 1,500*l.* to the sister, or in default thereof the lands should go to the sister and her heirs. The eldest son dies without issue; the sister dies within the six months; her heir, and not her executor, shall have the benefit of this devise over. *Winchelsea* v. *Wentworth*, 1 Vern. 402.

A man having mortgages, one of which was a mortgage in fee of lands in D., on which he had entered, devises those lands to his two daughters and their heirs, and the other mortgages to them, their executors, &c. One of the daughters dies; her share of the land in D. shall go to her heir, and not to her administrator. *Noys* v. *Mordaunt*, 2 Vern. 582. And see *Forrester* v. *Cotten*, Ambl. 388; 1 Eden, 532. *But see* 1 Swan. 408, n.

Construction of a will, giving to the testator's daughter by the description of heir under his will the legacy of a legatee, who died during the testator's life, by way of special substitution, not merely by lapse to her, as the residuary legatee. *Rose* v. *Rose*, 17 Ves. 347.

Where in a will the word "heir" is used in a popular sense as a word of description, so as that the capacity to inherit is not of the essence of the description, the want of capacity to inherit is immaterial if the person meant is otherwise ascertained. *Rittson* v. *Stordy*, 3 Sm. & G. 230; 1 Jur. (N.S.) 771; 3 W. R. 627.

An infant en ventre sa mère, under a devise to heirs of the body of the devisor, begotten and to be begotten, cannot take by purchase the legal fee, the terms of description not amounting to a legal designation of him; but is entitled in equity, by virtue of the apparent intention, to the trust of a term attendant on the inheritance, though merged at law. *Nurse* v. *Yerworth*, 3 Swan. 608.

A testator gave a legacy of 2,000*l.* stock to his two daughters, each of them 1,000*l.*, the interest to be paid to them in equal shares for life; the rest of his property to his children in equal proportions. By a codicil he directed that, after the decease of his two daughters, "the property for which they are to receive during their lives the interest, which is to be for their sole and separate use, independent of any connections they may form, the stock shall become the joint property of the lawful heirs of my said children and executors in equal proportions, viz., one-fourth part to the heirs of my daughter Nancy; one-fourth part to the heirs of my daughter Lydia; one-fourth part to the heirs of my son John; one-fourth part to the heirs of my daughter Sarah":—Held, that the gift was a tenancy in common, and that on the death of Sarah the moiety of the legacy became distributable in four equal shares to the heirs of the parties named as personæ designatæ. *Hansley* v. *Wills*, 14 L. T. 162.

The words "next heir" occurring in a will in a bequest of an annuity for life to be enjoyed by the next heir to a certain title and estate:—Held, by reference to the context, not to have been used in their strict sense, but to mean the person next presumptively entitled to succeed to the title and estate. *Dormer* v. *Phillips*, 4 De G. M. & G. 855.

Lord Dormer by will gave successive estates for life, with remainder in tail male, in his mansion and hereditaments to E. P. D., J. T. D., J. D., R. D., C. D., M. D., and R. D., with the ultimate remainder to his own right heirs. The testator by a codicil gave to J. T. D., "his next heir after the death of E. P. D. without issue, an annuity of 150*l.* for life, to become due from the day of the testator's death; but in case he should become possessed of the title and estate, then the annuity should be paid to his next male heir for life, and so on successively to all the sons of the testator's brother J. D., so that the next heir to the title and estate should always enjoy this annuity. To his cousin R. D., eldest son of J. D., 50*l.* a year, from the day of the testator's death, for life, to devolve to his next brother, and so on, in case of his becoming possessed of the annuity of 150*l.*" The annuity of 50*l.* was paid up to 1826, when E. P. D., the first tenant for life, died without issue, and J. T. became Lord Dormer, and C. D. became next heir after him, and the annuity of 150*l.* was paid to him till 1852, when he died, and M. D., son of J. D., the testator's brother, claimed it, as also did J. B. D., son of J. T. Lord Dormer, and the bill was filed to determine that question:—Held, that neither

the plaintiff nor the son of J. T. Lord Dormer was entitled, the annuities having both determined. *S. C.*, 3 Drew. 39; 24 L. J., Ch. 168; 3 W. R. 92, 337.

A testator devised certain land to his sons successively for life, beginning with the youngest, "and so on from son to son till it arrives to the oldest son, then the said estate to be for ever enjoyed by the oldest surviving heir of his oldest surviving son then living for their life or lives for ever":—Held, that upon the true construction of the will, the intention of the testator was to give a life estate to the "heir;" that the word "heir" was not to be regarded as a word of limitation, and therefore that the rule in *Shelley's Case* (1 Rep. 93) did not apply, and that the testator's oldest surviving son took only a life estate. *Pedder* v. *Hunt*, 56 L. J., Q. B. 212; 18 Q. B. D. 565; 56 L. T. 687; 35 W. R. 371—C. A.

Devise to J., "to hold to him and the heir male of his body lawfully begotten, and the heirs and assigns of such heir male for ever":—Held, an estate for life to J., with contingent remainder to the person, if any, who should answer the description of heir male of his body at his death. *Chamberlayne* v. *Chamberlayne*, 6 El. & Bl. 625; 25 L. J., Q. B. 357; 4 W. R. 614—Ex. Ch.

Heirs Construed Children.]—Devise of freeholds to six persons, equally, for life, and after the death of the survivor to sell, "and the money to be equally divided amongst their several heirs":—Held, that their children, and not their heirs-at-law, were intended. *Bull* v. *Comberbach*, 25 Beav. 540; 4 Jur. (N.S.) 526.

A testator gave his residuary real and personal estate to his wife for life, and after her decease to his brothers T. and E., "or their heirs in proportion to the number of children each might have then living, share and share alike." At the death of the wife both the brothers were dead; and there were then living four children of T. and two of E.:—Held, that the word "heirs" meant children, and that the residue was divisible in sixths amongst the children living at the death of the wife. *Roberts* v. *Edwards*, 32 Beav. 259; 33 L. J., Ch. 369; 9 Jur. (N.S.) 1219; 9 L. T. 360; 12 W. R. 33.

Personal property was bequeathed to trustees in trust for A. for life, and if she should have children that survived her then at her death for her children equally; but, if she should have no heirs, the trust fund was then bequeathed to B., who was A.'s mother, and her heirs:—Held, that upon the death of A., without having ever had any issue, the gift over took effect, and that B. and all her children, other than A., became entitled to the fund as joint tenants. *Dakin* v. *Nicholson*, 6 L. J., Ch. 329.

Testator gave his real and residuary personal estate in trust to pay an annuity to his nephew, and, subject thereto, in trust for his daughter for life, remainder in trust to pay the income for the maintenance of all and every such child or children as she might leave at her decease during his, her, or their minority; and when the youngest should have attained twenty-five, to pay, assign, and transfer the income, together with the principal, to the children, the same to be divided equally between them, share and share alike; but if any of them should die leaving a child or children who should attain twenty-one, then to pay and assign the share of such child to such his or their child or children; and the testator then expressed his further will to be, that his trustees should immediately after his nephew's decease, convey, release, and assign all his freehold and leasehold estates unto the heir or heirs who should be legally entitled thereto; and in case his daughter should leave no child or children, or they should die under age and unmarried, then in trust to pay and assign the income, together with the whole residue, unto and equally between his next of kin. The daughter left five children living at her death, all of whom attained twenty-five:—Held, that the trust for them was not void for remoteness, but that they took vested interests in the trust property on their mother's death. *Milroy* v. *Milroy*, 14 Sim. 48; 13 L. J., Ch. 266; 8 Jur. 234.

Bequest to A. for life, and after her decease to the testator's four children, the survivor or survivors of them, equally, or their heirs lawfully begotten. One of the four children died in the life of A.:—Held, that the children took one-fourth by substitution. *Price* v. *Lockley*, 6 Beav. 180; 7 Jur. 143.

A residuary estate was given to three brothers and a nephew, for their lives as tenants in common, and, after their decease, then in trust for their heirs and assigns as tenants in common. The will then contained provisions that the shares of any or either of their children dying under twenty-one without issue should go to the survivors, and that the share of such child as died under twenty-one, leaving issue, should go to the children of such child; but that in case one child only of the brothers and nephews should attain twenty-one or be married, then in trust for such child, his or her heirs or assigns:—Held, that the brothers and nephew took an absolute vested interest in the residuary estate, with an executory devise over in case of children being born. *Spence* v. *Handford*, 27 L. J., Ch. 767; 4 Jur. (N.S.) 987.

The testator directed the application of the surplus income of his estate for the maintenance of his children during their minority or apprenticeship, and the application of certain sums for their advancement, and after his youngest child should have attained twenty-one, he directed his executors to divide any surplus in their hands, every three years, during his wife's life or widowhood, and, after her death or marriage, every year equally amongst his children or their heirs, instead of any one that might happen to be dead, until the expiration of fifty years from the time of his death; and that at the end of the said fifty years, his executors should sell his remaining estate, and pay, discharge, or divide the money for the same amongst his children (naming them), or any of their heirs in their stead; and if any of his said children should die without lawful issue, such share or shares of those so dying to belong to the survivors or their lawful heirs equally:—Held, that the word "heirs" must be construed "issue," and not "children"; and that it was not a ground for departing from such meaning, that the consequence of adhering to it would be to render the will void for remoteness. *Speakman* v. *Speakman*, 8 Hare, 180.

See also *Loveday* v. *Hopkins*, Ambl. 273; *Garratt* v. *Cockerell*, 1 Y. & C. C. C. 494; 6 Jur. 909; *Swan* v. *Bowden*, 11 L. J., Ch. 155; *Fowler* v. *Cohn*, 21 Beav. 360.

Heirs of the Body Construed Children.]—Testator gave one-third of his residue in trust

for his sister, the interest to be paid to her during her life, and the principal at her death to go to the heirs of her body, share and share alike. The sister had five children living at the testator's death :—Held, from the context of the will, that she took for life, with remainder to her children as tenants in common. *Symers* v. *Jobson*, 16 Sim. 267.

Where testator's intent appears plain, court will construe the words "heirs of the body" to be words of purchase. *Bagshaw* v. *Spencer*, 2 Atk. 580.

"Heirs of the body" have at law been considered as words of purchase, even in a deed. *Ib.*

On the construction of Serjeant Maynard's will heirs of the body were held to be in the sense of the first and every other son. *Id.* 582.

Devise to the testator's wife, after her decease to the heirs of her body, share and share alike, and in default of issue to be lawfully begotten by him, to be at her own disposal. He dies, and leaves six children by his said wife :—Held, that the wife took an estate for life only, and that each of the six children took a fee-simple in remainder, expectant on the determination of the mother's life estate, in one-sixth part as tenant in common. *Gretton* v. *Haward*, 1 Mer. 448.

W. H. by will, after giving several legacies, left the remainder of his property to his wife for life, to be invested in the public funds, and at her demise to be equally divided between his children and the heirs of their bodies. The estates were retained unsold, and a bill filed raising the questions, whether there was a direction to convert, whether a surviving trustee was liable for non-sale, or what was meant by "heirs of their bodies" :—Held, that there was a direction to convert; but inasmuch as loss was not caused by non-sale, the trustee was not liable, but the estate of the widow; and that the words "heirs of their bodies" meant "children," and were substitutionary, and the children of a deceased child were equally entitled. *Pattenden* v. *Hobson*, 17 Jur. 406; 1 W. R. 282.

In a devise "to the heirs of the body of A. and B. lawfully begotten, share and share alike, or to the survivor or survivors of them if more than one, and if but one then to such only child" :—Held, that heirs of the body must be construed children. *Gummoe* v. *Howes*, 23 Beav. 184; 26 L. J., Ch. 323; 3 Jur. (N.S.) 176; 5 W. R. 219.

Heirs Construed Next of Kin.]—Gift of personalty to A. for life, and afterwards to his children; and in default to the heirs of B. :—Held, that the next of kin were entitled under the ultimate limitation. *Evans* v. *Salt*, 6 Beav. 266.

A testator devised and bequeathed all real and personal estate to trustees, upon trust for certain persons for life, and afterwards for the heir-at-law of his family then living, whosoever the same might be :—Held, that the next of kin of the testator, according to the Statute of Distributions, took no interest under this gift. *Tetlow* v. *Ashton*, 20 L. J., Ch. 53; 15 Jur. 213.

Testator bequeathed 5,000*l.* in trust for his daughter A. for life, and after her decease for such child or children as she shall leave at her decease, in such shares as she should think proper; and in case she shall die leaving no child, which was the event, then as to 1,000*l.* for her executors, administrators, or assigns; and as to the remaining 4,000*l.* in trust for such person or persons "as shall be my heir or heirs-at-law." The 4,000*l.* vested in A., and the other two daughters of the testator, being his co-heiresses-at-law, and next of kin at his death. If that union of characters had not occurred, quære, whether the next of kin could not claim, and supposing the heirs intended, what description of heirs. *Holloway* v. *Holloway*, 5 Ves. 399; 5 R. R. 81.

A testatrix, after devising real estate to a devisee, "and to her heirs and assigns," bequeathed to her trustees 500*l.* upon trust to invest and pay the proceeds to R. for life, and in case (which happened) R. should leave no child living at her (R.'s) decease, "then I direct my trustees to divide the 500*l.* . . . amongst the heirs of my late brother" S. :—Held, that by the word "heirs" were meant the next of kin of S. according to the Statute of Distributions, together with the widow of S., if living at the testatrix's death. *Steeven's Trusts, In re*, L. R. 15 Eq. 100; 27 L. T. 480; 21 W. R. 119.

The meaning to be given to the word "heirs," when it is used by a testator in a signification other than its ordinary one, must be gathered from the words and tenor of the will. *Powell* v. *Boggis*, 35 Beav. 535; 14 W. R. 670.

Where a will, in which the word "heir" is used in different places, is only intelligible by interpreting the word "heirs" differently in different places, such interpretation will be given in order to give effect to the will. *Ib.*

A share of the produce of real and personal estate directed to be sold was given to a feme sole for her life, "and after her decease to her heirs, as she shall give it by will, and if she die without leaving a will, to her right heirs for ever" :—Held, that the words "right heirs" were to be construed executors and administrators. *Ib.*

Bequest of personalty "to the heirs of my late partner, for losses sustained during the time that the business of the house was under my sole control" :—Held, that the persons to take were those who, at the testator's death, would have been entitled, under the Statute of Distributions, to the personal estate of the deceased partner, in case he had died intestate, and not the heir-at-law strictly so called. *Gamboa's Trusts, In re*, 4 K. & J. 756.

A testator, after giving several sevenths of his personal estate to his living brothers and sisters "and their heirs and assigns" respectively, proceeded to give another seventh as follows: "To the heirs and assigns for ever of my late sister D., now deceased" :—Held, that the persons entitled to this last-mentioned seventh were the next of kin of D. at her death, according to the Statute of Distributions. *Newton's Trusts, In re*, 37 L. J., Ch. 23; L. R. 4 Eq. 171.

The testator, after giving the income of his residuary real and personal estate to A. for life, and after her decease to B. for life, directed his trustees then to sell his estates and divide the proceeds amongst "the following persons, or their heirs for ever: the grandchildren of C., the grandchildren of D., and the grandchildren of E." :—Held, that the word "heirs" was to be construed heirs according to the nature of the property; and it being in this case given as money, "heirs" was construed "next of kin"; that the grandchildren of C., D., and E., living at the death of the testator, and afterwards born during the

lives of the tenants for life, and the next of kin of any of them who predeceased the surviving tenant for life, were entitled to the residuary estate, the next of kin of each deceased grandchild taking the deceased grandchild's share; that the words "for ever" did not alter the character of the persons who were to take, the only import of such words being that persons who were to take took absolutely. *Doody* v. *Higgins*, 9 Hare (App.) xxxii.; 1 W. R. 30.

Gift of residuary personal estate to be divided equally, share and share alike, amongst the following persons or their heirs for ever: to the grandchildren of A., also to the grandchildren of B., also the grandchildren of C. The court having previously held that the word "heirs" must be construed according to the nature of the property as "next of kin":—Held, further, that the "next of kin," according to the Statute of Distributions, including the widow, were entitled to take, and not the nearest of kin simply. *S. C.*, 2 K. & J. 729; 25 L. J., Ch. 773; 4 W. R. 737.

Gift of personalty to A., and after his death to be equally divided among his legal heirs, is a gift after his death to his next of kin, according to the Statute of Distributions. *Low* v. *Smith*, 2 Jur. (N.S.) 344; 4 W. R. 429.

A testator, after giving all his residuary real and personal estate to his nephews, grandnephews, and nieces, directed his trustees to invest their shares according to their discretion, and to pay the income, or as much as might be necessary, for their maintenance until twenty-one, except A. L., and he to receive the interest until thirty, and then half to be applied, "at the discretion of the trustees," to assist him if they thought him capable, the remaining half to remain invested, and the income paid to him during his life, and at his death to be equally divided between his legal heirs. A. L. died under thirty, leaving a widow and heiress-at-law. Upon the questions what was meant by "legal heirs," and whether any part of A. L.'s share was undisposed of:—Held, that next of kin according to the statute was meant, and that no part of A. L.'s share was undisposed of. *Ib.*

A husband bequeathed his personal estate to his wife for life, and after her death "to be divided amongst my heirs and to their children with H. R. P., share and share alike." The testator had five brothers and sisters, some of whom died in his lifetime, leaving issue; others survived him and died in the lifetime of their mother, leaving issue:—Held, that by the word "heirs" was meant next of kin, exclusively of the widow; that it was a gift to a class to be ascertained at the testator's death, and consisting of the brothers and sisters living at the death of the testator, the children of brothers and sisters then dead, and H. R. P., and that those persons took vested interest. *Peppitt, In re, Chester* v. *Phillips*, 36 L. T. 500.

Heirs of the Body Construed Next of Kin.]—In a will, "heirs of the body":—Held, to mean next of kin. *Pattenden* v. *Hobson*, 22 L. J., Ch. 697; 17 Jur. 406; 1 W. R. 282.

Gift by will of personalty to trustees for the separate use of A., the daughter of the testator, for life, with remainder to the trustees for the benefit of the heirs of the body lawfully begotten of A., first to educate the said heirs, and lastly to pay to them the residue at their respective ages of twenty-one, in such proportions as A. should by will appoint:—Held, that the words "heirs of the body" must be construed next of kin, descendants of A. *Jeaffreson, In re*, 35 L. J., Ch. 622; L. R. 2 Eq. 276; 12 Jur. (N.S.) 660; 14 W. R. 759.

"Heirs or Next of Kin" Construed Next of Kin.]—Testator, by will unattested, after giving, among others, charitable legacies, to be distributed by his executor, gave the remainder and residue of his estate, if any, and effects of what nature soever and wheresoever, which he should be seised or possessed of, &c., "to next of kin or heir-at-law, whom I appoint my executor, after debts, &c., paid." He left one brother, and, by deceased brothers, a niece and several nephews, one of whom was heir-at-law:—Distribution decreed according to the statute. *Lowndes* v. *Stone*, 4 Ves. 649; 4 R. R. 316.

Testatrix bequeathed her real and personal estate to trustees upon trust to convert and pay one-third part to the "heirs or next of kin" of J. L., deceased. At her death she had only personal estate:—Held, that the description was intended to apply to one and the same class, and the gift was not an alternative gift, and that the description was sufficiently answered by the statutory next of kin of J. L. *Thompson's Trusts, In re*, 48 L. J., Ch. 135; 9 Ch. D. 607; 27 W. R. 378.

Heirs Construed Executors and Administrators.]—A testator gave real and personal estate to trustees, upon trust for his wife for life, and after her death to sell and divide the proceeds among his children, A., B., C., D., and E., "or their heirs or assigns," and recommended his children to settle by arbitration any dispute as to the construction of his will:—Held, that the gift to the children was absolute, and that the share of one of them, who survived the testator, and died in the widow's lifetime, went to his administrator. *Walton, In re*, 8 De G. M. & G. 173; 25 L. J., Ch. 569; 2 Jur. (N.S.) 363; 4 W. R. 416.

A share of the produce of real and personal estate directed to be sold was given to a feme sole for her life, "and after her decease to her heirs, as she shall give it by will, and if she die without leaving a will, to her right heirs for ever":—Held, that the words "right heirs" were to be construed executors and administrators. *Powell* v. *Boggis*, 35 Beav. 535; 14 W. R. 670.

Gift to A. or his Heirs—Next of Kin Entitled—Personalty.]—Legacy to A., "and failing him by decease before me, to his heirs." A. dies before the testator, having made a will containing a residuary bequest; the legacy belongs to the next of kin of A. living at the time of the testator's death. *Vaux* v. *Henderson*, 1 J. & W. 388; 21 R. R. 193.

A testator gave to the children of his sister, the late E. W., whose names he enumerated, "or to their heirs," certain legacies. Three of the children died in the lifetime of the testator:—Held, that the legacies to these children did not lapse, but that their next of kin took by substitution at the death of the testator. The same testator gave all the residue of his property in equal shares to each of his sisters M. S. and S. G., and upon their deaths respectively to their heirs. Both sisters died in the lifetime of the testator:—Held, that the next of kin of M. S.

and S. G., living at the death of the testator, were entitled by substitution to the gift of the residue. *Gittings* v. *M'Dermott*, 2 Myl. & K. 69; 2 L. J., Ch. 212.

Bequest of residue of personal estate to A. or his heirs, in such manner, however, as he might deem proper. A. died without making any disposition:—Held, that the property vested in the next of kin as tenants in common according to the Statute of Distributions. *Jacobs* v. *Jacobs*, 16 Beav. 557; 22 L. J., Ch. 668; 17 Jur. 293; 1 W. R. 238.

A bequest of personalty to certain persons "or their heirs for ever," the word "heirs" being a word of substitution, and not a designatio personæ:—Held, to denote, not the nearest of kin in blood, but those who, under the Statute for the Distribution of the Personal Estates of Intestates, would have been entitled to the personal estates of such persons if they had died intestate. *Doody* v. *Higgins*, 2 K. & J. 729; 25 L. J., Ch. 773; 4 W. R. 737.

The testator, after giving the income of his residuary real and personal estate to A. for life, and after her decease to B. for life, directed his trustees then to sell his estates, and divide the proceeds amongst "the following persons or their heirs for ever: the grandchildren of C., the grandchildren of D., and the grandchildren of E.":—Held, that the word "heirs" was to be construed heirs according to the nature of the property; and it being in this case given as money, "heirs" was construed "next of kin"; that the grandchildren of C., D., and E., living at the death of the testator, and afterwards born during the lives of the tenants for life, and the next of kin of those of them who predeceased the surviving tenant for life, were entitled to the residuary estate, the next of kin of each deceased grandchild taking the deceased grandchild's share; that the words "for ever" did not alter the character of the persons who were to take, the only import of such words being that the persons who were to take took absolutely. *S. C.*, 9 Hare (App.) xxxii.; 1 W. R. 30.

Where there is a bequest to A. for life, and after his decease to B. "or his personal representatives," or a bequest to B., to be paid so many months after testator's death to B. "or his personal representatives," the courts have construed it simply as another way of giving B. a vested interest upon the testator's death, and B. dying before the testator, the bequest has been held to lapse; but if, instead of "personal representatives," the word "heirs" be used, it shows the testator intended the persons he designates his "heirs" to take by way of substitution whenever B. may die, and there shall be no lapse although B. should die before the testator. *Porter, In re*, 4 K. & J. 188; 27 L. J., Ch. 196; 4 Jur. (N.S.) 20; 6 W. R. 187.

Bequest of residue to A. for life, and at her death a legacy to B. "or his heirs":—Held, that the legacy to B. did not lapse by reason of his death in the lifetime of the testatrix, but that his widow and only child took by substitution. *Ib.*

A substitutional gift to the heirs of a legatee who dies in the testator's lifetime goes to the next of kin of the deceased legatee, and not to his personal representatives. *Ib.*

Of a policy of 1,200*l.* testator bequeathed 1,000*l.* to A., and 200*l.*, with all advantages and bonuses arising from the policy, to his wife. By a codicil the 1,000*l.*, was given in trust for A. and her children; and in case of her death without children, the 1,000*l.* was to become the property of the testator's widow, "or her heirs." The widow died, having bequeathed the 1,000*l.* (if A. died without issue) to B. A. died without issue:—Held, that the next of kin of the widow at the time of her death were entitled to the 1,000*l.* *Craven, In re*, 23 Beav. 333.

A testator directed that certain stock should after the death of his wife be divided among his "children then living, or their heirs." Two of the children were dead at the date of the will; three survived the testator and died in the lifetime of his wife; and two survived her:—Held, first, that the "heirs" of the children who predeceased the wife (including the two who were dead at the date of the will) were entitled to share in the fund along with the children who survived her. *Philps, In re*, L. R. 7 Eq. 151; 19 L. T. 713.

Held, secondly, that by "heirs" were meant the statutory next of kin of the children. *Ib.*

Held, thirdly, that such next of kin were to be ascertained, in the case of the children who survived the testator, at the time of the death of each child, but in the case of the children who predeceased the testator at the time of the testator's death. *Ib.*

A testator gave real and personal estate to A., charged with the payment of annuities to the testator's six children "or their heirs respectively":—Held, that the annuities were personal estate, and that the statutory next of kin of one of the six children who was dead at the date of will were entitled to one of the annuities. *Parsons* v. *Parsons*, L. R. 8 Eq. 260; 17 W. R. 1005.

A testator gave real and personal estate to his executors, and, after directing that certain legacies should be paid out of the proceeds of the whole, proceeded: "Whatever portion of my effects shall remain in the hands of my executors or the survivor of them, or, &c. (sic), after the payment of the above-mentioned legacies, I desire to be divided in the manner following, and giving two-thirds to the surviving sisters or sister of my wife or their heirs":—Held, that, the gift to heirs being substitutionary, the statutory next of kin of deceased sisters took under it, and not the heirs as personæ designatæ. *Stannard, In re, Stannard* v. *Burt*, 52 L. J., Ch. 355; 48 L. T. 660.

A testator gave his residuary personal estate to trustees upon trust for his wife during her life, and at her death for his children "or their heirs":—Held, that this was a substitutionary gift to the next of kin, according to the statute, of a child dying before the period of distribution. *Finlason* v. *Tatlock*, 39 L. J., Ch. 422; L. R. 9 Eq. 258; 22 L. T. 3; 18 W. R. 332.

A testatrix by her will gave a moiety of her personal estate in trust to be equally divided between two legatees, and afterwards by a codicil left the property, in the event of the legatees having no children, at their deaths to be equally divided to the children, or their heirs, of E. M. P. The original legatees having died without having had children:—Held, that the period of distribution was the date of the death of the survivor of the original legatees, and that, the gift to the "heirs" being a substitutional one, the property became divisible at that date between such one of the children of E. M. P. as was living both at the death of the testatrix and at that date, and the statutory next of kin of the remaining

children of E. M. P. who, having been alive at the death of the testatrix, had died before the period of distribution. *Neilson* v. *Monro*, 27 W. R. 936.

Gift for life followed by a gift to the surviving children of B. and C., "or their heirs and assigns" :—Held, that "heirs and assigns" could not be read next of kin, and that all who survived the testator took vested interests. *Hopkins, In re*, 2 H. & M. 411.

—— **Realty and Personalty Mixed.**]—In wills of personal estate, where the word "heirs" is used, it will be considered as indicating "successors according to the quality of the estate," and consequently the next of kin of a party who dies entitled to a share of personalty will take. *Preston's Trusts, In re*, 1 N. R. 470; 8 L. T. 20.

Where a testatrix gave personalty, subject to a life interest, equally to her brother and five sisters, if alive, and, if not, to their heirs: that is, she meant a deceased sister's children to have one-sixth :—Held, that the next of kin, according to the statute, of those sisters who died before the period for distribution took their shares. *Ib.*

A testatrix by her will, dated 1836, gave all her personal property and also her real property to trustees on trust for payment of her debts and legacies, and subject thereto she gave "all her personal and real property as aforesaid," between her five sisters, nominatim, and the survivors of them, in equal shares during their lives and spinsterhood, and upon the death or marriage of all her said sisters she directed that her "property should be divided into equal proportions or shares between her brothers and sisters then living or their heirs." She had twelve brothers and sisters, of whom one brother died before the testatrix was born, one sister died before the date of the will, two brothers and one sister died in her lifetime after the date of the will, and the rest survived her. The last survivor was one of the five sisters named in the will who died a spinster :—Held, first, that (notwithstanding the will was before the date of the Wills Act) the word "or" in the gift in remainder could not be read "and," and that there was no intestacy. *Wingfield* v. *Wingfield*, 47 L. J., Ch. 768; 9 Ch. D. 658; 39 L. T. 227; 26 W. R. 711.

Held, secondly, that the word "heirs" must be construed distributively so as to mean heirs-at-law as to the real estate, and statutory next of kin (including widows) as to the personal estate. *Ib.*

Held, thirdly, that such heirs-at-law and next of kin were to be respectively ascertained, as regarded brothers and sisters who predeceased the testatrix at the death of the testatrix, and as regarded those who survived her at their respective deaths. *Ib.*

Held, fourthly, that the heir-at-law and next of kin of the brother who died before the testatrix was born were not entitled to share. *Ib.*

Held, fifthly, that the heir-at-law and next of kin of the sister who died before the date of the will, as well as the heirs-at-law and next of kin of the two brothers and the sister who died in the lifetime of the testatrix and after the date of the will, were so entitled. *Ib.*

A testator gave, devised and bequeathed to his wife all his property, real or personal, on trust for herself for her life, and after her death the whole of his property was to be equally divided among all his children, "or such of them as may be then surviving, or their heirs." The testator had five children, all of whom survived him. Of these children two daughters died before the wife, leaving children :—Held, that the word "heirs" had a twofold meaning, viz.: heir-at-law as regarded the real estate, and next of kin as regarded the personalty. Held, also, that the property was divisible in fifths—each surviving child of the testator taking one-fifth, and the heir-at-law and next of kin of each deceased daughter taking between them (according to the nature of the estate) one-fifth share. *Wingfield* v. *Wingfield* (supra) followed. *Smith* v. *Butcher* (infra) distinguished. *Keay* v. *Boulton*, 54 L. J., Ch. 48; 25 Ch. D. 212; 49 L. T. 631; 32 W. R. 591.

Heirs Construed Literally — Gift of Personalty.]—Where a pecuniary legacy is given by a testator to his "heir" the word is to be understood in its legal and ordinary sense, unless controlled by the context of the will, and the heir-at-law will take the legacy, and not the next of kin. In such a case it makes no difference that there are three co-heirs. *Mounsey* v. *Blamire*, 4 Russ. 384; 28 R. R. 133.

Goods devised to A. for life, and after the death of A. to the heir of B. B. dies in the life of A.: —Decreed, the goods should go to him that was heir of B. at his death, and not to him who was his heir at the death of A. *Danvers* v. *Clarendon*, 1 Vern. 35. And see *Pleydell* v. *Pleydell*, 1 P. Wms. 748.

A. gave all his personal estate, after payment of debts, to his wife for life, and upon her death he gave whatever should remain, after payment of various legacies, equally between the heirs of his late uncle N. and his aunt F., all of whom were dead at the date of the will :—Held, that the word "heirs" applied to the heirs-at-law of the three persons named, and not their next of kin. *Rootes, In re*, 1 Dr. & Sm. 228; 29 L. J., Ch. 868; 8 W. R. 625.

A testator bequeathed 2,000*l.* consols, to be divided between his children, when each of them attained twenty-one; but should neither of them attain that age, then he bequeathed the stock to his wife for her life, and afterwards to his "next heir-at-law" :—Held, that the heir-at-law, at the death of the testator, was the person entitled, and not the next of kin. *Southgate* v. *Clinch*, 27 L. J., Ch. 651; 4 Jur. (N.S.) 428; 6 W. R. 489.

Bequest of personal estate to "the children of A. during their lives, and on the decease of either of them his or her share of the principal to go to his or her lawful heir or heirs" :—Held, that "lawful heir or heirs" must be read literally, and not as meaning "next of kin," "executors or administrators," or "children." *Mounsey* v. *Blamire* (supra) disapproved of. *Smith* v. *Butcher*, 48 L. J., Ch. 136; L. R. 10 Ch. D. 113; 27 W. R. 281.

Personal estate was settled on a husband and wife successively for life, with remainder to their children, and, in failure of children, "then to the right heirs" of the survivor of the husband and wife :—Held, that under the last limitation, the heir-at-law of the survivor and not the next of kin was entitled. *Hamilton* v. *Mills*, 29 Beav. 193.

The words in a will in the Spanish language, made use of by the testator, an Englishman, were, "As regards the lands, &c., of which I am the possessor in England and Scotland, I direct

that the whole may be sold, and that the amount thereof may be divided between and amongst the heirs I have there in accordance with English law." The property was the produce of a mortgage in fee in England :—Held, that the co-heirs of the testator were entitled, and not the next of kin. *Caldcleugh, In re*, 19 L. T. 377.

Testator bequeathed his residuary estate to his wife for life, his will continuing as follows : "And after the death of my said wife, I give unto my sister M. H., the wife of J. H., the sum of 1,000*l.* sterling, the same to become the property, at her death, of her heirs." J. H. survived M. H. (who died without issue), and by his will bequeathed the 1,000*l.* given to M. H. to X. and Z. on the subsequent death of the testator's widow :—Held, that the 1,000*l.* bequeathed to M. H. belonged to J. F., who was her heiress and next of kin, and not to X. and Z. *Russell, In re*, 52 L. T. 559—C. A. Reversing 53 L. J., Ch. 400.

—— **Gift of Realty and Personalty mixed.**]—Construction of the words "heirs" and "family," as applicable to dispositions of real and personal estate respectively. *White* v. *Briggs*, 2 Ph. 583 ; 17 L. J., Ch. 196.

Testator appointed his daughter-in-law his sole executrix, to have and enjoy all his real and personal estate, all the goods, cattle, chattels, enumerating several other articles of personal property, during her life, but not to diminish nor commit waste on the lands, and his nearest heir-at-law to enjoy the same after her death. An estate for life only in the whole, both real and personal estate, with remainder to the heir-at-law. *Gwynne* v. *Muddock*, 14 Ves. 488 ; 9 R. R. 327.

Testator devised all his estates in the funds of England, and all his manors, messuages, lands, &c., as well leasehold and freehold as copyhold, to A., B. and C., and their sons, in strict settlement, and ultimately to his own right heirs for ever, and empowered his trustees to invest the residue of his personal estates in the purchase of freehold lands in England, and to convey the same to such of the uses thereinbefore declared of his manors, messuages, lands, and premises devised by his will, as should be then subsisting. A. and B. died without issue in the testator's lifetime. C., who was his heir-at-law and executor, was living, but had no issue male. The testator's next of kin filed a bill against C., praying, amongst other things, for a declaration that, in the event of C. dying without leaving issue male, the plaintiff would be entitled to testator's personal estate. A general demurrer to the bill was allowed. *De Beauvoir* v. *De Beauvoir*, 15 Sim. 163 ; 15 L. J., Ch. 305 ; 10 Jur. 466. Affirmed 3 H. L. Cas. 524.

The words "next lawful heirs" in an ultimate gift of real and personal estate, construed in their strict sense as to the personalty and the heir-at-law, and not the next of kin, held entitled. *Haslewood* v. *Green*, 28 Beav. 1.

Devise and bequest of real and leasehold estates to the devisor's widow and her heirs for ever, "in the fullest confidence that after her decease she will devise the property to my family" :—Held, an estate for life only, with remainder in trust for the devisor's heir, as persona designata. *Wright* v. *Atkyns*, 19 Ves. 299 —C. A. See also *S. C.*, Coop. 111 ; 1 V. & B. 313 ; Turn. & R. 143 ; 13 R. R. 199.

A testator devised estates to his trustees, to produce a maintenance out of the proceeds for his son John, who was born deaf and dumb, with a provision for his wife, if she should marry, and limitations in favour of his children if she should have any. He then limited divers estates for life and in tail, with the reversion "to his own right heirs." At the death of the testator, his son John was his heir-at-law ; the immediate estates failed :—Held, that although the testator had provided a maintenance for his son during life, as for a person incapable of taking care of himself, yet there was nothing to show that he was intended to be excluded from taking under the limitation to the testator's own right heirs. The equitable reversion in fee, therefore, vested in John. Observations on *Cholmondeley* v. *Clinton*, 2 J. & W. 5 ; 22 R. R. 84. *Boidell* v. *Golightly*, 12 L. J., Ch. 187 ; 7 Jur. 53.

H. J. by his will, dated September, 1838, gave the whole of his rents, profits and interest of all his estates, both real and personal, situate in B. M. and H., to R. H. during his life, and the issue of R. H. after his death as therein mentioned, and in the event of R. H. dying without issue, his will was, that the whole of the said estates, both real and personal, should go to the heir-at-law of his family, and he ordered his trustees to give up the whole of his estates, both real and personal, to such heir. Inquiries were directed by the decree made in the court below, for the purpose of ascertaining the particulars and locality of the testator's personal estate other than leasehold at the time of his death. The court affirmed the decree, being of opinion that there was no intestacy, and that there was at all events sufficient doubt upon that point to make the inquiries necessary. *Horsfield* v. *Ashton*, 2 Jur. (N.S.) 193—L.JJ.

Devise to Heir—Taking by Descent or Purchase.]—Devise to his son and heirs, but in case he should die without issue, not having attained twenty-one, then over. He attained twenty-one :—Held, he took by purchase, and not by descent. *Scott* v. *Scott*, Ambl. 383 ; 1 Eden, 458.

The rule that a man cannot make his right heir a purchaser, is confined to the estate of which he is seised. *Robinson* v. *Knight*, 2 Eden, 159.

If the same is devised to H. which he would have taken by descent, he is in by descent. *Plunket* v. *Penson*, 2 Atk. 293.

Testator devised his real estates to trustees, in trust to pay an annuity, and out of the residue of the rents to maintain S. W. (who was his heir), until he attained twenty-one, and on his attaining twenty-one, to convey the estates to him in fee ; but if he died under twenty-one, then to J. S. in fee. S. W. attained twenty-one :—Held, that he took the estates by descent. *Wood* v. *Skelton*, 6 Sim. 176 ; 2 L. J., Ch. 163.

A testator gave his real estate to his wife for life, and after her decease to his granddaughter, the only child of his deceased daughter, her heirs and assigns ; but in case she should die under twenty-one without issue, then over :—Held, that the granddaughter, who was the testator's sole heir-at-law, took at the death of the tenant for life, by descent and not by purchase. *Manbridge* v. *Plummer*, 2 Myl. & K. 93 ; 3 L. J., Ch. 82.

Devise and bequest of leasehold, freehold and copyhold estates to trustees, their heirs,

executors, &c., upon trust to sell and pay debts, &c., and after payment thereof to pay and apply the rents, &c., to A. for life, and after his decease devising and bequeathing to the heir or heirs-at-law of B., and the heirs, executors, &c., of such heir or heirs to whom the trustees were directed to convey and assign accordingly; co-heiresses of B. being also co-heiresses of the devisor, take not as coparceners by descent, but as joint tenants by purchase; and, therefore, subject to survivorship. *Swaine* v. *Burton*, 15 Ves. 365.

Heir, being also devisee, takes by purchase, not by descent, if the devised estate is not of the same nature. *Id.* 371.

When a testator directs that his estates shall descend as if he died intestate, the heir-at-law takes by his title by descent. *Walcott* v. *Bloomfield*, 2 Con. & L. 577; 4 Dr. & War. 211; 6 Ir. Eq. R. 227.

Where lands were devised to the heir, subject to the payment of an annuity:—Held, that notwithstanding he would take by descent, the devise to him could not be treated as a mere nullity, nor deprive him of any benefit intended by the testator, and as between him and other devisees, the estates devised to him were not to be applied in payment of debts in priority of the estate devised to the latter. *Biederman* v. *Seymour*, 3 Beav. 368; 10 L. J., Ch. 177.

Limitation to Heir where no Estate in Ancestor.]—A testatrix, after giving estates tail to the then existing descendants of Sir T. S. by his first wife, devised as follows: "And for default of all such issue, then upon trust for the right heirs of my grandfather Sir T. S., deceased (the father of my late uncle Sir T. S.), by Mary his second wife, also deceased, who was the daughter of Sir G. C., for ever":—Held, that this was a limitation of an estate tail to the heirs of Sir T. S. by Mary, his second wife, and not of an estate in fee. *Vernon* v. *Wright*, 7 H. L. Cas. 35; 28 L. J., Ch. 198; 4 Jur. (N.S.) 1113.

Devise "to the right heirs of my grandfather S., deceased, by M. his second wife, also deceased, for ever":—Held, that the estate tail was not enlarged into an estate in fee by the use of the words "for ever." *Ib.*

Devise of lands to A. for ninety-nine years, if he should so long live, and after the determination of the term to the heirs of the body of A., and in default of such heirs over:—Held, an estate tail in the heir of the body of A. as an executory devise. *Harris* v. *Barnes*, Ambl. 666; 1 W. Bl. 643; 4 Burr. 2157.

Where there is a devise to the heirs male of the body of any person, he shall take an estate tail. *Newcoman* v. *Bethlem Hospital*, Ambl. 793.

"Next Nearest Heir."]—A testator (passing over his heir-at-law, the son of his deceased eldest brother) gave 1,000*l.* to the testator's father for life, and after his death to be continued to the testator's younger brother, and proceeded thus: "And after his death to be continued to my next nearest heir, and so on. This property is not meant to be disposed of by any of the family":—Held, that the ultimate limitation was void for uncertainty. *Thomason* v. *Moses*, 5 Beav. 77; 6 Jur. 403.

Devise of Real Estate to "Persons entitled according to Statute of Distributions"—Trust for Heir-at-Law.]—A conveyance to trustees without words of inheritance, of the share and interest, to which the conveying party is entitled under a will, passes a life estate only in so much of the property as consists of real estate. A devise of real estate in trust for the persons "who would have been entitled thereto" according to the Statutes of Distribution, creates a trust for the heir-at-law. *Hudson, In re, Kühne* v. *Hudson*, 13 R. 546; 72 L. T. 892.

m. Assigns.

Heirs and Assigns.]—A gift of a remainder to a person, her heirs and assigns, is a limitation to such uses as she shall appoint; and in default of appointment, to her heirs by way of purchase. *Quested* v. *Michell*, 24 L. J., Ch. 722; 1 Jur. (N.S.) 488; 3 W. R. 435.

A testator gives all his property to trustees upon trust to pay debts and legacies and to invest the residue in stock, thereout to pay certain annuities; and subject thereto he gives and bequeaths all his said residuary personal estate, and also all his freehold and copyhold messuages, lands, tenements and hereditaments, and real estate, as to one-sixth to L., his heirs, executors, administrators and assigns; as to one other sixth to H., daughter of C., in the same words; as to one other sixth in trust for W. C. and his assigns for life, and not by way of anticipation, remainder to his children; as to one other sixth in trust for M. B., wife of W. B., for life, without power of anticipation, upon trust, after payment thereout, for the heirs, executors, administrators and assigns of M. B.; as to one other sixth in trust for H. W., in the same words; and as to the remaining sixth part thereof in trust during the life of L. M., subject to payments thereout, to pay the clear rents to L. M. and her assigns, not by anticipation, during her life, and from and immediately after her decease upon trust for the heirs, executors, administrators and assigns of the said L. M. according to the several natures and qualities thereof:—Held, that M. B., H. W. and L. M. took an absolute interest in both the real and personal estate. *Ib.*

Gift for life followed by a gift to the surviving children of B. and C., "or their heirs and assigns":—Held, that "heirs and assigns" could not be read next of kin, and that all who survived the testator took vested interests. *Hopkins, In re*, 2 H. & M. 411.

Under a devise of real estate, in trust for the testator's widow for her life, and at her death to sell the property, and divide the proceeds among the testator's five children, by name, "or their heirs or assigns":—Held, that the children took absolutely on the death of the testator. *Walton, In re*, 8 De G. M. & G. 173; 25 L. J., Ch. 569; 2 Jur. (N.S.) 363; 4 W. R. 416.

Gift to A. "or to his Heirs, Executors, Administrators or Assigns."]—A testator, who had long resided in India, gave a legacy "to T. P., who resided at A. when I left England, or to his heirs, executors, administrators or assigns." T. P. died in the testator's lifetime:—Held, that the bequest was void for uncertainty. *Waite* v. *Templer*, 2 Sim. 524; 29 R. R. 161.

n. Servants.

Who included—Servants Hired by the Year.]—A bequest of a year's wages, to each of the testator's servants, over and above what may be

due to them at the time of the testator's decease, applies to such servants only as are usually hired by the year. *Booth* v. *Dean*, 1 Myl. & K. 560; 2 L. J., Ch. 162.

A bequest of a year's wages to each of the servants of the testator living with him at his decease, who should then have lived three years in his service:—Held, not to exclude servants of the testator living in a different house from that in which the testator lived, but to exclude servants not hired by the year; and held, therefore, that a gardener, employed at weekly wage (although paid at irregular intervals), was not entitled to the benefit of the bequest. *Blackwell* v. *Pennant*, 9 Hare, 551; 22 L. J., Ch. 155; 16 Jur. 420.

Whether the words "living with me," as applied to servants, should not be understood "living in my service," quære. *Ib.*

A legacy of a "year's wages" cannot properly be construed to mean the aggregate of the weekly wages of a servant for fifty-two weeks. *Ib.*

—— **Occasionally Employed.**]—Under a bequest to the testator's "servants in his service at the time of his decease":—Held, that the outdoor servants, continually employed at weekly wages, were entitled, but that a boy employed a few months in the year, whilst the testator was at his country residence, at weekly wages, to carry letters to the post, and who was so employed at the testator's death, was not entitled. *Thrupp* v. *Collett*, 26 Beav. 147; 5 Jur. (N.S.) 111.

"Household Servants" confined to Domestic Servants.]—A testator gave to each of his "household servants" who should have been in his service for one year previously to his death six months' wages, free of legacy duty, in addition to the ordinary wages that might be due to him or her respectively. The servants who had been in the testator's service the requisite time, in addition to the maid servants resident in the house, were a coachman who lived in a cottage adjoining the pleasure grounds, a groom who occupied a room over stables in the park and close to the house, and another groom who also occupied a room over the stables:—Held, that household servants had the same meaning as domestic servants, and that the coachman and grooms were not entitled to the gift. *Ogle* v. *Morgan* (infra) followed. *Drax, In re, Savile* v. *Yeatman*, 57 L. T. 475.

Jobbed Coachman.]—Under a general bequest to servants, a coachman (provided with the carriage and horses by a job master, according to the usual course of that business) not entitled. *Chilcot* v. *Bromley*, 12 Ves. 114.

Steward residing out of House.]—A. devises a year's wages to such of his servants as shall be living with him at his death. Stewards of court and such who are not obliged to spend their whole time with master are not entitled, but only such servants as live in house and have diet from master. *Townshend* v. *Windham*, 2 Vern. 546.

A. acted as the land agent and house steward of a testator, but he resided out of the house:—Held, that he was entitled under a bequest "to all my servants and day labourers, who shall be in my service at the time of my death, one full year's wages." *Armstrong* v. *Clavering*, 27 Beav. 226.

Farm Bailiff.]—A testator gave one year's wages in advance to each of his servants in his service at his death who should have lived with him five years or upwards:—Held, that a farm bailiff was a servant within the meaning of the testator's will, and that the plaintiff, being such farm bailiff living with the testator at the time of his death, and having lived the required time in his service, was entitled to a year's wages. *Bulling* v. *Ellice*, 9 Jur. 936.

Gardener at Weekly Wages.]—A testator, by his will, gave to each person as a servant in his domestic establishment at the time of his decease a year's wages beyond what should be due to him or her for wages:—Held, that a head gardener, who lived in one of the testator's cottages and was not dieted by the testator, was not entitled to a year's wages under the will. *Ogle* v. *Morgan*, 1 De G. M. & G. 359; 16 Jur. 277. Reversing 19 L. J., Ch. 531.

The mere temporary absence of the gardener would not have precluded him from claiming the legacy had he come within the description. *Ib.*

A. bequeathed to each of his servants who should be living in his service for six months previously to his decease the amount of one year's standing wages. B. had been living in the service of A. as a gardener for more than six months at a rate of wages payable by weekly allowance in money, and by the use of a house and certain rations, calculated to amount to 52*l.* a year:—Held, that B. was not entitled to any legacy under the above bequest. *Breslin* v. *Waldron*, 4 Ir. Ch. R. 333.

Gift on Condition of Continued Service.]—A testator directs that his executors pay to A. B. a yearly sum as wages, so long as she should continue in his wife's service; and if she should continue in such service, that the payment should be made to her quarterly, free from all deductions, to cease in case she should leave the service of his wife, until the decease of his wife. The testator's wife died in his lifetime:—Held, that A. B. was entitled to the annuity during her life. *Burchett* v. *Woolward*, Turn. & R. 442.

A. bequeathed a legacy to V. in case she should be in his service at his decease. A. was shortly afterwards removed to a lunatic asylum, and V., who was a yearly servant, voluntarily quitted the house, receiving from the family her wages up to the end of the year, which did not expire till after the death of the testator:—Held, that she was not entitled to the legacy. *Serres, In re, Venes* v. *Marriott*, 31 L. J., Ch. 519; 8 Jur. (N.S.) 882; 6 L. T. 892; 10 W. R. 751.

Bequest of a legacy to the servant of the testatrix, in consideration of her long and faithful services, to be paid within twelve months after her decease, provided "she remains in my service till my death." The servant was in the service of the testatrix for twenty-one years, when one of the next of kin of the testatrix caused the testatrix to be removed to a lunatic asylum, and upon her own authority dismissed the servant, who was desirous to continue in the service of her mistress. Subsequently an order in lunacy was obtained by the next of kin, by which it was declared that the testatrix had been ascertained to be of unsound mind, and her furniture and effects were directed to be

sold :—Held, that the order in lunacy operated as a dismissal of the servant, and that the conditional legacy to her therefore failed. *Hartley, In re*, 47 L. J., Ch. 610 ; 26 W. R. 590.

Legacy to A., if in the testator's service at the time of his decease ; parol evidence admitted to show that, though she had quitted his house, she continued and was by him considered as in his service, and upon that evidence the legacy was established. *Herbert* v. *Reid*, 16 Ves. 481.

—— **"In Service" — What is.** — A master bequeathed an annuity to his servant Sarah, "provided she shall be in my service at the time of my decease," and a few days before his decease he, without cause, dismissed her from his service, and at his death she was not in his service :—Held, that she was not entitled to the legacy. *Darlow* v. *Edwards*, 1 H. & C. 547 ; 32 L. J., Ex. 51 ; 9 Jur. (N.S.) 336 ; 6 L. T. 905 ; 10 W. R. 700—Ex. Ch.

"With me or in my Service"—Gardener of House Let for a Time.]—Sir F. B., by his will, directed his executors to pay to each of his domestic servants who should be with him or in his service at the time of his decease such sum of money as should be equivalent to two years of the then annual amount of their respective wages. A. was the gardener of Sir F. B. at a mansion where Sir F. B. formerly resided, but which for a short time previously to and at the time of the decease of Sir F. B. was let by Sir F. B. to Lady M. for a short term. A., however, had never ceased to be the servant of Sir F. B., but had the charge and management of the gardens at the mansion, for which he received an annual sum from Sir F. B. in addition to his yearly wages. A. was not resident in the mansion, but resided in a cottage in the garden, in the same manner as he did when the mansion was inhabited by Sir F. B. : —Held, following *Ogle* v. *Morgan*, supra, that A. was not entitled to a legacy as coming within the description of "a domestic servant of the testator living with him or in his service at the time of his death." *Vaughan* v. *Booth*, 16 Jur. 808.

"To Servants in my Service and to my Gardener."]—A testator, who died in 1883, by his will, dated in 1876, gave legacies to his servants in the following terms : "To each of my servants who shall at my death have been in my service twelve calendar months, or longer, one year's wages, in addition to anything owing by me, and to my gardener, Peter Grieve, 300*l.* in addition." In 1880 Peter Grieve, who had been in the testator's service for over thirty years, relinquished his situation, and when he did so the testator sent him 100*l.* The question was whether Peter Grieve was entitled to the legacy of 300*l.* :—Held, that the words "and to my gardener," &c., were governed by the condition that the servant should have been in the testator's service during twelve months preceding the testator's death, and as Peter Grieve had not fulfilled that condition, he was not entitled to the legacy. *Benyon, In re, Benyon* v. *Grieve*, 53 L. J., Ch. 1165 ; 51 L. T. 116 ; 32 W. R. 871.

Servants entering or quitting Service after Date of Will.]—Testator, by his will, bequeathed as follows : "My office and warehouse employés, such as clerks and workmen, shall have to receive six months' full salary" :—Held, that the persons to take were the employés in the service of the testator at the time of his death. *Marcus, In re, Marcus* v. *Marcus*, 56 L. J., Ch. 830 ; 57 L. T. 399.

Under a bequest of "500*l.* each to the other servants," a servant who quitted the service after the date of the will was held entitled. *Parker* v. *Marchant*, 2 Y. & C. C. C. 279 ; 12 L. J., Ch. 314 ; 7 Jur. 457—C. A .

S., by will, directed his trustees to pay to each man who should have been in his employment in London over ten years the sum of 10*l.* for each year beyond the said ten years :—Held, that a man who had been fifteen years in the testator's employment, but was not in such employment at the date of the testator's death or at the date of the will, was entitled to a legacy of 50*l.* *Sharland, In re, Kemp* v. *Rozey*, 65 L. J., Ch. 280 ; [1896] 1 Ch. 517 ; 74 L. T. 20.

——**Alteration in Number.**]—Bequest to the two servants that should live with testatrix at her death ; she had three at that time, and all of them were held entitled. *Sleech* v. *Thorington*, 2 Ves. 560.

o. Personæ Designatæ and Persons Filling a Particular Description.

i. *Error in Name or Description.*

Gift good notwithstanding.]—Mistake in the description of legatees, yet legacy :—Held, good, and took place according to intention. *Bradwin* v. *Harper*, Ambl. 374.

A wrong description of a legatee will not defeat a legacy given to him by name. *Standen* v. *Standen*, 2 Ves. 589.

Bequest of 800*l.* to the four eldest children of the testatrix's cousin, A. B., and 200*l.* to the three remaining children of her uncle A. B. The testatrix had a cousin and an uncle of that name. The cousin had seven children, and the uncle but one, but he had three remaining grandchildren, one other having died :—Held, that the three younger children of the cousin were entitled to the 200*l.* *Bristow* v. *Bristow*, 5 Beav. 289.

Testator gave 100*l.* in trust to pay the interest to A. till her daughter B. should attain twenty-four, and then he gave the said 100*l.* and the interest then due to her said mother A. :—Held, a mistake, and decreed the legacy to be paid to the daughter at the age of twenty-four. *Clarke* v. *Norris*, 3 Ves. 362.

Legatee's name very falsely spelt ; referred to a Master to see who was intended. *Masters* v. *Masters*, 1 P. Wms. 425.

The christian name of legatee was mistaken in will ; legacy was established on evidence, &c., after great delay in filing bill. *Smith* v. *Coney*, 6 Ves. 42.

Legatee entitled, notwithstanding a mistake in his name. *Campbell* v. *French*, 3 Ves. 322 ; 4 R. R. 5.

Legatee's both christian and surnames mistaken, yet the legacy is good. *Beaumont* v. *Fell*, 2 P. Wms. 141.

One name may be substituted for another in the construction of a will where it is manifest not only that the name used was not intended, but that a certain other name was necessarily intended. *Dent* v. *Pepys*, 6 Madd. 350 ; 23 R. R. 239.

Error in Name.]—Testator, by his will, in his own handwriting, devised an estate to Ann Aspinall and her heirs, if she should be then living; but if not, then to her issue and their heirs. He afterwards made a codicil commencing thus: "This is a codicil to the last will and testament of me, J. S., and which will I some time since made in my own handwriting, and thereby devised to John Aspinall as therein mentioned." At the date of the codicil Ann Aspinall had a son named John. Part of the testator's estates having been sold in pursuance of a direction in the will, the purchaser objected to the title, on the ground that the reference in the codicil afforded strong presumption of the existence of a subsequent will. But, as the will contained a gift which might take effect in favour of John Aspinall, the objection was overruled. *Howarth* v. *Smith*, 6 Sim. 161.

Bequest to "the two daughters of Sergeant-Major Gill, late of the 2nd Dragoon Guards, and who was lately stationed at N. barracks, and who is married to my cousin, M. A. M., the sum of 400*l.*, to be equally divided between them." M. A. M. was not cousin to the testatrix; she was the testatrix's father's stepdaughter; but they had been brought up together, and sometimes called each other cousins, sometimes sisters. M. A. M. was married to Sergeant Simons, by whom she had two daughters: Raynah, married to Sergeant-Major Gill, 3rd Dragoon Guards (which regiment had been stationed at N. barracks, shortly before the date of the will), and who had one daughter, an infant; and Rachel, married to Adams:—Held, on the evidence of statements made by the testatrix with reference to herself (M. A. M.) and her husband's name, that the testatrix, when making her will, had mistaken the name "Gill" for "Simons," and that Raynah and Rachel, the daughters of M. A. M., were entitled to the legacy. *Baxter* v. *Morgan*, 7 L. R., Ir. 501.

Administration granted to Andrew Carroll, of R., as universal legatee, although named in the will "Matthew Carroll, of R.," on satisfactory evidence of the mistake, and that there was no such person as "Matthew Carroll" living at R. *Murphy, In goods of*, 7 L. R., Ir. 561.

"Bequest to Miss Sarah Jameson"; there was no Miss Sarah Jameson. The testatrix was acquainted with Mrs. Sarah Jameson and her daughter Miss Frances Ann Jameson. Miss Frances Ann Jameson was held to be entitled to the legacy. *Lee* v. *Pain*, 4 Hare, 253; 14 L. J., Ch. 346; 9 Jur. 247; and see *Id.* 24.

A father, by his will, appointed his son, "Forster Charter," his executor, and made him his general devisee. At the date of the will he had two sons, William Forster Charter and Charles Charter. Another son, who was named Forster Charter, had died many years before. The elder son was usually called Willie, never Forster. He for many years had lived one hundred miles or more away from his father, was married, and he carried on an independent business as a butcher. The younger son, Charles, lived with his father and mother, working on their farm. The will directed the "executor, Forster Charter," to pay to the testator's wife an annuity of 10*l.*, and to allow her ordinary maintenance "so long as they reside together in the same house. . . . . But should they think proper to live separately, then, besides the annuity and the maintenance, 'Forster Charter' shall allow my wife, rent free, the use of the cottage," which adjoined his house. Any difference between the executor and widow as to the latter's maintenance was to be referred to the arbitration of a person named, who lived near the farm. On the hearing of the case, the evidence of the testator's intention to make Charles Charter his executor and devisee was admitted:—Held, that such evidence was not admissible, but that from the words "so long as they reside together," and from the other directions above mentioned, there was enough to show that the testator intended to name his younger son Charles, and that the demonstration of the legatee thus afforded must prevail over the incorrect description of the legatee by the name "Forster Charter." *Charter* v. *Charter*, 43 L. J., P. 73; L. R. 7 H. L. 364—H. L. (E.)

A testatrix, without professional assistance, made her own will and named Robert John M. (the eldest son of her brother) her executor. She then created two annuities of 50*l.* each in favour of two persons, and made a gift to a third, but in terms which left it doubtful whether the gift was of that specific sum, or of an annuity to that amount. She then proceeded thus: "My dear nephew John Henry M., of H., surgeon, but late of Calcott Hall, the above bequests to fall into his hands; and should he not marry, to be divided equally between Samuel M., John M., and Mary D.," formerly Mary Margaret M., but then a married woman, "all of them late of Calcott Hall, must each receive 50*l.*, the residue to fall into my above-named executor's hands." There was a son Thomas, born between Samuel and Mary, but there was no son named only John, the second nephew John Henry, and unmarried. The others survived him:—Held, that a court of justice could not safely arrive at the conclusion, that the words "John M." in the last stated gift were written by mistake for "Thomas M.," either on the ground that if "John M." meant John Henry M. there would be two inconsistent provisions for his benefit, or on the ground that the testatrix evidently intended to benefit all the children, and that in regular order of seniority the name of Thomas M. would have come in that place. *Mostyn* v. *Mostyn*, 5 H. L. Cas. 155; 23 L. J., Ch. 925. Affirming 3 De G. M. & G. 140.

A testator devised his estates on trust for "the second son of Edward Weld, of Lulworth," for life, with remainders to his sons successively in tail male, with like remainders to the third and other sons (except the eldest) of the said Edward Weld, and their sons; with remainders to the first and other sons of each brother (except the eldest brother) of the said Edward Weld successively in tail male; with like remainders to the second and other sons (except the eldest) of Lady Stourton, "one of the sisters of the said Edward Weld." There was not, at the date of the will or death of the testator, any such person as Edward Weld, of Lulworth, but it appeared, from evidence as to the state of the Weld family, that Joseph Weld was the then possessor of Lulworth; that he had an eldest brother living; that Lady Stourton was one of his sisters; and that he had an eldest son named Edward Joseph, commonly called Edward, and a second son named Thomas, both unmarried:—Held, that the descriptions of the unnamed devisee, taken with the whole context of the will, and with the evidence of the state of the Weld family, clearly designated the second son of Joseph Weld, and that he was entitled, as tenant for life in possession, to the devised estates. *Camoys (Lord)* v. *Blundell*, 1

H. L. Cas. 778. Affirming 1 Ph. 279; 12 L. J., Ch. 225; 7 Jur. 269.

Right Name Substituted by Court.]—A father gave the residue of his property in trust for his four children: Ann, Charles, Florence Mary, and Agnes Emily. He had living four children: Ann, Charles, Florence Mary, and Alice Martha. He had previously had a child, Agnes Emily, but she had been dead more than five years:—Held, that the name of Alice Martha must be substituted for that of Agnes Emily. *Gregory* v. *Gregory*, 19 W. R. 711.

A testator, by his will made in 1856, gave a legacy of 10*l.* to his servant, Susanna Cole. He had at that date a servant of that name, but in 1858 she married and left the testator's service, although for five years she continued to be employed occasionally in his house. When she left, her place was taken by her sister, Ann Cole. In 1871 the testator made a codicil, by which he gave a legacy of 100*l.* "to my servant Susanna Cole." At the date of the codicil, Ann Cole was still in the testator's service:—Held, that Ann Cole was entitled to the legacy of 100*l.* *Fry, In re, Matthews* v. *Greenman*, 31 L. T. 8; 22 W. R. 813—L.JJ.

A testatrix left by her will "to the five children of the late post captain Horatio Nelson Noble, her husband's son," 50*l.* each. Her husband had two sons: Horatio Nelson, who had been a major in the Indian army, and was dead many years, and Jeffrey, who had died shortly before the testatrix, and had been a post captain in the navy. There were five children of each son living at the date of the will. It was proved that the testatrix had been on terms of great intimacy and affection with Jeffrey and his children, but had little intercourse with the children of Horatio Nelson; that she had directed the widow of Jeffrey to be written to for the christian names of her children shortly before making her will, and that when the will was read over to her, she had directed the word "post" to be inserted in the draft before "captain":—Held, that the children of Jeffrey, the post captain, were entitled to the legacies. *Noble, In re*, Ir. R. 5 Eq. 140; 18 W. R. 881.

Error in Description.]—Legacy "to my namesake Thomas, the second son of my brother John," there being no son named Thomas, established in the favour of the second son, William, as an erroneous description, not a condition. *Stockdale* v. *Bushby*, 19 Ves. 381; G. Coop. 229.

Bequest to the children of R. H., late of N., and now of L., the sum of 100*l.* apiece; R. H. had left N. at the age of fourteen or sixteen, and died in L. several years before the will: his only surviving child entitled to the legacy against the claim of the children of G. H., formerly of N., residing in L. at the testator's death, upon the suggestion of mistake. *Holmes* v. *Custance*, 12 Ves. 279.

An aunt bequeathed a legacy to a niece, whom she described as "Monimia Mahon, daughter of my brother Walter," and it appeared that the only daughter of Walter, named Monimia, had been married to a person named Smith, and was dead at the date of the bequest, as the testatrix was aware, but that she had another niece named Monimia Mahon, who survived her. This lady, however, was not a daughter of Walter:—Held, that, notwithstanding the inaccuracy in the description of the legatee, the testatrix had indicated with sufficient certainty that the legacy was intended for the niece Monimia who survived her. *Dooley* v. *Mahon*, Ir. R. 11 Eq. 299.

Bequests unto "my niece Mary Elizabeth G., now residing with me." The only niece of testator was named Elizabeth W. Mary Elizabeth G. was a stranger in blood to testator, being the wife of an illegitimate son of testator's wife. Neither Elizabeth W. nor Mary Elizabeth G. actually resided with testator, but both of them visited at his house and were in attendance upon him during his last illness, in the course of which his will was made:—Held, that Mary Elizabeth G. was the person designated. *Lyon's Trusts, In re*, 48 L. J., Ch. 245.

A testator devised and bequeathed his real and personal estate to trustees absolutely, upon trust, as to one moiety of the personalty, to pay and divide the residue equally between and amongst his nephew John and his niece Hannah (whom he described as the children of his late brother Joseph), "and all and every the children of my late nephew Mark Ingle and my niece Eliza Wheelwright," share and share alike. He then desired his trustees to stand possessed of a moiety of the proceeds of the sale of his realty, upon trust to divide the same as before mentioned. In a codicil he referred to the "legacy left and apportioned to my niece Eliza." Some years before the date of the will a brother of the testator, named Mark, had died, leaving three sons, and a third son named Mark. The evidence showed that, at the testator's death, the nephew Mark, who had had a son born to him in England, and had emigrated to America, where he had another child, was still living; also that the testator knew of the birth in England of the child of Mark, and of his emigration to America, and that from such circumstances he (the testator) had, shortly before the date of the will, been led to suppose that Mark might be dead:—Held, that by the words "my late nephew Mark" the testator meant his (living) nephew Mark, and not his late brother Mark. *Ingle, In re*, 40 L. J., Ch. 310; L. R. 11 Eq. 578; 24 L. T. 315; 19 W. R. 676.

—— **In Sex.**]—Testator gave a share of his residuary personal estate to "my niece, the daughter of my late sister Sarah." The testator had had one sister only, named Sarah Ann, who had died fifteen years before, and who had never had any daughter, and but one child, a son:—Held, that such son was entitled. *Ricket's Trust, In re*, 11 Hare, 299; 1 Eq. R. 251; 22 L. J., Ch. 1044; 17 Jur. 664; 1 W. R. 492.

Where Description Changed by Subsequent Resettlement.]—In 1841 lands were settled to the use of J. C. the elder for life, remainder to E. C. for life; remainder to the first and other sons of E. C. in tail. E. C. had two sons, namely, J. C. the younger and H. C. In 1848 J. C. the elder made his will, by which he bequeathed an annuity of 200*l.* a year, during the life of E. C., to J. C. the younger; and in case of his death, to the person or persons who would be entitled to the rents of the settled lands under the limitations of the settlement of 1841, if E. C. were dead. J. C. the younger married, and had one son, J. M. C. In 1866 the lands were resettled and limited, after the death of E. C., to the use of H. C. for life. J. C. the younger died:—

Held, upon the construction of the entire of the will of J. C. the elder that J. M. C., and not H. C., was the person entitled during the life of E. C. to the annuity of 200*l.* a year. *Croker, In re*, Ir. R. 2 Eq. 58.

Error in Name and Description.]—A bequest to the children of the testator's late aunts, Rachael Walker and Diana Walker, who should be living at his death. The testator had no aunt nor any relative named Diana Walker, but he had a cousin, the daughter of his aunt Rachael, named Dinah Walker, who married Harrison long before the date of the will, and survived the testator. Evidence proved that the testator called his cousin by her maiden name of Walker after her marriage:—Held, that the children of Dinah Harrison were not entitled as the children of his late aunt, Diana Walker. *Shearman* v. *Jennett*, 9 L. J. (o.s.) Ch. 148.

A testatrix made a bequest in favour of "John Bird, son of the late Charrington Bird, who was my first husband's brother." H. W. Charrington, son of a brother-in-law of the first husband, claimed the fund, as being the person meant by the testatrix:—Held, that the claim was good. *Meredith, In re*, 10 L. T. 565; 12 W. R. 849.

Where a legacy was given to a legatee by the name and description of "C. H., the wife of A.," H. being in fact the wife of A., and C. H. his daughter, an infant of tender years, the court would not presume that there was any mistake in the preparation of the will; and it being more probable that the testatrix had mistaken the name than the description of the legatee, the court held that the legatee intended was reasonably certain, and decreed the legacy to be paid according to the description, and not according to the name. *Adams* v. *Jones*, infra.

—— **Name and Sex.**]—A testator devised an estate to "Elizabeth Abbott (a natural daughter of Elizabeth Abbott, of G., single woman, and who formerly lived in his service)" for life, with remainder to her children. At the date of the will, there was no person answering this description; for though Elizabeth Abbott, who had formerly lived in his service, had a natural child, yet it was a son and not a daughter, and was named John and not Elizabeth; besides this, Elizabeth herself was not then a single woman, but had married one Caddy, and had a legitimate daughter Margaret. John Abbott being dead, the property was claimed, first, by the plaintiff, on the ground that the gift was void for uncertainty; secondly, by the children of John Abbott; and, thirdly, by Margaret; but the court held, under the circumstances, that the children of John Abbott were entitled. *Ryall* v. *Hannam*, 10 Beav. 536; 16 L. J., Ch. 491; 11 Jur. 761.

—— **Number of Class Designated.**]—A testator bequeathed the residue of his estate to his trustees, and directed that out of the proceeds they should pay his funeral and testamentary expenses, debts and legacies. By a codicil he bequeathed 4,000*l.* to his trustees, on trust to pay the annual income thereof to his son R., who was in his uncontrolled discretion to apply the same for the benefit of the testator's son W. and his two children by his late wife. And, after the death of W., the trustees were to stand possessed of the capital and income of the 4,000*l.* in trust for "the said two children of W. in equal shares as tenants in common, to be paid to them on their respectively attaining the age of twenty-one years or marrying under that age." At the date of the codicil there were living four children of W. by his late wife. In an action by the trustees after W.'s death to determine which of his four children were entitled to the 4,000*l.*:—Held, that the four children were entitled to the 4,000*l.* in equal shares. *Groom, In re, Booty* v. *Groom*, 66 L. J., Ch. 778; [1897] 2 Ch. 407; 77 L. T. 154.

Gift to an Eldest, Youngest, or Other Son.]—A bequest "to my nephew John Newbolt, second son of the Rev. W. S. N., vicar of Somerton, Somerset." The vicar of Somerton at the date of the will was the Rev. W. R. N., who was brother-in-law to the testatrix; his second son's name was R. H. N., and his third son's name was John Pryce Newbolt:—Held, that it was a good bequest to the third son John Pryce Newbolt, and that his description by the name "John" was sufficient to make the veritas nominis overcome the error descriptionis. *Newbolt* v. *Pryce*, 14 Sim. 354; 8 Jur. 1112.

A. bequeathed 4,000*l.* in trust for his brother for life, and after his decease upon trust to pay or divide the principal unto or equally between the child or children of the brother living at his decease except Thomas (his eldest son), and the issue then living of any (except Thomas) then dead, such issue taking their parent's share only. It was shown by evidence that Thomas was the youngest son of the testator's brother at his decease; and that, to his knowledge, when he made his will, the eldest son of his brother was possessed of a large fortune, whilst the youngest and other children were unprovided for:—Held, that the eldest son, and not Thomas, was the son intended to be excepted. *Hodgson* v. *Clarke*, 1 De G. F. & J. 394. See *S. C.*, 1 Giff. 139; 5 Jur. (N.S.) 1024.

Testator devised an estate in Jamaica to trustees, upon trust, so long as Robert B., the second son of his daughter E. B., should be under the age of twenty-one years, to pay and apply 150*l.* per annum out of the rents and profits for his maintenance and education, and subject thereto upon various other trusts in favour of his daughter E. B., and his said grandson Robert B., and subject to all those trusts in trust for the said Robert B. for life, with remainder to his first and other sons in tail male, with remainder in moieties in favour of H. C. and R. C., the second and third sons of J. C., and their issue. The testator also devised his estate in England in trust for his said daughter E. B. for life, with remainder to his said grandson Robert B. for life, with remainder to his first and other sons in tail male, with remainder to the third, fourth, fifth and every other son of the said E. B. severally and successively in tail male, with remainder to the testator's right heirs. E. B. had no second son named Robert. The name of her eldest son was Robert, and that of the second son, Henry:—Held, under the circumstances, that this was a mistake in the name and not in the description of the devisee, and consequently that Henry and not Robert was entitled to take under these devises, and parol evidence was admitted to explain the ambiguity. *Bradshaw* v. *Bradshaw*, 2 Y. & C. 72; 6 L. J., Ex. Eq. 1.

Bequest to "Francis G., the youngest son of

my brother Francis G." There was no son of Francis G. answering the description, his youngest son being named Arthur Charles, and his eldest Arthur Francis. In support of the claim of the youngest son, parol evidence was admitted of a bequest to him, by a prior will, of the same property, and of a general belief that the testator was his godfather :—Held, that the youngest was entitled to the legacy. *Gregory, In re*, 6 N. R. 282; 34 Beav. 600; 11 Jur. (N.S.) 364; 13 W. R. 828.

A testator devised freehold property to trustees to the use of his son George Gillett for life, and after his decease to the use of "Robert Gillett, the fourth son of George Gillett," in fee, in case he should attain twenty-one; but if he should die under that age, to the use of the fifth son in fee, and if he should die under twenty-one, to the first son coming after the fifth who should attain twenty-one. Robert Henry Gillett was the third, and John William Gillett was the fourth son of George Gillett, who had seven sons. There were reasons apparent why the testator passed over the first and second sons, but none for omitting the third son :—Held, that the name must prevail over the description, and that Robert Henry Gillett, the third son, took under the devise. *Gillett* v. *Gane*, 39 L. J., Ch. 818; L. R. 10 Eq. 29; 22 L. T. 58; 18 W. R. 423.

Land was devised on trust for A. for life, with remainder to "W., the eldest son of A.," for life. At the date of the will A. had two sons living, both children : J., the elder, the third-born, and W., the younger :—Held, that W. was the person designated. *Garland, In re, Garland* v. *Beverley*, 47 L. J., Ch. 711; 9 Ch. D. 213; 38 L. T. 911; 26 W. R. 718.

Gift to Illegitimate Children.] — Though a bastard's name be mistaken in a devise, yet, if the person meant can be clearly ascertained by averment, the devise is good. *Rivers' Case*, 1 Atk. 410.

A legatee in a will was described as "J. E., the son of S. E. by M. J., or M., or E. his wife." There being no doubt as to the identity of the person intended, the question whether he was the son born in lawful wedlock or not was utterly immaterial, for he was the person designated as the legatee. *Thompson* v. *Eastwood*, 2 App. Cas. 215—H. L. (Ir.)

Question as to whether a bastard could take under the denomination in a will of "eldest son," by way of descriptionis personæ, the testator knowing of his existence, and believing that there was no lawful issue. *Baker* v. *Baker*, 2 Ves. Sen. 167.

Where a testator made a bequest in favour of the daughters of A. (his first cousin once removed), and it was proved that A. died seven years before the date of the will, leaving no legitimate daughters, but having had two reputed daughters, of whom one survived at the date of the will, and it being further proved that the testator had been in communication with members of A.'s immediate family, who recognised the illegitimate children as daughters of A., and that he had taken a small bequest under the will of A.'s brother, by which will the death of A. and the existence of the reputed daughters appeared :—Held, that these facts were sufficient to entitle the surviving daughter as a persona designata. *Herbert, In re*, 1 J. & H. 121; 29 L. J., Ch. 870; 6 Jur. (N.S.) 1027; 8 W. R. 660.

A father bequeathed his residuary estate to "all and every my daughters in equal shares who shall attain the age of twenty-one or marry." He never had any legitimate children, but he had three illegitimate daughters, whose mother he had married two years before the date of his will, and whom he always treated and spoke of as his children :—Held, that the illegitimate daughters were entitled to take under the will as personæ designatæ. *Laker* v. *Hordern*, 45 L. J., Ch. 315; 1 Ch. D. 644; 34 L. T. 88; 24 W. R. 543.

Testator, by his will, after reciting that he had nine children by his then present wife, and enumerating such children by their respective names and descriptions, devised his real estate upon trust for sale, and upon the death or second marriage of the testator's then present wife to divide the proceeds of such sale among his children by his then present wife who should be then living, and the issue of such of them as should be then dead, such issue taking per stirpes, and not per capita, but subject, as to the shares of daughters, to the directions thereinafter contained; and the testator thereby directed his trustees, during the life of each of his said children by his then present wife who should happen to be a daughter, to pay the dividends of her share of the proceeds of the real estate as such daughter should appoint; and in default of appointment, to such daughter for her life to her separate use; and after the decease of such daughter, upon certain trusts for the benefit of her children; and in default of issue of such daughter, then upon trust as such daughter should by will appoint; and in default of appointment, then upon certain trusts for the benefit of the brothers and sisters of the whole blood of such daughter and their issue; and in default of such brothers and sisters, or their issue, then upon trust for the next of kin of such daughter at her death, according to the Statute of Distributions. The testator, at his death, left by his said wife the nine children only enumerated in the will; but of these one, a married daughter, was illegitimate, having been born before the marriage :—Held, upon the context of the whole will, that the illegitimate daughter was entitled to participate in the benefit of the gift to the testator's children of the proceeds of his real estate. *Owen* v. *Bryant*, 2 De G. M. & G. 697; 21 L. J., Ch. 860; 16 Jur. 877.

A testator described his daughter as Mary, the wife of John Crook, and spoke of him as her present husband. The daughter was the sister of the deceased wife of John Crook. There were children of Mary Crook by John Crook, whom the testator recognised as his grandchildren, and no other children of Mary Crook :—Held, that such children could not take under a bequest to "the children or child of my daughter Mary Crook." *Crook* v. *Hill*, 38 L. J., Ch. 579; 17 W. R. 1092.

Gifts to Charitable Institutions.] — Gift by the will of 100*l.* to Highbury College, and of another 100*l.* by the second codicil under a gift of that sum to each of the charities mentioned in the will. In the same codicil was a legacy of 500*l.* to Hoxton Academy. The establishment known as Highbury College was formerly called Hoxton Academy. There was no Hoxton Academy at the date of the codicil or subsequently, but other charitable societies had for some time occupied the same premises :—Held,

that the Highbury College was not entitled to the legacy of 500*l.* *Lee* v. *Pain*, 4 Hare, 254.

A testatrix who died in 1885, by a codicil to her will dated in 1882, bequeathed to the "Anti-Vivisection Society" a legacy of 200*l.*, and to the "International Anti-Vivisection Society" a legacy of 200*l.* These two societies amalgamated in 1883, their objects being identical. The question was, whether the united society was entitled to both legacies, one legacy, or nothing at all:—Held, that, for the purpose of the will, both societies must be deemed to be still in existence, and took both legacies, and that the united society was entitled to 400*l.* *Joy, In re, Purday* v. *Johnson*, 60 L. T. 175.

Gift to Persons holding a Particular Office—Rector—Vicar.]—Charitable bequest in trust to the rector for the time being of W., W. being a vicarage, ordered to be paid to the vicar. *Hopkinson* v. *Ellis*, 5 Beav. 34.

—— **Provost and Scholars — Fellows.**] — A legacy was given to the provost and fellows of Queen's College. The proper name of the corporation was "The provost and scholars":—Held, that the provost and scholars were entitled. *Queen's College* v. *Sutton*, 12 Sim. 521; 11 L. J., Ch. 198; 6 Jur. 906.

—— **Surgeon and Apothecary of Hospital—Dispenser.**] — A testator bequeathed nineteen guineas each to the "surgeon" and "resident apothecary" of the Southern Dispensary of Bath, or any who might hold the like situations at his decease. There were two surgeons and no resident apothecary, but a "dispenser":— Held, that the three were entitled to nineteen guineas each. *Ellis* v. *Bartrum*, 25 Beav. 109.

—— **Curate of B. Church.**]—A testator gave legacies of 25*l.* each to the Rev. J. B., the Rev. N. L., and the Rev. J. D. C. W., described as curates of a particular church. At the date of the will and the death of the testator, the Rev. J. B., the Rev. N. L., and the Rev. W. C. B. were curates of the church; there never had been any curate of that church named W., but there was a clergyman of that name whose initials were J. D. C.:—Held, that the Rev. J. D. C. W. was entitled to the legacy, and that extrinsic evidence of the testator's intention was inadmissible. *Furrer* v. *St. Catharine's College, Cambridge*, 42 L. J., Ch. 809; L. R. 16 Eq. 19; 28 L. T. 800.

—— **Peer.**]—A testator bequeathed a silver cup to Lord S. and his heirs for an heirloom. The person who was Lord S. at the date of the will died before the testator, leaving a successor to the title:—Held, that the bequest lapsed. *Wilmorwood, In re, Ogle* v. *Sherborne (Lord)*, 56 L. J., Ch. 340; 34 Ch. D. 446; 56 L. T. 71; 35 W. R. 342—C. A.

Person Entitled to Possession of M. House.]—Testator bequeathed a collection of books, manuscripts, and pictures to his executors to hold as heirlooms, and suffer the same to be used and enjoyed by the person who for the time being under the limitations of "a certain deed of entail bearing date day of shall be entitled to the possession of" M. House. At the testator's death there was no such deed of entail as described in the will in existence, and the testator was entitled to the house absolutely in fee simple:—Held, that the collection belonged to the heir-at-law of the testator, as the person entitled in possession to M. House. *Bute (Marquis), In re, Bute (Marquis)* v. *Ryder*, 53 L. J., Ch. 1090; 27 Ch. D. 196; 32 W. R. 996.

"Person Entitled to the Possession or Receipt of Rents and Profits."]—The canon of construction laid down in *Doe* d. *Hearle* v. *Hicks* (8 Bing. 475) and *Langdale* v. *Briggs* (8 De G. M. & G. 391), that an estate clearly given cannot be divested except by words as clear and unequivocal as those which created it, approved and applied. A testatrix by her will directed that certain hereditaments thereby devised should go over in case the person for the time being "entitled to the possession or to the receipt of the rents and profits" of the said hereditaments should succeed to a certain title. A management clause provided that while and so often as the person who (but for the proviso) would have been "entitled to the possession, receipt, or enjoyment of the rents, issues, and profits" of the hereditaments should be an infant, the trustees should enter into and hold "the possession or receipt of the rents, issues, and profits" thereof, and manage the same. The trustees had a power of leasing during the minority of any person who if of full age would have been "entitled at law or in equity to the possession or to the receipts of the rents and profits" of the hereditaments:—Held, on the construction of the whole will (several other parts of which also contained the words "possession or receipt of rents and profits," or similar words), that the shifting clause did not apply to the case of a tenant in tail in possession who while an infant succeeded to the title. *Leslie* v. *Rothes (Earl)*, 63 L. J., Ch. 617; [1894] 2 Ch. 499; 7 R. 600; 71 L. T. 134— C. A.

Equivocation.]—Two schools in the same town, one a free school and the other a charity school for boys and girls: A. devises 500*l.* to the charity school; and though both be charity schools, yet only the charity school for boys and girls shall take. *Att.-Gen.* v. *Hudson*, 1 P. Wms. 674.

Legacy to "R. C., my nephew, the son of Joseph C."; other clauses describing "my nephew R. C." generally, and one legacy to "my nephew R. C., the son of John C." The testator had only two brothers, John and T. C., each having a son named R. C. Parol evidence admitted to resolve this latent ambiguity, shewing intimacy with the son of John C., and very slight knowledge of the other C.; the legacy was decreed to the former. *Careless* v. *Careless*, 19 Ves. 601; 1 Mer. 384; 15 R. R. 134.

Legacy to Miss S.; if more than one person answering that description must be intended the eldest. *Lee* v. *Pain*, 4 Hare, 249. And see *Id.* 24; 14 L. J., Ch. 346; 9 Jur. 247.

A testator, who was a farmer, by his will gave a legacy in these terms: "to W. R., one of my farming men." At the date of the testator's will, and at the time of his death, he had two persons in his service named W. R.; one of them was a farming man, and the other was employed both in the house and in the farm:—Held (upon some evidence that the testator intended to benefit the latter), that the latter, and not the former, was entitled to the legacy. *Reynolds* v. *Whelan*, 16 L. J., Ch. 434.

Testator bequeathed his residue to his first cousins, the children of his father's brother of the name of C. The testator's father had two

brothers of the name of C., both of whom had left children :—Held, that the bequest was not void for uncertainty, but that the children of both the brothers were entitled to share in the residue. *Hare* v. *Cartridge*, 13 Sim. 165.

A testator having several nephews, among them Joseph Healy, the son of his deceased brother James, and Joseph Healy, the son of a living brother Joseph, devised his farm to "my nephew Joseph Healy," with remainder, in case of his death without issue, to his nephew Thomas Healy. He bequeathed to his brother Joseph 300*l*., legacies to Thomas Healy and three other nephews, "all of whom are children of my brother the late James Healy." To a niece, "daughter of my brother Joseph Healy," and to "Joseph Healy, only son of my brother Joseph Healy aforesaid," 200*l*., to be paid to him at such time and in such manner as his said brother Joseph Healy should direct. He bequeathed the residue of his property of every kind to his "said nephew Joseph Healy":—Held, that Joseph, the son of James, took the farm and the residue. *Healy* v. *Healy*, Ir. R. 9 Eq. 418.

Gift to "my grand-daughter E. B." There were two of that name, one of them constantly visiting the testator, and much noticed by him, and the other not :—Held, that the former was entitled to the legacy. *Jefferies* v. *Michell*, 20 Beav. 15.

Where impossible to ascertain Mistake—Gift Void for Uncertainty.]—Where it was impossible to ascertain the mistake in a devise, the name belonging to one, the description to another, it was held void for uncertainty. *Careless* v. *Careless*, 19 Ves. 604 ; 1 Mer. 384 ; 15 R. R. 134.

A. devised a life interest in an estate to his "sister, Mary Frances Tyrwhitt Drake" ; he had no sister, but he had a sister-in-law, of that name. After other devises and bequests, he gave the residue equally among four persons, one of whom was named and described, "my niece Mary Frances Tyrwhitt Drake." He had no niece who bore those two names conjointly ; he had nieces who bore one or other of those names :—Held, that the bequest as to the fourth part was void for uncertainty. *Drake* v. *Drake*, infra, col. 872.

Legacy to son and daughter of W. ; W. had four sons :—Held, none of the sons could take, but the daughter took the whole. *Dowset* v. *Sweet*, Ambl. 175.

Legacy to John and B., sons of S. ; S. had two sons, James and B., but no son of the name of John :—Held, James should take. *Ib.*

By his will the testator gave his residue amongst his nephews and nieces, excluding John Shutt. By a codicil, he varied the limitation to this class, and excluded William Shutt "as in his will was directed" :—Held, that the exclusion was void for uncertainty, and that they both took a share. *Cope* v. *Henshaw*, 35 Beav. 420.

Where Description supplies Motive for Gift.]—A false character, attributed by a testator to a legatee, will not affect the validity of the legacy, unless the false character has been acquired by a fraud which has deceived the testator ; and where the testator and legatee have a common knowledge of an immoral or criminal act, by which the legatee has acquired the false character, the rights of the legatee, as such, will not be affected, it being no part of the duty of courts of equity to punish parties for immoral conduct, by depriving them of their civil rights. *Giles* v. *Giles*, 1 Keen, 685 ; 5 L. J., Ch. 46.

If a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the rule of the civil law is adopted, and the legacy fails ; therefore, where a legacy was given by a woman to a man in the character of her husband, whom she supposed and described as such, but who, at the time of the marriage ceremony with her, had a wife living ; the court in respect of his conduct held him not entitled ; but inclined to think it would be otherwise where, from circumstances not moving from the legatee himself, the description is inapplicable. as where a testator gives a legacy to a child from motives of affection supposing it his own, but is imposed upon in that respect. *Kennell* v. *Abbott*, 4 Ves. 802 ; 4 R. R. 351.

A legacy to A., described as, and believed by the testator to be, his wife, A. being, in fact, aware that she had a husband living when she went through the marriage ceremony with the testator, and during the whole coverture, is void. *Wilkinson* v. *Joughin*, 35 L. J., Ch. 684 ; L. R. 2 Eq. 319 ; 12 Jur. (N.S.) 330 ; 14 L. T. 394.

But a legacy given by the same testator to B., a daughter of A. by her husband, under the designation of the testator's step-daughter B. (B. being innocent of the fraud), is valid. *Ib.*

A testator, by will dated in 1874, shortly before his death, bequeathed to his executors a sum of new 3*l*. per cent. annuities, upon trust to sell the same and apply the proceeds in the purchase of a life annuity in "the name and for the benefit of my housekeeper M. R., whether living in my service at the time of my death or not." M. R. had left the testator's service six or seven years before, and married in 1871, and her sister E. R. had been since 1870, and was, at the time of the testator's death, in his service as his housekeeper :—Held, that the primary description of the legatee, "my housekeeper," and not the name, was in this case the guide to the testator's intention, and that E. R. was entitled to the fund. *Nunn, In re*, 44 L. J., Ch. 255 ; L. R. 19 Eq. 331 ; 23 W. R. 376.

A testator directed his trustees to set apart and invest 1,000*l*., and to stand possessed thereof and the income thereof in trust for Y. for life, and, after his death, "in trust for his daughter, my godchild, for her sole and separate use." Y., at the date of the will and the testator's death, had a son who was the godchild of the testator, and a daughter who was married. The testator had not been sponsor to any of Y.'s children, except the son, and had left legacies to several other godchildren of his, and was on intimate terms with the son, but not with his sister :—Held, that the son was entitled to the legacy, the leading motive of the bequest appearing to be that he was the testator's godchild. *Blayney, In re*, Ir. R. 9 Eq. 413.

A testator, by his will made in 1856, gave a legacy of 10*l*. to his servant, Susanna Cole. He had at that date a servant of that name, but in 1858 she married and left the testator's service, although for five years she continued to be employed occasionally in his house. When she left her place was taken by her sister, Ann Cole. In 1871 the testator made a codicil, by which he gave a legacy of 100*l*. "to my servant, Susanna Cole." At the date of the codicil, Ann Cole was

still in the testator's service :—Held, that Ann Cole was entitled to the legacy of 100*l*. *Fry, In re, Matthews* v. *Greenman*, 31 L. T. 8 ; 22 W. R. 813.

Parol Evidence — When admitted.]—When there is an error both in the names and description, parol extrinsic evidence will not be admitted to explain who were the intended objects of the testator's bounty. *Acworth* v. *Benton*, 22 L. T. 776 ; 18 W. R. 988.

Parol evidence is admissible to prove that a person exactly answering to a description in a will is not the person intended by the testator, and that another person who does not exactly, but does substantially, answer the description is the person intended by the testator. *Woolverton Mortgaged Estates, In re*, 47 L. J., Ch. 127 ; 7 Ch. D. 197 ; 37 L. T. 573 ; 26 W. R. 138.

A father left a legacy to the children of his daughter by any husband other than Mr. Thomas Fisher, of Bridge street, Bath. There was a Mr. Thomas Fisher, of Bridge street, Bath, who was a married man. There was also a Henry Tom Fisher, son of Thomas Fisher, who sometimes lived with his father :—Held, that although Mr. Thomas Fisher answered the description, and his son's name was not Thomas but Tom, parol evidence of these circumstances might be admitted to shew which was intended. *Ib.*

When a legatee is once correctly described in a will, and the same name is mentioned again without any description, evidence is not admissible to shew that a different person was intended. *Webber* v. *Corbett*, L. R. 16 Eq. 515 ; 29 L. T. 365.

An aunt gave "to her niece Laura, the second daughter of her brother John Webber," certain chattels. In a subsequent part of her will she gave to "each of her nieces, Laura Webber" and others, 50*l*. : and almost immediately afterwards "to each of her nieces, the said Laura Webber" and others, 100*l*. : and divided her residuary estate equally between "the said Laura Webber" and three others. The testatrix had two nieces, one named Laura, the second daughter of her brother John, and the other named Laura Frances Tonkin, the daughter of her brother William :—Held, that having once clearly and accurately described her niece Laura, as Laura "the second daughter of her brother John," whenever she mentioned "her niece Laura" afterwards, she must be presumed to have meant the same person : there was consequently no latent ambiguity, and parol evidence was therefore not admissible to shew which of the two nieces was meant. *Ib.*

Where there is a person corresponding in name and address, but not in other particulars, to the description of the legatee contained in a will, and another person corresponding in every particular except the christian name, the court admitted parol evidence to shew that the latter was the person intended to be benefited. *Roland, In re*, 14 W. R. 317.

Testatrix bequeathed 100*l*. to T. T., of R. square, Brighton. The testatrix had two nephews, one J. T. of R. square aforesaid, surgeon ; and another, the Reverend T. T., of Little Preston, Daventry, clerk. Each of these persons claimed the legacy. The money having been paid into court under the Trustee Relief Act, T. T. presented a petition for payment of it to him, and adduced extrinsic evidence in support of his claim, such evidence going to shew that he was in some sense properly described as of R. square. In opposition to the claim of T. T., evidence was adduced by J. T. to shew that the testatrix had made a mistake in his name, and a former will of the testatrix was produced made three years before the instrument in question, in which she gave a legacy to "T. T., of R. square, Brighton, surgeon," that being, with the exception of the wrong christian name, the exact description of J. T. :—Held, that such evidence was admissible, and that the evidence of the prior will was conclusive in favour of J. T. *Feltham's Trusts, In re*, 1 K. & J. 528, 533.

A. bequeathed a legacy to his niece, E. S. After her death, he made another will, in which the same bequest was copied. The latter alone was proved. The legacy was claimed by E. J. S., a great-great-niece :—Held, that she was entitled, and that parol evidence was inadmissible to shew that the deceased niece was intended. *Stringer* v. *Gardiner*, 27 Beav. 35. Affirmed, 4 De G. & J. 468.

A gift by the testator to his first cousin, Vincent B., the son of his late uncle, Peter B. The testator had no cousin named Vincent B., who was the son of his late uncle Peter ; but he had a first cousin named George Vincent B., who frequently visited and dined with him, whom he commonly called "Vincent," and who was the son of a deceased uncle named Joseph. The son of Peter was named Frederick, and was not in the habit of visiting the testator. The court admitted evidence of these extrinsic circumstances, and :—Held, that the testator was mistaken in the description rather than in the name of the legatee ; and that the George Vincent B., the son of Joseph, was entitled to the legacy. *Bernasconi* v. *Atkinson*, 10 Hare, 345 ; 17 Jur. 128 ; 1 W. R. 152.

Held, also, that the evidence of the solicitor who prepared the will, that the testator had by his instructions expressly indicated that George Vincent B. was the person for whom the legacy was intended, and that he (the solicitor) had inserted the description without the direction of the testator, and in a mistaken belief of the parentage of the legatee, was not admissible. *Ib.*

Where a legatee is pointed out by name and description, and there is no person to whom the name and description both apply, but the name only applies to one and the description only applies to another, the court will endeavour, from such of the extrinsic circumstances as are admissible, to ascertain the person meant by the testator, and will not hold the bequest void for uncertainty, except in cases where it is impossible to discover any preponderance in favour of one of the persons rather than of the other. Extrinsic evidence is only admitted to assist in the construction of wills where the ambiguity is created by matter dehors the will. *Ib.*

A name and a description of a legatee were given in a will, which, taken together, could not be applied to any one person. Evidence of the state of the family was admitted, and an affidavit of a solicitor who prepared the will was offered to shew what had been the cause of the mistake :—Held, that the affidavit was not admissible. *Drake* v. *Drake*, 8 H. L. Cas. 172 ; 29 L. J., Ch. 850 ; 3 L. T. 193. Affirming 25 Beav. 642 ; 4 Jur. (N.S.) 727 ; 6 W. R. 791.

Where a gift is made by a will to persons described by their surnames only, extrinsic evidence is admissible to shew what persons having such surnames were known to the testator, and

in what respective relations they stood to him. *Gregson's Trusts, In re*, 2 H. & M. 504; 4 N. R. 222; 10 Jur. (N.S.) 696; 10 L. T. 642; 12 W. R. 935.

Semble, where the number of persons entitled to any such surname, and known to the testator, exceeds the number of legatees of that name, the court will not look at external evidence of the testator's intention, but will determine which of the persons are entitled to the gift from evidence derived from the state of the family, and the rest of the will itself. *Ib.*

Evidence admitted to prove mistake in name of legatee in will; but one legatee in will who might otherwise have had a claim to that legacy being an infant, inquiry was directed as to the party entitled. *Still* v. *Hoste*, 6 Madd. 192.

Legacy to "James, son of Thomas A." There was no person of that description; there was a "Thomas, son of James A." The court will not receive evidence to shew that this was a mistake in the description. *Andrews* v. *Dobson*, 1 Cox, 425.

A will contained a legacy of 300*l.* to Commodore P. D., of S., and a like legacy to the children of P. H. D. This legacy was claimed by the three children of H. O. D., and also adversely by the five children of P. D., whose real name was P. J. D. P. J. D. and H. O. D. were both in the same degree of relationship to the testatrix, and she had given like legacies to their brothers and sisters. H. O. D. was dead at the date of the will:—Held, that the previous gift to Commodore P. D., and the fact that the gift was not to the children of "the said" P. H. D., together with the intention manifested in the will to provide for all the members of the D. family, was sufficient to enable the court to decide, upon the face of the will, that the children of H. O. D. were intended, although there was no reference to him as "the late" H. O. D.:—Held, also, that this construction did not strike out the name "P.," but treated it as having been used by mistake:—Held, lastly, that extrinsic evidence of the intention of the testatrix was not admissible, although it might have been if there had been only one class of claimants. *Douglas* v. *Fellows*, 1 Kay, 114; 23 L. J., Ch. 167; 2 W. R. 654.

Testator gave the residue of his estate to the poor of the parish of K., in L., but that parish was in N. It was set up by the next of kin, that testator did not imagine his residuum would exceed 10*l.*, and had so declared, whereas it amounted to near 1,000*l.* The court thought parol evidence should be admitted to help out the description of the parish, but not as to the quantity of the thing given. *Brown* v. *Langley*, 2 Barnard. 118. See also *Blackman, In re*, 16 Beav. 377.

—— **Where Latent Ambiguity.**] — Latent ambiguity, propounded and dissolved by parol, but parol never admitted on patent ambiguity. Bequest to the "son and daughter" of one who has several sons is a latent ambiguity. *Delmare* v. *Robello*, 1 Ves. J. 415.

Testator devised to all the children of his two sisters A. and B.; A., long before the date of the will, changed from the Jewish to the Roman Catholic religion, was baptised by a new name, and became a professed nun at Geneva. Bill by the children of C., a third sister, living with B. at Leghorn, upon ground of mistake in testator, and evidence of intent to provide for his sisters at Leghorn, dismissed. *Id.* 412.

Legacy to "R. C., my nephew, the son of Joseph C.," other clauses describing "my nephew, R. C.," generally, and one legacy to "my nephew, R. C., the son of John C." The testator had only two brothers, John C. and T. C., each having a son named R. C.: parol evidence admitted to resolve this latent ambiguity; shewing intimacy with the son of John C. and very slight knowledge of the other, and the legacy was decreed to the former. *Careless* v. *Careless*, 19 Ves. 601; 1 Mer. 384; 15 R. R. 134.

A., by will, left to F. M. F., and to "his sister, M. F., my grand-daughter, share and share alike, M. F. now living in France with her uncle M.," all his estates. M. F. was not then living, and had never lived, while her sister, C. F., was living and had lived for some time with the uncle:—Held, that extrinsic evidence was admissible to explain the ambiguity in the will. *Plunkett, In re*, 11 Ir. Ch. R. 361.

Held, also, that the name should control the description, and that M. F. was therefore entitled. *Ib.*

A testatrix gave a sum of stock in trust for "S. D., for life, and after her decease, in trust for D., daughter of the said S. D." At the date of the will S. D. had one, but at the death of the testatrix, three daughters. On evidence, shewing that the eldest daughter of S. D. was alone known to the testatrix, who was not aware of the existence of the other daughters, the court declared her entitled. *Phillips* v. *Barker*, 1 Sm. & G. 583; 2 Eq. R. 795; 17 Jur. 1146; 2 W. R. 110.

A testator by his will dated in 1884, bequeathed "to my cousin A., son of my late uncle A., unless he shall immediately on my death succeed to the title of Marquis of E.," the sum of 2,000*l.* The testator's cousin A. died in 1866, and at the date of the will and also of the testator's death, G. was the only child of the testator's uncle A. other than the son who succeeded to the title:—Held, that on the face of the will there was a gift to a non-existent person, that there was no ambiguity, and that parol evidence was not admissible to shew that the testator intended to benefit G., or that A.'s name had been inserted by mistake of the draftsman. *Ely, In re, Tottenham* v. *Ely*, 65 L. T. 452.

Before resorting to parol evidence to explain a latent ambiguity, the court should be satisfied that the ambiguity cannot be removed by the construction of the will itself, having regard to the circumstances surrounding the testator. *Healy* v. *Healy*, 9 Ir. Eq. R. 418.

A brother, having two sisters, E. D. and E. B., appointed J. M., E. C., and his sister E. D. joint executors of his entire property for the purpose of putting it to the best advantage for "his sister, wife and children":—Held, that E. D., being the sister in the mind of the testator when making his will, was the person entitled to share in his property, and that E. B. was not entitled to any share therein. *Murphy* v. *Donnelly*, Ir. R. 6 Eq. 203.

—— **Equivocation.**]—Latent ambiguity arises dehors the will, and evidence is admissible to explain it; as in case of two manors of the same name, or an inadequate description of a child; not to explain a patent ambiguity upon the face of the will. *Baugh* v. *Read*, 1 Ves. 259; 3 Bro. C. C. 192.

A devise to my son E. F., and then to my grandson H. F. (the testator having two grandsons of that name through different sons), does

not necessarily mean to H. F., son of E. F.; and parol evidence is admissible to shew which was meant. *Fleming* v. *Fleming*, 31 L. J., Ex. 419; 8 Jur. (N.S.) 1042; 6 L. T. 896; 10 W. R. 778.

An aunt, after making specific bequests to her niece Clara and "my niece Laura, second daughter of my brother J. H. W.," bequeathed as follows: "To each of my nieces, K. G., H. M. T., H. B., and Laura W., 50*l.*," and further bequeathed "to each of my nieces, C. W., Laura W., R. W., M. E. S. S., and E. G. S., 100*l.*," and gave the residue "in trust for M. E. S., Laura W., E. G. M., and R. W." The testatrix had two nieces, one Laura W., a daughter of her brother J. H. W., and the other Laura Frances Tomkins W., a daughter of her brother William W. Parol evidence had been entered into to shew which Laura was intended:—Held, that in the first gift the person who was intended was accurately described; that there was no latent ambiguity; and that parol evidence was not admissible; that the same Laura W. mentioned in the first gift took both the legacies of 50*l.* and 100*l.*, and also the share of the residue. *Webber* v. *Corbett*, 43 L. J., Ch. 164; L. R. 16 Eq. 515; 29 L. T. 365.

Held, that, there being only one living person answering to the name given, this was not a case of equivocation, and that evidence of intention was not admissible. *Ingle, In re*, supra, col. 862.

Devise "to William Marshall, my second cousin." The testator had no second cousin so named, but he had two first cousins once removed, one named William Marshall, the other named William John Robert Blandford Marshall:—Held, a latent ambiguity, and parol evidence admitted to dissolve it. *Bennett* v. *Marshall*, 2 K. & J. 740.

—— **Assumed Name or Nickname.**]—The court will not allow parol evidence to explain a blank in a will; but where a legatee is nicknamed, or where there are two of the same name, parol evidence will be admitted to explain. *Baylis* v. *Att.-Gen.*, 2 Atk. 240. And see *Beaumont* v. *Fell*, 2 P. Wms. 141.

When a person is mentioned by a nickname, or where there have been two who have had the same christian and surname, parol evidence has been admitted to ascertain whom the testator meant. *Ib.*

A legacy having been given to a legatee, in a name which she had for many years assumed, the court will direct an inquiry who was the person meant. *Neathway* v. *Ham*, Tam. 316.

Annuity bequeathed to testator's brother E. for life, remainder to his children by his present wife: at the date of the will, E. and his wife were dead, and their children had other legacies under it, and testator had only one brother S., having a wife and children, whom he had been in the habit of calling E.: his children held to be entitled upon these circumstances. *Parsons* v. *Parsons*, 1 Ves. 266; 5 R. R. 120.

Legacy to "Mrs. G." Evidence admitted to prove who was intended. *Abbott* v. *Massie*, 3 Ves. 148.

The testatrix bequeathed to Mrs. and Miss B., the widow and daughter of the late B., 200*l.* each; at the date of the testamentary instrument there were no persons answering the description. The legacy was claimed by a Mrs. W., the daughter of the late B., and her daughter, Miss W. (the grand-daughter of the late B.); it was proved that the testatrix was intimately acquainted with the late B. and also with Mrs. and Miss W., and used to call them by Mrs. W.'s maiden name of B.:—Held, that this evidence was admissible, and Mrs. and Miss W. were declared to be entitled to the legacies. *Lee* v. *Pain*, 4 Hare, 251; 14 L. J., Ch. 346; 9 Jur. 247. And see *Id.* 24.

ii. *Construction of Particular Gifts.*

Gift to Friends of Testator.]—A testator devised freehold lands to his wife for life, provided she remained unmarried, and directed that on her death or marriage the lands should revert to his friends, and be their property. With the exception of a few nominal legacies, he bequeathed to his wife all his personal and chattel property absolutely, and appointed her sole residuary legatee:—Held, upon the construction of the will, that the words "my friends" were capable of meaning the testator's kindred who would have taken his interest in the lands but for the interposed devise to his wife; that the devise over, on the death or marriage of the wife, was not void for uncertainty, and that upon her death the testator's heir-at-law became entitled under the devise. *Coogan* v. *Hayden*, 4 L. R., Ir. 585.

To Offspring.]—A gift of personalty by will to A. for life, remainder to her children; "but if there should not be any child or offspring," then a legacy to B., and the remainder to other persons. A. died, leaving only grandchildren:—Held, that the legacy to B. failed, offspring meaning issue beyond children. *Thompson* v. *Beasley*, 3 Drew. 7; 3 Eq. R. 59; 24 L. J., Ch. 327; 18 Jur. 973.

A testator directed a policy on the life of his son, to be settled, and the interest to be paid to his son's widow for life, and after her decease to her offspring:—Held, that the children of his son, who survived him, were entitled, to the exclusion of grandchildren. *Lister* v. *Tidd*, 29 Beav. 618.

The word "offspring," in its natural and proper sense, means lineal issue, or descendants. *Young* v. *Davies*, 2 Dr. & Sm. 167; 1 N. R. 419; 32 L. J., Ch. 372; 9 Jur. (N.S.) 399; 8 L. T. 80; 11 W. R. 452.

Where there is a gift of personalty for life to a testator's son, and "at his death to my surviving daughters, and their lawful offspring," that is a gift to the daughters only who survive the son, absolutely, the word "offspring" being a word of limitation, and meaning the same as "issue." *Ib.*

To an Orphan.]—A testatrix devised the rents and profits of houses to be applied "for and towards the maintenance, education and support of my grand-daughter until she arrives at twenty-one, provided she be left an orphan, unprovided for, and lives with part of my family." On a bill by the grand-daughter, an infant, by her father as next friend, the mother being dead at the time of the execution of the will:—Held, that she was not an orphan within the meaning of the will, and the rents and profits were not applicable to her support or education. *Guilmette* v. *Mossop*, 7 L. T. 190.

To a Child.]—A testator at the time of making his will had four children, one of them married

(who had then one daughter), and three others unmarried. He gave an estate to one of the four for life, remainder to "one child" of each, provided that if the three then unmarried, naming them, should never have any lawful children, their part should go to the next of kin :—Held, that the first-born child of each of the four children took a fourth share in fee, as they successively came in esse. *Powell* v. *Davies*, 1 Beav. 532 ; 3 Jur. 839.

To a Son.]—A testator devised certain estates in remainder to "a son of my nephew J. W., his heirs and assigns." J. W. had three sons, the two elder of whom died infants and unmarried :—Held, that the eldest son of J. W. took an estate in fee simple in remainder in the estates. *Ashburner* v. *Wilson*, 19 L. J., Ch. 330 ; 14 Jur. 497.

A. having a power to appoint real estate and 4,000*l.* to all or any, or one or more of the children, or more remote issue of his marriage, made his will before any child was born, but while his wife was enceinte, bequeathing all his property on trust in the event of his leaving one child, that he or she should inherit all his landed and personal property ; but, in case of his leaving a son and daughter, he devised and bequeathed all his landed and personal property to his son, save and except 4,000*l.* to his daughter. He afterwards died, having no real estate except what was the subject of the power, but considerable personal estate, and leaving two sons and two daughters :—Held, that the will did not operate as an execution of the power over the real estate, as the devise was either void for uncertainty, or conditional on events which had not happened. *Russell* v. *Russell*, 12 Ir. Ch. R. 377.

To "Other Sons"—Eldest Son excluded.]—Testator devised his mansion-house successively to his second and third sons, F. L. and J. L., for life, with remainder to their sons in tail male, and then to the use of his fourth, fifth, and all and every other the son and sons of his body on the body of his wife to be begotten, born, or en ventre sa mère at the time of his decease, severally, successively, and in remainder one after another in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons and the heirs male of his body to be always preferred, and to take before the younger of such son and sons and the heirs male of his and their body and bodies issuing, and for default of such issue to the use of the testator's daughters, begotten or to be begotten, as tenants in common in tail. The will also provided for portions for the testator's children other than his three eldest sons, "who are otherwise provided for." The will contained no provision for the eldest son, but he was entitled to other family estates in remainder upon the death of the testator. The testator died leaving three sons and five daughters, all of whom were in esse at the date of the will. The limitations to the second and third sons and their issue having failed, the eldest son claimed an estate tail under the devise to the fourth, fifth, and other sons :—Held, that he was not entitled. *Locke* v. *Dunlop*, 57 L. J., Ch. 1010 ; 39 Ch. D. 387 ; 59 L. T. 683—C. A. Affirming 36 W. R. 41.

To "Younger Children."]—A testator devised real estate on trust after the death of his wife in strict settlement on his four sons, A., B., C. and D., and their issue male successively. He bequeathed a legacy of 14,000*l.* after the death of his wife to be paid to his "younger children," namely B., C., D., E., F., G., H., K. and L. (the six latter being his daughters), in equal shares, so that the share of each of his said younger children should be absolutely vested at twenty-one, whether the preceding trusts should be determined or not. A. and B. died in the lifetime of the testator's widow without issue male. C. attained twenty-one in the lifetime of B., and on the death of the widow became tenant for life under the will of the real estate :—Held, that he was entitled to a share in the legacy of 14,000*l.* *Prytherch, In re, Prytherch* v. *Williams*, 42 Ch. D. 590.

To a Charitable Institution.]—A bequest of 500*l.* to the Westminster Asylum for Pregnant Women :—Held, upon extrinsic evidence, and the context of the will, without any inquiry, a gift to "The General Lying-in Hospital." *General Lying-in Hospital* v. *Knight*, 21 L. J., Ch. 537.

A testator, who had never been in England, bequeathed the residue of his personal estate to "the hospitals of Paris and London." In another part of the same will he spoke of a solicitor, whose offices were in Savile Place, as his "notary at London" :—Held, that the word "London," as used by the testator, included Brompton. Semble, that it included all houses in a continuous line of streets with the City, Westminster, and Southwark, and the houses contiguous to such streets. Quære, whether "the hospitals of London" would not include all hospitals for the benefit of the inhabitants of London. *Wallace* v. *Att.-Gen.*, 3 N. R. 555 ; 33 L. J., Ch. 314 ; 10 Jur. (N.S.) 249 ; 12 W. R. 506.

To a Trade Union.]—See *Amos, In re*, ante, sub tit. TRADE.

To A. "if not a Bankrupt."]—A legacy was given to A. "if not an uncertificated bankrupt at the testator's death." He was a bankrupt at the testator's death, but his bankruptcy was annulled for months afterwards :—Held, that he was not entitled to the legacy. *Cox* v. *Fonblanque*, L. R. 6 Eq. 482.

To a Roman Catholic Bishop.]—A bequest to Roman Catholic bishops and their successors is void, no such characters being known to the laws of Ireland ; but where they are particularly named, though so described, the bequest is good, for their joint lives, subject to the control of the Court of Chancery. *Att-Gen.* v. *Power*, 1 Ball & B. 145.

To a Family until Extinct.]—A testator, by a codicil to his will, having devised certain lands to trustees for charitable purposes, and having recited that they were then let at a clear yearly rent of 237*l.*, which he directed to be appropriated in the particular manner specified in the codicil for the maintenance of an almshouse, &c., declared that, in the event of there being an increase in the rents by any new letting, the surplus so to arise should go to the only use and behoof of the person or persons of the S. and C. families who for the time being should be lord or lords, lady or ladies, of the manor of D. ; and

in case the said families did not protect the said charities, or if the said families should become extinct, then and in either of said cases the trustees were to apply the said surplus rents in addition to the former provisions for the charity. After the death of the testator, the families of S. and C. sold the manor of D.:—Held, that the families of S. and C. had not, by the sale of the manor of D., become extinct within the meaning of the codicil. *Charitable Donations Commissioners* v. *De Clifford*, 1 Dr. & War. 245.

To Person "living and residing at J."]—Devise of several estates to A. for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of A. in tail male, with divers remainders over, with power to the persons from time to time entitled to the estates devised to lease all such estates, except an estate called Juts, and with a direction that the persons who should be entitled to and possessed of the devised estates should not lease the estate called Juts or any part thereof, and that every such person should live and reside on the said estate called Juts, and, for default thereof, all the devised estates to go over to the person next in succession, as if the person refusing or neglecting to reside or live at Juts were actually dead:—Held, in a suit by parties making title under a recovery suffered by A. and his eldest son against a purchaser for specific performance, that it was too uncertain what the testator meant by the words live and reside for the court to determine that there had been a forfeiture, and specific performance decreed. *Fillingham* v. *Bromley*, Turn. & R. 530; 24 R. R. 136.

To Persons "living" or "residing" in England.]—A. gave her residuary estate equally among such of her nephews and nieces as should "be" in England at the time of her decease, and the children of such as should be then dead "living" in England, such children taking only the parents' share, and her great-niece J. G., and the children of her deceased niece M. W., such last-mentioned children only to take one of such shares in right of their mother equally among them:—Held, that two nieces who had for many years been permanently settled in America were excluded; that two nieces who at the time of the testator's death were temporarily in Ireland were not excluded, and that J. G. and the children of M. W. were entitled to claim double interests as parties named, and as included in the class. *Woods* v. *Townley*, 11 Hare, 314; 23 L. J., Ch. 281; 3 Jur. (N.S.) 41; 1 W. R. 504.

Bequest in a will "to such of my nephews and nieces as shall at my decease be residing in this country." At the date of the will, and at her death, the testatrix had one nephew residing in the United States, and another in the East Indies. A third nephew was a seafaring person, born and in his youth resident in Durham, where the testatrix resided. He was thenceforth continually a seafaring man, without any fixed residence on shore, living, however, occasionally at Durham, and sometimes in Ireland. He married an Irishwoman in Ireland, but neither did he provide any fixed residence for her, and she sometimes lived in England, sometimes in Ireland. At the time of the death of the testatrix this nephew was in Belfast harbour, on board ship, having just arrived from North America:—Held, that he was entitled within the words "residing in this country." *Dale* v. *Atkinson*, 3 Jur. (N.S.) 41.

Where Name Omitted—Effect of Recital.]—By articles of agreement of the 19th November, 1812, purporting to be made in contemplation of a then intended and soon after solemnised marriage, it was declared that 600*l.*, portion of the wife's fortune, should be secured by the bond and warrant of her father L. On the 19th January, 1826, L. made his last will and testament, wherein he (correctly) recited that he was tenant for life of the lands of Aggard, which, by the terms of his marriage settlement, were charged with 4,000*l.* for his daughters in such shares as he should by will or other writing appoint, and he thereby further (erroneously) recited that the sum of 600*l.* was on the marriage of his daughter charged for her on the lands, and he thereby directed the said last-mentioned sum, together with other sums amounting to 1,100*l.*, to be for her (his married daughter's) portion, and he then also appointed three several sums of 900*l.* each to his third, fourth and fifth daughters, which, with sums charged on other lands, made 1,100*l.* each:—Held, that the will sufficiently indicated an intention on the part of the testator to appoint the 600*l.* to his married daughter, notwithstanding that he had not therein made any appointment to her by name. *Burke* v. *Lambert*, 15 W. R. 913.

Where One Person fills Two Descriptions.]—After a devise to a party for life, remainder, in default of certain powers of appointment, to the testator's male relations of the name:—Held, that the devisee for life, filling the character to whom the estates were given in certain events, was not, because he was tenant for life, to be excluded from taking under the description on the ultimate limitation which he afterwards filled. *Pearce* v. *Vincent*, 2 Keen, 230. *S. C.*, 7 L. J., Ch. 285. And see 2 Bing. (N.S.) 328; 1 C. & M. 598; 2 Scott, 347; 5 L. J., C. P. 82.

Where Description filled by Two Persons successively—Superioress of Convent.]—A testatrix devised her share of freehold lands to her brother and sister equally for life, and on the death of either the whole to the survivor, and directed that on the death of the survivor the share should be divided equally between the superioresses of two convents for the benefit of the schools attached to each. The lands were sold after the death of the survivor. The purchaser required that the person who was superioress at the date of the death of the testatrix, or her heir-at-law or devisee, should join in the conveyance:—Held, that the devise meant the superioress at the date of the death of the testatrix, and not the superioress at the date of the death of the surviving tenant for life, and that the requisition of the purchaser should be complied with. *Laffan and Downe's Contract, In re*, [1897] 1 Ir. R. 469.

Construction of Word "Unmarried."]—The word "unmarried" is flexible in its meaning, and may be construed to mean "never having been married," or simply "unmarried at the time of the death," according to the obvious meaning of the parties, as manifested by the words of the instrument, or the nature of the transaction itself. *Coventry* v. *Lauderdale (Earl)*, 10 Jur. 793.

Although the word "unmarried" is one of flexible meaning, and may mean either "never having been married," or "not having a husband" at the time when a gift is to take effect, the former is the primary or natural meaning, and, in the absence of any context shewing a different intention, the word will be so construed. *Sergeant. In re, Mertens* v. *Walley*, 54 L. J., Ch. 159 ; 26 Ch. D. 575 ; 32 W. R. 987.

Bequest to the son and unmarried daughters of G. D. G. as he (G. D. G.) might by will direct, and failing such direction, to them equally :—Held, that the word "unmarried" had reference to the state of G. D. G.'s family at the date of the will, and that therefore daughters of G. D. G., who were unmarried at the date of the will, were not excluded from participating in the benefit of the bequest by the circumstance of their having afterwards married in the lifetime of the testator. *Hall* v. *Robertson*, 2 Eq. R. 15 ; 4 De G. M. & G. 781 ; 23 L. J., Ch. 241 ; 18 Jur. 635. Reversing 1 W. R. 464.

Construed to mean wifeless. *Sanders, In re*, L. R. 1 Eq. 675 ; 12 Jur. (N.S.) 351 ; 14 W. R. 576.

Property was given by will to trustees in trust for A. for life, "but if he should die unmarried," to be equally divided between the children of B. At the date of the will A. was a bachelor, and at the time of his death he was a widower :—Held, that, in the absence of context shewing a contrary intention, the word "unmarried" must be construed according to its ordinary or primary meaning, as "never having been married," and therefore that the gift to the children of B. did not take effect. *Dalrymple* v. *Hall*, 50 L. J., Ch. 302 ; 16 Ch. D. 715 ; 29 W. R. 421.

A testator gave a legacy to his daughter (a spinster) at her mother's decease, if she should be then unmarried, as an outfit and to answer her immediate purposes :—Held, by Stuart, V.-C., not conclusively forfeited upon her marrying in her mother's lifetime. But on appeal :—Held, upon the construction of the context and upon a comparison of the use of the word "unmarried" in the bequest with its use in other parts of the will, that it meant "without having been married." *Thistlethwaite's Trust, In re*, 1 Jur. (N.S.) 570 ; 3 W. R. 466 : and on appeal, *S. C.*, nom. *Thistlethwayte's Trust, In re*, 24 L. J., Ch. 712 ; 1 Jur. (N.S.) 881 ; 3 W. R. 629.

See also *Maberly* v. *Strode*, 3 Ves. 450 ; 4 R. R. 61 ; *Bell* v. *Phyn*, 7 Ves. 458 ; 6 R. R. 148 ; *Gonne* v. *Cook*, 15 W. R. 576 ; *Radford* v. *Willis*, L. R. 7 Ch. 7 ; 25 L. T. 720 ; 20 W. R. 132. Reversing 40 L. J., Ch. 484.

—— **Effect of Divorce.**]—A testator by his will devised freehold and leasehold estates to trustees upon trust out of the rents and profits arising therefrom to pay an annual sum to his son and his son's wife E. jointly, and if his son predeceased E., to E. "so long as she continues unmarried." Before his son's death his son obtained a divorce from E. He was now dead, and E. had not been remarried. On an application that the receiver might be directed to pay E. the arrears unpaid since her husband's death, and continue to pay the annuity :—Held, that the phrase "so long as she continues unmarried" was not equivalent to "during widowhood," and that, although E. was not a widow, as she was the "E." named in the will, and was unmarried, she was entitled to the annuity so long as she remained unmarried. *Knox* v. *Wells*, 48 L. T. 655 ; 31 W. R. 559.

A testatrix, by her will made in 1860, bequeathed a fund to trustees, on trust to pay the income to her husband for life, and on his death to divide the fund into four equal parts, and, as to one of the parts, "upon trust to pay the same to J. H., spinster, if she be then sole and unmarried, but, if she be then married," the testatrix directed her trustees to pay the income of the fourth part to J. H. for her life, for her separate use, and after her death to hold it on trust for her children. In June, 1878, the testatrix died, and her husband died in April, 1883. In April, 1861, J. H. married, and in November, 1878, a decree absolute was made for the dissolution of her marriage. There were three children of the marriage. J. H. did not marry again :—Held, that the words "then sole and unmarried" meant "not having a husband" at the time of the death of the tenant for life, and that, in the events which had happened, J. H. was absolutely entitled to the one-fourth share. *Lesingham's Trusts, In re*, 24 Ch. D. 703 ; 49 L. T. 235 ; 32 W. R. 116.

—— **Of Nullity Decree.**]—A testator by his will gave the proceeds of sale of his residuary estate to trustees, on trust to pay to his wife E. C., within one month after his decease, a legacy of 200*l.*, and in addition thereto to pay to his said wife, "so long as she shall continue my widow and unmarried," an annuity of 300*l.*, commencing from the date of his decease, "or otherwise in lieu and in substitution of the said annuity, at the option of my said wife, if she shall prefer it, a legacy of 2,000*l.* And I direct that the provision hereby made for my said wife shall be in lieu and satisfaction of any dower or thirds to which she might be entitled out of my estate." After the date of the will the marriage was, in a suit in the Divorce Court instituted by the wife, declared void ab initio, on the ground of the impotency of the testator. He died without altering his will :—Held, that the late wife was entitled to a legacy of 200*l.*, but that she could not claim the annuity inasmuch as she, never having been in law the wife of the testator, never could be or continue his widow, and the annuity was therefore given for a period which could never come into existence. *Boddington, In re, Boddington* v. *Clairat*, 53 L. J., Ch. 475 ; 25 Ch. D. 685 ; 50 L. T. 761 ; 32 W. R. 448—C. A.

Held, also, that she could not take the 2,000*l.* which was given in substitution for the annuity to which she was not entitled. *Ib.*

—— **Of Invalid Marriage—Widow.**]—A testator gives to his mother an annuity for life, and after her decease to his sister, if she be a widow, but not otherwise, but to revert back to his children after her death. At the death of the testator and of the mother, who survived him, the sister was a married woman :—Held, that the sister, on afterwards becoming a widow, was not entitled to the annuity. *Bartleman* v. *Murchison*, 2 Russ. & M. 136 ; 9 L. J. (O.S.) Ch. 60.

Bequest to Lady C., a widow of Sir N. C., considered valid although at the date of the will she had married a second husband, R., and the fact of that marriage was unknown to the testator, and she continued to call herself Lady C. The bequest was the bequest of a fund to

trustees to pay to her the dividends so long as she should continue single and unmarried; and if she should anticipate such dividends, then the fund to become part of the testator's residue :—Held, that she took an absolute interest in the fund. *Rishton* v. *Cobb*, 9 Sim. 615; 5 Myl. & Cr. 145; 9 L. J., Ch. 110; 4 Jur. 261.

"Unprovided for by Marriage" Construed Unmarried.]—A testator bequeaths the sum of 400*l.* sterling to each of his sister's children that may be alive and unprovided for by marriage at her death; and in a subsequent passage of his will adds, "I have left small legacies to my sister's children, that they may not in their turn become the prey of unprincipled men" :—Held, that this was a bequest to daughters only, and not to sons; that "unprovided for by marriage" meant "unmarried"; that a daughter who was a widow at her mother's death was entitled to her legacy of 400*l.* *Dunbar* v. *Boldero*, 4 L. J. (o.s.) Ch. 76.

2. Gifts to a Class.

a. What is a Class.

A testator directed his property to be sold, and the proceeds to be divided between his three sons and his daughter (naming them), or as many of them as should be then living. He then referred to a power of appointment over a fund under his marriage settlement, and to the appointment of 2,000*l.*, part thereof, to his daughter on her marriage, and declared his wish to be that the residue should be "equally divided among my sons, as also any other sum of money that I may die possessed of" :—Held, that the gift of the residue of the trust fund was made to his sons as a class generally, and not to the three sons named in the previous gift. *Fitzroy* v. *Richmond* (*Duke*), 27 Beav. 186; 28 L. J., Ch. 750; 5 Jur. (N.S.) 971.

Bequest to wife for life, and afterwards to all testator's nephews and nieces living at the death of his wife, namely, "all the children of my brother S. N.," &c. (naming the greater part, but not the whole of his brothers and sisters, and excepting one of his nieces by name, and giving her a legacy) :—Held, that this was not a gift to a class consisting of all the testator's nephews and nieces, but to the children only of those brothers and sisters who were specifically named. *Hull, In re*, 21 Beav. 314; 4 W. R. 194.

Personal property was bequeathed to trustees in trust for A. for life, and if she should have children that survived her, then at her death for her children equally; but if she should have no heirs, the trust fund was then bequeathed to B., who was A.'s mother, and her heirs :—Held, that upon the death of A., without having ever had any issue, the gift over took effect, and that B. and all her children other than A. became entitled to the fund as joint tenants. *Dakin* v. *Nicholson*, 6 L. J., Ch. 329.

Bequest of residue "in trust for my son George, my daughters Lydia, Mary Ann, Alice, and Frances, and such of my child or children, if any, hereafter to be born, as shall attain the age of twenty-one years or marry, in equal shares as tenants in common, but subject, as to the share of any daughter, whether now living, or a child hereafter to be born, to the trusts following"; the share of "such daughter" being settled. The testator had six children only, the five named and one other, all of whom had attained twenty-one at the date of the will. Of the named children, two died in the testator's lifetime without issue, and three survived him :—Held, that the five named children took as a class, and not as individuals, and that the whole residue was divisible among the three who survived the testator. *Stanhope's Trusts, In re* (27 Beav. 201), followed. *Jackson, In re, Shiers* v. *Ashworth*, 53 L. J., Ch. 180; 25 Ch. D. 162; 50 L. T. 18; 32 W. R. 194.

Testator bequeathed his residue to several classes of persons. Some of the parties were members of two of the classes :—Held, nevertheless, that they were entitled to only one share each. *Pruen* v. *Osborne*, 11 Sim. 132.

A testator gave 2,000*l.* in remainder to his sisters except A., and he then gave a legacy to A. He afterwards gave "to each of his sisters, namely, B., C. and D., 500*l.* each"; and in case of death of either, portion to go to the surviving sisters above mentioned :—Held, that A. was not included among the surviving sisters. *White* v. *Wakley*, 26 Beav. 23; 28 L. J., Ch. 79.

Bequest to A. for life, and at her death for her brother and sister and the testator's brothers and sisters equally. At the date of the will A. had one brother and sister, and the testator had three brothers and one sister :—Held, that this was not a gift to an unascertained class, but to the brothers and sisters living at the date of the will. *Havergal* v. *Harrison*, 7 Beav. 49; 13 L. J., Ch. 30; 7 Jur. 1100.

A testatrix bequeathed the residue of her property to be equally divided between the five daughters of Samuel and Mary L. for their own use :—Held, that this was a bequest to the five daughters as personæ designatæ, and not as a class. *Smith, In re*, 9 Ch. D. 117; 38 L. T. 905; 27 W. R. 132.

To a gift equally between father, mother, brothers and sisters of the testatrix was added a direction that the shares of brothers should not vest till they attained twenty-one, nor of sisters till they attained that age or married :—Held, that brothers and sisters constituted only one class, and a child en ventre sa mère but not born at the time of ascertaining the class did not participate. *Garratt* v. *Weeks, Gardiner, In re*, 45 L. J., Ch. 193; L. R. 20 Eq. 647.

Testator directed that at the decease of his wife (who died in his lifetime) his real estate and household furniture should be sold, and the moneys equally divided "between my nine children." He then bequeathed his personal estate not thereinbefore bequeathed to his trustees, upon trust to get in and convert the same into money, and pay and divide the same "equally to and between all my children," except that his eldest son, John, by reason of his becoming entitled to a piece of property by a different title, should receive 30*l.* "less than each of my other children" :—Held, that the gift of residuary personalty was a gift to the testator's nine children as persons designated; and hence that the representative of a child who died in the testator's lifetime was entitled to participate by virtue of the 33rd section of the Wills Act, 1837. *Stansfield, In re, Stansfield* v. *Stansfield*, 49 L. J., Ch. 750; 15 Ch. D. 84; 43 L. T. 310; 29 W. R. 72.

Under a gift to one for life, with remainder "to my grandchildren" :—Held, that the bequest

was not limited to grandchildren to whom legacies had previously been given nominatim, but that all the grandchildren who came into esse prior to the period of distribution were entitled. *Moffatt* v. *Burnie*, 18 Beav. 211; 23 L. J., Ch. 591; 18 Jur. 32; 2 W. R. 83.

Where a testator directed his trustees to pay all or any part of the residue of the income of his personal estate, so long as his mother should live, as in their discretion, and to the exclusion of any one or more of them, his trustees should think fit and proper, for the maintenance and education or otherwise for the advancement of "my nephew, A. W., and my nieces, the son and daughters of my late sister A.," and after the decease of his mother to pay an annuity, which he had given her, "for the benefit of my nephew and nieces," in the same manner and for the same purposes as thereinbefore directed, until they should respectively attain twenty-one, and provided that "in case my said nephew or any or either of my said nieces" should marry under twenty-one, and die leaving issue, his trustees should make advances out of income for the benefit of such issue "as they may deem expedient or think fit," and directed that immediately after the decease of his mother, and upon his nephew and nieces respectively attaining twenty-one, his trustees should transfer one equal share of the trust estate to each, and provided that in the event of his nephew or either of his nieces dying under twenty-one married and leaving issue the issue should take their parent's share:—Held, that the gift to the nephew and nieces was made to them nominatim, and not as a class. *Barnshaw, In re*, 15 W. R. 378.

A testatrix bequeathed stock to trustees in trust for her brother R.-G. for life, and after his decease in trust for his son, J. R.-G., for life, and after the decease of both of them upon trust for any immediate or direct descendants of her said brother or nephew who should bear the name of R.-G. for life, and from and after his or her decease, or in case of failure of any such immediate or direct descendants of her said brother or nephew who should bear that name, upon trust for certain charities, with a condition of forfeiture on abandoning the name of R.-G. Both R.-G. and his son J. R.-G. survived the testatrix, and J. R.-G. survived R.-G., but died without ever having had any issue. At the death of J. R.-G., the only descendant of R.-G. who bore the name of R.-G. was a descendant in the female line, C. G. R.-G., and he had assumed the name of R.-G. by royal licence after the death of R.-G.:—Held, that the intention of the testatrix was not that the descendants described should take singly and successively, but as a class for life, and that C. G. R.-G., being the only member of the class, took the whole for life. *Roberts, In re, Repington* v. *Roberts*, 45 L. T. 450—C. A. Reversing on this point 50 L. J., Ch. 265.

b. Who are Entitled.

Gift to Children "To be Born" or "To be Begotten."]—The words "to be begotten" in a will are construed as relating to the root of descent, and not to the time of birth. *Almack* v. *Horn*, 1 H. & M. 630; 1 N. R. 535; 32 L. J., Ch. 304; 8 L. T. 415; 11 W. R. 505.

The words "to be begotten," in a will, where the intention of the testator is not otherwise to be collected, will have their strict legal construction. Therefore all the children of a particular person "begotten" or "to be begotten" will be included. *Ib.*

Devise to A. and her daughter, B., for their lives, remainder to all the children of A. and B. to be begotten, as tenants in common in tail. B. being the only daughter of A.:—Held, that B. was entitled in common with her own children to share in the remainder in tail. *Ib.*

A legacy of 500*l.* is given to the eldest son of A., to be begotten, to place him out apprentice. A. has a son born after the testator's death, who brings a bill for the legacy; and it is decreed to be paid him forthwith, though not born in the testator's lifetime, and though the 500*l.* was given for a particular purpose. *Nevill* v. *Nevill*, 2 Vern. 431.

The words "begotten and to be begotten" are the same as well on construction of wills as settlements. *Cook* v. *Cook*, 2 Vern. 545.

—— **When only those born in Testator's Lifetime included.**]—Legacy to children of A. lawfully begotten or to be begotten extends only to those born in lifetime of testator. *Sprackling* v. *Ranier*, Dick. 344.

Testator devised freehold fee-simple estates to trustees during the life of his son J., upon certain trusts, remainder to his son's children and their issue, in the same words as in the above devise to his daughter's children, and in default of such issues to all and every the child and children of his daughter S., &c. (in same words as before):—Held, that only six of the nine children of S. took under this devise, namely, five who were born, and one who was en ventre at the death of J. *Mogg* v. *Mogg*, 1 Mer. 665; 15 R. R. 185.

Testator devised freehold fee-simple estates to his widow for life, and after her decease to the same uses as in the devise last stated:—Held, that all the nine children of S. took under this devise, all being born in the widow's life. *Ib.*

Testator gave legacies of 200*l.* to each of the children of his nephews and nieces begotten, or to be begotten, and directed that the legacies should be paid to them at the usual periods:—Held, that the legacies vested on the testator's death, and that the children of the nephews and nieces who were born after the testator's death were not entitled to participate in the legacies. *Butler* v. *Lowe*, 10 Sim. 317; 3 Jur. 1143.

A testatrix gave her residuary personal estate to trustees in trust as to one-fourth for her grand-daughter A., and as to the remaining three-fourths in trust for the children of her daughter B., with certain after limitations. Afterwards, by an informal codicil, she desired her will to be altered, so that instead of her grand-daughter A. receiving one-fourth part of the trust estate, such estate should be equally divided between A. and the children "now born or hereafter to be born" of her daughter B.:—Held, that A. took one moiety, and the children of B. born in the lifetime of the testatrix, or within nine months after her death, took the other moiety. *Armitage* v. *Ashton*, 20 L. T. 102.

Gift to A. for life, and after her decease to all the children of B. who should be living at the testator's death, or be born afterwards, who should attain twenty-one, with a direction that no child should be excluded in consequence of any other child having attained a vested interest:

—Held, that the class was to be ascertained upon the latter of these two events, viz., a child of B. attaining twenty-one at the death of A., and that a child born after that period was excluded. *Parsons* v. *Justice*, 34 Beav. 598.

Testator devised estates after the decease of F. S. and M., unto all the children of F. S. and M. then already or thereafter to be born of their bodies, male or female, for and during their joint lives and the life of the survivor of them; remainder to trustees to preserve contingent remainders, in trust nevertheless to permit all the said children to receive the rents of the property in equal shares during their lives, and from and after their several deceases unto and equally between all their issue, male and female, and for want of such issue over:—Held, that only children of F. S. and M. living at testator's death were included under the gift to children "now already or hereafter to be born." *Woodhouse* v. *Herrick*, 1 K. & J. 352; 3 Eq. R. 817; 24 L. J., Ch. 649; 3 W. R. 303.

—— **When Children Born after Testator's Death included.**]—Testator devised freehold fee-simple estates in possession to all and every the child and children "begotten and to be begotten" of his daughter S. M. for life; and after the decease of such child and children, to the lawful issue of such child and children, to hold to such issue, his, her and their heirs as tenants in common; and in default of such issue over to other persons. S. M. had nine children, four born in the testator's life, and five after his decease:—Held, that all the nine took under this devise as tenants in common in tail, with cross-remainders. *Mogg* v. *Mogg*, 1 Mer. 654; 15 R. R. 185.

A testator devised a real estate to trustees in fee for all the children of his two sisters then born, or thereafter to be born, who should have attained, or should afterwards attain twenty-one, in equal shares. And he directed that, as the same should respectively become vested, the trustees should convey the same accordingly:—Held, that the children born after the testator's death took a share. *Eddowes* v. *Eddowes*, 30 Beav. 603.

After the death of the annuitant, the testator directed that "the principal from which such annuity was derived should be equally divided between her five daughters, then in existence, and any other children, whether male or female, that might yet be born":—Held, that the five daughters, and all the after-born children of the annuitant, were entitled to the fund producing the full annuity, in equal shares. *Attwater* v. *Attwater*, 18 Beav. 330; 23 L. J., Ch. 692; 18 Jur. 50; 2 W. R. 81.

A. devised a term for years to his daughter and her children (she having then three children), "and also to such other children as she should have, and the children of those children." She had other children afterwards. Per cur., the woman and her three children took jointly each a fourth part, and that the after-born children took nothing. *Alcock* v. *Ellen*, 2 Freem. 186. And see *Minshull* v. *Minshull*, 1 Atk. 413.

—— **Children Living at Date of Will, when included.**]—Devise in trust to the use of the testator's son H. for life, and after his decease to the use of J., the son of H., for life, and after the decease of J., to the use of the first and every other son of J. successively in tail, and in default of such issue, to the use of every son of the testator's said son H. thereafter to be born severally and successively in tail:—Held, that on the death of J. without issue, H. having previously died, the second son of H., though born at the date of the will, became entitled to an equitable estate tail in the devised lands. *Harrison* v. *Harrison*, Ir. R. 10 Eq. 290.

The testator devised an estate to his six grandsons (of whom the appellant was one) "during their respective lives, in equal shares, as tenants in common, and as to the respective shares therein of each of them, my said grandsons after his decease, to the use of his first and every other son successively, according to seniority of birth in tail male; and on failure of the issue male of any one or more of my said grandsons, then and so often as the same shall happen, I give and devise as well the share or respective shares originally limited to the grandson whose issue shall so fail, as the share or respective shares which by virtue of this present clause shall have become vested in him or them, or his or their issue male, to the use of the other or others of my said grandsons during his or their life, or respective lives, as tenants in common. And after the decease of such last-mentioned grandsons, then I give and devise the share or shares lastly hereinbefore limited to him, to his first and every other son successively according to seniority of birth in tail male; and if there shall be a failure of such issue of all my said grandsons but one of them, I give and devise the entirety of all the said estates to the use of such only grandson for his life, and after his decease to the use of his and every other son successively according to their seniorities in tail male." By a proviso at the end of the will, the testator directed—"Provided always, that if any person whom I have made tenant in tail male of my said estate shall be born in my lifetime, then and in such case I revoke the devise so made to him. In lieu thereof, I give and devise the hereditament comprised in such devise and appointment to the use of the same person respectively, for the term of his or her natural life, and after his or her decease, to the use of his or her first and every other son successively according to their respective seniorities in tail male." Two out of the six grandsons died without issue. The eldest son of the appellant was born before the date of the will, and by a disentailing deed executed after the testator's death conveyed to the appellant his share and interest in the said estate in fee. In a suit for declaration of title and consequent relief:—Held, that the appellant was entitled to an estate in fee-simple in one-fourth part of the hereditaments and premises, the subject of the suit. The words of the proviso must be construed in their grammatical sense, and be taken to mean a tenant in tail male born after the date of the will, and therefore not to include the eldest son of the appellant. The words "shall be born in my lifetime," in the absence of any context to explain them, are to be taken as words of futurity. Consequently, the gift of an estate tail to the appellant's eldest son, who was born before the date of the will, was not revoked. *Gibbons* v. *Gibbons*, 50 L. J., P. C. 45; 6 App. Cas. 471; 45 L. T. 177.

Testator, by codicil, gave legacies of 500*l.* each to A., B., C. and D., who, from the other parts of the codicil, and from the will, appeared to be grandchildren of his brother Henry. He added, "Item, I direct my executors to pay out of my personal estate the sum of 500*l.* apiece to each

child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to them on his or her attaining the age of twenty-one." At the date of the codicil, and at the testator's death, there were to his knowledge living several grandchildren of his brothers, besides A., B., C. and D., and various children of the brothers of the testator, and the testator was survived by one at least of his brothers:—Held, that A., B., C. and D. were not entitled to double legacies. *Early* v. *Benbow*, 2 Coll. C. C. 342; 15 L. J., Ch. 169; 10 Jur. 169.

A testator, by a codicil to his will, gave legacies of 500*l.* each to four children, by name, of his niece, Alice Early, the eldest daughter of his brother Henry, and he directed his executors to pay, out of his personal estate, the sum of 500*l.* apiece to each child that might be born to either of the children of either of his brothers, to be paid to each of them on his or her attaining the age of twenty-one years. The testator's niece, Alice Early, besides the four children named in the codicil, had three other children living at the date thereof:—Held, that those children were not entitled to a legacy of 500*l.* each, as the words of the codicil contemplated only children who might be born subsequently to the date of it:—Held, also, on the same will, by Sir John Leach, that a child born after the testator's death was not entitled, and, by Sir J. L. Knight-Bruce, that the four children did not take cumulative legacies. *Early* v. *Middleton*, 14 Beav. 453; 15 Jur. 867.

—— **Child en ventre sa Mère.**]—A testator directed his executors to pay "the sum of 500*l.* apiece to each child that may be born to either of the children of either of my brothers lawfully begotten":—Held, that the child of a niece born within eight months after the testator's death was entitled to the legacy, and that the gift was not as to such child void for remoteness. *Storrs* v. *Benbow*, 3 De G. M. & G. 390; 22 L. J., Ch. 823; 17 Jur. 821; 1 W. R. 115, 134, 420.

A will directed that all legacies should be paid within six months after death. By a codicil, executed on the day of the testator's death, after giving 500*l.* apiece to five of the grandchildren of his brothers by name, he bequeathed 500*l.* to legatees thus described, "each child that may be born to either of the children of either of my brothers lawfully begotten":—Held, that of the children of the brother's children neither those born at the date of the codicil nor those begotten after the testator's death were entitled, but only children en ventres leur mères at the date of the codicil and of the testator's death. *Townsend* v. *Early*, 3 De G. F. & J. 1; 28 Beav. 429. *And see cases in next col.*

—— **Where Period named by Testator.**]—Residue bequeathed to A. and all the other children hereafter to be born of B., at their respective ages of twenty-one; those born after one attains that age are excluded. *Gilbert* v. *Boorman*, 11 Ves. 238; 8 R. R. 137.

Bequest to children of A., born or to be born, as many as there might be, at twenty-one or marriage, with survivorship, and a limitation over on death of all, &c.:—Held, vested in those living when one is entitled, to the exclusion of those born afterwards. *Whitbread* v. *St. John* (*Lord*), 10 Ves. 152; 7 R. R. 366.

Under a bequest to all the children of A., "now born or hereafter to be born who shall attain twenty-one," in equal shares, with powers of maintenance, accumulation, and advancement out of presumptive shares, the members of each class are not to be ascertained at the time the first of them attains twenty-one, but all the children are to be let in. *Bateman* v. *Gray*, 37 L. J., Ch. 592; L. R. 6 Eq. 215; 16 W. R. 962. Reversing 29 Beav. 447.

A testator gave the accumulation of the rents and profits of real and personal estate at the expiration of twenty years after his decease to such of his grandchildren, "now born or hereafter to be born during the lifetime of their respective parents," as should attain twenty-one or marry with consent, and whether born or unborn when any other of them should attain the age aforesaid. At the expiration of the twenty years there were several grandchildren who had attained twenty-one, but two of the testator's children were still living:—Held, that the shares of the grandchildren who had attained twenty-one were vested, subject to open and let in the claim of any other grandchildren who might attain the same age, and in the meanwhile the interest only of the vested shares was to be paid. *Scott* v. *Scarborough* (*Earl*), 1 Beav. 154; 8 L. J., Ch. 65.

Gift to Children "Born" or "Begotten."]—Gift to all and every the children of nephews and nieces lawfully begotten, includes after-born children. *Browne* v. *Groombridge*, 4 Madd. 495; 20 R. R. 326.

The testator gave to A. B.'s children, 50*l.* to every child he hath by his wife, to be paid them as they come of age; there were eleven children at the date of the will, thirteen at the testator's death, and three born afterwards. The thirteen children living at the death of the testator are entitled to their legacies, but not those born afterwards. *Ringrose* v. *Bramham*, 2 Cox, 384; 2 R. R. 84.

Devise of real estate to A. for life, and after her death to all the children of A. born at the time of her death. A. had two children, both of whom died in her lifetime:—Held, that the shares in the real estate vested in them indefeasibly at their births. *Paterson* v. *Mills*, 18 L. J., Ch. 449; 14 Jur. 126.

Gift after a previous life estate to C. to the children of W. who should be living at the death of testator and C.:—Held, that a child of W. who was born after the death of testator and survived C., was included in the class and took a share. *Fox* v. *Garrett*, 28 Beav. 19.

The fiction or indulgence of the law which treats a child en ventre sa mère as actually born, applies only for the purpose of enabling such child to take a benefit to which, if actually born, it would have been entitled; in all other cases the word "born" must have its natural interpretation. *Blasson* v. *Blasson*, 5 N. R. 65; 2 De G. J. & S. 665; 34 L. J., Ch. 18; 10 Jur. (N.S.) 1113; 11 L. T. 353; 13 W. R. 112. And see *S. C.*, 3 N. R. 407.

Children en ventre sa Mère, when Entitled.]—The law is clear that a devise to an infant en ventre sa mère is good, though he be born after the death of the testator, and he shall take by way of executory devise when he is born. Anon., 1 Freem. 293. S. P., *Taylor* v. *Bydall*, *id.* 243.

One devises, in case he have no son at the

time of his death, to S. The testator dies, leaving his wife privement enceinte with a son; this posthumous son is a son living at the testator's death, and S. not entitled. *Burdet* v. *Hopegood*, 1 P. Wms. 486.

Infant en ventre shall not take under a bequest to the children of A. living at the death of testator. *Cooper* v. *Forbes*, 2 Bro. C. C. 63, sed quære.

Bequest to all children "born in the lifetime of testator" includes child of which the feme was enceinte at death of testator. *Trower* v. *Butts*, 1 Sim. & S. 181; 1 L. J. (O.S.) Ch. 115; 24 R. R. 164.

The description of children of A. does not extend to a child en ventre sa mère. *Pierson* v. *Garnet*, 2 Bro. C. C. 38; Pre. Ch. 201, n. *S. C.*, *Id.* 226.

Testator gave to each and every of his children born or thereafter to be born, and who should be living at the time of his death, 5,000*l.* apiece, to be paid at their ages of twenty-one, &c., with interest from the day of his death. A child en ventre sa mère is entitled to a legacy of 5,000*l.*, but the interest is to be computed only from the birth. *Rawlins* v. *Rawlins*, 2 Cox, 425.

One devises the surplus of his estate to his grandchildren living at his death; grandchildren born after his decease shall not take. *Musgrave* v. *Parry*, 2 Vern. 710.

An infant en ventre sa mère, under a devise to heirs of the body of the devisor begotten and to be begotten, cannot take by purchase the legal fee, the terms of description not amounting to a legal designation of him; but is entitled in equity, by virtue of the apparent intention, to the trust of a term attendant on the inheritance, though merged at law. *Nurse* v. *Yerworth*, 3 Swan. 608.

One devises the surplus of his estate to his children and grandchildren; a grandchild en ventre sa mère at the testator's death shall not take; secus had it been to the children and grandchildren living at his death. *Northey* v. *Strange*, 1 P. Wms. 342; Pre. Ch. 470; Gilb. Eq. R. 136.

Under a devise to all the children of A. except B., a posthumous child is entitled. *Clarke* v. *Blake*, 2 Ves. 672.

Where a testator makes a bequest to a person and his children, if there are any children in esse at the date of the will, they take jointly with the parent; but if words are superadded shewing an intention to settle the property the parent only takes a life interest, and for this purpose a child en ventre sa mère is considered to be in esse. *Mason* v. *Clarke*, 17 Beav. 126; 22 L. J., Ch. 956; 17 Jur. 479; 1 W. R. 297.

In construing a will a child en ventre sa mère is treated as living where the effect is to leave to the child an interest vested or contingent which any other construction would take away from it, unless there is a clear contrary intention. *Pearce* v. *Carrington*, 42 L. J., Ch. 900; L. R. 8 Ch. 969; 22 W. R. 41. Affirming 28 L. T. 659.

A husband gave a fund to his wife for life, then to his daughter (a married woman) for life, and after her death to her children who being sons should attain twenty-one, or being daughters attain that age or marry, and if none, then to certain persons by name. By a codicil he directed that if his daughter should be living at the expiration of five years from the death of his wife, and should not then have had any child or children, the fund should be at once divided between the ulterior takers, as if his daughter were dead without children. The daughter's first child was born five years and six months after the death of the testator's widow:—Held, that as the daughter had a child en ventre sa mère within five years after the death of the widow, the gift over had not taken effect. *Ib.*

A testatrix by will bequeathed residuary personal estate unto and equally between all her brothers and sisters, share and share alike. She directed that the shares of her brothers respectively should not vest in them respectively until they should respectively attain twenty-one, and that the shares of her sisters should not vest in them respectively until they should respectively attain that age or marry:—Held, that the brothers and sisters formed one class only of persons; and that a brother not born, though en ventre sa mère when the eldest of the brothers and sisters who attained twenty-one came of age, was excluded, although he was born before the eldest of the brothers only who attained twenty-one came of age. *Gardiner, In re, Garratt* v. *Weeks*, 45 L. J., Ch. 193; L. R. 20 Eq. 647.

Testator gave his estates to trustees to apply the profits for the use of the child with which his wife was then pregnant during infancy, and at twenty-five to the child in fee; but in case the child should die before twenty-five, without issue, remainder over. The child was still-born. Afterwards testator made a codicil affirming his will, and died without issue. Forty-three weeks after his death his widow was brought to bed of a son; this son cannot take the estate, though found to be legitimate, but it shall go to the devisees over. *Foster* v. *Cook*, 3 Bro. C. C. 347.

A testatrix, who died in November, 1874, by her will in January, 1874, bequeathed to each of the three children of her niece 1,000*l.*; and if any of the said three children should die before attaining the age of twenty-one the legacy was to be divided between the survivors of the said three children. There was a codicil in June, 1874, confirming, as regarded this bequest, the will. At the date of the will the niece had three children living, the youngest being three years old, and a fourth child, en ventre sa mère at the time, and born in July, 1874, claimed a legacy of 1,000*l.*:—Held, that the three children born at the date of the will only were entitled to legacies. *Emery, In re, Jones* v. *Emery*, 3 Ch. D. 300; 34 L. T. 846; 24 W. R. 917.

A testator devised his estates to trustees, in trust, after C.'s decease, "in case she should leave only one child which should survive her," to pay 200*l.* a year for his maintenance until he should attain twenty-five, and from and after the time when such only child should attain that age to raise 10,000*l.* and pay the same to him at that age, or in case C. should, at her decease, have two or more children, then to raise an annuity for their maintenance until they should respectively attain twenty-five, and when they respectively attained that age, to pay each an equal share of the 10,000*l.* The plaintiff was en ventre sa mère at the testator's death, and was the only child of C. who survived her:—Held, that the bequest of the 10,000*l.* was too remote. *Merlin* v. *Blagrave*, 25 Beav. 125.

A father directed the income of one-half of his residuary estate to be paid to his son during his life and afterwards to his lawful issue; one of the issue was en ventre sa mère at the date of the

death of the tenant for life, but his parents were not married till after that date, though before the birth of the child:—Held, that such child was not entitled to share in the distribution of the half of the residue. *Corlass, In re*, 45 L. J., Ch. 118; 1 Ch. D. 460; 33 L. T. 630; 24 W. R. 204.

20,000*l.* left to executors in trust to dispose of in such proportions, &c., as they should think fit amongst such of the testator's relations as should not be worth 2,000*l.*, and should apply within two years after the testator's death. One within the description applied and had a sum ordered her, but died before it was paid:—Held, her representative entitled to it. A child born after the death of the testator, who was of consanguinity, claimed and died without issue:—Held, not within the description, though en ventre sa mère at testator's death. *Bennett* v. *Honywood*, Ambl. 708.

A testatrix directed that a fund should be accumulated, and that when the youngest of the children of her nephew and nieces, A., B. and C., who should have been born and living at the time of her decease, should attain twenty-one, the accumulated fund should be divided equally among all such children of A., B. and C. as should then be living, with a provision that if at the period of division any children should not personally claim their shares within twelve months their shares should go over to the others. There were children born in the lifetime of the testatrix, and others born after her death, two of whom were en ventre sa mère:—Held, that the clause as to personal claim was not sufficient to restrict the preceding gift to children who attained twenty-one before the period of division, and that all children living at the period of division, whether born before or after the death of the testatrix, were entitled. *Blasson* v. *Blasson*, 5 N. R. 65; 2 De G. J. & S. 665; 34 L. J., Ch. 18; 10 Jur. (N.S.) 1113; 11 L. T. 353; 13 W. R. 113. And see *S. C.*, 3 N. R. 407.

Held, also, that a child en ventre sa mère is only to be treated as born where such construction is necessary for the benefit of that child, and that therefore the distribution was not postponed till the youngest child en ventre sa mère at the death of the testatrix attained twenty-one. *Ib.*

Held, also, that the words "born and living" were used for the purpose only of ascertaining a period of time, and were not a description of children as objects of the bequest, and therefore children in utero were not included. *Ib.*

The rule of construction by which a child en ventre sa mère is in law considered as a child in esse is not confined to cases in which the unborn child is benefited by its application. Dictum in *Thellusson* v. *Woodford* (11 Ves. 112, 149) considered and approved. *Blasson* v. *Blasson* (supra) distinguished. *Burrows, In re, Cleghorn* v. *Burrows*, 65 L. J., Ch. 52; [1895] 2 Ch. 497; 13 R. 689; 73 L. T. 148; 43 W. R. 683.

See also *Mogg* v. *Mogg*, 1 Mer. 654; 15 R. R. 185.

Children of Objects deceased at Date of Will.]—A testator, after bequeathing several pecuniary legacies, gave the residue of his real and personal estate to trustees, on trust to sell and invest the surplus after payment of his debts, and pay and divide the income unto and between all his brothers and sisters, share and share alike, during the terms of their natural lives respectively; and upon their deaths respectively the principal of such residuary property to which each should be entitled for his or her natural life should go to the child or children of the person or persons respectively so dying, in equal shares and proportions, and the testator stated his wish to be, and he recommended such child or children to invest the amount of their respective shares in the purchase of farms. The testator had two brothers, J. and C., and one sister, M., all of whom were married, and had families. C. and M. were both dead at the date of the will. J. was then alive, but predeceased the testator:—Held, that the residue was divisible equally between the families of the two brothers and the sister, so that each stirps took one-third share. *Walsh* v. *Blayney*, 21 L. R., Ir. 140.

A testator, by a codicil to his will, bequeathed to the widow of his deceased son the interest accruing from a sum of money, the payment thereof to cease upon her death or second marriage. He directed his executors to divide the principal sum "amongst my surviving male and female children. Should a male or female child's death precede mine, his or her share to be divided equally between the male and female children of such son and daughter deceased." One son and two daughters of the testator were dead at the date of the codicil; the two daughters each left one child. Eight children of the testator survived him:—Held, that the class of persons entitled under the gift were children of the testator living at his death and, per stirpes, the children living at his death of any child of the testator who had predeceased him, whether before or after the date of the codicil; consequently the fund was divisible into tenths among the eight surviving children of the testator and the children of the two daughters who died in his lifetime. *Miles* v. *Tudway*, 49 L. T. 664.

Sect. 33 of the Wills Act, preventing lapse in case of gifts to a child or other issue of the testator, does not apply where the devise or bequest is to children as a class. *Harvey, In re, Harvey* v. *Gillow*, 62 L. J., Ch. 328; [1893] 1 Ch. 567; 3 R. 247; 68 L. T. 562; 41 W. R. 293.

The principle is, that the section leaves the construction of class gifts unaltered, and that these gifts are still to be read as gifts to those only who survive, and not as gifts to the possible members of the class who die in the lifetime of the testator; and that the gift in regard to those children who so die is not to be treated as a gift to individuals. Where, therefore, a possible member of such a class of children died in the testator's lifetime, leaving issue that survived the testator, and there was never, in fact, any other possible member:—Held, in conformity with the above principle, that s. 33 of the Wills Act did not apply. *Olney* v. *Bates* (3 Drew. 319) and *Browne* v. *Hammond* (Johns. 210) followed. *Ib.*

Gift to a Class for Life and then to their Children—Children born before and after Testator's Death.]—Where a will contains a gift to a class whose members take at or before twenty-one and must all be ascertained within the legal period, a proviso settling the shares of members of the class upon themselves for life and then upon their children will be good as to shares of members born in the testator's lifetime, whether or not there are in fact members subsequently

born, as to whose shares the settlement cannot take effect. *Russell, In re, Dorrell* v. *Dorrell*, 64 L. J., Ch. 891 ; [1895] 2 Ch. 698 ; 12 R. 499 ; 73 L. T. 195 ; 44 W. R. 100—C. A.

And see PERPETUITY.

Gift to Children of Nephew to be vested at Twenty-five—Children born before and after Testatrix's Death.]—Testatrix directed that as to one moiety of the residue of her estate the trustees should hold it upon trust for the benefit of the children of her nephew, W. H., to be vested interests in them, as to sons on attaining the age of twenty-one years and as to daughters on their attaining twenty-five years or being married before that age ; and in case a daughter should marry under age, power was given to the trustees to settle her share. Power was also given to the trustees to apply the income of an expectant share of any child for maintenance, education, and bringing up, and also to apply half of an expectant share for advancement in life. In case all the children of W. H. should die without taking a vested interest, there was a gift over to testatrix's brothers and sisters, &c. W. H. had seven children, four born before the testatrix's death, all being now infants, and three afterwards. A daughter, one of the four, had married under age :—Held, that the four children, and those only, could take, and that the daughter took a vested interest which at present was one-fourth. *Elliott* v. *Elliott* (post, cols. 908–9) followed. *Coppard, In re, Howlett* v. *Hodson*, 56 L. J., Ch. 606 ; 35 Ch. D. 350 ; 56 L. T. 359 ; 35 W. R. 473.

"E. and the Other Children"—Children living at Date of Will.]—Testator bequeathed all the stock in the funds which he might die possessed of to trustees upon trust, to pay an annuity to his wife for life, and after her decease upon trust to pay and apply the dividends of the stock to and for the proper use and benefit of E., the eldest daughter of his brother J., and the other children of his said brother, in equal shares for their respective lives ; and he directed that the principal stock should be divided and apportioned to and amongst all and every the lawful issue of the said E. and the other children of his brother in equal shares and proportions, and be assigned to them respectively upon their severally attaining the age of twenty-one years, and to the survivors or survivor of them. He left the residue of his estate to his wife. By a codicil he explained that by E., the eldest daughter of his brother, he meant an illegitimate daughter called E. At the date of the testator's will and of his death his brother had three children only, namely, E., M. and J. Of these E. survived the widow, and had a child, who also survived the widow. M. died in the widow's lifetime, leaving a child who survived the widow, and J. died in the widow's lifetime, without leaving issue :—Held, that by the expression "E. and the other children" the testator intended the three children of his brother living at the date of the will ; that each of the three children took a life interest only in one-third of the dividends ; and, consequently, that upon the death of the widow E. took a life interest in one-third of the dividends, and each of the children of E. and M. took one-third of the capital. *Leach* v. *Leach*, 2 Y. & C. C. C. 495 ; 7 Jur. 243.

Tenant for Life included in Gift over to a Class.]—Bequest to testator's daughter, Martha, for life, with power to appoint by will amongst her children ; but if she should die without leaving any, then to and amongst "such of his children as should be living at his decease," and if any should die before becoming entitled to receive a share of the fund leaving issue, the share to be distributed amongst their children : the testator died leaving five children living at his decease ; Martha died without issue :—Held, that her personal representatives were entitled to one-fifth of the fund. *Jennings* v. *Newman*, 10 Sim. 219 ; 3 Jur. 748, 1068.

Gift to a Class "from A. downwards."]—A gift to a class "from A. downwards" was held to be inclusive of A., and entitled her to share in the gift. *Lett* v. *Osborne*, 51 L. J., Ch. 910 ; 47 L. T. 40.

Class described by Relationship—Half-blood.]—A gift in a will to a class of persons described by relationship will, in the absence of an overruling context, be construed as a gift to all persons answering the relationship, whether of the whole blood or of the half-blood ; therefore a bequest simply to "the sisters of A." will extend to A.'s sisters of the half-blood. *Reed, In re*, 57 L. J., Ch. 790 ; 36 W. R. 682.

c. When Class Ascertained.

i. *Children.*

Immediate Gift—Children living at Death of Testator.]—Gift by will to the children of a deceased sister is a gift to those who were living at the death of the testator. *Viner* v. *Francis*, 2 Cox, 190 ; 2 Bro. C. C. 658 ; 2 R. R. 29.

A will can never relate to a child who was not in esse till some years after testator's death. *Heathe* v. *Heathe*, 2 Atk. 122.

A. devises 20*l.* apiece to all the children of his sister B. A child born after making of will, and before testator's death, shall take. *Garbrand* v. *Mayot*, 2 Vern. 105 ; 2 Freem. 105.

Devise in favour of children of testator's sister :—Held, on construction of the whole will, to apply to such children only as were living at the testator's death, and not to include after-born children. *Scott* v. *Harwood*, 5 Madd. 332 ; 21 R. R. 300.

Where there is no immediate devise to children and grandchildren generally vesting in possession on death of the testator, after-born children are excluded ; but if the vesting in possession be postponed, then after-born children in esse at the time of distribution are entitled, though devise immediate. *Crone* v. *Odell*, 1 Ball & B. 483. Affirmed, 3 Dow, 61 ; 15 R. R. 20.

Where devise immediate, and the description of persons to take general, those answering it on testator's death alone can take, and after-born children are excluded ; but where the enjoyment is postponed to a particular period, or until a particular event happens, those then answering the description will take, and after-born children will be included. *S. C.*, 1 Ball & B. 459. Affirmed, 3 Dow, 61 ; 15 R. R. 20.

E. devised all her real estates to trustees for a term of five hundred years, to raise 200*l.* for the purposes in the will mentioned, and after the determination of that term, and subject thereto to other trustees for one thousand years, in trust to pay out of the rents certain annuities ; and

subject to the said two terms, she gave the premises to all and every the child and children of her brother T. and the heirs of their bodies, &c. T. had two children at the death of the testatrix and one born afterwards, but before the death of the annuitant. This is an immediate devise; and the last-mentioned child being born after the testatrix's death, is not entitled to any share of the premises. *Singleton* v. *Gilbert*, 1 Cox, 68.

A devise to a man and his children of personal estate. A child born after the death of the testator shall not take. *Cook* v. *Cook*, 2 Vern. 545.

One devises the surplus of his estate to his grandchildren living at his death. Grandchildren born after his decease shall not take. *Musgrave* v. *Parry*, 2 Vern. 710.

Devise thus: "All the rest of my estate I give to be equally divided between my three daughters, F., G. and A. and all my grandchildren and great-grandchildren, or so many of them as shall be living within two years next after my decease." This was held to extend only to those then born, and not to any to be born within two years after testator's death. *Trelawney* v. *Molesworth*, Colles's P. C. 163.

Bequest of residue to children of A., the interest to be paid for their learning, and at the age of twenty to be equally divided between them: but if A. have no children, the interest to be paid to A. for seven years, and then the whole to be paid to her. Whether after-born child shall take, quære on. A new bill by the husband after the death of his wife and several children to whom he was administrator to have the question determined; Lord Camden, Chancellor, was clearly of opinion that the interest vested at the death of the testator, being given per verba de presenti, and that the after-born child was excluded. *Hodges* v. *Isaac*, Ambl. 348.

Bequest of 100*l.* each to the testator's two sisters, and the testator's ornaments to be equally divided amongst the unmarried ones:—Held, that the class of unmarried daughters was to be ascertained at his death. *Blagrove* v. *Coore*, 27 Beav. 138.

Gift to the wife of the use of all testator's property (following an absolute bequest of 500*l.* to her), for the benefit of herself and unmarried children that they might be comfortably provided for during her life:—Held, to confer on the wife and the children who were unmarried at the testator's death an equal share in the income of the property during the life of wife. *Jubber* v. *Jubber*, 9 Sim. 503.

A testator gave 5,000*l.* to be invested in the names of trustees for the benefit of a tenant for life, and at his death the principal to his son and unmarried daughters as he might by will direct, and failing such direction, to them equally:—Held, that "unmarried daughters" meant those who were unmarried at the date of the codicil. *Hall* v. *Robertson*, 4 De G. M. & G. 781; 2 Eq. R. 15; 23 L. J., Ch. 241; 18 Jur. 635. Reversing 1 W. R. 464.

Residuary disposition to the children of the testator's brothers and sisters as aforesaid (named previously as legatees) who shall be living at his decease, at twenty-five equally; but in case of the decease of any of the aforesaid brothers and sisters having issue, then the child or children to have the same share as if the parent had been living at his decease, with maintenance and survivorship in case of the death of any unmarried and without issue. The first clear designation of nephews and nieces, living at his death, as the sole objects of his bounty, not altered or controlled by the subsequent designation of the brothers and sisters, admitting questions of doubtful construction as to after-born children. *Barker* v. *Lea*, 3 V. & B. 113.

Future Gift — Remainder — Children born before Period of Distribution.]—Testator gave the residue of his real and personal estate to his wife for life, and upon her decease he bequeathed it to the children of A. and his wife Jane, to be equally divided amongst them, the said Jane's children, and not to any children by any other marriage of either party; the residue is divisible amongst the children of A. and his wife who were living at the death of the wife, but will not extend to children born after that time. *Ayton* v. *Ayton*, 1 Cox, 327.

Bequests to the testator's wife for life, then after an appropriation to answer annuities, to the children of the testator's brothers and sisters. All the children living at the death of the testator and those born afterwards before the death of the wife had vested interests, a codicil in favour of the same objects, only restrained to those surviving at the time of distribution, being held to apply only to the capital of the fund appropriated to the annuities. *Middleton* v. *Messenger*, 5 Ves. 136; 5 R. R. 1.

Devise of real estate to H., the testator's daughter, for life; and after her death without issue to sell and divide the money among all and every the children of his two sisters. The sisters had several children born in the lifetime of testator; one of them had a child born afterwards, but in the lifetime of H. H. died without issue:—Held, the after-born child entitled. *Bartlett* v. *Hollister*, Ambl. 334; 1 Bro. C. C. 530, n.

Child born after death of testator decreed to take under a general gift to A. for life, then to the children of A., but this point not contested. *Simmons* v. *Vallance*, 4 Bro. C. C. 345.

A legacy of a sum to be divided among children. All those born before the time of division take. *Pulsford* v. *Hunter*, 3 Bro. C. C. 416.

Devise to S. for life, and after her decease estate to be settled by counsel, and go amongst testator's grandchildren of male kind, and issue in tail male with remainder over. Only one grandchild was born in testator's lifetime, but two were born afterwards, before death of S.:—Held, such after-born children were entitled. *Marshall* v. *Bousfield*, 2 Madd. 166.

Bequest of residue after death of testator's wife to five of his children, and to "the son of his son T. or his other children that is living":—Held, to pass shares to children of son born after the testator's death, and before the death of the wife. *Tebbs* v. *Carpenter*, 1 Madd. 290; 16 R. R. 224.

A gift of a sum on death of a tenant for life to the children of A. includes only children of A. born at the death of the tenant for life, notwithstanding the gift was made by reference to another and independent gift, which included all children of A. *Batson* v. *Rowlands*, 13 L. T. 663; 14 W. R. 261.

Where property is limited to A. for life, and the will contains a subsequent limitation in favour of A.'s children, and a question arises as to which of the children are to participate, the court will not decide the question until the death of A., when all the parties interested in

discussing the question are in esse. *Heather* v. *Winder*, 5 L. J., Ch. 41.

A testator devised and bequeathed to his trustees all his freehold, leasehold and personal estate, in trust to accumulate the rents and interests until his daughter H. attained twenty-one, then to be divided between his children, W., A. and H.; and he directed that the rents and interests arising therefrom after his daughter attained twenty-one should be paid to W., A. and H. equally; all the rest and residue of his personal estate, he gave unto the issue of W., A. and H., share and share alike. W. and H. died without issue:—Held, that such of the children of A. as were living at the time of the death of H. were entitled to the one-third given to H. for life, and similarly of the share of W. *Ib.*

When life estate is interposed between the death of testator and the enjoyment by the children of the tenant for life, and there is nothing to limit the general description, after-born children will be included. *Crone* v. *Odell*, 1 Ball & B. 462. Affirmed, 3 Dow, 61; 15 R. R. 20.

Where property is given to trustees upon trust for a person or persons for life or until a contingency, and afterwards upon trust for a class of children or others, the members of the class are those who are members of it at the death of the testator and all who become members of it before the arrival of the event. *Wood, In re, Moore* v. *Bailey*, 43 L. T. 730; 29 W. R. 171.

In a legacy to the children of A., those born before the time of distribution are entitled to share, unless a time of distribution is expressly provided, excluding those born afterwards by the necessity of a previous distribution. *Walker* v. *Shore*, 15 Ves. 125; 10 R. R. 41.

Bequest of the produce of the sale of a copyhold estate to A., the wife of B., for life, and after her death to divide the principal among the children of B. and C. equally, and of the testator's reversionary interest in bank stock on the death of D., if in his name at his decease, and if not, at D.'s death equally among the same children. Vested interests in all the children, comprising those who died and those who came into existence after the death of the testator, and during the lives of the tenants for life. *Id.* 122.

—— **Where Interest accelerated.**]—Where a fund was given to be divided upon the death or alienation by tenant for life among his children who should attain twenty-one, and the gift over took effect upon his bankruptcy, there being then three children, of whom two had attained twenty-one, the court allowed them the dividends of one-third each, but refused them the capital. *Brandon* v. *Aston*, 2 Y. & C. C. C. 30; 7 Jur. 10.

A testator gave a fund to trustees upon trust to pay the income to his son during his life, and after his death to pay and divide the fund equally among all the children which the son might have, as and when they should respectively attain twenty-one, and if the son should leave no child who shall attain twenty-one, the fund was to sink into the residue of the testator's estate. There was a proviso that if the son should be adjudicated bankrupt, the fund and the income thereof should thenceforth immediately go and be payable or applicable to or for the benefit of the said child or children of the son "in the same manner as if he was naturally dead" or in default of such child or children should sink into the residue. After the death of the testator, the son was adjudicated a bankrupt; at the date of the adjudication he had two children; other children were born to him afterwards:—Held, that the children born after the adjudication were entitled to share in the fund subject to the contingency of their attaining twenty-one. *Bedson's Trusts, In re*, 54 L. J., Ch. 644; 28 Ch. D. 523; 52 L. T. 554; 33 W. R. 386—C. A.

Testator gave his property to his widow for the benefit of his children so long as his wife remained unmarried, and, in the event of her marrying, gave her a life interest in 2,000*l.*, which he directed to be invested, and, in the event of her death, to be divided equally between his children. He then authorised certain advancements on loan to be made to his children, and continued, "At my wife's death the estate then remaining is to be divided into four parts, and the proceeds divided equally amongst the children then surviving." The widow married again:—Held, that the residue vested in the children living at the widow's remarriage. *Dear, In re, Helby* v. *Dear*, 58 L. J., Ch. 659; 61 L. T. 432; 38 W. R. 31.

A testator devised a house to his son for life, and after his death to his son's wife for life, and after the death of the survivor to a trustee upon trust to sell and hold the proceeds in trust for all the testator's children then living, and the issue then living of deceased children. The testator subsequently revoked the life interest given to his son and his son's wife, both of whom were still living:—Held, that there was an immediate devise to the trustee upon trust for sale on the death of the testator, at which time the trust for sale arose, and that the class of children and issue of deceased children, who were to take under the trust, was to be ascertained when the trust for sale arose, and not at the date of the death of the survivor of the tenants for life. *Johnson, In re, Danily* v. *Johnson*, 3 R. 308; 68 L. T. 20.

—— **Children dying before Period of Distribution.**]—A testator directed his property to be settled upon his daughter H., in such manner that in case of her death it should devolve upon her children, if she had any, and if she should not have any, then that she should bequeath it to any person she might think fit. The word "devolve" imports transmission to children living at the death of the mother; and upon the death of the mother, her husband, as representative of a deceased child, took no interest under the will. *Parr* v. *Parr*, 1 Myl. & K. 647; 2 L. J., Ch. 167.

A testator, by his will dated in February, 1854, left the entire residue of his property (which was principally realty) to his trustees therein named, "In trust for the benefit of my dear wife during her lifetime, at her death to be equally divided among our children, Thomas, James and Mary Hamilton, to take what would have been their mother's share, and any other of my grandchildren to represent their parents in similar circumstances." The testator died in December, 1856, leaving seven children. His widow died in April, 1889. Thomas, James and Mary Hamilton named in the will were grandchildren of the testator, and their mother, the testator's daughter, was dead at the date of the will. Three other children of the testator died in the interval between the date of his death and the date of the death of his widow. The question was, what in

the events which had happened was the true construction of the devise and bequest of the residue of the testator's real and personal estate :—Held, that the words "in similar circumstances" afforded no ground for disturbing the well settled rule that where the period of distribution was the death of the tenant for life, and the gift was one among a class of persons, then the share of any one dying in the lifetime of the tenant for life went over :—Held, therefore, that the children of the testator who died after his death and before the death of his widow did not take vested or indefeasible interests in the testator's estate ; but that the interests of such children so dying were devised and bequeathed to their children by the concluding clause in the will. *Miles, In re, Miles* v. *Miles*, 61 L. T. 359.

J. L., by his will, gave to his niece the rents of houses for her life, and after her death devised the houses to her children by her late husband, in what proportions she should by her will direct. At the testator's death, the niece had nine children, but four died in her lifetime :—Held, that all the five surviving children were entitled, to the exclusion of the representatives of those who died in the lifetime of their mother ; held, also, that these children took as tenants in common. *Arrow* v. *Bellamy*, 9 L. J. (o.s.) Ch. 198.

A. bequeathed to trustees certain leasehold property, in trust to pay the rents to B. for life ; and after B.'s death A. gave the leasehold to the heirs and children of the body of B. lawfully begotten, whether males or females, equally between them, for all the residue of the term of years that should remain unexpired thereon at B.'s death. B. had ten children, some of whom died during her lifetime, and others survived her :—Held, that the respective personal representatives of the children who predeceased B. took equal shares in the leaseholds with the children who survived her. *Swan* v. *Bowden*, 11 L. J., Ch. 155.

A testator devised certain lands to his eldest son, John, and his assigns during his life and after his death to such of his children or other issue born in his lifetime as he should appoint, and in default of appointment equally among them as tenants in common ; in case John should leave no issue living at his decease, the testator devised the lands to the second son, Richard, for life, followed by the like provisions and limitations in favour of his children or other issue born in his lifetime ; in the event of Richard dying without lawful issue the lands were devised in similar terms to the testator's third son, Emanuel, for life, with the same provisions and limitations in favour of his children or other issue born in his lifetime ; and in the event of Emanuel dying without issue the lands were devised in similar terms to the testator's fourth son, Robert, for his life, with the same provisions and limitations in favour of his children or other issue born in his lifetime. The will then provided : "And in case my said son Robert shall leave no issue living at the time of his death, then, subject as aforesaid, I give and bequeath the same to my daughters who shall then be living or who shall have died leaving issue then living, and their respective executors and administrators in equal shares, as tenants in common for ever." The testator's four sons survived him. Robert, the fourth son, and Emanuel, the third son, both died in 1853 unmarried and without issue ; John, the eldest son, died in 1862 without issue and having survived his wife. Richard, the second son, died in 1892 unmarried and without issue :—Held, that the daughters of the testator who were to take as tenants in common, under the provisions of the will, were to be ascertained as a class on the death of Robert in 1853 and not on the death of Richard in 1892, when all the previous limitations in favour of the testator's sons were exhausted. *Archer* v. *Jegon* (8 Sim. 446) considered and followed. *Palmer* v. *Orpen*, [1894] 1 Ir. R. 32.

—— **Interests vested—Subject to be divested pro tanto.**]—Bequest "and after death of, &c., I give and leave to each of the children of —— R., and of B. his wife, 50*l*., which shall be paid to them when they shall be of age" :—Held, vested legacies, and that after-born child shall take. *Att.-Gen.* v. *Crispin*, 1 Bro. C. C. 386.

After specific legacies to three of the testator's nieces (a sister's children), there was a gift of the residue, subject to the life interest of the sister and her husband and of an annuitant, "to be divided equally between the daughters of his said sister," and which he bequeathed "to his said nieces," and a gift over if no daughter of his sister should be then living ; the sister had four daughters born at the date of the will and one daughter born after the testator's death, but some only survived the tenants for life :—Held, that all the nieces took vested interests, subject only to be divested by an event which had not happened. *Locker* v. *Bradley*, 5 Beav. 593.

A testator directed his trustees to pay the income of his personal estate between his son and two daughters and a grand-daughter for life ; the son to have one-third of such income, one of the daughters another third, and the remaining third was to be divided between the other daughter and the grand-daughter ; and from and after the decease of each of the tenants for life, the trustees were to pay and transfer the share in the principal moneys of the party dying equally amongst all and every his or her children ; and there was a gift over, in case of any of the tenants for life dying without issue, of the share of the party dying to the children of the others :—Held, that the children of the tenants for life took interests which vested immediately on the testator's death, and that the gift was not to a class to be ascertained at the death of the tenant for life. *Salmon* v. *Green*, 11 Beav. 453 ; 18 L. J., Ch. 166 ; 13 Jur. 621.

Bequests to the testator's wife for life ; then after an appropriation to answer annuities, to the children of the testator's brothers and sisters. All the children living at the death of the testator and those born afterwards before the death of the wife had vested interests, a codicil in favour of the same objects, only restrained to those surviving at the time of distribution, being held to apply only to the capital of the fund appropriated to the annuities. *Middleton* v. *Messenger*, 5 Ves. 136 ; 5 R. R. 1.

Testator gave annuities to three of his relations, and directed that if the annuities were paid by the interest of money in the stocks, at the death of the different parties the principal should be divided between the children of the deceased. One of the annuitants had five children living at the testator's death, but only one of them survived the annuitant :—Held, that the capital of the stock which had been provided to answer the annuity did not vest in the surviving child on the annuitant's death, but vested

on the testator's death in all the children then living, as tenants in common. *Watson* v. *Watson*, 11 Sim. 73.

S. gave 5,000*l.* to purchase stock, the interest to M. for life, then to W. for life, at his decease to testator's godson S., and at his death to be divided among his brothers equally. S. was dead at the time of the will made. A son of W. born after the testator's death, who would have been a brother of S. had he lived, shall take a share in the 5,000*l.* The testator also, by codicil, gave 4,000*l.* to L. for life, and in case he had no children, to revert to W.'s children. A daughter of W., who was alive at the time of the codicil being made, but died before W., was held to have a vested interest transmissible to her representative. *Devisme* v. *Mello*, 1 Bro. C. C. 537.

Bequest of stock to testator's wife for life, and then, as she should by will direct, amongst A., B. and C. and their respective children, and in default of appointment the same at his wife's death to go amongst all the children equally. No appointment was made :—Held, that the fund vested in the children living at the testator's death, subject to be divested pro tanto for the purpose of admitting any after-born child coming into existence before the period of division, i.e., before the death of the tenant for life. *Pattison* v. *Pattison*, 19 Beav. 638.

Testator directed the residue of his personal estate after the death of his wife, who was tenant for life, to be divided as follows: to his five nephews and nieces, A., B., C., D. and E., two shares each, and to their children one share each; the nephews and nieces survived the testator :—Held, that the residue vested in the nephews and nieces living at the testator's death or born in the lifetime of the tenant for life, the children taking per capita, but the shares of each of the nephews and nieces being double that of each child. *Cooker* v. *Bowen*, 4 Y. & C. 244.

Future Gift—Executory.]—Testator directed all his property to be sold and brought into the funds in the names of his executors, in trust for all his grandchildren, to be divided equally among them at the expiration of twenty years after his death :—Held, that all the grandchildren living at the death of the testator took vested interests, subject to be opened to let in after-born grandchildren. *Oppenheim* v. *Henry*, 1 W. R. 126.

Testator gave 30,000*l.* unto and amongst the children of his daughter who should be living at the time the eldest should live to attain the age of twenty-four years and the issue of such of them as might be then dead, to be equally divided amongst them per stirpes, and not per capita, and to be paid to them respectively when and as they should attain twenty-four, but without interest in the meantime. At the testator's death, his daughter had three children, who were of the ages of thirteen, twelve and nine :—Held, that the testator intended that such only of his daughter's children should take as should be living when the eldest for the time being should attain twenty-four, and consequently that the bequest was too remote. *Dodd* v. *Wake*, 8 Sim. 615.

A bequest to all the children of A. and their issue, share and share alike, and to be paid twelve months after the testator's death, is an absolute gift to such children of A. as are living at the testator's death. *Butter* v. *Ommaney*, 4 Russ. 70; 6 L. J. (o.s.) Ch. 54; 28 R. R. 6.

A testator bequeathed the residue of his estate, after the death of two persons, to such children of B. as should be then dead leaving children; he directed that the children should stand in the place of their parents :—Held, that the children of such children of B. as died in the testator's lifetime took no share of the residue. *Id.*

Legacy of 300*l.* to E., to be paid at twenty-one or marriage, but if she died before, then to the younger children of F. E. having died unmarried, under twenty-one :—Held, to vest in such of the younger children as were living at that time. *Ellison* v. *Airey*, 1 Ves. 111.

Testator had four daughters, A., B., C. and D., and by his will gave 4,000*l.* to each of his daughters A. and B., with a direction that if either of them died unmarried, 3,600*l.*, part of the 4,000*l.*, should be divided among his surviving daughters and the child or children of such of them as should be then dead. A. died unmarried. C. had five children, two of whom survived A., but the other three died in her lifetime. The five children of C. took vested interests in equal fifths of the fund, as well those who died before as those who survived A. *Stanley* v. *Wise*, 1 Cox, 432.

A testator gave his residuary real and personal estate upon trust for his wife for life, and after her death upon trusts for the testator's issue, with executory trusts for his sister and her issue; and in default of such issue of himself and his said sister, "or upon their total extinction under twenty-one years old," he bequeathed the said residuary estate unto his first cousins by their mother's side and the issue of such of them as might happen to be dead per stirpes, and to their heirs, executors, administrators and assigns for ever as tenants in common, and not as joint tenants :—Held, first, that the gift to the cousins was not too remote; secondly, that it was not a gift to a class to be ascertained at a future period, but that the first cousins ex parte maternâ living at the testator's death took vested interests liable to be divested to the extent required to let in other first cousins born before the period of distribution; thirdly, that the shares of first cousins who died before the period of distribution leaving no issue were not divested, but went to their real and personal representatives; fourthly, that the share to a first cousin who died before the period of distribution leaving children went to those children. *Baldwin* v. *Rogers*, 3 De G. M. & G. 649; 22 L. J., Ch. 665; 17 Jur. 267.

A husband directed that after the death of his wife his trustees should pay and divide 1,000*l.* equally between such ten of the children or remoter issue of H. as the trustees should think fit. At the death of the widow there were only six descendants of H. living :—Held, that the sum was to be divided equally amongst them. *Carthew* v. *Enraght*, 26 L. T. 834; 20 W. R. 743.

—— **Effect of charging Land or Personalty.**]—Legacies in trust for grandchildren then in existence by name, to sons at twenty-three, daughters, at twenty-one; mesne interest for education; surplus to accumulate with survivorship; residue for all the grandchildren generally for their benefit "as aforesaid." By codicil a fund was set apart to pay life annuities :—Held, that grandchildren born after the testator's death were not entitled to a share of the residue into which the fund under the codicil falls, after the

purpose answered. *Hill* v. *Chapman*, 1 Ves. 405; 3 Bro. C. C. 391.

A testator directed a reversionary sum to fall into his residue. He gave an annuity to A. for life, and his residue to a class of children who should attain twenty-one. The only residue was the reversionary sum and the fund set apart to answer the annuity. On the death of A.:—Held, that children born in the life of A., but after one of the class had attained twenty-one, were excluded, and did not participate in the fund then distributable. *Hagger* v. *Payne*, 23 Beav. 474; 26 L. J., Ch. 617; 3 Jur. (N.S.) 479.

Where a residue, consisting partly of reversionary property, is given directly to a class, the class is to be ascertained at once, and not from time to time as the reversions fall into possession, and become distributable. *Ib.*

A testator, by his will, directed a fund to be set apart to answer an annuity which he directed to be paid to his widow. After her death he directed the fund to form part of his residuary estate; and he bequeathed his residuary estate to all his children equally to be divided between them, with a proviso that if any child should die either in his lifetime or after his decease, and before the part or share bequeathed to such child should become a vested interest, without leaving issue, then such share should go to the survivors, but in case any child should die leaving issue, then such issue should take their parent's share:—Held, that the second branch of the proviso must be read in connection with the first, and that in both the death contemplated was a death before the share vested in possession. *King* v. *Cullen*, 2 De G. & Sm. 252.

Bequest of residue in trust, after payment of an annuity of 50*l.* to A. for life, to apply the residue of the interest towards the maintenance of the children of B. until twenty-one, and, in case of the death of A. during their minority, to apply the whole, or so much as was necessary, in the same way, and after the death of A., when such children attained twenty-one, to transfer the principal to them. There was a gift over in case there should be no children of B. living at the death of A. The fund was more than sufficient to provide for the annuity:—Held, that the gift to the children was not confined to those living at the death of the testatrix. *Gardner* v. *James*, 6 Beav. 170.

A testator devised his freehold, leasehold, and copyhold estates upon trust to pay his debts; and subject thereto, as to one-half, he gave the income to his wife for her life, and at her death directed it should go into and form part of his residuary estate; and as to the other half, he directed it to accumulate till 1875, when he directed it should fall into his residuary estate; and as to the residue of his estates, whether real or personal, the testator devised the same amongst his son, his daughter-in-law, and all his grandchildren, share and share alike:—Held, that grandchildren living at the death of the testator would alone take; and that adult grandchildren could claim the immediate enjoyment of their shares notwithstanding the accumulation clause. *Coventry* v. *Coventry*, 2 Dr. & Sm. 470; 13 L. T. 83; 13 W. R. 985.

Where there was a gift of residue to a class, and no tenancy for life of the income of that residue, but the division of the principal was postponed until after the death of one annuitant, the general rule that the class must be ascertained at the death of the testator was adhered to. *Bortoft* v. *Wadsworth*, 12 W. R. 523.

A testator devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion, and out of the income to arise therefrom to pay certain annuities to his wife and children respectively. The trustees were then directed to stand possessed of the balance thereof upon the trusts thereinafter declared; and the testator directed that if any of his children should die in his lifetime or afterwards, without having acquired a vested interest in the income or trust moneys, leaving any child or children, then and in such case such last-mentioned child or children should be entitled to the same share of the income as his, her, or their deceased parent would have been entitled to if living; and from and after the determination of the estates and interests in the trust property thereinbefore limited and given, upon trust to divide the same between and amongst the whole of the testator's grandchildren in equal shares per capita as and when they, being respectively a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, for their own use and benefit absolutely. Upon the questions as to what would be the period of distribution of the capital and amongst whom such capital would be divisible:—Held, that no distribution could take place until the death of the last surviving annuitant, and that all the testator's grandchildren then existing would be entitled to share equally. *Hiscoe, In re, Hiscoe* v. *Waite*, 48 L. T. 510.

Where no Child in Existence at Death of Testator.]—One devises the surplus of his personal estate to the children of A. and B.; neither of them has a child at the making of the will or the death of testator; the devise is executory, and shall extend to any children that A. and B. shall afterwards have; and the children of each shall take per capita, and not per stirpes. *Weld* v. *Bradbury*, 2 Vern. 705.

Legacy in trust for the children of A. to be equally divided between them, with benefit of survivorship, and a provision for maintenance out of the interest, A. having no children at the death of the testator:—Held, that after-born children would take, and that the interest till the birth of a child fell into the residue. *Harris* v. *Lloyd*, Turn. & R. 310; 24 R. R. 68.

Testator bequeathed 500*l.* to be paid to his grandson P. if he lived to be twenty-one, and in case he died before then, to the other child or children of his daughter equally arriving at such age. P. died before twenty-one, and no child of P. was born or living at testator's death. The grandchildren born after the death of testator were held entitled to the 500*l.*; for not being in esse in his lifetime, he must have had in his view the future children of his daughter. *Haughton* v. *Harrison*, 2 Atk. 329.

A parent is bound by nature to support a child, but this has not been extended to grandchildren, and therefore not entitled to interest. *Ib.*

If the child or children of P. arrive at twenty-one, then the 500*l.* was directed to be paid to them, and interest from the time it becomes payable. *Ib.*

Devise of estate to A., subject to payment of 500*l.* to M. with interest on her marriage or attaining twenty-one; but if she dies before

twenty-one or marriage, and there be no children born of B., then the 500*l.* to revert to A. M. died before twenty-one unmarried :—Held, that children born of B. after death of M. entitled. *Hutcheson* v. *Jones*, 2 Madd. 124 ; 17 R. R. 198.

Bequest of shares, the profits to be invested and the interest applied in the education of the children of A. and B., in equal shares ; "and on their attaining twenty-one, the whole to be sold and divided equally among them." There was a gift over if A. and B. should die without issue. A. and B. had no child at testator's death :—Held, that all the children of A. and B. took, and that the class was not limited to those born when the first attained twenty-one ; and, secondly, that the children of A. and B. took per capita, and not per stirpes. *Armitage* v. *Williams*, 27 Beav. 346.

H. by her will gave 100*l.* to each of the children of M. who should attain twenty-one years. At the death of the testatrix M. had no children :—Held, that none of her after-born children, if she had any, could be entitled to the legacy. *Rogers* v. *Mutch*, 48 L. J., Ch. 133 ; 10 Ch. D. 25 ; 27 W. R. 131.

Where Distribution postponed to a given Age.]—Devise to all the children of A. at the respective ages of twenty-one ; a child born after the death of the testatrix shall take. *Congreve* v. *Congreve*, 1 Bro. C. C. 530.

Bequest to younger children of testator's son, to be paid at twenty-one :—Held, vested in those born at the time of the testator's death. *Horsley Chaloner*, 2 Ves. Sen. 85.

Trust, by will, for all the children of A. when and as they shall severally attain sixteen, with a direction for their maintenance ; those born after the eldest attain sixteen were excluded ; maintenance was directed without regard to the father's ability. *Hoste* v. *Pratt*, 3 Ves. 730.

Bequest to children of A. born or to be born, as many as there might be at twenty-one or marriage, with survivorship, and a limitation over on death of all, &c. :—Held, vested in those living, when one is entitled, to the exclusion of those born afterwards. *Whitbread* v. *St. John* (*Lord*), 10 Ves. 152 ; 7 R. R. 366.

Bequest of a residue to all the children of A., the daughters' shares to be paid at twenty-one or marriage, the sons' at twenty-one, or to be sooner advanced for their benefit, with survivorship and interest for maintenance. The fund shall be divisible when the eldest attains twenty-one, and the division shall be among those then in esse. *Andrews* v. *Partington*, 3 Bro. C. C. 401.

Testator bequeathed his residuary estate to trustees, upon trust to transfer the same unto his great-nephews and nieces, the shares of the boys to be transferable to them at twenty-one, and those of the girls at twenty-one or marriage, and to accumulate for them in the meantime, with benefit of accruer and survivorship ; and in case of the death of all the said children except one before their shares became vested, then upon trust to transfer the whole to the survivor at the age or time aforesaid :—Held, that a great-nephew born after the testator's death, but before any of his other great-nephews or nieces attained twenty-one or married, was entitled to a share of the testator's residuary estate. *Balm* v. *Balm*, 3 Sim. 492 ; 30 R. R. 192.

Where there is a gift to children as a class, and a vested interest is given to them, but there is a postponed time of payment, and another child is born before the period of distribution, such child is entitled to claim a share in his own right. *Blease* v. *Burgh*, 2 Beav. 221 ; 9 L. J., Ch. 226.

Bequest to particular description of persons at a particular time vests in persons answering the description at that time exclusively. *Godfrey* v. *Davis*, 6 Ves. 43 ; 5 R. R. 204.

J. S. by his will, dated in 1833, directed his trustees to accumulate the income of his residuary real and personal estate during the term of twenty-one years next after his decease, upon trust, at the expiration of the said term, to assign and transfer the same unto and among all and every his (the testator's) great-grandchildren being sons and daughters of his grandchildren, John S., Maria S., and Harriet S., equally to be divided between them, if more than one, as tenants in common, and if there should be but one great-grandchild, then to such one, his or her heirs, executors, administrators, and assigns, and in trust in the meantime to pay the whole income of the trust premises unto the respective parents, his said grandchildren, John, Maria, and Harriet, respectively, and their respective assigns equally ; and in the event of there being no such child or children of his said grandchildren, the testator directed that the whole of the said trust premises and the accumulations should belong to E. M. F. absolutely. Testator died in 1837, John S. died in 1848 without leaving issue, and Maria and Harriet S., who were respectively of the ages of forty-two and thirty-eight years, although married, had not had any children at the expiration of the period of accumulation. An amicable settlement and compromise of the rights and interests of the various parties claiming to be entitled under the said will, including the said Maria and Harriet S., was subsequently entered into :—Held, that the testator did not intend that at the end of the period of accumulation there should be no longer any continuing trust ; and that the two surviving grandchildren were entitled to receive the income of the trust premises during the continuance of their joint lives and the life of the survivor, and that after the death of such survivor the said E. M. F. was entitled (in the event of no great-grandchild being born) to the corpus of the accumulated fund. The compromise above referred to declared to be for the benefit of the married ladies, and ordered to be confirmed. *Conduit* v. *Soane*, 4 Jur. (N.S.) 502 ; 6 W. R. 667.

Bequest to J. (a younger son of A.) as soon as he should attain twenty-one ; but in case he should die before attaining twenty-one, then to such of the other children of A. as should attain twenty-one ; J. died an infant :—Held, that the words "such, &c., as should attain twenty-one" were equivalent to "at twenty-one," or "when and as they should attain twenty-one," and that on D.'s death the share of a child who had then attained twenty-one became immediately payable, and no after-born child (if any) would be entitled to a share in the fund. *Gillman* v. *Daunt*, 3 K. & J. 48.

Testator gave the residue of his personal estate unto and among all and every the children, sons and daughters, of his daughter Elizabeth, in equal shares and proportions, as and when they should attain their respective ages of twenty-two years :—Held, that the children of the testator's daughter living at the testator's death were the only objects of the bequest, and that it was not

void for remoteness. *Elliott* v. *Elliott*, 12 Sim. 276; 10 L. J., Ch. 363.

A testator, after devising and bequeathing all his real and personal estates to trustees, on trust from time to time to receive the rents and profits, and therewith to pay various legacies and annuities, directed that they should invest the surplus rents and profits at interest, and suffer the same to accumulate; and he declared that they should stand seised of his said trust estate and the accumulations, upon trust that when and as soon as any son of either of his nephews A. and B. should have attained the age of twenty-five years a valuation of his said trust estate should be made, and that the same should then be divided into as many equal lots as there should be sons of his said nephews then living, and thenceforth separate accounts should be kept of the respective portions; and that each of his said nephews' sons, when and as they should respectively arrive at the age of twenty-five years, should choose one of such portions as the share to be allotted to him and his children; and that thenceforth the said portion or share should be held by trustees upon trust for the person so selecting the same for his life, and after his decease upon trust as to one equal moiety for his eldest son and his heirs, executors, &c., and as to the other moiety for the rest of his children and their heirs, executors, &c., in equal proportions, and if but one child both moieties for such child absolutely; but if any or either of his said nephews' sons should die under their respective ages of twenty-five years, or having attained that age, should afterwards die without leaving issue, the share or shares intended for the person or persons so dying should go to the others and other of the said nephews' sons; and if all but one should die without leaving issue, the trustees should stand seised and possessed of the whole trust estate in trust for such one surviving nephew's sons for his life, and for his children and child as aforesaid; but if all the testator's said nephews' sons should depart this life without leaving issue, then upon trust for such person as should at that time be the testator's heir. At the time of the testator's death A. and B. had several sons living, and B. had another son born afterwards:—Held, upon the construction of the will, that the trusts for accumulation and division of the property comprised all the sons of the nephews who should be living when the first of them should attain twenty-five; and as the son who should first attain that age might not be born until after the testator's death, the gifts were too remote, and therefore void; and the testator's real estates upon his death became vested in his heir. *Boughton* v. *Boughton*, 1 H. L. Cas. 406. Affirming with a variation 1 Coll. C. C. 26; 8 Jur. 329.

Testator gave his real and personal property upon trust for the children of his daughters who should live to attain twenty-five. At his death one of his daughters had a child who had attained twenty-five:—Held, that this gift was not void for remoteness, but was a valid gift to such of the children living at the testator's death as should attain twenty-five. *Picken* v. *Matthews*, 48 L. J., Ch. 150; 10 Ch. D. 264; 39 L. T. 531.

Testator, who died in 1879, gave his real and residuary personal estate to trustees upon trust for sale, conversion, and investment, and directed them to hold the investments, and the income thereof, upon trust to pay and divide the same equally between the then present children of his son J. (whom he named), and any other children who might be thereafter born, as and when they should respectively attain the age of twenty-five, with power for the trustees in the meantime to pay and apply the whole or any part of the income for the maintenance and education of such grandchildren during their minority. There was also a power of advancement. J. survived the testator. He had at the testator's death five children living; one other child was born four months afterwards, and two others subsequently. The eldest child attained twenty-five in 1890:—Held, first, that the children of J. did not take vested interests under the will; secondly, that the gift was to a class which must be ascertained when the first of the children attained twenty-five; and, thirdly, that the gift was void for remoteness. *Parker, In re, Barker* v. *Barker* (16 Ch. D. 44), followed. *Elliott* v. *Elliott* (supra) commented on and distinguished. *Mervin, In re, Mervin* v. *Crossman*, 60 L. J., Ch. 671; [1891] 3 Ch. 197; 65 L. T. 186; 39 W. R. 697.

The testator directed that the rents of the trust premises should be accumulated for twenty-one years; and that the accumulated fund should be in trust for all the children of B. who should attain twenty-one, in equal shares. B. had six children who attained twenty-one. One of them, E., was born after the eldest had attained twenty-one, but during the period of accumulation:—Held, that E., having been born before the period of accumulation came to an end, was entitled to take as a member of the class; and that the fund was, therefore, divisible in sixths. *Watson* v. *Young*, 54 L. J., Ch. 502; 28 Ch. D. 436; 33 W. R. 637.

—— **After a Life Interest.**]—After an annuity for life to father of part of dividends, and remainder as to whole dividends subject to father's annuity, gift to children when they attain twenty-one is gift to all living when eldest attains twenty-one. *Curtis* v. *Curtis*, 6 Madd. 14.

A fund was given to one for life, remainder to such children of another person as should attain the age of twenty-one. The legatee for life died before the eldest child attained that age:—Held, without argument, that all the children in esse when such eldest child did attain twenty-one were entitled to share on attaining that age themselves. *Clarke* v. *Clarke*, 8 Sim. 59; 5 L. J., Ch. 286.

A testator gave real and personal estate to a trustee upon certain trusts for the benefit of his son during his life, and directed that in case his son should die under twenty-one without leaving issue his trustees should convert the same into money, and divide it equally among E. H., the children of M. W., and the children of E. E., and the issue of such of them as should die leaving lawful issue, the issue taking their parents' shares, the shares to be paid to the legatees being sons at twenty-one and being daughters at twenty-one or marriage, the shares during minority to be invested and the dividends applied for the maintenance and education of the legatees. M. W. had children at the death of the testator, and other children born after the death under twenty-one years of age of the testator's son:—Held, that all the children of M. W. who were born at the time the first of the legatees who attained twenty-one attained that age were entitled to participate in the gift.

Robley v. *Ridings*, 16 L. J., Ch. 344; 11 Jur. 813.

Testator bequeathed his residuary estate to trustees in trust for his wife for life, and after her decease "to preserve the then remaining part of my estate for the grandchildren of my brother C., to be by them received in equal proportions when they shall severally attain the age of twenty-five years; and when the youngest shall have attained the age of twenty-five years, and he or she shall have received their final dividend or share of my estate, the trust shall cease." Testator left his widow and brother surviving. Eight grandchildren of the brother were in existence at the widow's death, and several were born afterwards:—Held, that the bequest was not void for remoteness, but that those only of the grandchildren who were in existence at the widow's decease were entitled to share in the testator's residuary estate. *Kevern* v. *Williams*, 5 Sim. 171.

Where a testator, after giving certain sums in certain shares among the six children of A., naming them, to be vested and payable at twenty-five, with certain provisions for their maintenance until then, afterwards gives another sum of 6,000*l.*, subject to certain life interests, to all the children then born or hereafter to be born, to be vested and payable at twenty-five, and with the like trust for maintenance, and subject to the like provisions and conditions, as the legacies before given to the children then born and named:—Held, that the legacy of 6,000*l.* was void for remoteness as to all the children, both those then born and also the unborn. *Comport* v. *Austen*, 12 Sim. 218.

A testator bequeathed a fund to trustees upon trust, after the determination of a life interest, to pay and transfer the trust property equally among the female children of his sister on their attaining twenty-one or marrying with the consent of their parents. At the death of the tenant for life the testator's sister was a widow and had two daughters, the elder of whom afterwards married while under age with the consent of her mother:—Held, that the class to take must be ascertained when the first member became absolutely entitled to a share. *Dawson* v. *Oliver-Massey*, 45 L. J., Ch. 519; 2 Ch. D. 753; 34 L. T. 551; 24 W. R. 993.

A testator gave the residue of his property in trust for his mother for life, with remainder to all the younger children of his two sisters, to be vested interests on their attaining twenty-one. There was also a clause of survivorship upon any of the children dying under twenty-one:—Held, that those children were alone entitled who were born previously to the death of the tenant for life. *Berkeley* v. *Swinburne*, 16 Sim. 275; 17 L. J., Ch. 416; 12 Jur. 571.

Testator gave his estates, real and personal, upon trust to convert the personal, and after payment of debts, &c., to invest and to permit H. E. during his life to receive the rents and income for his own benefit, and after his death, as to one undivided third part, for all the children of H. E. equally, the shares to be conveyed and paid to them as they should attain twenty-one as to sons, and twenty-one or marriage as to daughters. There were clauses of maintenance and accruer. Testator gave another third part of the estates after the death of H. E. in favour of the children of his sister, and the remaining third part in trust for all and every the children of G., the shares to be conveyed and paid at the ages and times above mentioned, and in case H. E. should die without children the share given for them was to be divided between his sister's and G.'s children, as the two-thirds given to them. H. E. died a bachelor. At his death, G., a widower, had two children. He married again, and when his eldest child attained twenty-one, he had six children, all of whom lived to attain twenty-one. Another child was born afterwards:—Held, that the six children, or their legal personal representatives, were entitled to a moiety of the estates. *Berkeley* v. *Swinburne* (supra) explained. *Emmet's Estate, In re, Emmet* v. *Emmet*, 49 L. J., Ch. 295; 13 Ch. D. 484; 42 L. T. 4; 28 W. R. 401—C. A.

—— **Where Definite Sum given to each Child.**]—Legacy to children of S., he having but one born. Those born after held entitled. *Maddison* v. *Andrews*, 1 Ves. 58.

A legacy of 500*l.* apiece "to each child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship," does not include a child born after the testator's death. *Storrs* v. *Benbow*, 2 Myl. & K. 46; 2 L. J., Ch. 201.

A. bequeathed legacies of "500*l.* apiece to each child that may be born to either of the children of my brothers":—Held, that the class included only the children coming into esse between the date of the will and the death of the testator, and that children born at the date of the will, and those born after his death (unless en ventre sa mère at that period), were excluded. *Townsend* v. *Early*, 28 Beav. 429; 3 De G. F. & J. 1.

Where a sum of money is bequeathed to be divided among a class when the eldest attains twenty-one, whether the gift be vested or contingent, all the children who are born before the period of division are admitted to take shares. *Mann* v. *Thompson*, *Perkin* v. *Mann*, 1 Kay, 638; 18 Jur. 826; 2 W. R. 582.

When distinct sums of money are given to every individual of the class, but no time is limited for distribution, the persons who answer the description at the death of the testator are alone entitled to take. *Ib.*

The construction is the same if the gift be of a certain sum to each of the children of A. and B. who should attain twenty-one; but in case any of them should die under that age, his share to go to his surviving brothers and sisters, although A. had no children at the date of the will, or at the death of the testator, but had children born after the testator's death. The word "surviving" in such a limitation cannot be read "other," so as to entitle a child to the share of a brother who died before he was born. *Ib.*

The testator gave 300*l.* apiece to each of the grand-daughters of E. S. H. at twenty-one, or on marriage with consent; and if any of them should die, their shares to be equally divided, &c.:—Held, that grand-daughters born after the testator's decease were not included in this bequest. *Peyton* v. *Hughes*, 7 Jur. 311.

A limited fund was given to A. B. until some child should attain twenty-one, and 1,000*l.* consols was to be paid thereout to each of his children as they attained twenty-one. The fund was insufficient to provide for all the children. A child attained twenty-one:—Held, that it was, notwithstanding the deficiency, entitled

to 1,000*l.* consols. A. B. had issue at the death of the testatrix:—Held, also, that the children born after her death were also entitled. *Evans* v. *Harris*, 5 Beav. 45.

Bequest of "the sum of 100*l.* to each of the children of my niece M. who shall live to attain the age of twenty-one years." The niece survived the testatrix, and was still living, but had no children:—Held, applying the rule that, under a gift of a certain sum to each of a class of objects at a future period, objects born after the testator's death cannot be admitted,—that no child the niece might have could take under the bequest. *Rogers* v. *Mutch*, 48 L. J., Ch. 133; 10 Ch. D. 25; 27 W. R. 131.

The rule that a gift of a certain sum to each of a class of objects at a future period is confined to those living at the testator's death, is one of convenience only, to facilitate the more speedy division of the estate. *Ib.*

—— **When Youngest attains given Age.**]—The "rule of convenience," by which in a bequest of an aggregate fund to children, as a class, payable on attaining a given age, the period of ascertaining the class is the time when the first of the class by attaining the given age becomes entitled to payment, and children coming into esse after that period are excluded, is not applicable to similar bequests of income. *Wenmoth's Estate, In re, Wenmoth* v. *Wenmoth*, 57 L. J., Ch. 649; 37 Ch. D. 266; 57 L. T. 709; 36 W. R. 409.

A residuary gift to trustees, with a direction to apply such part of the interest as they might deem necessary in the maintenance of all and every the testator's grandchildren, the children of the testator's two sons, until they severally attain the age of twenty-one, and to accumulate the surplus; and when and as each of such grandchildren should attain the age of twenty-one years, to pay to each of them 2,000*l.*; and as soon as all and every the said grandchildren should have attained their ages of twenty-one, to pay and divide the trust fund unto and amongst all and every his said grandchildren:—Held, to be a gift for the benefit of all the children of the testator's two sons, born or to be born, not confined to children living at the death of the testator, and not distributable upon the youngest grandchild for the time being attaining twenty-one; but that, on attaining twenty-one, the grandchildren were entitled to the interest on their presumptive shares, until another grandchild should be born. *Mainwaring* v. *Beevor*, 8 Hare, 44; 19 L. J., Ch. 396; 14 Jur. 58.

Trust of real and personal estate by will, to apply rents and dividends for maintenance of all and every the children of the testator's daughters (except the eldest son), share and share alike, until the youngest of his said grandchildren should attain the age of twenty-one; and in case of the death of any of his said grandchildren, before the youngest shall be twenty-one, having a child or children, such child, &c., to receive the parent's share; and when the youngest of his said grandchildren living shall have attained twenty-one, one equal share of the capital, real and personal, to the use of such of his said grandchildren as shall then be living; and the children of his said grandchildren in case of the death of any leaving such issue, to have the share the parent would have been entitled to, if living at the time of distribution; and to the heirs, executors, &c., of such of his grandchildren and great-grandchildren. The division is to be among all the grandchildren living when the youngest attains twenty-one, including those born since the testator's death, and the children of those deceased; but the representatives of grandchildren dead, not leaving children, are not entitled. *Hughes* v. *Hughes*, 14 Ves. 256; 3 Bro. C. C. 352, 434.

A testator, by his will, directed that, after the death of the survivor of his widow and daughter, his trustees should stand possessed of the residue of his personal estate, upon certain trusts, for his grand-daughters; then, by a codicil, he revoked the bequest to his grand-daughters, and gave the share and interest which they, by his will, would have taken in his personal estate, to all and every the child and children of his said grand-daughters, in equal shares, to be paid to such child or children when the youngest or survivor of them should attain the age of twenty-one years:—Held, that these words gave a vested interest to the great-grandchildren who were living at the death of the survivor of the mother and daughter, and that after-born great-grandchildren took nothing. *Smith* v. *Jackson*, 1 L. J. (o.s.) Ch. 231.

A. gave real and personal estate to trustees as to his household furniture, to permit his children who should be living at home to have the use of the same until such time as his youngest surviving child should have attained twenty-one, and then for all his children equally; and as to the residue of his real and personal estate, to realise the same, and to stand possessed of the net moneys upon trust, when and as all his children, being sons or a son, should have attained twenty-four, or being daughters or a daughter, should have attained the same age or have married, to divide the capital equally amongst all such children, share and share alike; and he empowered his trustees to apply the whole or any part of the annual income of the capital of his residuary estate, in or towards the maintenance and education, or otherwise, for the benefit of all his children who should continue to live together and form a home, until the time of the division of the capital, and to accumulate the unapplied income, and add such accumulations to the capital. The will contained a power to advance to any of the sons who should not have attained twenty-one, any sum not exceeding 1,000*l.* out of the share to which such son might be presumptively entitled. And he directed his trustees to pay and allow, to and for the separate use of any daughter who should marry before the capital of his residuary trust fund should be divisible and divided, an annuity. And if any of his sons who should have attained twenty-four should be desirous of being married to some person approved of by his trustees, he empowered his trustees to declare in writing that upon such marriage the contingent share of his same son in the capital of his residuary estate should become a vested share, and that in that case, upon such marriage, the same should become vested accordingly; and that for every purpose of his will such son should be deemed to have attained twenty-four. Four of the children having attained twenty-four, filed a bill against the trustees and the other children of the testator who had not attained that age, and claimed to have their shares paid to them immediately:—Held, that the estate was not divisible until the youngest child had attained twenty-four, or married. *Hole* v. *Marsland*, 4 L. T. 781—L. C.

A testator directed that all his property should be sold, the proceeds to be invested and the interest to accumulate, and after payment of debts the residue to remain until the children of A. by his wife B. should arrive at the age of twenty-one each; then the whole of the proceeds to be divided, share and share alike, between them. There was a gift over in the event of none of the children attaining twenty-one:—Held to be a gift for all children of A. and B. born or to be born, and not restricted to the children living at the testator's death:—Held also, that the shares were not distributable until all such children should have attained the specified age. *Pilkington* v. *Pilkington*, 29 L. R., Ir. 370.

—— **Effect of Gift for Maintenance or Advancement.**]—A testator, having one nephew and one niece, and eight great-nephews and nieces, living at his death, gave one-tenth of his residue to his nephew, and another to his niece, and the remainder to trustees in trust for their children at twenty-one, and he empowered his trustees to apply all or any part of their respective shares for their advancement:—Held, that all the great-nephews and nieces born before the eldest attained twenty-one, though after the testator's death, were entitled to shares. *Titcomb* v. *Butler*, 3 Sim. 417.

Legacies to all the children of the testator's sister of 2,000*l.* each, payable at twenty-one or marriage of daughters; and until the shares become payable, the interest, &c., thereof respectively to be paid to his sister for her separate use; a fund to be set apart for paying the legacies to his said sister's children as they became due, and in case he shall die before all her sons shall attain twenty-one, or before all the daughters attain that age or marry, the interest, &c., of the legacies for such sons and daughters as should be under age or unmarried, to be applied towards their education, &c.: all children, including those born after the testator's death, entitled, and an inquiry was directed what would be a proper sum to be set apart to answer the legacies to future children. *Defflis* v. *Goldschmidt*, 19 Ves. 566; 1 Mer. 417; 13 R. R. 259.

Bequest of a share of testator's estate, after conversion to be invested in the names of his executors, for the use of the children of J. J. M. by his (testator's) daughter, Mary Elizabeth M.; the interest thereof to be appropriated to their education, and the principal to be divided amongst them as they should severally attain the age of twenty-one years:—Held, that the bequest was for the benefit of all the children of J. J. M. by M. E. M., born prior to the period of distribution, whether before or after the testator's death. *Mower* v. *Orr*, 7 Hare, 473; 18 L. J., Ch. 361; 13 Jur. 421.

Under a bequest in trust for all the sons and daughters of A., B. and C. (who were living) who shall attain twenty-one:—Held, that the class was not to be ascertained on the first of the class attaining twenty-one, in consequence of the will containing a power of maintenance and advancement whether they shall or shall not have attained twenty-one, and notwithstanding the liability of the share to be lessened by the subsequent addition to the class entitled to the entire fund. *Iredell* v. *Iredell*, 25 Beav. 485.

A. gave his residue to his wife for her life, to be expended by her in and about the maintenance of herself and her children; and after her decease unto and amongst his children, to be paid to them as they should severally attain the age of twenty-one years, with benefit of survivorship:—Held, that each child, on attaining twenty-one, took a vested interest, but that his presumptive share would not be paid to him with the consent of the mother, as there was a trust for maintenance of the others. Part, however, was paid out, the rest being reserved as security for payment of the life income. *Berry* v. *Bryant*, 2 Dr. & Sm. 1; 8 Jur. (N.S.) 69; 5 L. T. 818; 10 W. R. 242.

Bequest of a fund in trust to apply the dividends in the maintenance and education of the children of A. until they should respectively attain twenty-one, and upon their severally attaining that age in trust as to the capital of the fund for all such children in equal shares:—Held, that the class was determined when the eldest child attained twenty-one. *Pridham* v. *Massey*, 20 W. R. 196.

Real and personal property was bequeathed on trust for division among such of her grandchildren as should attain twenty-one equally, with power for the trustees, during the minority of any of the children, to raise money for maintenance:—Held, that the objects of the gift were ascertained on the eldest child attaining twenty-one, to the exclusion of after-born children. *Gimblett* v. *Perton*, 40 L. J., Ch. 556; L. R. 12 Eq. 427; 24 L. T. 793.

Gift to one for life, remainder to four persons named, with a proviso that the share of any legatee in remainder, who should die in the lifetime of the tenant for life leaving lawful issue, should be "assigned and transferred to such issue respectively, in equal shares and proportions on their attaining twenty-one; and the dividends and proceeds in the meantime to be applied in or towards their maintenance and education":—Held, that the gift of income, being to an entire class, for maintenance only, was not sufficient to vest the legacy in the issue before twenty-one. *Ashmore, In re*, 39 L. J., Ch. 202; L. R. 9 Eq. 99.

—— **Effect of Gift over on Default of Issue or Death under Age.**]—Under a disposition by will to the children of A. and B., payable at twenty-one or marriage, with a limitation over, upon failure of issue in the lives of A. and B., it was held, that all the children without restriction were entitled; and an apportionment being directed and the interest ordered to be paid to those who had attained twenty-one; children born afterwards, though entitled to a share of the capital, were not allowed to claim the bygone interest. *Mills* v. *Norris*, 5 Ves. 335; 5 R. R. 56.

Legacy to the children of A., to be equally divided among them, and if either of them die before twenty-one their share to go to the survivors; a vested interest in the children living at the testator's death, subject to be divested in the event pointed out; after-born children therefore excluded. *Davidson* v. *Dallas*, 14 Ves. 576; 9 R. R. 350.

Testator gave 350*l.* to the children of his sister at twenty-one (with interest), and if any died before, to the survivor or survivors. A child born after the testator's death, but during the infancy of the others, is entitled to a share. *Gilmore* v. *Severn*, 1 Bro. C. C. 582. And see *Berkeley* v. *Swinburne*, and *Emmet's Estate, In re, Emmet* v. *Emmet*, supra, cols. 911–12.

Class trebly restricted—"Married Children having Issue at the Death."]—A. bequeathed to

his four daughters, unmarried, 2,000*l.* each on their day of marriage, with the consent of his trustees, with interest, by way of maintenance in the meantime; and if one of his daughters should die without being married, he desired the fortune and legacies of her so being the first to die to go to and be divided equally among such of his married sons and daughters as might have issue at the death of such dying daughter. The four unmarried daughters survived the testator, and one of them died unmarried and without issue: —Held, that her legacy was divisible among the testator's sons and daughters who were married at the date of the will and survived her, and had issue living at the time of her death. *Elliott* v. *Elliott*, 11 Ir. Ch. R. 482.

ii. *Issue.*

Substitutionary Gift to Issue of Deceased Legatees — Death before Date of Will.]—A testatrix by her will bequeathed her residuary estate "unto and equally between all my nephews and nieces living at my death: provided that if any of my said nephews and nieces shall die in my lifetime leaving lawful issue, such issue shall take his, her or their respective parents' share or shares equally":—Held, that issue of nephews and nieces already dead at the date of the will took no share in the residuary estate. *Smith's Trusts, In re* (5 Ch. D. 497, n.) not followed. *Brown, In re, Brown* v. *Brown*, 58 L. J., Ch. 420; 37 W. R. 472.

A testator directed his residue to be divided on the death of his wife (who survived him) equally between his brothers and sisters by name, and declared that if any of them should die leaving issue, his, her or their share should go to his, her or their respective issue: — Held, that the class was to be ascertained, as to the issue of a legatee who had died before the testator, at the death of the testator, and as to the issue of a legatee who had survived him at the death of the legatee. *Hobgen* v. *Neale*, 40 L. J., Ch. 36; L. R. 11 Eq. 48; 25 L. T. 681; 19 W. R. 144.

A testator, after giving his residuary personal estate to all and every the children of his uncle F. or their issue in equal shares, gave his real estate to A. for life, and after her death upon trust for sale, and to hold the proceeds upon trust for "all and every the children of F. or their issue in equal shares per capita." Four of the six children of F. were dead at the date of the will, and two survived the tenant for life: —Held, that the issue of the four deceased children of F. alive at the death of the testator or born during A.'s lifetime took as by substitution the shares of their deceased ancestors in the proceeds of the realty, the issue of each of the four taking, inter se, in equal shares. *Sibley, In re*, 46 L. J., Ch. 387; 5 Ch. D. 494; 37 L. T. 180.

—— **Issue coming into Existence before Death of Ancestor or Tenant for Life.**]—A father gave his residuary estate upon trust for his three daughters for life, and if any of his daughters should die leaving issue, a share proportioned to the number of his daughters was to go to the issue of such daughter, and if only one of such daughters should die leaving issue the whole to such issue, and if all his daughters should die without issue, then to his sisters. He had three daughters. One died leaving four children, one of whom died leaving two children born after their grandmother's death; afterwards another of his daughters died a spinster:—Held, that there were implied cross limitations, so that the surviving daughter had a life interest in half the share of the daughter so last dying. *Ridge, In re*, 41 L. J., Ch. 787; L. R. 7 Ch. 665; 27 L. T. 141; 20 W. R. 878.

Held, also, that the gift to issue was to the issue living at the death of the daughter, and therefore the three survivors of the four children and the representative of the dead one were entitled to the second moiety, and would, if the third daughter of the testator died without issue, become entitled to the whole. *Ib.* And see *Corrie, In re*, 32 Beav. 426.

A husband gave his residuary real and personal estate to trustees to convert and invest, and pay the income to his wife during widowhood, or until his son should attain twenty-two, and then to call in half the money invested and pay it to his son, and as to the other half, to pay the income to the wife during widowhood, and then to his son for life, and afterwards to his lawful issue:—Held, that the children and remoter issue of the son living at his death took together as joint tenants. *Corlass, In re*, 45 L. J., Ch. 118; 1 Ch. D. 460; 33 L. T. 630; 24 W. R. 204.

A testator gave the interest of 3,000*l.* stock to his wife for life, and after her decease the interest of 1,000*l.*, part of the 3,000*l.*, to his daughter E. for life, and then to her issue; and as to another 1,000*l.* to his daughter M., and all her issue at twenty-one, with trusts for maintenance; and if she should not leave issue at her decease, or they should not attain twenty-one, to the issue of his daughters E. and S. equally, in the same terms as the former gift; and as to the remaining 1,000*l.*, to his daughter S., and her issue after her decease. He then directed a valuation of his farm stock, and gave the amount thereof, and all his personalty and estate whatsoever, to his sons J. and T. equally, and appointed his sons R., J. and T. residuary legatees, subject to the payment of 10*l.* a year to his wife out of the valuation. By a codicil the testator gave to his daughter M. 1,000*l.* consols for life, and after her decease to her issue; and in default of issue, to her two surviving sisters' issue at twenty-one. M. survived her two sisters, and was not married, and the testator left grandchildren and great-grandchildren:—Held, that M. took for life only; that the three sons of the testator, R., J. and T., all took the residue, and their issue at M.'s death took as purchasers as joint tenants; that is, such issue as were either alive at the testator's death, or came into esse before the death of M. *Surridge* v. *Clarkson*, 14 W. R. 979.

M., by her will, gave the whole of her property to A. for her life, remainder as to one-fourth to L. or her issue, as to one-fourth to the issue of C., deceased, as to one-fourth to G. or his issue, and as to the other fourth to H. or her issue. The question having been raised as to the period at which the class of issue entitled under the gift was to be ascertained:—Held, that all issue coming into existence before the death of the tenant for life were included in the class, and that they took as joint tenants. *Jones, In re, Hume* v. *Lloyd*, 47 L. J., Ch. 775; 26 W. R. 828.

iii. *Descendants.*

Bequest to each of A.'s sisters and brothers, or to such of them as may be living at the time of my decease, in case of those who may not be in

existence at my death, to go to their respective descendants :—Held, that the descendants of a sister who was dead at the date of the will were excluded. *Smith* v. *Pepper*, 27 Beav. 86.

A. bequeathed all the residue of his property, after the death of his widow, to the brothers and sisters of her and himself, and to their descendants :—Held, that the persons entitled to take the property were those brothers and sisters of the testator and his wife who were living at the death of the tenant for life, and the children of such of them as were dead were entitled to take by way of substitution. *Tucker* v. *Billing*, 2 Jur. (N.S.) 483.

A testator, by a codicil to his will, directed his son to insure his life for 5,000*l.*, and to bequeath that sum to his wife in case she should survive him, to be invested in trust for her sole use and benefit during her life, and at her decease, or at the decease of the son if he should be the longest liver, the 5,000*l.* to be bequeathed to the testator's "daughters or their descendants in equal proportions." The son duly insured his life, and after his death the sum of 5,000*l.* was received by the trustees of the testator's will and invested and the dividends were paid to the son's wife during her life. At her death questions arose on the construction of the codicil, and it was decided that the bequest was a substitutionary gift to the descendants of those of the daughters of the testator who died in the lifetime of the son's wife leaving descendants; that "descendants" included children, grandchildren, and great-grandchildren living at the time of distribution ; and that, although the daughters were to take as tenants in common, the words "in equal proportions" did not apply as between the descendants themselves, such descendants taking as joint tenants. Subsequently the question was raised whether descendants of a daughter of the testator who might have survived such daughter, but died in the lifetime of the son's wife, having severed their joint tenancy, were entitled to participate in the gift :—Held, that it was not necessary that the descendants who took a share should survive the tenant for life. *Flower, In re, Matheson* v. *Goodwyn*, 62 L. T. 677.

iv. *Relations.*

At Death of Testator.]—Testator gives a residue to A. for life, remainder to B. for life, then to be divided among his (testator's) relations. This is a mere intestacy, and goes to the relations at the death of testator. *Masters* v. *Hooper*, 4 Bro. C. C. 207.

A testatrix directed all her property at the death of A. and B. "to pass to my relatives in America" : —Held, that the class was to be ascertained at her death, and that all her next of kin in America then living were entitled as joint tenants. *Eagles* v. *Le Breton*, 42 L. J., Ch. 362; L. R. 15 Eq. 148.

A testator gave a sum of money to be divided between the relations of his late wife, in such shares as if she had died a spinster, and intestate. The wife had sixteen next of kin at her death, five of whom died in the lifetime of the testator : —Held, that those living at the death of the testator each took a share, and that five shares went to the residuary legatees. *Ham's Will, In re*, 2 Sim. (N.S.) 106; 21 L. J., Ch. 217; 15 Jur. 1121.

A testator devised his real estates to his first cousin, Thomas Pearce, for life, and, after T. P.'s decease, he devised and bequeathed all his real and personal estates in trust for such of his relations of the name of Pearce, being a male, as T. P. should by deed or will appoint ; and in default of such appointment, for such of his relations of the name of Pearce, being a male, as T. P. should approve of or adopt, if he should be living at the death of T. P., and his heirs, executors, &c. ; and in case T. P. should not adopt any such male relation, or no such male relation should be living at the death of T. P., then to the next and nearest relation or nearest of kin of him, the testator, of the name of Pearce, being a male ; or the elder of such male relations, in case there should be more than one of equal degree, who should be living at the testator's decease, his heirs, &c., for ever. The testator had a brother, Z. P., who had gone to sea, and had not been heard of for many years ; and, supposing Z. P. to have died without issue, the nearest relation of the testator, answering the description in the ultimate limitation at his decease, was the tenant for life, T. P., and next to him R. P., the plaintiff. T. P. died without issue, and without having exercised the power of appointment or adoption given to him by the will :—Held, that T. P. took under the ultimate limitation. *Pearce* v. *Vincent*, 2 Keen, 230 ; 7 L. J., Ch. 285. Affirming 2 Bing. (N.S.) 328 ; 2 Scott, 347 ; 5 L. J., C. P. 82 ; 1 C. & M. 598 ; 2 L. J., Ex. 194. And see *S. C.*, 2 Myl. & K. 800 ; 2 L. J., Ch. 187.

—— **Child en Ventre sa Mère.**]—20,000*l.* left to executors in trust to dispose of in such proportions, &c., as they should think fit amongst such of the testator's relations as should not be worth 2,000*l.*, and should apply within two years after the testator's death. One within the description applied and had a sum ordered her, but died before it was paid :—Held, her representative entitled to it. A child born after the death of the testator, who was of consanguinity, claimed and died without issue :—Held, not within the description, though en ventre sa mère at testator's death. *Bennett* v. *Honywood*, Ambl. 708.

At Death of Tenant for Life.]—Residuary bequest to a brother of the testator for life, and after his death to his wife, and at her death to go to such of the testator's relations as survived them :—Held, to give the whole to the only one of the brothers of the testator who survived the tenants for life, to the exclusion of the children and representatives of brothers of the testator who survived him, but died in the lifetime of the second tenant for life. *Bishop* v. *Cappel*, 1 De G. & Sm. 411 ; 11 Jur. 939.

Devise to trustees to invest in stock and pay dividends to testator's son for life ; and after his decease, to his eldest son and his heirs for ever ; and in case of their death without issue, to his (testator's) nearest relation, and the nearest relation of such nearest relation for ever. First, this is a double contingency, and the event of the son dying without issue is good ; secondly, it goes to the person who was nearest relation at the time, the half-sister, though there were living representatives of a person as near, viz., a half-brother. *Marsh* v. *Marsh*, 1 Bro. C. C. 293.

A married woman, by her will, made in execution of a power given to her in her marriage

settlement over certain freehold estates, in which her husband had a life interest under the settlement, directed and appointed that the estates in question should be charged and chargeable with the sum of 1,500*l.*, to be paid twelve months next after the death of her husband, amongst the relations of her late mother, in such manner and form, and to such of them particularly, and in such shares, as her said husband should by his last will and testament appoint; and, for want of such appointment, amongst her mother's relations, according to the Statute of Distributions. After the death of the testatrix, the husband, in exercising the power, made an appointment, by will, of the fund, which was invalid as to 1,495*l.*, part thereof:—Held, upon bill filed after the husband's death to establish a claim to the 1,495*l.*, that the next of kin of the testatrix's mother, according to the Statute of Distributions, at the death of the testatrix's husband, were the parties entitled to the fund. *Davidson* v. *Proctor*, 19 L. J., Ch. 395; 14 Jur. 31.

Residuary bequest to the testator's daughter for life, and to her children at their ages of twenty-one, and, after the decase of his daughter and of her children under that age, to go and be distributed among his relations in due course of administration. Great-nephews and great-nieces, the next of kin of the testator, at the death of the daughter, entitled, against the claim of the personal representatives of the daughter, the sole next of kin at the death of the testator, and of the representatives of nephews and nieces, who died in her life, insisting that she was excluded by the will. *Jones* v. *Colbeck*, 8 Ves. 38; 6 R. R. 207.

A. devised a moiety of the rents of his real estates to his wife for her life, and directed the other moiety to be applied to the maintenance of his daughter; and after the death of his wife he devised all his real estates to his daughter in fee; but if his daughter should die without issue in the lifetime of his wife (which happened), in such case he gave his real estates to his wife for life, and after her decease to his relations, share and share alike. Romilly, M.R., was of opinion that the class of persons to take, was to be ascertained at the death of the testator. On appeal:—Held, that the death of the daughter was the period when the class was to be ascertained. *Lees* v. *Massey*, 3 De G. F. & J. 113; 7 Jur. (N.S.) 534; 4 L. T. 36; 9 W. R. 425.

Bequest to A. for life; and afterwards, in an event (which happened), the testator directed advertisements to be made for his relations, to such only of whom as should claim within two months he left the property, to be divided according to the discretion of his executors. The executors died in A.'s lifetime:—Held, that the next of kin of the testator, according to the statute, took equally, and that the class was to be ascertained at the death of A., and not at the death of the testator. *Tiffin* v. *Longman*, 15 Beav. 275.

At Death of Donee of Power without Appointing.]—A testator gave a legacy to his relatives in such shares as his wife should appoint. She appointed part to children of the testator's illegitimate brother:—Held, that the class of relatives who were to take the share which was badly appointed, was to be ascertained at the death of the donee of the power, and not of the testator. *Saville, In re*, 14 W. R. 603.

v. *Cousins.*

P. bequeathed to each of the first cousins of the late A., living in England at the time of A.'s death, a legacy:—Held, that those only who were living at the death of P. were entitled. *Nicholson* v. *Patrickson*, 3 Giff. 209; 7 Jur. (N.S.) 987; 5 L. T. 202.

A testator gave property, after the failure of prior limitations, "unto my first cousins by my mother's side, and the issue of such of them as may happen to be dead, per stirpes, and to their heirs, executors, administrators and assigns for ever, as tenants in common":—Held, that the words, "and the issue," &c., did not make the class ascertainable in futuro, but that the first cousins ex parte maternâ, living at the testator's death, took vested interests, liable to be divested pro tanto, so as to let in all other first cousins born before the period of distribution. *Baldwin* v. *Rogers*, 3 De G. M. & G. 649; 22 L. J., Ch. 665; 17 Jur. 267.

A testator devised a copyhold estate to his wife for life, and after her decease he devised one-half thereof unto and equally between all his first cousins, or the lawful issue of any or either of them who might be dead, as tenants in common:—Held, that the first cousins of the testator living at his death, and the issue in every degree of his first cousins who were then dead, were to take in equal shares per capita. *Cogswell* v. *Chapman*, 6 L. J., Ch. 184.

Upon the construction of a will:—Held, that the residue of the testator's personal estate devolved to his cousin-german living at his death, except that the issue of any cousin dying between the date of the will and the death took the prospective share of the parent. Upon the construction of the same will, the share of a cousin dying without issue between the date of the will and the death of the testator was held not to have lapsed, but to have fallen into the bequeathed residue. *Cort* v. *Winder*, 1 Coll. C. C. 320.

Testator bequeathed the residue of his personal estate as follows: "As to the residue of my fortune, I will and desire that the descendants or representatives of each of my first cousins deceased partake in equal shares and proportions with my first cousins now alive": the residue is divisible per stirpes amongst the first cousins who were living at the testator's death, and such of the descendants of the first cousins who died before him, as were next of kin of the deceased first cousins, and living at the time of the death of the testator. *Humphreys* v. *Humphreys*, 2 Cox, 187.

vi. *Nephews and Nieces.*

At Death of Testator.]—A testator gave all his personal estate to trustees, upon trust, to pay an annuity to his wife for her life, and to pay the remainder of the interest equally between his nephews and nieces, and his sister, E. W., in equal shares; but that the share of the said interest should be paid to E. W. during her life, and, after her decease, to go to her children; and he directed that, after the death of his wife and sister, the principal money should be divided between his nephews and nieces equally; at the death of the testator E. W. was living, but no other sister and no brother of the testator; E. W. had three children, and there were five other nephews and nieces:—Held, that all the

nephews and nieces were equally entitled to the property, with the qualification that the shares of the children of E. W., during her life, belonged to her. *Blakelock* v. *Sharpe*, 2 De G. & Sm. 484; 17 L. J., Ch. 453; 12 Jur. 819.

Children of Brothers living at Death of Testator.]—Under a bequest "unto and to the use of and equally between all and every my brothers and sisters, their respective executors, administrators and assigns, absolutely and for ever," the brothers and sisters who survived the testator took the whole, excluding the representatives of the deceased ones. *Shuttleworth* v. *Greaves*, 4 Myl. & Cr. 35; 8 L. J., Ch. 7; 2 Jur. 957.

At Death of Tenant for Life.]—Bequest of stock to trustees in trust, after the death of A., to transfer the same to and amongst all and every the nephews and nieces that should be then living; to wit, the said J. B. or her children, and the said P. B. or his children, and D. L. or his children, and P. L. or his children: under this bequest a nephew not expressly named is not entitled to any share; and the fund is equally divisible amongst such nephews and nieces, and their children, as were living at the time of the death of A. *Eccard* v. *Brooke*, 2 Cox, 213; 2 R. R. 31.

A gift of real and personal estate to trustees for the testator's brothers and sisters for life, with a direction after the decease of the survivor of them to sell and to divide the proceeds unto and equally between all his nephews and nieces, grandnephews and grandnieces, to take per capita, with power to apply the presumptive shares for advancement and maintenance:—Held, that all the class, including those born after the testator's decease, were entitled per capita. *Partington's Trusts, In re*, 3 Giff. 378; 8 Jur. (N.S.) 877; 5 L. T. 559.

A testatrix bequeaths the residue of her personal estate to trustees, upon trust, to pay the interest to A. during her life; and from and after her death, to pay the interest thereof to B. during his life; and from and after his decease, to transfer the trust moneys to such of the testatrix's nephews and nieces as should be then living at the time of B.'s decease: the testatrix dies; then B. dies, and afterwards A. dies:—Held, that all the nephews and nieces of the testatrix who were living at the death of B., though not living at the death of A., were entitled to take. *Netherwood* v. *Hall*, 3 L. J. (O.S.) Ch. 159.

On Determination of Prior Interests.]—A testator gave his real and personal estate to his sister for life, and if she should have any family living at her decease, they should have "their due proportion of the property"; and in case of the demise of his sister's children, his two nephews were to stand in the same situation as his sister's children would have stood had they been living:—Held, that such only of the nephews as survived the sister and the children took, and one of the nephews having died in her lifetime, that the other nephew was entitled to the whole residue. *Lewis* v. *Lewis*, 17 Beav. 221.

Where Distribution postponed to given Age.]—A testator, having one nephew and one niece, and eight great-nephews and nieces, living at his death, gave one-tenth of his residue to his nephew and another to his niece, and the remainder to trustees in trust for their children at twenty-one, and he empowered his trustees to apply all or any part of their respective shares for their advancement:—Held, that all the great-nephews and nieces born before the eldest attained twenty-one, though after the testator's death, were entitled to shares. *Titcomb* v. *Butler*, 3 Sim. 417.

Testator bequeathed his residuary estate to trustees, upon trust to transfer the same unto his great-nephews and nieces; the shares of the boys to be transferable to them at twenty-one, and those of the girls at twenty-one or marriage, and to accumulate for them in the meantime, with benefit of accruer and survivorship: and in case of the death of all the said children except one, before their shares became vested, then upon trust to transfer the whole to the survivor, at the age or time aforesaid:—Held, that a great-nephew born after the testator's death, but before any of his other great-nephews or nieces attained twenty-one or married, was entitled to a share of the testator's residuary estate. *Balm* v. *Balm*, 3 Sim. 492; 30 R. R. 192.

Effect of Gift Over in Default.]—A testator gave specific legacies to three of his nieces (daughters of his sister) by name, and the residue to his sister and her husband for their lives, subject to an annuity to A.; and, after the death of the parents and A., he directed the residue to be "divided equally between the daughters of his said sister," and which he bequeathed "to his said nieces." There was a gift over, if no daughter of his sister should be then living. The sister had four daughters born at the date of the will, and another born after the testator's death; some only survived the tenants for life:—Held, that the residue was divisible among all the nieces, and that they took vested interests, subject to be divested in an event which had not happened. *Locker* v. *Bradley*, 5 Beav. 593.

vii. *Next of Kin.*

At Death of Testator.]—The rule, that in a gift to the next of kin of A. the next of kin are to be ascertained at the time of A.'s death, is not affected by the fact that the gift compromises the proceeds of sale of real as well as of personal estate. *Cusack* v. *Rood*, 24 W. R. 391.

A testator having directed his executors to pay the interest of his residue to a woman during her life, and after her decease to divide the residue amongst the next of kin:—Held, the next of kin at the time of testator's death were the persons entitled. *Collisam* v. *Sams*, Tam. 346.

Testator ordered real estate to be sold, and the residue to be laid out in the funds, to remain for ten years, and, at the end thereof, gave the same to his next of kin. Although the expression "next of kin" means generally those who are so at a testator's death, yet here, upon the intention, the period of vesting was held to be at the expiration of the ten years. The testator, therefore, having but one brother, who was next of kin (at his death), but who died within the ten years, so much as was produced by the real estate was held to belong to the heir-at-law of the testator, so much as was personal going to the representatives of the brother. *Spink* v. *Lewis*, 3 Bro. C. C. 355.

Bequest to testatrix's daughter for life, and after her death as she should appoint, and in

default of appointment to testatrix's next of kin, to be considered as a vested interest from testatrix's death, except as to any after-born child of daughter. The daughter having died without any child, and without executing any appointment:—Held, that the persons who would be next of kin at testatrix's death if her daughter had then been without children were entitled. *Bird* v. *Wood*, 2 Sim. & S. 400; 4 L. J. (O.S.) Ch. 86; 25 R. R. 238.

Testator directed his trustees to pay the dividends of certain stock to his wife for life, and after her decease to transfer the capital to such person or persons, in such shares and proportions, at such times and in such manner, as might be expressed in any codicil or codicils to his will; and in default of such direction or appointment, to transfer and make over the same unto such person or persons as would under and by virtue of the Statutes of Distribution of Intestates' Estates have been entitled to his personal estate in case he had died intestate. The testator died without making an appointment by codicil, leaving his wife surviving him. The wife afterwards died:—Held, that the fund belonged to those who at the testator's death, and not to those who at the widow's death, would have been entitled to his personal estate in case he had died intestate; consequently that the widow was entitled to a distributive share of the fund; but semble that there was no joint tenancy between the widow and the next of kin of the testator living at his death, and, therefore, that the widow, having survived those next of kin, was not entitled to take the whole fund by survivorship. *Jenkins* v. *Gower*, 2 Coll. C. C. 537; 10 Jur. 702.

Testator bequeathed the residue of his personal estate to his wife for life, and after her decease to his sister for life for her separate use, and after her decease to such person or persons as under the Statute of Distributions should be legally entitled to the same:—Held, that the residue, after the death of the sister, was bequeathed either to the next of kin of the testator living at his death, as joint tenants, or to the next of kin of the testator or of the sister living at the death of the sister, as tenants in common, and consequently that the wife, who died in the sister's lifetime, was not entitled to anything beyond a life interest in the residue. *Godkin* v. *Murphy*, 2 Y. & C. C. C. 351.

Testator, by his will, gave the residue of his property to a trustee in trust, out of the rents of particular leaseholds, to pay the annuities given by his will, and on further trust to invest the surplus rents of such leaseholds, upon trust, when his grandson, E. R. W., the child of a deceased daughter of the testator, should attain the age of twenty-one years, to transfer the same to E. R. W. absolutely: and the testator then directed, that after E. R. W. should attain twenty-one the trustee should pay the whole surplus income of his residuary estate, after satisfaction of the said annuities, and upon the death of the last annuitant, to E. R. W. for life, with remainder in favour of his issue; and in case E. R. W. should die under twenty-one without lawful issue, upon trust to pay and apply such surplus rents and profits unto and amongst testator's next of kin, in such proportions and manner as is provided by the Statute of Distributions, until the last of the said annuitants should depart this life; and in case E. R. W. should die after twenty-one years of age without leaving lawful issue, then upon trust, when the last of the said annuitants should die, but not before, to distribute the whole of the residue unto and amongst his next of kin in such proportions and manner as aforesaid. E. R. W., after surviving the testator, died a minor, without issue:—Held, that, as sole next of kin, according to the statute, of the testator at his death, E. R. W., and not the next of kin at the time of the death of E. R. W., was entitled to the residuary estate, after payment of the annuities. *Bird* v. *Luckie*, 8 Hare, 301; 14 Jur. 1015.

A testator, after bequeathing his residuary estate to trustees upon trust for his grandson, the child of his deceased daughter, for his life, directed them, in case his grandson should die under twenty-one without issue, then to pay the rents and profits unto and amongst his (the testator's) next of kin in such proportions and manner as is provided by the Statute of Distributions; and in case the grandson should die after attaining twenty-one without leaving issue, or such issue should die under twenty-one, or unmarried, or without issue, then to distribute the whole of the residue amongst such next of kin, in the same proportions and manner:—Held, that the gift was to the next of kin of the testator at his death, and this notwithstanding his sole next of kin at the time of making the will, and at the time of his death, was the grandson of the testator, to whom the life estate was given, and the sole next of kin of the grandson at the same time was the father of the grandson, the husband of the deceased daughter of the testator. *Ib.*

The mere circumstance that the gift to the next of kin of a testator is not immediate, but is contingent upon a future event which might or might not happen, is insufficient to render the description applicable only to such person or persons as should form the class at the time of the occurrence of the event. *Ib.*

Testator directed one-half of the interest of his residue to be paid to his daughter and only child, and the other half to his wife, during their joint lives; and that if his daughter survived her mother, or married and left issue, then that the whole of the capital should be paid to her after his wife's death; but if she died first without marrying or leaving issue, then that the trustees should accumulate the interest of the residue so far as it was not directed to be paid to his wife, and that on her death one-half of the capital should be divided amongst his nearest of kin, and the other half amongst his wife's nearest of kin. The daughter was the testator's nearest of kin at his death; she died a spinster before her mother. At the mother's death the testator's sister was his nearest of kin:—Held, that by "my nearest of kin" the testator meant his nearest of kin at his own death, and not at the death of his wife; and, consequently, that the personal representative of his daughter, and not his sister, was entitled to one moiety of the residue. *Urquhart* v. *Urquhart*, 13 Sim. 613; 8 Jur. 161.

A testator gave his residuary estate to his daughter for life, with remainder to her children, and in default to his next of kin:—Held, that the class of next of kin was to be ascertained at the testator's death. *Lasbury* v. *Newport*, 9 Beav. 376.

Upon an ultimate limitation to a testator's next of kin:—Held, that the next of kin at the testator's death, and not those at the time when such ultimate limitation took effect, were entitled. *Seifferth* v. *Badham*, 9 Beav. 370; 15 L. J., Ch. 345; 10 Jur. 892.

A testatrix, having three daughters, gave one-third of a fund to each for life, with remainder to their children respectively, with cross-remainders between them, with an ultimate limitation to her own "next of kin and legal personal representatives":—Held, that the class of next of kin was to be ascertained at the death of the testatrix, and that they took as joint tenants. *Baker* v. *Gibson*, 12 Beav. 101.

A testator directed the sale and conversion of his property, and that a daughter should be entitled for life to a certain sum, to be invested in the usual way, with remainder to her husband, A., in case he should survive her, and in default of children or child, then to pay the same "according to the Statutes of Distribution of Intestates' Effects":—Held, that the next of kin of the testator at the time of his death was entitled to the principal so invested. *Royds* v. *Royds*, 1 N. R. 516; 8 L. T. 199.

A testator gave his residuary real and personal estate to his widow during widowhood, and then on trusts for the child of which his wife was enceinte when he should attain twenty-one, with maintenance in the meanwhile, but if such child died under twenty-one without having lawful issue then living, then on these trusts "in trust for such person or persons as shall be my next of kin according to the Statute of Distributions." The child, who at his father's death was his sole next of kin, died six months after his father:—Held, that the next of kin must be ascertained at the death of the testator, and not at the death of the son or of the widow. *Harrison* v. *Harrison*, 28 Beav. 21.

A testator gave his real and personal estate to trustees for his wife for life, and after her decease for his daughter for life, and for her husband and children; and in case she died without lawful issue attaining twenty-one, then after her decease he directed that his personal estate, including the proceeds of the copyholds, should be for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto if he were to die possessed thereof and intestate, to be divided among them, if more than one, in the shares in which the same would be divisible under the same statutes. The wife and daughter and her husband survived the testator, the daughter never having any child; and on her husband's death the fund under the ultimate trust became divisible:—Held, that the period of ascertaining the class was the testator's death, and the wife and daughter's representatives were entitled. *Michell* v. *Bridges*, 11 L. T. 727; 13 W. R. 200.

A., after giving all his real and personal estate to trustees for his children, directed his trustees, when any of his daughters should attain twenty-one or marry, to raise and settle not exceeding 5,000*l.* upon each such daughter, in part of her presumptive share, in trustees of her own nomination, in trust for her for life, with remainder for her children, and if all such children should die under twenty-one, in trust for the testator's next of kin. One of the daughters, having attained twenty-one, settled her 5,000*l.* upon herself and children, with a trust in default of children for the next of kin of the testator, according to his will. She died without having had any child:—Held, that the next of kin of the testator living at his death were entitled to the fund as joint tenants. *Aspinall, In re*, 30 L. J., Ch. 321; 4 L. T. 176; 9 W. R. 269.

A testator gave his residuary personal estate to trustees upon trust to pay the dividends to J. B., A. L., and J. L., for their lives, and the life of the survivor of them, and on the decease of the survivor "in trust to divide the fund among the children of J. L., and in default of such children for all and every my next of kin who shall be in equal degree, and those who legally represent them according to the statute." At the testator's death, A. L. was his sole next of kin:—Held, that she was entitled to the fund. *Barber's Will, In re*, 1 Sm. & G. 118.

A testator gave his residue to his wife, and on her death or marriage to his children; but in case she should die or marry again without leaving any child, or should any such child die before twenty-one, he directed the trustees to pay it to "such person or persons as might be legally entitled to the same under the Statute of Distributions." There was one child only, who was born after the testator's death, and who died three years old. The widow married again:—Held, that the class to whom the residue was given over was to be ascertained at the testator's death, and not at the death of the child, and that the widow was not excluded. *Starr* v. *Newberry*, 23 Beav. 436.

Bequest to A. for life, with remainder to B. for life, and after their deaths to the testator's next of kin; but should no claimant appear within twelve months after their death, then to charities. A. and B. were sole next of kin at the testator's death:—Held, that the next of kin were to be ascertained at the testator's death. *Gorbell* v. *Davison*, 18 Beav. 556.

A. bequeathed a leasehold for the benefit of B., and gave her a power to appoint it by will, and in default to A.'s "nearest of kindred, precisely in the same manner directed by the statute made for the distribution of intestates' effects." On B.'s death without appointment:—Held, the next of kin of A. at her own death, and not those at the death of B., were entitled. *Markham* v. *Ivatt*, 20 Beav. 579.

Where Testator supposed to die at Future Time.]—Where a testator gives property in trust for the benefit of the persons who at a time subsequent to his own death shall by virtue of the Statute of Distributions be his next of kin, the class is an artificial class, to be ascertained on the hypothesis that the testator lives up to and dies at the subsequent period of time. *Sturge* to *G. W. Ry., In re*, 51 L. J., Ch. 185; 19 Ch. D. 444; 45 L. T. 787; 30 W. R. 456.

The difference in legal effect between a gift to the "children" or "nephews," or "kindred" of A. who shall be living at his death, and a gift to the persons who shall then be his statutory next of kin, considered and explained. *Parsons, In re, Stockley* v. *Parsons*, 59 L. J., Ch. 666; 45 Ch. D. 51; 62 L. T. 929; 38 W. R. 712.

A testator gave in a certain event all the residue of his estate to "the person or persons, exclusive of my surviving grandchild, who, under the Statute for Distribution of the Personal Estates of Intestates, would, immediately after the decease of the survivor of my other two grandchildren, be entitled to my personal estate." At the period in question the surviving grandchild was the sole next of kin:—Held, that the persons who would have been next of kin if the surviving grandchild had been dead at the period in question were entitled. *White* v. *Springett*,

38 L. J., Ch. 388; L. R. 4 Ch. 300; 17 W. R. 336—C. A.

At Death of Tenant for Life—Next of Kin of Testator.]—Upon the construction of a will, the gift of the residue after a life interest to the testator's next of kin:—Held, to mean next of kin at the death of the wife, and not those living at the testator's death, they having express bequests under the will. *Miller* v. *Eaton*, G. Cooper, 272; 14 R. R. 259.

A testator gave his personal estate to trustees upon trust to convert into money, and invest the same and pay the interest to his mother for her life; and after the decease of his mother he gave all his estate and effects to such person or persons as she should by her will direct and appoint, and in case his said mother should die without a will, then to such person or persons as should be entitled to the same by virtue of the Statute of Distributions. The mother survived the testator and died intestate:—Held, that the testator's next of kin at the death of the mother were entitled to the bequest. *Briden* v. *Hewlett*, 2 Myl. & K. 90; 1 L. J., Ch. 114. And see S. P., *Spink* v. *Lewis*, 3 Bro. C. C. 335.

A testator directed that upon the death, without leaving issue, of his daughter, who was his sole next of kin, a certain fund should be assigned to the nearest of kin of his own family for ever:—Held, upon the construction of the will, that these words were meant to describe some person or persons to be ascertained at the daughter's death, and not the person or persons who should be his own next of kin at the time of his own death. *Clapton* v. *Bulmer*, 5 Myl. & Cr. 108. Affirming 10 Sim. 426; 9 L. J., Ch. 261; 4 Jur. 288; 5 *id.* 477.

After bequest of residue to testator's daughter for life, with remainder to her children, it was provided that if she should die without leaving issue, 3,000*l.* should be paid as she should appoint, and if testator's wife should survive the daughter, and the daughter should die without issue, then he gave 2,000*l.* to his wife, and the residue unto the nearest of kin of his own family for ever. The daughter, who was the sole next of kin of the testator, survived the wife, and died without issue:—Held, that her next of kin were entitled, to the exclusion of her personal representative. Affirmed by the Lord Chancellor, who observed, that the same person was next of kin of the daughter and of the testator at her death. *S. C.*, 10 Sim. 426.

C. devised freehold estate in trust for his son D. for life, with remainder to D.'s sons in tail, with remainders over; but in case D. should die under twenty-five without leaving any children him surviving, then in trust for such persons as at the time of such failure of issue should be his (the testator's) next of kin according to the statute made for the distribution of intestates' estates, and as if he (C.) had survived D. C. made a similar devise in trust in favour of another son, and then he declared that the leasehold premises given to his sons should not vest in them during the life of his wife, but in case they or either of them should attain twenty-five, and should die in the lifetime of his wife without children, should belong to such persons as should then be his next of kin in manner aforesaid. C. then bequeathed a legacy in trust for his daughter for her separate use, and after her decease for her children; and in case she should leave no children, then in trust for his next of kin in manner aforesaid:—Held, that the persons entitled, upon the death of the testator's daughter without leaving children, were those persons who at that period, and not at the death of the testator, were the testator's next of kin. *Bessant* v. *Noble*, 26 L. J., Ch. 236; 2 Jur. (N.S.) 461; 4 W. R. 475.

Testatrix bequeathed all her personal estate to her executors, upon trust that same be placed out at interest for the sole use of E. B., until she should arrive at the age of twenty-one years, or be married; and directed her executors to draw the interest thereof during the minority of E. B., or until her marriage, and apply same towards her maintenance and education; and when E. B. should attain her age of twenty-one years, or be married, then to pay the principal and interest to her, as and for her own proper money; and in case E. B. should die under age and unmarried, the testatrix bequeathed the said principal money and interest to her (the testatrix's) next of kin, share and share alike, as tenants in common; and if but one, the whole to such one. E. B. was the sole next of kin of the testatrix at the time of her decease, and afterwards died under age and unmarried:—Held, that the personal representative of E. B., and not the next of kin of the testatrix at the time of E. B.'s death, was entitled to the trust funds. *Murphy* v. *Donegan*, 3 Jo. & Lat. 534.

A husband gave his residuary personal estate to his wife for life, and after her death he directed his trustees to pay and divide three-fifths of the residue among such person or persons as under the Statute of Distributions would have become entitled on his late father's side to his personal estate at the death of his wife if he had died intestate, and the other two-fifths he gave in similar terms to his next of kin on his late mother's side:—Held, that the period for ascertaining the classes was the date of the death of the widow and not that of the testator himself. *Morley*, *In re*, 25 W. R. 825.

G. gave to trustees a sum of money to invest, and pay the interest unto such person as his daughter M. should during her life direct; and in default of appointment, to her for life; and after decease, to her husband and children: and in case M. should not have a child, then to assign and transfer the fund unto such person or persons as should happen to be his next of kin according to the Statute for the Distribution of Intestates' Effects. M. died in 1860, without having been married. The next of kin of G. at his death were his four children, two of whom died before M., and at her death the next of kin of the testator were one child and eight grandchildren:—Held, that the persons entitled were the next of kin at the death of M., but that they took as joint tenants. *Greenwood*, *In re*, 3 Giff. 390; 31 L. J., Ch. 119; 8 Jur. (N.S.) 907; 10 W. R. 117.

A testator bequeathed part of the residue of his property to trustees in trust for his daughters during their lives, and after their respective deceases for their children, and in case there should be no children of his daughters respectively in trust for such person or persons as should happen to be his next of kin according to the Statute of Distributions:—Held, that upon the death of a daughter who survived the testator without issue her share went to the persons who were the testator's next of kin at her death. *Butler* v. *Bushnell*, 3 Myl. & K. 232; 3 L. J., Ch. 139.

—— **Next of Kin of Wife.**]—A testator by his will directed that the shares of his daughters in his residuary estate should be settled, the ultimate limitation, in case a daughter should not leave any child or children who should be living at the decease of the survivor of herself and her husband, being in trust for the person or persons who, under the statutes of distribution, "would on her decease have been entitled thereto in case she having survived her husband and had then died possessed thereof and intestate." A daughter having died without issue, leaving her husband surviving:—Held, that her next of kin to take under the ultimate limitation were to be ascertained at the time of her own death, and not at the time of the death of her husband. *Chalmers* v. *North* (28 Beav. 175) disapproved. *Druitt* v. *Seaward*, 55 L. J., Ch. 239; 31 Ch. D. 234; 53 L. T. 954; 34 W. R. 180.

—— **Next of Kin of Third Party.**]—A testator directed that the residue of his personal estate, after the death of his widow, the tenant for life, should be paid by his trustees or the survivor of them, his executors or administrators, to A. and B., to be equally divided between them, share and share alike, if then living; but if dead, to go and be equally divided to and amongst the respective next legal representatives of A. and B., share and share alike. A. and B. died in the lifetime of the testator's widow:—Held, that the next of kin of A. and B., according to the statutes of distribution, living at the death of the testator's widow, were entitled to the fund per stirpes. *Booth* v. *Vicars*, 1 Coll. C. C. 6; 13 L. J., Ch. 147; 8 Jur. 76.

At Death of Third Party—Next of Kin of Wife.]—A limitation to the next of kin of a wife after the death of the surviving husband and failure of children:—Held, to be an exception to the general rule, and to mean not the wife's next of kin at her death, but at the death of the surviving husband. *Pinder* v. *Pinder*, 28 Beav. 44.

—— **Next of Kin of Third Party.**]—Bequest to A. B. for life, and afterwards to her children; but, in default of children, "to pay or assign and transfer" to C. D. if living, but if dead, to his next of kin ex parte maternâ. C. D. died before A. B.:—Held, that the next of kin were to be ascertained at the death of C. D., and not of A. B. *Gundry* v. *Pinniger*, 14 Beav. 94. Affirmed 1 De G. M. & G. 502; 21 L. J., Ch. 405; 16 Jur. 488—C. A.

Effect of word "Then."]—The word "then" construed as pointing to the event, and not to the time. *Ib.*

A testatrix left her real and personal estate upon trust after the death of her sister to pay all income to her niece during her life, and after her death to stand possessed of the estate for the children, if any, of the niece, but in case of her niece leaving no children, then for "such persons as shall then be my next of kin." The niece died childless:—Held, that the general rule did not apply here, and that the persons to take would be the next of kin at the time of the death of the tenant for life, the niece. *Travis* v. *Taylor*, 12 Jur. (N.S.) 791; 14 W. R. 909.

A testator bequeathed a mixed residue upon trust, as to one moiety for his daughter Mary for life with remainder for her children, and as to the other moiety for his daughter Sarah for life, with remainder for her children, with cross-remainders, and proceeded thus: "And in case both my daughters should die without issue, or leaving such, all should die under twenty-one without leaving issue, then I direct my trustees to pay one moiety unto the person or persons that shall then be considered as my next of kin and personal representative or representatives, agreeable to the order of the Statute of Distributions, and the other moiety unto the person or persons that shall then be considered the next of kin and personal representative or representatives of my late wife Sarah, agreeable to the order of the Statute of Distributions." At the date of his will his daughter Sarah was the only child and sole next of kin of his late wife Sarah. The daughter survived the testator and died without issue:—Held, that the persons entitled to the second moiety were those who at the death of the surviving daughters were the next of kin, according to the statute, of the testator's deceased wife; and having regard to the juxtaposition of the bequests, that the persons entitled to the first moiety were those who at the same period were the next of kin, according to the statute, of the testator. *Wharton* v. *Barker*, 4 K. & J. 483; 4 Jur. (N.S.) 553; 6 W. R. 534.

Review of the authorities as to the time when the persons taking under bequests of this description are to be ascertained. *Ib.*

Where there is simply a gift to tenant for life, and then to the testator's next of kin, the class must be ascertained at the decease of the tenant for life, so that the gift then vests immediately in them, although not in enjoyment, yet in right and interest; subject, however, to open so as to admit any subsequent next of kin (if any) who may come into existence before the period of enjoyment arrives. *Ib.*

D., after specific bequests to different members of his family, gave the residue to three persons, in trust to pay the dividends to his son for life, and after the son's decease to pay to any widow of the son (who was not then married) an annuity for life, and the residue to his son's children, and in case there should not be any child of the son, "then to stand possessed of the same for such person or persons of the blood of me as would by virtue of the statutes of distributions of intestates' effects have become and been entitled thereto in case I had died intestate." At D.'s death, he left the son and four daughters him surviving. The son married, enjoyed the dividends of the residue during life, and died without even having had a child:—Held, that the word "then," even if treated as an adverb of time, referred only to the time when the persons entitled would come into possession of what had been bequeathed to them; that the persons entitled were to be ascertained at the death of the testator; that the son was one of those persons, and that his right as one of the next of kin was not affected by the previous gift of a life interest in the whole of the residue, so that on the death of the son without issue the residue became divisible into five shares, of which his personal representatives took one, and his sisters the other four. *Bullock* v. *Downes*, 9 H. L. Cas. 1. Affirming 25 Beav. 4.

A testator, who had four daughters, divided a fund into four equal amounts, giving one to each daughter and her children; but when one died and left no child the interest was to be paid to the others, and after the death of the last

survivor the fund was to be divided among her children; "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statute for the Distribution of Intestates' Estates." One of the daughters left issue; the others had no issue. On the death of the last daughter:—Held, that under the words of the will the class of "next of kin" described the persons who filled that character at the time of the death of the testator, and not at the death of the last surviving daughter; and that the shares of the daughters who had died without issue were divisible among the persons representing the four daughters. *Mortimore* v. *Mortimore*, 48 L. J., Ch. 470; 4 App. Cas. 448; 27 W. R. 575—H. L. (E.) Affirming 37 L. T. 520.

A testator gave his residuary real and personal estate upon trust out of the income to pay an annuity to his widow for her life, and after her death he directed that the trustees should hold the proceeds of the trust property in trust, to divide them among his children on their attaining twenty-one (with full powers of maintenance and advancement in the meantime), and the issue of such children if dead; and in case there should be no child of the testator living at his death, upon trust for such persons who at "the failure or determination of the preceding trusts" would be entitled under the Statute of Distributions as his next of kin to the trust estate if he had "then died possessed thereof intestate and without leaving any wife" him surviving:—Held, that the sole next of kin at the time of the testator's own death was the person entitled under the ultimate bequest. *Fletcher* v. *Fletcher*, 3 De G. F. & J. 775.

A testator, who died in April, 1879, by his will, dated in March, 1870, gave his residuary estate to his wife for life, and, after her death, to "the nearest relatives then living (to be hereafter named in the codicil)." He died without having executed any codicil:—Held, that the class must be ascertained at the death of the testator—namely, his next of kin by blood at that date—but that only those members of the class could take who survived the wife. *Nash, In re, Prall* v. *Bevan*, 71 L. T. 5—C. A.

—— **No Reference to Intestacy or to Statutes of Distributions.**]—The ultimate trusts of a testator's real and personal estate were declared to be in favour of his "own right heirs and next of kin according to the nature of the said property," without any reference to an intestacy or the statutes of distributions. The several tenants for life of the property, under prior trusts, were moreover restricted from alienating their respective life interests:—Held, that nevertheless the class to take under the ultimate trusts must be ascertained in accordance with the rule established in *Bullock* v. *Downes* (supra), namely, as at the testator's death, and not at the period fixed by the will for distribution. *Ford, In re, Patten* v. *Sparks*, 72 L. T. 5—C. A.

Next of Kin of Person Dead at Date of Will.]—A bequest to the next of kin of a person who is dead at the date of will:—Held, to be analogous to a gift to the testator's own next of kin as regards the period of ascertainment. *Philps* v. *Evans*, 4 De G. & Sm. 188; 15 Jur. 809.

Therefore, where a testatrix bequeathed her personal estate in trust for her sister for life, and after her death for the sister's daughter for her life with limitations to the children of the daughter, and if there were none, to another niece for life, with a limitation to her children, and in the event (which happened) of both nieces dying without leaving any child, the testatrix directed the residue to be paid and assigned to "the personal representatives or next of kin" of her late father:—Held, that the case was in principle similar to *Bird* v. *Luckie* (8 Hare, 301; 14 Jur. 1015), and that the next of kin meant were those living at the testatrix's death, although they all took expressly under the will. *Ib.*

Testatrix bequeathed a sum of money "to such person or persons as would have become entitled to my said husband's personal estate under or by virtue of the Statute of Distributions had he died intestate and without leaving any widow him surviving":—Held, that the persons to take, and the shares and proportions in which they were to take, were to be ascertained at the death of the husband, and that the share of one of the husband's next of kin who predeceased the testatrix lapsed. *Rees, In re, Williams* v. *Davies*, 59 L. J., Ch. 305; 44 Ch. D. 484; 62 L. T. 362; 38 W. R. 523. See also *Gundry* v. *Pinniger*, supra, col. 931.

viii. *Heirs.*

At Death of Testator.]—A testator having large real estates in fee, and having one son, J., who was deaf and dumb, and had been born so, devised his estates to trustees in fee, upon trust to apply a certain sum of the rents and profits yearly in the maintenance of J., and giving other powers to the said trustees, which denoted that they were to manage the estate for him, then proceeded to limit estates tail to the first and other sons of J., then to J.'s daughters as tenants in common, then estates tail to other persons, "and for default of such issue in trust for my own right heirs for ever":—Held, that the circumstances of the case, as to the supposed incapacity of J. to manage his estate, were not sufficient to take this case out of the legal presumption in favour of the words "right heirs" meaning right heirs at the death of the testator, or from the rule of law in favour of the present vesting of estates; and that J. being the right heir of the testator at the time of his death, the equitable fee vested in him, and he had power to devise it. *Boidell* v. *Golightly*, 12 L. J., Ch. 187; 7 Jur. 53.

A testator by will gave and directed his real estates to be sold, and the interest of the proceeds of the sales to be paid to his daughter for life, with remainder as she should appoint by will, and, in default of appointment by her, then to his own heirs ex parte maternâ. By a codicil he directed the trustees (if his said daughter required it) to sink the whole or part of the same property in an annuity for her for life, to be paid to her sole and separate use, without power of anticipation. The testator left his daughter, his only child and heir-at-law, him surviving:—Held, that she was heir at the death of the testator, and that she was absolutely entitled to the real estates. *Rawlinson* v. *Wass*, 9 Hare, 673; 16 Jur. 282.

A. devised his estates to B., his son, for life, remainder to the first and other sons of B. in tail, remainder to his daughters as tenants in common, remainder to C. for life, remainder to

D., the son of C., if living at C.'s death, for life, remainder to the first and other sons of D. in tail, remainder to the male heir for the time being entitled to a certain family estate, remainder to the first and other sons of such male heir, remainder to the testator's own right heirs of his name; and he directed the residue of his personal estates to be laid out in lands to be conveyed to the same uses as his devised estates. B., his son and executor, did not lay out the personal estate as directed by the will, but by his will he directed that certain real and personal estates should be conveyed and assigned to the trustees under the will of A., upon the trusts of that will or such of them as could then be executed, adding, that he deemed such property an equivalent in value for the residuum of his father's personal estate; and he directed that the same should be settled and accepted accordingly. The real and personal estate were not conveyed or assigned according to the will. On the death of B. without issue, C. entered into possession of the real estate devised by both wills, and the personal estate bequeathed by the will of B. At the death of C., D. entered into possession of the same real and personal estate. D. died without issue, and at his death there was no male heir entitled to the said family estate:—Held, that the ultimate limitation in the will of A. to his right heirs of his name vested at his death, and not at the death of D.; that the co-heiresses at law of B. (or the parties claiming under them) were entitled to the real estate so devised by the wills of A. and B.; that, inasmuch as the estates were made equitable by the will of B., the court might properly send a case to a court of law, to try at the same time the right under the will of A. as well as under the will of B.; that the personal estate bequeathed by the will of B., though not actually converted, must be deemed to be converted into and to have descended as real estate. *Wrightson* v. *Macaulay*, 4 Hare, 487. And see *S. C.* at law, 14 M. & W. 214; 15 L. J., Ex. 121.

Testator devised and bequeathed all his real estate and all the residue of his personalty to trustees, upon trust to pay his wife an annuity for her life, and subject to such annuity upon trust as to the whole of his said real and personal estate for his son F., his heirs, executors, administrators, and assigns, as and when he should attain the age of twenty-five; and in case his said son should die after the age of twenty-one, but before twenty-five, then as his said son should by will or deed appoint; but in case his said son should not make any such appointment, or should die before attaining twenty-five without leaving issue, then upon trust for the testator's own heirs, executors, or administrators:—Held, that the last limitation embraced those persons only who were entitled to the testator's property at the time of his death, and that it was no objection to this construction that F. himself happened to be one of those persons. *Wilkinson* v. *Garrett*, 2 Coll. C. C. 643; 15 L. J., Ch. 416; 10 Jur. 560.

A testator directed his executors to set apart a sum of stock to answer an annuity of 600*l.* to be paid to his daughter Anna Maria (who was then his only surviving child) for her life, and on her death to divide the principal among her children, if she should leave any, on their respectively attaining the age of twenty-four; if no child, or none who should attain that age, to pay thereout two small legacies; "and all the rest and residue of the said principal fund he gave and bequeathed to and amongst his heirs-at-law, share and share alike"; and in a subsequent part of his will he appointed his said daughter by name his general residuary legatee:—Held, nevertheless, that, as sole heiress-at-law and next of kin of the testator at the time of his death, she, and not his heir-at-law or next of kin at the time of her death, was entitled, under the ultimate gift, to the fund set apart to answer the annuity. *Ware* v. *Rowland*, 2 Ph. 635; 17 L. J., Ch. 147; 12 Jur. 165. Affirming 16 Sim. 587.

A testator gave certain property to his wife, and in respect to his house at P. wished her to enjoy it for her life, and at her death it was to be sold and equally divided among his children, if living, but if dead before their mother he requested the house at her death to come to his brother J. S., or his next heir-at-law. The testator then gave 2,000*l.* to his two daughters; and as his wife was then pregnant, should she be delivered, he recommended the 2,000*l.* to be equally divided when each attained twenty-one; should each die, the survivor or survivors to receive the whole; but should neither attain twenty-one, the 2,000*l.* to go to his wife for life, and afterwards to his next heir-at-law. After the testator's death his widow had a son, but that son and the two daughters died infants in the widow's lifetime, as did the testator's brother and his son, who left a son, and such son claimed the fund:—Held, first, that "next heir-at-law," although a gift of personalty, did not mean "next of kin"; and that the person to take was the heir-at-law at the time of the testator's death, that is, his own son, although then unborn. *Southgate* v. *Clinch*, 27 L. J., Ch. 651; 4 Jur. (N.S.) 428; 6 W. R. 489. And see *Ford, In re, Patten* v. *Sparkes*, supra, col. 933.

At Death of Tenant for Life.]—A. bequeathed his residue to his widow for life, and after her decease to be divided between his two brothers or their heirs in proportion to the number each might have then living, share and share alike. Both brothers died before the widow:—Held, that "heirs" was to be construed children, and that all the children living at the widow's death took in equal shares. *Roberts* v. *Edwards*, 33 Beav. 259; 9 Jur. (N.S.) 1219; 9 L. T. 360; 12 W. R. 33.

One devises his freehold estate to trustees and their heirs, in trust to convey the premises to A. for life, remainder to his first, &c., son in tail male successively, remainder to his daughters in tail general; and if A. should die without issue, then the premises to be settled on B., C., D., and E., to each one-fourth in fee; and in case any of the four remaining persons die without issue, the trustees to convey such fourth part in fee to the respective heirs of the person so dying. One of the persons dies without issue; her fourth in equity belongs to her brother as her heir, and there was an executory devise to such person as would be the heir at the death of A. without issue. *Blackborn* v. *Edgley*, 1 P. Wms. 606.

Testator devised his real estate to trustees in trust to permit A. to receive the rents during his life; and, upon his decease, to permit the eldest son of A. to receive the rents during his life; and, "upon the decease of such eldest son," in trust to convey the estate "to the right heir male of A. and his heirs." A. survived testator, and died in the year 1857, leaving B. his eldest son

him surviving. The trustees refusing to convey the legal estate, B. presented a petition asking for a vesting order:—Held, that the general rule, that the heir of a person named in a will must be ascertained as soon as possible, applied; that B. was ascertained to be "the right heir male of A." upon A.'s death in 1857; and that he was therefore entitled to a vesting order. *Grayson, In re*, 48 L. J., Ch. 354; 40 L. T. 98; 27 W. R. 534.

—— **After-born Heir.**]—A. devises an Exchequer annuity of 1,000*l.* to trustees in trust for J. for so many years as he should live, and from and after his decease for such person as at the time of his death should be the heir male of his body, and in case there should be no such person then in trust for the heir male of B., who was J.'s father. J. died an infant, and without issue, and about four years afterwards B. had another son born. G., who also died an infant without issue:—Held, that absolute property of annuity vested in G., and that upon his death it belonged to B. as his administrator. *Montagu* (*Duke*) v. *Beaulieu*, 3 Bro. P. C. 277; Ambl. 533.

At Death of Third Party dying before Tenant for Life.]—Goods devised to A. for life, and after the death of A. to the heir of B. B. dies in the life of A.:—Decreed, the goods should go to him that was heir of B. at his death, and not to him who was his heir at the death of A. *Danvers* v. *Clarendon*, 1 Vern. 35.

A testator bequeathed to A. 1,000*l.*, part of a policy of 1,200*l.*, and the remaining 200*l.*, together with all advantages arising from the policy, to his widow. By a codicil he gave the 1,000*l.* to trustees for A. and her children, and in case of A.'s death without children, to his widow "or her heirs." The widow died, having bequeathed the 1,000*l.* to B., and A. died afterwards without children:—Held, that B. was not entitled, but that the next of kin of the widow (ascertained at her death, and not at the period of distribution) took the 1,000*l.* by substitution. *Craven, In re*, 23 Beav. 333.

3. Gifts to Survivors.

a. Meaning of "Survive," "Survivor."

Survive—Outlive.]—The meaning of the word "survive" in a limitation of property is, that the person to survive shall be living at the death of the person whom, or at the time of the event which, he is to survive; it does not mean living at any time whatever after the event referred to; consequently a gift over, if there should be no child or remoter issue of A. who should survive the testator and A., and should live to attain twenty-one, is not void for remoteness. *Gee* v. *Liddell*, 35 Beav. 631, 658; 35 L. J., Ch. 640; L. R. 2 Eq. 341; 12 Jur. (N.S.) 541; 14 W. R. 853.

A husband gave his residuary estate to his wife for life, and afterwards to his cousin for her sole use; and should she have any legal issue by marriage, to be divided amongst them equally at twenty-one. "Should my cousin not survive my wife, and die without the said legal issue by marriage," he gave his residuary estate to M. The cousin survived the wife, but had no children:—Held, that the words "not survive" must be construed as equivalent to "die in the lifetime of," and that the gift over could only take effect on the death of the cousin, without children, in the lifetime of the testator's widow, which event not having happened, it failed. *Reed* v. *Braithwaite*, 40 L. J., Ch. 355; L. R. 11 Eq. 514; 24 L. T. 351; 19 W. R. 697.

, **Survivor—Longest Liver.**]—When a gift is given to a class and the survivors, the obvious and natural meaning of the word "survivor" is not the person surviving any particular event, but the longest liver of the class. *Taaffe* v. *Conmee*, 10 H. L. Cas. 64; 8 Jur. (N.S.) 919; 6 L. T. 666.

Devise to trustees and their heirs, in trust for A. and his wife for their lives, and after the death of the survivor to the testator's four grand-daughters, as tenants in common during their respective lives, with benefit of survivorship, remainder to the trustees "and their heirs," upon trust to preserve contingent remainders, remainder to the issue male of the four grand-daughters successively, remainder to the testator in fee:—Held, that the survivorship had reference to the extent of the estate, and not to the persons who were to take, and that the grand-daughters took for life as tenants in common, with survivorship to the survivors and survivor of them; and that after the death of the last survivor their issue took several inheritances in tail. *Haddelsey* v. *Adams*, 22 Beav. 266; 25 L. J., Ch. 826; 2 Jur. (N.S.) 724.

Semble, that, to effect the expressed intention of the testator, the word "survivor" may receive a different sense in different parts of a will. *Winterton* v. *Crawfurd*, 1 Russ. & M. 407; 8 L. J. (O.S.) Ch. 134.

D. by will gave all his real and personal property to his wife for life, and, after certain gifts not material to the question argued, he gave to his five first cousins, naming them, or the survivors of them, the sum of 1,050*l.* stock, to be equally divided between them, share and share alike; the whole to be paid as soon as possible after his wife's death. D.'s wife survived him. Three of the cousins died in the lifetime of D., and only one survived D.'s widow:—Held, that the word "survivors" must include the case of one legatee alone surviving. *Hearn* v. *Baker*, 2 K. & J. 383.

Who Included.]—A gift of residuary estate among surviving children not extended to deceased children by reason of ambiguities in the will, shewing merely a tendency to treat all the children with equality. *Crosse, In re*, 1 N. R. 419; 32 L. J., Ch. 344; 9 Jur. (N.S.) 429; 8 L. T. 299; 11 W. R. 396.

An intention of equally benefiting all the children is to be assumed in a settlement, but not in a will. *Ib.*

A testator gave 5,000*l.* to each of his four daughters for their separate use, and if they had any children the principal to be divided between them after her death, if they should attain twenty-one; if not, it was to be divided among "her surviving sisters." A. B., one daughter, died, leaving two children, both of whom died infants, but one of them left a child surviving. Another daughter died before her sister A. B.'s children, leaving three children. The testator had a fifth daughter, for whom he had separately provided:—Held, that the separate provision was no reason for excluding her from taking under the words "her surviving sisters." *Carver* v. *Burgess*, 7 De G. M. & G. 96; 3 Eq. R. 421; 24 L. J., Ch. 401; 3 W. R. 308.

Maintenance having been allowed by an order of this court out of the income of the legacy, and the surplus having been invested, it was held that such surplus passed to the legal personal representatives of the infants. *Ib.*

—— **After-born Children.**]—A gift by will to C. for life, "and after her death to all and every the children of C. who shall survive me," includes children of C. born after the death of the testator. *Clark's Estate, In re*, 3 De G. J. & S. 111; 13 W. R. 115.

A testator gave the proceeds of the sale of real and personal estate to trustees for C. for life, and after his decease as to one moiety for the reputed daughter of C. for life for her separate use, and after her decease to divide the same equally among all her children who should survive the testator, with benefit of survivorship, and if there should be no child who should survive the testator, then over. C.'s reputed daughter was twelve years old at the death of the testator. She afterwards married and died, leaving several children; the legatees in remainder were also dead:—Held, that the children born after the testator's death were entitled to their mother's moiety on her decease. *Ib.*

A testator by his will directed that his four children should be made wards of court, and having made provisions for maintenance, and bequeathed pecuniary legacies to his younger children, appointed his eldest son, W., residuary legatee and devisee, and directed as follows: "In case of any of the younger children dying before they attain the age of twenty-one years or leaving legitimate issue, I direct their portion or portions to be divided among the survivors, share and share alike; and failing all my own children, I devise the whole of my property to the children of my sister," &c. The testator left four children, all minors, him surviving; namely, W., his eldest son, and J., R., and H. At the time of the death of the testator, his widow was enceinte of a child, C., who was born after the testator's death. R., one of the children, having died under twenty-one and unmarried:—Held, that W., the eldest son, and C., the posthumous child, were not entitled, upon the construction of the will, to any share of the legacy bequeathed to R. *Wallis* v. *Wallis*, 13 L. R., Ir. 258.

b. When Construed "Others."

"Survivors" construed strictly, not as importing "Others."]—The rule of law, as laid down by modern authorities, is, that the word "survivors" is to be confined to its literal signification of survivors at the period spoken of by the testator in every case where it is possible to do so without violating the clear meaning of the rest of the will. *Keep, In re*, 32 Beav. 122.

Testatrix, before the statute 1 Vict. c. 20, bequeathed the residue of her personal estate to her son A. and her daughter B., to be divided equally between them, in case they were both living at the time of her decease; but if either of them should happen to die before her, or at any time after, without issue, then she bequeathed the share of him or her so dying, and without issue, to the survivor of them. A. and B. survived the testatrix. A. died unmarried in the lifetime of B.:—Held, that the moiety of the residue given to A. devolved to B. *Turner* v. *Frampton*, 2 Coll. C. C. 331; 10 Jur. 24.

Where there were different bequests to different classes of children, followed by a general clause that the shares of all such legatees as died under twenty-three should go over to the survivor and survivors, such clause was construed distributively as to each class, and the word "survivor" was taken in its usual sense. *Cromek* v. *Lumb*, 3 Y. & C. 565.

A testator gave a fund between the children of H., and provided that the legacies should vest at twenty-three, and that if any should die under twenty-three without issue, their legacies should go to the survivors; there were five children of H., of whom one, who attained twenty-three, died between the deaths of two of his brothers, who died under that age:—Held, that he took an original fifth, and a part of the share of the one who died before him, but no part of the share of the one who died after him. *Ib.*

Gift of a residue of real and personal estate to trustees to sell, get in, and pay and divide the money arising therefrom unto and equally among the testator's children so soon as the youngest should attain twenty-one; the daughter's shares to be invested and secured, and the interest paid to such daughter, and the principal to be disposed of amongst her children as she might direct; if no child, the share to be divided amongst the survivors of the testator's children equally; and in case of the death of any of his children leaving lawful issue, the testator gave to such issue the share the parent would have been entitled to have. Semble, that the word "survivors" in the residuary clause must be construed in its natural sense, and not as importing "others," and that this construction of the word in one part of the will must govern the construction of the same word in the other parts. *Leeming* v. *Sherratt*, 2 Hare, 14; 11 L. J., Ch. 423; 6 Jur. 663.

Bequest to one for life, and then to be divided among four legatees equally, as tenants in common; if either died in the life of the tenant for life, his share to be divided among his children; if either died during that period without leaving issue, then his share to go to the survivors or survivor of them. One died leaving nine children, and then another died without issue, and then the tenant for life died:—Held, that the children of the legatee who died first took no interest in the share of the one who died afterwards without issue. *Moate* v. *Moate*, 16 Jur. 1010.

Where testator, after giving legacies to daughters for their respective lives, with remainder to their respective issue, and in default of issue the share of the daughter so dying to go to the survivors, directed that if any daughter should die before vesting of legacy leaving issue, the legacy should descend to such issue:—Held, that the word "survivor" must be strictly taken, but that under the clause of substitution a survivor's share of a deceased daughter's legacy passed to the children of a daughter predeceasing testator, leaving issue surviving him. *Willetts* v. *Willetts*, 7 Hare, 39; 17 L. J., Ch. 457; 12 Jur. 670.

Gift of a certain sum to each of the children of A. and B. who should attain twenty-one, but in case any of them should die under that age his share to go to his surviving brothers and sisters; the word "surviving" in such a limitation cannot be read "other," so as to entitle a child to the share of a brother who died before he was born. *Mann* v. *Thompson*, Kay, 638; 18 Jur. 826; 2 W. R. 582.

The rule as settled by modern authorities is, that the word "survivor" is to be construed strictly, and is not to be read "other," unless the rest of the will should render the more liberal and less literal construction essential, for the purpose of carrying into execution the objects expressed by the will. *Hodge* v. *Foot*, 34 Beav. 349.

The words "survivor or survivors" in a will must be taken in their proper and usual sense, unless the context plainly shews that the testator employed such words in some other signification. *Ustieke, In re*, 35 Beav. 338; 14 W. R. 447.

The words "survivors and survivor" of parents construed strictly, although the children of some of them took an interest in remainder. *Ib.*

A testator devised all his estate to trustees (subject to an annuity to his wife), to pay the rents to his six daughters, share and share alike, as they should respectively attain twenty-one, or be married, and to continue during their respective lives; and in case any of his children should die without having any child or children, then as to the share or shares of her or them so dying in trust to pay the same to the survivors or survivor of them, to be equally divided between them, if more than one; and if but one, to pay the whole to her; provided that such shares should be paid to his daughters for their separate use; and in case any of his daughters should have any child or children living at their respective deaths, it should be lawful for such of his daughters to dispose of their property, thereby devised to them, to and amongst her child or children as she might appoint, and for want of appointment to and among such child or children equally; and in case all his daughters should die without having any child or children, as aforesaid, then for his wife; and he devised all the residue of his property to his six daughters: —Held, that "survivors or survivor" were to be construed in their ordinary sense of "longest liver," and that a surviving daughter took for her life the share of one who died without children, to the exclusion of the children of another deceased daughter. *Browne* v. *Rainsford*, Ir. R. 1 Eq. 384; 16 W. R. 198.

A father devised real estate to trustees upon trust to receive the rent, and to pay one-fourth part of such rent unto each of his four daughters for her separate use during her life, and after the death of either or any of his daughters, he gave and devised one equal undivided fourth part or share of and in the premises unto the child or children of each of his daughters so dying and leaving lawful issue, and the heirs and assigns of such children for ever, and as tenants in common if more than one child; and in case any or either of his daughters should happen to die without leaving any lawful issue surviving her, then the testator gave and devised the share or shares of any such daughter so dying unto the survivors or survivor of his daughters, and their or her heirs and assigns for ever; and in case all his daughters should die without leaving lawful issue, then he gave and devised the premises unto his two sons:—Held, that the words "survivors or survivor" must be taken in their natural and primary sense, and that on the death of a daughter without leaving a child, the children of a daughter who predeceased her took no interest in her share. *Twist* v. *Herbert*, 28 L. T. 489.

Where legacies were given to each of four persons for life, interest at 5 per cent., to be paid till heir attained twenty-one, and "in case of the demise of any of them without legitimate issue, then his or her proportions to be divided equally among the survivors," and one of the legatees died without having been married:—Held, that the survivors were absolutely entitled to the legacy. *Ranelagh* v. *Ranelagh*, 4 Beav. 419.

A. devised freeholds to two or their heirs as tenants in common, and in case either should die without leaving lawful issue surviving her, then he devised her part unto the survivor:—Held, that "survivor" was to be read in its ordinary sense, and not in the sense of "other." *Greenwood* v. *Percy*, 26 Beav. 572.

Testator being possessed of a mill, &c., which had been granted to him and heirs for three lives, devised his property to trustees and their heirs upon trust to let and to pay one-fifth of the profits to his wife for life, and the other four parts he directed to be applied for the maintenance, education, and bringing up of his four children until they severally attain twenty-five, at which time, as they should severally attain that age, he gave, devised and bequeathed unto such of his children as should attain that age, one-fifth of the property, to hold to them and their heirs. The testator then provided that, if any of his children should die under twenty-five and leave no lawful issue, then he gave, &c., the part of him, her, or them so dying unto the survivors or survivor of his said children, to be equally divided amongst them, their heirs, &c., with a like proviso if any of such children should happen to die under twenty-one; and after the death of his wife he gave the other fifth part to his children subject to the same trusts, provisoes and conditions. The testator left all his four children, E., M., J. and Joseph, him surviving. E. attained twenty-five and married S.; M. married P. and died under twenty-five; J. attained twenty-five, married G., and had one child, who died an infant, and afterwards J. died. Joseph died under twenty-five unmarried. On bill filed by E. and her husband against the children of M. and G., the husband of J., in order to ascertain the rights of the parties to the mill:—Held, that the children of the testator did not take vested interests until they severally attained twenty-five. That the words "survivors or survivor" could not be read "others or other"; that the husband of J. was not entitled to the share of J. during his life as tenant by the curtesy. *Stead* v. *Platt*, 18 Beav. 50.

Testator bequeathed the residue of his estate equally between his two sons and his daughter with a direction that in case either of his sons should die under twenty-one, or in case his daughter should die unmarried, the share of the son or daughter so dying should go to his, the testator's, two then surviving children; and that in case both sons should die under twenty-one, or one son die under that age, and the daughter die unmarried, the share of the second child so dying should go to the only surviving child and, further, that in case both the sons should die under twenty-one, and the daughter die unmarried, the residue should go over; the two sons attained twenty-one; daughter survived them and died unmarried:—Held, that there was an intestacy as to the daughter's share *Cooper* v. *Palmer*, 1 Coll. C. C. 665.

On a gift to a class and their issue, and in case of the death of one without leaving issue, to the survivors or survivor and their issue:—

Held, that the word "survivors" could not be read "others" merely on the ground of the improbability of the testator intending the interests of the issue to depend on the period of their parents' death. *Corbett, In re*, Johns. 591 ; 29 L. J., Ch. 458 ; 6 Jur. (N.S.) 339 ; 8 W. R. 257.

A sum bequeathed to trustees, in trust for A., and to pay the income to her, with limitations over to her issue, and to the survivors of A., B. and C., and their issue :—Held, upon failure of the subsequent limitations, that A. was absolutely entitled to the bequest. *Ib.*

Under a devise of real and personal estate to the widow for life, and afterwards to the testator's four children, "or" their children, share and share alike ; and if any of such children should die without leaving a child, his share was to be divided between "the survivor or survivors" of them "or" their children :—Held, that "or" could not be read as "and," nor "survivors" as "others," and that the effect of the gift was to substitute children for their parents who had died in the life of the tenant for life. One child died in the life of the tenant for life, without issue ; and at the death of the latter, the three other children and several grandchildren were living ; also, that the three children took exclusively as tenants in common. *Blundell* v. *Chapman*, 33 Beav. 648. And see *Parsons* v. *Cole*, 4 Drew. 296.

The word "survivor" cannot be construed as "others," where the gift over is partly to persons whose interests are not given over. *De Garagnol* v. *Liardet*, 32 Beav. 608 ; 2 N. R. 296.

A testator gave legacies to each of his four daughters for life, with remainder to their children ; and he provided, that if either of the daughters should die without children, her share should go over to the survivors of his sons and daughters :—Held, that "survivors" could not be read "others," in consequence of the gift over being to a different class from those whose shares were to go over. *Ib.*

A testator gave stock to the four children of his daughter (a son and three daughters), the shares of the grand-daughters to be held in trust for their separate use for their lives ; and he directed, that in case of any of his grand-daughters dying without issue, their shares should accrue and survive to the "survivors" of all the children of his daughter, including the son, the accruing shares of the grand-daughters to be subject to the same conditions as their original shares :—Held, that upon the death of the last surviving grand-daughter without issue, her share, both original and accrued, was undisposed of, and fell into the residue. *Nevill* v. *Boddam*, 28 Beav. 554 ; 29 L. J., Ch. 738 ; 6 Jur. (N.S.) 573 ; 8 W. R. 490.

H. in 1823 bequeathed the interest of a fund in trust for her niece S. for life, and after the death of S. to her three daughters H., M. and L., in equal shares and proportions. She declared, that in case any of them should die without leaving any lawful issue, the share or shares of her or them so dying should go to the survivors of them in equal shares ; and if but one, then to such one only ; but if any or either of them should leave any child or children, then she gave the share or shares of her or them so dying unto her or their child or children respectively in equal shares ; provided that if H., M. and L. should all die without lawful issue, in the lifetime of their mother, S., then the fund should go to S. absolutely. H. and L. died in the lifetime of S., leaving children, and M. survived S., and was unmarried :—Held, that the share of M., in the event of her dying without issue, was at her absolute disposal, and did not pass to the children of her sisters H. and L. *Hays' Trusts, In re*, 9 Jur. (N.S.) 1068 ; 9 L. T. 197.

A testatrix bequeathed two sums of money upon trust respectively for her nieces M. and E. The legacy given to E. was bequeathed upon trust for E. for life for her separate use, and after her decease for her children, if any, living at her death, as she should appoint ; and in default of appointment equally amongst them ; or if but one child, the whole to be in trust for such only child. The legacy to M. was bequeathed upon similar trusts ; and the testatrix directed that in case her said nieces, or either of them, should die without leaving issue, the legacy of the niece so dying should be equally divided between the children of whichever of the testatrix's nieces should happen to survive, and the children of C. (a nephew of the testatrix), in equal shares, on attaining twenty-one years or day of marriage ; and if only one such child then living, the whole should go to such only child. There was no gift over of the whole fund, in the event of their being no children to take it. M. died in 1877, E. died in 1881 without issue, and at the time of her death there were living children of M. and children of C. :—Held, that the children of C. were entitled to the whole of the legacy so bequeathed to E., to the exclusion of M.'s children, and that the words "whichever should happen to survive" should receive their literal meaning, and could not be construed as equivalent to "the other." *Dunlevy's Trusts, In re*, 9 L. R., Ir. 349—C. A.

Testator gave, by will made in 1834, the residue of his estate to trustees to pay the income, after the death of his wife, unto such of his four named children as should be living at the decease of his wife, during their lives ; and after the decease of any one or more of such children who should leave children, he gave the share, whether original or accruing, of the one so dying in trust for his or her children ; and in the event of any one of his children dying without leaving children who should attain twenty-one years, then he gave the share, whether original or accruing, of such of them so dying in trust for the survivor or survivors of his said children during their lives, and after their deaths for their respective children, and their heirs, executors and administrators. There was no gift over. The four children of the testator survived the widow. One child died leaving two children who attained the age of twenty-one years, and the other three children died without issue :—Held, that the words "survivor or survivors" must be so read, and not as "other or others." *Horner's Estate, In re, Pomfret* v. *Graham*, 51 L. J., Ch. 43 ; 19 Ch. D. 186 ; 45 L. T. 670.

A testator, by will in 1826, gave real and personal estate to trustees in fee, in trust for his four nieces, M., B., S. and J., for their respective lives, as tenants in common, and on the death of any of them, then in trust as to the share of her so dying, to stand possessed of and interested in such share for the child or children of such of them as should have died, and if any of them should die without issue, then he directed the share or shares of her or them so dying to go to the survivor or survivors of them and their heirs, and be conveyed to them and their heirs accordingly. B. and J. died leaving children. M. died

a spinster, S. was a spinster and over sixty :—Held, first, that the equitable fee was given to the children of the nieces. *Maden* v. *Taylor*, 45 L. J., Ch. 569.

Held, secondly, that seeing that S. was past the age of child-bearing, she was entitled to her own one-fourth share in fee, under the gift over to the survivor of the nieces. *Ib.*

By codicil of same date, the testator devised freehold estate on trust for M., B., S. and J., for their respective lives, as tenants in common, and on death of all or any of them, then as to the part of her or them so dying, in trust for all and every the child and children of them respectively, and the heirs of their bodies ; and if any of them should die without leaving issue living at her death, then in trust for the survivors and survivor of them and the heirs of her and their bodies ; and if all except one should die without leaving lawful issue, then in trust for such only or surviving niece and the heirs of her body, and in case of a total failure of issue of them, then in trust for his heirs. B. died, having had four children, three of whom died infants, and unmarried. J. died, having had three children, one of whom died an infant and unmarried. Then M. died a spinster. S. was a spinster, and over sixty :—Held, first, that cross-remainders in tail were to be implied between the children of the tenants for life. *Ib.*

Held, secondly, that "survivor" was not to be read "other," but that S. took M.'s share. *Ib.*

Held, thirdly, that S. being past the age of child-bearing, was entitled to her own one-fourth share in tail under the gift over to the survivors and survivor of them. *Ib.*

A testator bequeathed the dividends of a sum of 10,000*l.* consols unto and equally between his four daughters, and from and immediately after their several and respective deceases he bequeathed the 10,000*l.* to their children respectively, viz., one-fourth part thereof unto and equally between the children of each daughter. And, in case any one or more of the daughters should die without leaving issue her or them surviving, he bequeathed the share or shares of the stock as bequeathed to and intended for the issue (had there been such) "unto the survivors or survivor" of the four daughters, equally if more than one, and if but one, to that one, absolutely. Three of the daughters married, and died leaving children. The fourth was the longest liver, and was a spinster of the age of fifty-four :—Held, that on her death without leaving issue she would be entitled to her own one-fourth share of the 10,000*l.* absolutely ; that it might be assumed that she would never have any children ; and that the share might be transferred to her at once. *Maden* v. *Taylor* (supra) approved and followed. *Davidson* v. *Kimpton*, 18 Ch. D. 213 ; 45 L. T. 132 ; 29 W. R. 912.

A testator gave legacies to four named persons for their respective lives, and continued, "the interest on all these legacies is to be paid regularly to the respective parties as it becomes due ; and in the event of either of the parties dying, and without child or children, then the legacy of the deceased is to be at once divided amongst the survivors." The will contained a residuary gift. The last survivor of the four named persons having died without children :—Held, that his legacy fell into the residue. *Nevill* v. *Boddam* (supra) and *Corbett's Trusts, In re* (supra), followed. *Maden* v. *Taylor* (supra) and *Davidson* v. *Kimpton* (supra) considered. *Mortimer, In re*, *Griffiths* v. *Mortimer*, 54 L. J., Ch. 414 ; 52 L. T. 383 ; 33 W. R. 441.

A testator devised to each of his children an estate for the life of that child, with remainder to the children of that child, and in case any or either of the testator's children should die without leaving any child or children, him, her, or them surviving, then the testator devised the estates to which their child or children respectively would have been entitled under his will, if living, to his, the testator's, surviving children for their respective natural lives, and after their deceases respectively he gave their respective shares to their respective children, their heirs, executors, administrators and assigns. There was no gift over on the death of all the testator's children without leaving children. C., one of the testator's children, died without leaving issue. Some of the other children were then living ; others had died leaving children of theirs then living :—Held, that the word "surviving" was to be read in its proper sense, and that the children of those children of the testator who had predeceased C. took no interest in the estate of which C. was tenant for life. *Benn, In re, Benn* v. *Benn*, 29 Ch. D. 839 ; 53 L. T. 240 ; 34 W. R. 6—C. A.

The fact that the original shares are all settled by the will, and that the shares which the "survivors" take in the share of a child who dies without issue are settled in the same way as their original shares, is not by it itself sufficient to shew that "survivors" is used otherwise than in its proper sense. *Ib.*

A testator directed his personal estate to be converted and invested in consols sufficient to provide life annuities to a specified amount for his wife and his four children, George, Jane, William and Robert ; upon the death of his wife her annuity was to be distributed among his said four children for their lives ; upon "the decease of either of his said children" the testator bequeathed one-fourth of the said fund of consols to the children or child of such deceased child absolutely, and in the event of either of his said children dying without issue he gave "the fourth part or share to which the children of such dying child would have been entitled unto the survivors of my said children in equal shares." The will contained a residuary gift. George, the last survivor, having died without issue :—Held, following *Maden* v. *Taylor* (supra) and *Davidson* v. *Kimpton* (supra), in preference to *Mortimer, In re* (supra), and *Askew* v. *Askew* (57 L. J., Ch. 629), that George, as the longest liver, became absolutely entitled on his death without issue to the corpus of his one-fourth of consols, and consequently, that it belonged to his representatives. *Roper's Estate, In re, Morrell* v. *Gissing*, 58 L. J., Ch. 439 ; 41 Ch. D. 409 ; 61 L. T. 42 ; 37 W. R. 731.

Pecuniary legacies were severally given to four persons during their natural lives, and in case of the decease of any of them without legitimate issue his or her proportion was to be divided amongst the survivors. The last surviving legatee died without leaving issue :—Held, that this legacy fell into residue. *King* v. *Frost* (15 App. Cas. 548) followed ; *Maden* v. *Taylor* (supra), *Davidson* v. *Kimpton* (supra), and *Roper's Estate, In re* (supra), not followed. *Ranelagh* v. *Ranelagh*, 3 R. 315 ; 41 W. R. 549.

And see *Davidson* v. *Dallas*, 14 Ves. 576 ; 9 R. R. 350 ; *Milsom* v. *Awdry*, 5 Ves. 465 ; 5 R. R. 102 ; *Slade* v. *Parr*, infra, col. 955 ; *Beck-*

with v. *Beckwith*, infra, col. 955; *Crowder* v. *Stone*, post, col. 958.

Construed Others.]—Bequest to three children in thirds respectively, with a direction that they should not be put in possession till their respective attainment of particular ages, and in case of the death of either of the above-named children before the ages mentioned, that third to be equally divided between the two surviving children; and in the event of the death of two before the respective ages above mentioned, then the whole to devolve to the surviving child; but should all the testator's children die before they should attain their said respective ages, then the whole of his estate was given over. One died, having attained the age mentioned; afterwards another died under that age; the share of the latter a vested interest in the child who died first, and the survivor attaining the age specified. *Wilmot* v. *Wilmot*, 8 Ves. 10; 6 R. R. 196.

J. having three unmarried daughters, A., L. and C., bequeathed to A. and L. 2,000*l*. each, and to C. 2,500*l*., to be invested for their benefit, and there to remain until their day of marriage; and in case one or more of his daughters should die before her marriage, then the portion or portions of her so dying should go to and be divided between his surviving daughters, share and share alike; and if only one should survive, then to that daughter; and if all his said daughters should die before their marriage, then their portions should be divided between all his sons. The testator had also three married daughters. C. married, and died in the life of A., who died unmarried, leaving L. surviving:—Held, that C.'s personal representative was entitled to a moiety of A.'s share. *Jackson*, *In re*, 14 Ir. Ch. R. 472.

Testator bequeathed a sum of stock to A. and B. for their lives, and on their deaths to their children then living who should attain twenty-one, with a gift over to the survivor of A. and B., in case the children of either of them should die under twenty-one. A. died, leaving a child who had attained twenty-one. B. afterwards died without having had a child:—Held, that A.'s personal representatives were entitled to B.'s moiety of the stock. *Aiton* v. *Brooks*, 7 Sim. 204.

Testator by will directed his executors to place out upon government securities such a sum of money out of the interest thereof as should be sufficient to produce an annuity of 50*l*., which he gave unto his daughter J. for her life; and after her decease, in case she should leave issue, he gave the principal unto and equally amongst his surviving children and their legal representatives, share and share alike. The testator had four children living at the date of his will and of his death, of whom the daughter J. was the survivor; she died without leaving issue:—Held, that the words "surviving children" meant children surviving the daughter J., and that the words "legal personal representatives" must be construed in their ordinary sense, and not as importing kindred or representatives in blood; consequently, that the fund, of which the testator's daughter was the tenant for life, fell into the testator's residuary estate. *Taylor* v. *Beverley*, 1 Coll. C. C. 108; 13 L. J., Ch. 240; 8 Jur. 265.

A gift over to "surviving daughters," on the decease of daughters without issue, is a gift over to "other" daughters. *Crowther* v. *Evans*, 11 Jur. (N.S.) 902; 13 L. T. 271.

A testator bequeathed all his property to his four daughters, share and share alike, the share of each to be given to each on their days of marriage, with consent; and if his daughters should happen to die unmarried, then the share of the child to go, share and share alike, among his surviving daughters, or daughter so surviving:—Held, that surviving daughters meant other daughters, and therefore that the children of a deceased daughter were entitled to a share of the legacy of a daughter who died unmarried. *Connellan*, *In re*, 16 Ir. Ch. R. 524.

When a testator manifests a clear intention to give a benefit to certain objects in an event which happens, the legatees shall not be deprived of it, although a circumstance inadvertently coupled with it in the language used does not literally take place. Therefore, under a bequest of equal sums for the benefit of each of two grand-daughters, A. and B., for life, and their children respectively; but if either died without issue, her share to go to the children of the surviving grand-daughter; A. marries and dies leaving children in the lifetime of B. Then B. dies unmarried:—Held that A.'s children took each of their shares, though their mother did not actually survive B. *Harman* v. *Dickenson*, 1 Bro. C. C. 91.

A. bequeathed to four nieces, C., D., E. and F.; and on death of any, the whole bequest should go to survivor or survivors; but if any died leaving a child, then her share should go to such child; if all died without issue, then to B. C. married, and had issue G. and H., who died in life of their mother, H. having issue L. and M.; C., D., E. and F. died in succession, F. being last surviving:—Held, that L. and M. were entitled to the whole bequest. *Pitt* v. *Harbin*, Lofft, 19.

A testator bequeathed 10,000*l*. equally between his four daughters for life, with remainder to their issue; and directed that the share of every of them dying without issue should devolve to the survivors and survivor of them. There was a gift over, if they should all die without issue:—Held, that "survivors and survivor" were to be read "others and other," and that the issue of one daughter, who died, was entitled to participate in the share of another daughter, who subsequently died without issue. *Lowe* v. *Land*, 6 L. J., Ch. 234; 1 Jur. 377.

Testator by a will made since the statute 1 Vict. c. 26, after directing payment of his debts and bequeathing several specific articles of plate to his sister L., desired that all his other plate, jewellery, books, pictures and other property, except freehold and leasehold property, should be sold, and the produce, after deducting funeral and other expenses, be divided in equal parts amongst L., M., N., O. and P. He then directed that his freehold house and his leaseholds, some of which were held for years, and others for years determinable on lives, should be kept in hand and let to the best advantage, and the produce be divided every half-year among the above-named L., M., N., O. and P., or to their lawful heirs; and in case of there being no heirs, the share or shares to be divided in equal parts among the surviving legatees. The testator at his death left L. his heiress-at-law and sole next of kin; M., N., O. and P. were not related to L., but were related to and capable of inheriting from each other; M. died unmarried in the testator's lifetime:—Held, first, that M.'s share of the residuary personal estate lapsed for the benefit of the next of

kin; secondly, that M.'s share of the freehold property did not lapse, but went to the surviving devisees, the words "heir and lawful heirs" referring to heirs of the body, and "or" being construed "and"; thirdly, that M.'s share of the leaseholds for years lapsed and fell into the residue, the words "there being no heir" referring to an indefinite failure of issue, and the word "surviving" meaning "other." *Harris* v. *Davis*, 1 Coll. C. C. 416; 9 Jur. 269.

Where a testator has directed his trustees to convey one-third of his real and leasehold property to each of his three daughters for life, with a power to each daughter to appoint her third share among her children, and in default of appointment to go to her children equally as tenants in common in fee-simple, but in default of issue of any one or more of his daughters, then the share or shares of such one or more dying without issue to be limited, so as to go to her surviving sisters and to their issue in like manner as their original third parts were directed to be conveyed to each of them, with a gift over in case all three daughters should die without issue in the lifetime of their mother, and the testator directed, in such conveyance to be made to his daughters, that all necessary trustees and trusts should be inserted therein for the purpose of protecting the entail and succession designed by him to be effected upon his three daughters and the issue of them:—Held, that this was a case for reading "surviving" as "others." *Hurry* v. *Morgan*, 36 L. J., Ch. 105; L. R. 3 Eq. 152; 15 W. R. 87.

The word "surviving" interpreted to mean "other" upon a consideration of the whole scope of the will. *Holland* v. *Allsop*, 29 Beav. 498; 7 Jur. (N.S.) 856; 9 W. R. 683.

In a gift over, upon the death of any of a class without leaving issue, to the survivors, the word "survivors" was construed "others," in consequence of the ultimate gift over being only to take effect on the death of all the class without issue. *Ib.*

The word "survivors" of nieces construed "others" in consequence of the gift over and of the subsequent part of the will referring to the issue of a deceased niece participating in an accrued share. *Keep, In re*, 32 Beav. 122.

T. devised real estate to her three nephews, A., B., and C., for their lives, share and share alike, with remainder, as to the share of each nephew, to his first and other sons in tail male, with remainder to his daughters as tenants in common in tail, and in case of the death of any or either of the nephews without lawful issue, male or female, then to such of her nephews as should survive, and to their and his issue in the manner thereinbefore mentioned, and in case of the death of all the nephews and their issue, then to the right heirs of the testatrix. A. died leaving a son; then B. died without issue; then C. died leaving a son:—Held, that the words of the will "such as shall survive" of the nephews must be construed as meaning "the others or other" of them, and consequently that A.'s son was entitled to one moiety of B.'s share. *Tharp, In re*, 1 De G. J. & S. 453; 2 N. R. 253; 33 L. J., Ch. 59; 8 L. T. 558; 11 W. R. 763.

A testator gave one-third of his real and personal estate to each of his three daughters for life, and after their respective deaths to their respective children; but in case any or either of the daughters should die without leaving any child, or if all should die under twenty-one, then the share of the daughter so dying should be for the separate use of surviving daughter or daughters and their children, per stirpes:—Held, that "surviving" ought to be construed "other." Consequently one having died leaving children in 1803, and a second in 1837 leaving a child, and the third in 1864 leaving no child:—Held, that the share of the last was divisible per stirpes amongst the children of the two former. *Hodge* v. *Foot*, 34 Beav. 349.

A father gave a sum of money in sixths, and directed his trustees to hold one-sixth in trust for each of his six daughters for life, with remainder to her children, to be transferred and vested at twenty-one or marriage; and he provided that in case any of his daughters should die without leaving a child, then her share should go in trust for his surviving daughters in equal shares, if more than one, during their respective lives, and after their decease for their respective children per stirpes, and not per capita, in the same manner as the original shares:—Held, that on the death of a daughter without leaving a child who attained twenty-one or married the children of other daughters who had predeceased her took shares in her one-sixth. *Waite* v. *Littlewood*, 42 L. J., Ch. 216; L. R. 8 Ch. 70; 28 L. T. 123; 21 W. R. 131.

A testatrix devised and bequeathed all her real and personal estate upon trust to sell and convert, and directed her trustees to stand possessed of her residuary personalty upon trust to invest, and as to one-fourth to pay the income to her daughter A. for life, and after A.'s death to assign, transfer, and make over the same to and amongst A.'s child and children, to be assigned, transferred, and paid at twenty-three. Any child attaining twenty-three in the lifetime of A. was to acquire a vested interest. In case of the death of A. without leaving any such child or children as aforesaid, she directed the trustees to pay, apply, and dispose of the income of the fourth to and amongst her (testatrix's) surviving daughters, such benefit of survivorship to extend to the surviving as well as to the original shares; and directed that the principal should go and belong to, and be divisible amongst, the several child or children of such daughter or daughters. As to the remaining three-fourths, she directed the trustees to stand possessed of the income on similar trusts for the benefit of her other three daughters, B., C., and D., for their lives, and of the principal for their respective children, in such manner and form as before directed. In case of the death of all her four daughters without leaving such children as aforesaid, or leaving such, and they should all die under twenty-three, the trustees were to hold the fund in trust for the testatrix's next of kin. Upon the death of a daughter without leaving children:—Held, that the children of a deceased daughter were entitled to participate in the share of the daughter so dying; in other words, that "surviving" must be read as meaning "other." *Badger* v. *Gregory*, L. R. 8 Eq. 78; 21 L. T. 107; 17 W. R. 1090.

A testator devised freeholds in moieties to the use of A. and B. respectively for life, with remainder to the use of their respective children equally as tenants in common in tail, and in default of issue of either A. or B., then to the same uses in favour of the "survivor of them" and her issue as thereinbefore declared concerning their original shares, remainders over. A. died leaving a child, who thereupon became

tenant in tail of A.'s moiety. Subsequently B. died without issue:—Held, that A.'s child then became tenant in tail of B.'s moiety, "survivor" being read "other." *Row, In re*, 43 L. J., Ch. 347; L. R. 17 Eq. 300; 29 L. T. 824.

A testator devised real estate upon trust for his three grand-daughters for their lives respectively, share and share alike; and after the death of each of them, he gave one-third of his said estate to the children of each of them who should attain twenty-one, or die under twenty-one leaving issue. And in case any one of such three grand-daughters should die without leaving such issue, the testator gave his said estate during the lives of his two surviving grand-daughters upon trust for them in equal shares; and after the death of each of two such surviving grand-daughters, he gave one moiety of his said estate to their children who should attain twenty-one, or die under twenty-one leaving issue. And in case either of such two surviving grand-daughters should die without leaving such issue, he gave his said estate during the life of the last survivor of such grand-daughters upon trust for her, and after her death to her children who should attain twenty-one, or die under twenty-one leaving issue:—Held, that, according to the true construction of the will, "survivors" and "surviving" must be construed "others." *Beck, In re*, 37 L. J., Ch. 233; 16 W. R. 189. S. P., *O'Brien* v. *O'Brien*, [1896] 2 Ir. R. 459—C. A.

A father directed the income of the residue of his estate to be divided between all his sons as tenants in common, with benefit of survivorship between them, in case any or either of them should die without issue, and in case any child or children who should be entitled under the trusts of his will to any principal money or income should die leaving issue, the principal money or share, from which the interest of such child or children should be derived, should go to and be divided amongst such issue as tenants in common. The testator left five sons, two of whom died leaving issue, and three died without issue, the last survivor of the five dying without issue:—Held, that on the death of the last surviving son the principal set free accrued to the children of the sons who had died leaving issue. *Cross* v. *Maltby*, L. R. 20 Eq. 378; 33 L. T. 300; 23 W. R. 863.

After a bequest to testator's children for life, with remainder to their respective children, a clause of accruer of the shares of any of the testator's children dying without leaving issue in favour of his surviving children was held to carry an accruing share to the then living children of the testator and children of those then dead, although the will contained no gift over on the death and failure of issue of all the testator's children. *Walker's Estate, In re, Church* v. *Tyacke*, 48 L. J., Ch. 598; 12 Ch. D. 205.

A father gave the residue of his property to trustees, on trust to pay and divide the income equally among his three children during their respective lives, and after the death of each child the share of the fund to the income of which the deceased child was entitled for life was to be in trust for his or her issue; and in case, and so often as, any of the three children should die without leaving issue, the share to which such child should become entitled during his or her life, as well originally as by survivorship or accruer, was to be in trust for the survivors or survivor of the children during their, his, or her respective life or lives, and in equal shares if more than one; and, after the decease of each such survivor, the surviving or accruing share, to which such survivor for the time being should become entitled for his or her life, was to be in trust for his or her issue; and in case all the children should die without leaving issue, the fund was to be in trust for the representatives of the survivor. After the death of the testator one of his children died without issue, then another child died leaving issue, and, lastly, the third child died without issue:—Held, that the issue of the second child, though she was not the survivor, became entitled on the death of the third to the whole of the fund. *Wake* v. *Varah*, 45 L. J., Ch. 533; 2 Ch. D. 348; 34 L. T. 437; 24 W. R. 621—C. A.

A testator directed his trustees to pay one-seventh part of his residuary estate, after conversion, to each of his two sons upon their attaining twenty-one, and to pay the income of one other seventh part to his daughter E. for her life, and after her death to divide the capital thereof among such children of E. as should attain twenty-one, and as to the other four-sevenths upon like trusts for the benefit of his daughters A., B., C., and D., and their children; and the testator directed that in case any of his daughters should die without leaving issue surviving them, then the shares, as well original as accruing, of such daughters should be divided among his surviving sons and daughters, the shares of any daughters to be held upon the trusts therein declared concerning the other shares as accretions thereto:—Held, that "surviving" was to be read as equivalent to "other." *Jackson* v. *Sparks*, 38 L. J., Ch. 75.

A father gave his residuary estate to his six children in equal shares, and directed the shares of his sons who conducted themselves with propriety to be paid to them at twenty-five, and the shares of his sons who did not so conduct themselves to remain vested in his trustees upon trust for such sons for life, and afterwards for their children. The testator also directed the shares of his daughters to remain vested in his trustees upon trust for his daughters for life, and afterwards for their issue; and in case of the death of his daughters or his sons without having received their shares and without lawful issue, then he directed such shares to be divided equally between his "surviving children" in the same manner as the original shares. All the six children of the testator survived him. His three sons attained twenty-five, and their shares were all paid to them. His three daughters all married; one died in 1876 without leaving issue. At that time one son only was living. Two daughters died leaving issue; one son died leaving issue, and one without leaving issue. The question before the court was the distribution of the share of the daughter who died without leaving issue:—Held, that "surviving children" must be construed "other children," and that the share must be divided into fifths amongst the representatives of all the brothers and sisters. *Lucena* v. *Lucena*, 47 L. J., Ch. 203; 7 Ch. D. 255; 37 L. T. 420; 26 W. R. 254—C. A. Varying 36 L. T. 87.

Testator bequeathed a leasehold estate to his son Charles, and directed that, if his son should die without issue, the leasehold estate should be considered as part of his residuary estate, and be divided amongst the children of his three daughters, Isabella, Matilda, and Mary, as hereinafter mentioned; and he gave the residue of his estate to trustees, in trust for his son and

three daughters, or such of them as should be living at the death of his wife, equally during their lives; and he directed that after their deaths the whole of the residue should be divided amongst all the children of his said son and daughters in equal parts, shares, and proportions; and in case any of his said son and daughters should die without leaving issue, that the share of him, her, or them so dying should be divided amongst the survivor or survivors of his said children and their issue in the like equal parts, shares, and proportions. Isabella died in the lifetime of the testator's widow, leaving children; Mary died after the widow, leaving children. Then Charles died without issue. Matilda was still living, and had children:—Held, that Isabella's children were entitled to one-fourth of the residue, notwithstanding their mother died before the widow; that Mary's children were entitled to another fourth; and that Matilda was entitled to another fourth for her life, with remainder to her children; and that, as Charles had died without issue, the remaining fourth was divisible into three parts, and one of those parts belonged to Isabella's children, another to Mary's children, and the remaining part to Matilda for life, with remainder to her children. *Hawkins* v. *Hamerton*, 16 Sim. 410; 13 Jur. 2.

Where there is in a will a gift to two designated devisees, as tenants in common in tail, and if either should die without issue, then to the "surviving" devisee, that word must be taken to mean "other." *Smith* v. *Osborne*, 6 H. L. Cas. 375; 3 Jur. (N.S.) 1181; 6 W. R. 21.

O., in anticipation of marriage, executed a settlement, which recited, that, "whereas O. is entitled to a contingent remainder on failure of the issue of G. C., party hereto in the town and lands of S., and in certain tenements in W., subject only to such powers over the same as shall appear to be vested in G. C., under and by virtue of the last will of T. C."; and it went on to covenant, that when and as soon as "the said remainder" should become vested in O. in possession he would then convey the property to the uses of the settlement. By the will of T. C., both these properties were devised to G. C. for life, remainder to his first and other sons in tail, remainder to the testator's daughters Elizabeth and Frances, as tenants in common in tail, and if either daughter should die without issue, then "to the use of my surviving daughter and the heirs of her body lawfully issuing, and in default of such issue to my own right heirs." G. C. died unmarried, and the lands of S. and W. descended to the two daughters (one of whom was O.'s mother), as tenants in common. The two sisters executed disentailing deeds as to S., but not as to W., and soon afterwards O.'s mother died intestate, and her property descended to O., her son, the covenantor. The other sister by will gave all her property to O., her nephew, subject to annuities and legacies:—Held, that as to the lands at S., the entail of which had been barred, and which had not descended to O., under the will of T. C., this covenant did not take effect, but it did take effect as to the lands at W., for the word "surviving" in the will of T. C. must be construed to mean "other," and the words "such issue" include the issue of both daughters, and therefore O. succeeded to both moieties of that estate as tenant in tail under the will. *Ib.*

A testator devised to J. certain hereditaments, to E. certain other hereditaments, to M. certain other hereditaments, to A. certain other hereditaments; J., E., M., and A. were children of M. and the estates given to them were in tail general. By a subsequent clause in his will he devised as follows:—"In case if either or all the within-named children of M. shall happen to die leaving no lawful issue, or if they leave lawful issue if such issue die leaving no lawful issue, in any of such cases the property of him, her, or them so dying shall be equally transferred to the use and uses of the surviving child or children of M. that are herein named" in tail general. E. died leaving an only son. A. died leaving a daughter, and after the deaths of E. and A., J. died without having been married, and M. survived E., A., and J.:—Held, that the word "surviving" must be read as the word "other," and E.'s only son was entitled to recover from M. one undivided third part of the hereditaments devised to J. *Williams* v. *James*, 20 W. R. 1010.

A testatrix devised her real estate, after the death of her daughter, as to one-fourth part thereof, to the use of Thomas (a son of the daughter) for his life, with remainder to the use of his children as tenants in common in tail, with cross-remainders in tail. The testatrix devised the other three-fourths of her real estate upon similar limitations in favour of the three other children of the daughters and their issue. By a codicil she directed that, in case any of her grandchildren named in her will should die without leaving any child or children, then the share or shares of them, him, or her so dying in the hereditaments devised by her will should go to and devolve on the "survivor or survivors" of her grandchildren and the heirs of his, her, or their respective bodies. One grandchild died a spinster. Then two of the grandchildren died leaving children. Thomas was the last survivor, and he died without having had a child:—Held, that Thomas could not take his own share as "survivor," that cross-remainders were to be implied between the four grandchildren, or else the words "survivor or survivors" were to be construed "other or others," and that consequently Thomas's shares devolved, on his death without having had a child, upon the two grandchildren (who left children) equally as tenants in common in tail. *Askew* v. *Askew*, 57 L. J., Ch. 629; 58 L. T. 472; 36 W. R. 620.

A testatrix bequeathed 8,000*l.* to her nephew upon trust to invest and pay the income equally amongst her four nieces during their respective lives, and after the decease of any of them to pay the principal of her share among her children as she should appoint, and in default of appointment equally, the shares of sons to be vested interests at twenty-one, and the shares of daughters at twenty-one or marriage, with benefit of survivorship among them as to the original and accruing shares of any who should die before attaining a vested interest, and in case any of her said nieces should die without having any children who should have attained a vested interest, she gave the share of such niece and the interest thereof to her nephew upon trust "to pay and dispose thereof to or among her" (the niece's) "surviving sisters and their respective children in the same manner as I have hereinbefore directed respecting their original shares"; and she gave her residuary personal estate to her nephew. The four nieces survived the testatrix. One of them died leaving children, and two others subsequently died without issue:—Held, that the children of the niece who first died

were entitled to participate in the shares of those who died subsequently. Previous decisions considered and their effect stated. *Bowman, In re, Whytehead* v. *Boulton*, 41 Ch. D. 525; 60 L. T. 888; 37 W. R. 583. See also *Barlow* v. *Salter*, 17 Ves. 482; *Arnold's Estate, In re*, infra, *Eyre* v. *Marsden*, post, col. 960.

Where "Others" Associated with "Survivors."]—Legacies to the children (by name) of the testator's late niece M., to be assigned to them when and as soon as they should respectively attain twenty-five, provided that if any should die under twenty-five leaving issue, the issue to take the parent's legacy; but if any should die under twenty-five without having issue then living, the legacy of the child so dying to go and be paid to the "survivors and survivor and others and other" of the same children, in equal shares. At the death of the testator, all the children of M. are under twenty-five. All afterwards attain twenty-five except A., who dies under that age, without issue, having survived two of the children: B. and C. The share of A. devolves to the representatives of B. and C., together with the children who survive A. *Slade* v. *Parr*, 1 Y. & C. C. C. 565; 7 Jur. 102.

Semble, that, to effect the expressed intention of the testator, the word "survivor" may receive a different sense in different parts of a will. *Winterton* v. *Crawfurd*, 1 Russ. & M. 407; 8 L. J. (O.S.) Ch. 134.

A father directed his trustees to pay and divide the residuary moneys arising from the sale and conversion of his real and personal estate among all such of his five daughters as should be living at his death in equal shares, and he directed his trustees to invest every share given to a daughter of his living at his death, and during the life of each such daughter to pay the income of her share to her for her separate use, and after her death to hold the same in trust for her children as therein mentioned, and declared that if there should be no child of such his daughter who should attain a vested interest, then, subject to a power of appointment given to her over a portion of her share, as well the original share of such daughter as any share or shares which might accrue to her under that provision or otherwise should accrue to his other daughters or daughter surviving in equal shares, if more than one, each accruing share to be held upon the same trusts as the original. The will contained no gift over in the event of all the daughters dying without issue. All the five daughters survived the testator. Then one of them died leaving a child; then another died without issue:—Held, that the words "other daughter or other surviving daughters" referred to survivorship at the death of the daughter whose share was to be distributed, and that the child of the daughter who died first took no interest in the share of the daughter who died next. *Beckwith* v. *Beckwith*, 46 L. J., Ch. 97; 36 L. T. 128; 25 W. R. 282—C. A.

A testator gave property upon trust for his four children as tenants in common during their lives, and after the decease of his children respectively in trust for the children of his children respectively per stirpes, and in case of a failure of such issue of either of his children then in trust for his other surviving children or child. One of the testator's children predeceased him, leaving an infant daughter. Another of the testator's children survived him, and afterwards died without issue:—Held, that the infant grandchild took one-third of the lapsed share concurrently with the two surviving children of the testator. *Arnold's Estate, In re*, 39 L. J., Ch. 875; L. R. 10 Eq. 252; 23 L. T. 337; 18 W. R. 912.

"Others" Construed "Survivors."] — A mother, having two daughters, A. and B., and three sons, C., D., and E., bequeathed a fund upon trust for A. for life, and after her death for her children, with a gift over in default of children "to the others or other of them, B., C., D., and E., equally to be divided between or amongst them, if more than one." The will contained a like bequest in favour of B. and her children, with a like gift over "to the others or other of my children, that is to say, A., C., D., and E., equally to be divided." A. died a spinster; C. and D. predeceased her:—Held, that the words "others or other" could not be read as equivalent to "survivors or survivor at the death of A.," and that upon her death the fund bequeathed upon trust for her life became divisible in fourths. *Hagen, In re*, 46 L. J., Ch. 665.

A testator, in case of the death of any of his children without leaving issue, before payment of any part of reversionary legacies, directed such parts to be divided among the others and other of them, and in case of the death of a child leaving issue before such payment, he directed such parts to be divided among the children of such child:—Held, that "others" meant children other than those who had died without leaving issue. *Chaston, In re, Chaston* v. *Seago*, 50 L. J., Ch. 716; 18 Ch. D. 218; 45 L. T. 20; 29 W. R. 778.

c. Accruing Shares and Clause of Accruer.

General Rule—No Survivorship.]—A survived share shall not survive again without express words. *West, Ex parte*, 1 Bro. C. C. 575; 1 P. Wms. 275.

A. devises to his grandchildren, B., C., and D., 1,000*l.* each, the interest to their use, and if any dies to the survivors or survivor, share and share alike, the interest to be paid to their father to their use. B. dies an infant; then C. dies. The share which C. took by the death of B. shall not survive to D., but go to the father, administrator of C. *Rudge* v. *Barker*, Cas. t. Talb. 124.

A testator gave his residuary personal estate to trustees, upon trust to pay the income to his wife until his youngest child should attain twenty-one years, she thereout maintaining the children during their respective minorities; and on the youngest child attaining twenty-one years, upon trust to divide the trust fund among the testator's wife and children as tenants in common, with benefit of survivorship:—Held, that the shares of children dying before the youngest child attained twenty-one went to the survivors. But whether the accrued shares survived as well as the original shares, quære. *Vorley* v. *Richardson*, 8 De G. M. & G. 126; 25 L. J., Ch. 335; 2 Jur. (N.S.) 362; 4 W. R. 397.

Effect of Words "Share" or "Portion."]—T. by will appointed the interest that should be made of his personal estate to be paid to his father for life, then to his mother for life; and he gave the residue of his personal estate to his

brother and sisters, and to A. and B., sisters of his late wife, share and share alike; and then said "in case of the death of any of them before me, or the survivor of my father and mother, then the share of the deceased to go among the survivors." The brother died in testator's lifetime; but after the will was made the sisters (in the lifetime of testator's mother, who survived her husband and then died) and A. and B. claimed the residue of the personal estate:—Held, that they were entitled, as the only surviving legatees, not only to their own original shares, but to all accumulations. *Pain* v. *Benson*, 3 Atk. 78.

A. gave 1,000*l.* among four persons, as tenants in common, and directed, if one of them die before twenty-one or marriage, it shall survive to the other; if one dies, and three are living, the share of that one so dying will survive to the other three; but if a second dies, nothing will survive but his original share, for the accruing share was a new legacy, and there is no survivorship. *Id.* 80.

One devises several parcels of land to his several children in tail, and if any of them die before twenty-one or unmarried, such child's part to go to the surviving children: if any of the children die unmarried, though above the age of twenty-one, his share shall go to the surviving child, but such survivor shall have such share for life only; what goes over on one child's death shall not go over again a second time. *Woodworth* v. *Glassbrook*, 2 Vern. 388.

Testator gave a sum to the four children of A., to be divided into equal shares, and paid to them at twenty-one, and the interest of their shares to be paid to their parents in the meantime; and in case of any dying under twenty-one, his, her, or their shares to be divided among the survivors. Two of the children died under twenty-one, in the testator's lifetime:—Held, that the original share of each had accrued to the then survivors, but that the accruing share of the one who died last lapsed. *Rickett* v. *Guillemard*, 12 Sim. 88; 5 Jur. 818.

A testator gave all the property he possessed in the parish of K., consisting of houses, lands, debts, ready money and other effects which he then possessed or might possess at the time of his decease, and also all his funds in the Bank of England, or that of the United States of America, to his reputed children, Anthony, James and Richard, and their heirs, share and share alike, as soon as they should have attained twenty-one, it being his will that if one of them should die before he attained that age, his share should vest in and belong to the survivors. James died under twenty-one, leaving Anthony and Richard surviving:—Held, that the share of the testator's property, which James would have been entitled to if he had attained twenty-one, vested in Anthony and Richard as joint tenants. *Jones* v. *Hall*, 16 Sim. 500.

A testator gave stock to trustees, to be divided after the death of the two persons who had life interest in it among A., B., C., D. and E., in equal shares; and he directed that, if any of them should die without issue, before their respective shares should become payable, the share of him, her, or them so dying without issue should go to and be equally divided among the survivor and survivors of them. A. died, leaving issue, who were living at the time fixed for the distribution of the fund; then B. died, leaving a son, who died without issue before the period of distribution; shortly afterwards, and also before the period of distribution, C., died without issue:—Held, that B.'s personal representatives were not entitled to any portion of the fund; that the one-third of B.'s share, which on the failure of her issue survived to C., did not, on C.'s death, survive to her other legatees, but was transmitted to her personal representative; that the words "survivor and survivors" were to be construed in their natural sense, and not as equivalent to "other and others," so that no part of the shares of B. and C. went over to A.'s personal representatives. *Crowder* v. *Stone*, 3 Russ. 217; 7 L. J. (O.S.) Ch. 93; 27 R. R. 68.

One devises portions to his children, A., B. and C., and if any die before twenty-one or marriage the portion of the child so dying to go to the survivor; one of the children dies in the lifetime of the testator. This is not a lapsed legacy, but shall go over to the surviving children. *Perkins* v. *Micklethwaite*, 1 P. Wms. 274.

A married woman, by a testamentary instrument, made in execution of a power contained in her marriage settlement, gave 2,000*l.*, subject to the life interest of her husband, to trustees upon trust for the benefit of her child or children, to be equally divided between them, share and share alike; but, in case the 2,000*l.* should become payable before her children, being sons, should have attained twenty-one, or, being daughters, should have attained that age or day of marriage, then in trust to invest and apply the interest to their maintenance and education, and when they should attain twenty-one or day of marriage, to pay to them their respective shares of the principal; and, in case any of the children should happen to die before their portions should become payable, then they should go and belong to the survivors or survivor of them. The testatrix left a son and two daughters, all of whom had attained twenty-one at her decease. The son and afterwards a daughter died in the lifetime of their father:—Held, that on the death of the father the surviving daughter was entitled to the 2,000*l.* by survivorship, except as to that share of it which accrued to the deceased daughter upon the death of the son, which belonged to the representative of the deceased daughter. *Bright* v. *Rowe*, 3 Myl. & K. 316.

A. gave his leasehold and general residuary estate to trustees in trust, "as to the clear annual residue of his estate," to divide the same between his three daughters N., P. and M., for their separate use; but in case any or either of his daughters should die, leaving lawful issue surviving, to pay such "shares or share" to the children of such one or more of them; and if one of his daughters died without issue surviving, upon trust to pay her annual share unto the survivors equally; and in case there should be only one surviving daughter during the continuance of the trusts, then the whole of his estate and effects was to be paid to such surviving daughter, for her own absolute use. All three daughters were married, and died without ever having had children. The husband, as the representative of the survivor, P., who died in 1857, claimed the whole of the estate, but the representatives of M., who died in 1839, submitted that there was an intestacy:—Held, upon the whole language of the will, that the plaintiff, as the representative of the survivor, was entitled to the estate and effects absolutely. *Pulbrook* v. *Bratt*, 5 Jur. (N.S.) 330.

Gift to A. for life, and afterwards to seven

named persons, equally, "the share of each who shall happen to die to be equally divided amongst the survivors, unless A. (one of them) should die, leaving children; in that case, I mean that her children should inherit the share of the parent." The seven all died before the tenant for life, A. being the survivor of them:—Held, first, that the seven took equally; secondly, that the children of A. took no more than one-seventh; and, thirdly, that the share of one of the seven, who predeceased the testatrix, was undisposed of. *Cambridge* v. *Rous*, 25 Beav. 409.

Accruing share held to go over with the original share, by force of the words "part share and interest." *Douglas* v. *Andrews*, 14 Beav. 347.

A testator gave his estate to one for life, with remainder to her children equally, with a gift over (in case of the death of any child in the life of the tenant for life) of the "part and parts, share and shares, and interest" of such child to his issue:—Held, that the gift over comprised the accrued as well as the original share. *Ib.*

The word "share" alone, when there is no gift over of the whole fund, in case of the failure of all the members of the class, is not sufficient to carry over an accrued share. *Evans* v. *Evans*, 25 Beav. 81.

Bequest to four equally, "and as each dies, his or her part shall be equally divided amongst the others that's living":—Held, that the accrued shares did not go over. *Goodwin* v. *Finlayson*, 25 Beav. 65.

A testator gave certain securities to trustees upon trust that a moiety should be set apart for his two sons, T. and C., share and share alike, to pay the interest to them respectively until T. succeeded to the F. estates, when the whole of the moiety should be transferred to C., until he attained twenty-seven, then to be paid to him for his absolute use. And in case either of his sons died unmarried his share should go to the survivor; and if both died unmarried under twenty-seven, then over. T. succeeded to the estates, and C. died unmarried, under twenty-seven:—Held, that the whole of the moiety belonged to T. *Edmonstone* v. *Farley*, 18 L. T. 847.

A testator in case of the death of any of his children without leaving issue, before payment of any part of reversionary legacies, directed such parts to be divided among the others and other of them, and in case of the death of a child leaving issue before such payment, he directed such parts to be divided among the children of such child:—Held, that the gift over applied to accrued as well as original shares. *Chaston, In re, Chaston* v. *Seago*, 50 L. J., Ch. 716; 18 Ch. D. 218; 45 L. T. 20; 29 W. R. 778.

Accrued Shares directed to go in same manner as Original Shares.]—Residuary bequest to the testator's nephews and nieces, per stirpes, equally for their lives, and after the death of either that share of the principal to be paid equally to and among the children of such of his said nephews and nieces as should die; and if any die without leaving any child or children, that share to go to and among the survivors or survivor of them in manner aforesaid. Upon the death of one without a child, that share goes to the survivors for their respective lives only, and will pass to their children respectively with the original shares; but upon the death of the last survivor without a child, his shares both original and accrued are undisposed of, notwithstanding another has left a child. *Milsom* v. *Awdry*, 5 Ves. 465; 5 R. R. 102.

A gift between grandchildren living at the testator's death, to be divided between them on the death of the survivor of three persons, with a gift over to the survivors, in case of the death of any before he should be entitled to receive his share, and to be paid at the same time, and in the same manner, as before mentioned, touching the original share. The gift over held to apply to the accruing as well as to the original share. *Eyre* v. *Marsden*, 2 Keen, 564; 7 L. J., Ch. 220. Affirmed, 4 Myl. & Cr. 231; 3 Jur. 450—C. A.

After a bequest for the benefit of children and their issue, it was declared that, if any should die without issue, his share should go among the survivors in the manner directed concerning the original shares:—Held, that the gift over comprised an accrued share. *Goodman* v. *Goodman*, 1 De G. & Sm. 695; 17 L. J., Ch. 103; 12 Jur. 258.

Devise of estates to testator's son and four daughters, "and their lawful issue respectively in tail general, with benefit of survivorship, to and amongst their issue respectively as tenants in common; but such issue, being sons, not to have vested interests until twenty-one, or daughters until twenty-one or marriage, with powers to trustees to advance, &c., to the extent of one-half the presumptive share of each child; and in case his son or daughters, or either of them, should die without leaving lawful issue, or with lawful issue, and such issue being a son should not attain twenty-one, or a daughter not attain twenty-one nor be married, then the share of the party so dying to be for the benefit of the survivors and their issue, in same manner as their original shares":—Held (confirming the certificate of the Court of Exchequer), that the son and daughters took estates for lives as tenants in common, with contingent remainders in their shares to their respective children, by purchase, as tenants in common in tail, with cross-remainders in tail between such children in each respective share, with cross-remainders over in the whole of each of such shares respectively (on failure of all the children of any one son or daughter and their issue), to the survivor or survivors of the testator's son or daughters, for life, remainder in tail general to the children of such surviving son or daughters respectively, in like manner as in the original share given to such son or daughters respectively; and that the son and daughters and their children respectively took corresponding interests in the leaseholds devised by way of executory bequest after the death of the testator's widow. *Cursham* v. *Newland*, 2 Beav. 143. And see *S. C.* at law, 2 Bing. (N.S.) 58; 2 Scott, 105; 5 L. J., C. P. 137; 4 M. & W. 101; 7 L. J., Ex. 212.

—— **Consolidation of Shares.**]—By a settlement trustees were directed to be possessed of 1,760*l.* in trust for a daughter, and her sons, at twenty-one, and daughters at twenty-one or marriage. Like trusts of two other sums of 1,760*l.* were declared for two other daughters and their children. Benefit of survivorship and accruer between the three daughters and their children, in default of children, was declared, with a declaration that the provisions applicable to the original shares should apply to such surviving or accrued shares; and it was provided, that if either of the

three daughters should die without having or leaving any children who should attain a vested interest, she might dispose of any part of "her share" not exceeding one-third by deed or will. On the death of one of the three daughters, her share accrued among the survivors; one of the survivors then died without a child, and appointed by will "one-third of her share or shares, as well accrued as original, in the said sum of 5,280*l*." The trustees paid so much of the share of the testatrix as had accrued into court, under the Trustee Relief Act:—Held, that the previous provisions of the settlement consolidated the accrued with the original shares, and that the power to appoint overrode the whole share thus consolidated. *Hutchinson's Settlement, In re*, 5 De G. & Sm. 681; 17 Jur. 59.

Fund treated as a whole Fund.]—Testator leaves a residue in trust for four, with survivorship; two died: the survived share shall survive as well as the original shares, being the case of an aggregate fund. *Worlidge* v. *Churchill*, 3 Bro. C. C. 465. And see *Langley* v. *Langley*, 6 L. R., Ir. 277.

Where residuary real and personal estate was directed to be all converted into personalty, and to be applied in payment of debts, &c., and the residue to be divided among testator's children, J., M. and C., and grandchild R., the share of M. to be paid as soon after his decease as convenient, and the shares of C. and R. at the ages of twenty-two and twenty-one respectively; and in case any of his children should die before their shares became so vested as aforesaid, the shares to go to the survivors equally; and if but one, the whole to that one. J. and C. died in testator's lifetime, C. under twenty-two, and R. survived testator, but died under twenty-one:—Held, first, that "vested" must mean "payable," and that the original shares of the deceased children survived to the survivors; and, secondly, that "whole" meant the whole residue, and therefore that the accruing as well as original shares devolved to M. as sole survivor. *Sillick* v. *Booth*, 1 Y. & C. C. C. 121, 739; 6 Jur. 142.

A testator bequeaths the residue of his property to his nephews and nieces on their respectively attaining twenty-five, with a direction that his trustees shall, in the meantime, apply the profits to their maintenance; but in case of the death of any of them unmarried, and without issue, he gives the shares of those so dying unto the survivors equally, to be paid at the same time with their original shares; first a nephew, and then a niece die, under twenty-five, unmarried, and without issue; the whole residue is divisible among the survivors who attain the specified age, and the niece does not, upon the death of the nephew, acquire, under the clause of survivorship, a vested interest in her proportional part of his share. *Barker* v. *Lea*, Turn. & R. 413; 24 R. R. 85.

A testator gave a fund in trust for W. for life, and after her death in trust for the children of A., of B., and of C. who should survive the testator, "such children taking per stirpes, with benefit of survivorship among members of the same family":—Held, that the survivorship extended to accrued as well as original shares, so that the whole of each third share of the fund went to those objects of gift who survived the tenant for life. *Crawhall's Trusts, In re*, 8 De G. M. & G. 480; 2 Jur. (N.S.) 892.

The general rule is, that where a fund is given to a class of persons, with a direction that on the death of any of them their "shares" are to go over, the original and not the accruing shares will go over. But a testator may express a contrary intention, thus: where he shews an intention to keep the fund "aggregate" and unsevered, the rule does not apply. *Douglas* v. *Andrews*, 14 Beav. 347.

Where in the disposition of real estate amongst various persons in different shares, with clauses of accruer and gifts over in certain events, the intention is shewn of keeping the estate together in an aggregate mass, the word "share" will be construed to include accrued as well as original shares. *Dutton* v. *Crowdy*, 3 N. R. 234; 33 L. J., Ch. 241; 10 Jur. (N.S.) 28; 9 L. T. 630; 12 W. R. 222.

Real estate was devised to A. for life, with remainder to his children, as tenants in common in tail; and in case any of such children should die without issue, then, as to the share or shares of him, her or them so dying, to the eldest surviving son for the time being of A. in tail; and in case there should be no son, then to the others or other of the children of A., as tenants in common in tail; and if all such children but one should die without issue, or if there should be only one such child, then to such one or only child in tail; and in default of such issue, over:—Held, that the will shewing an intention to keep the estate in an aggregate mass, and to accumulate all the shares which failed upon the eldest surviving son, the word "share" must be construed to extend to accrued as well as to original shares. *Ib.*

Upon a bequest of equal legacies to testator's six children, to be paid on their respectively attaining twenty-one, or the marriage of the daughters; the interest to be paid in the meantime, and the principal as they might direct to their issue, but in case they should die without issue the principal to go among "the survivors" of his children in equal proportions; after directing his freehold estate to be sold and all the residue of his personal estate, he declared the trusts to be, equally to pay and divide the money therefrom, so soon as his youngest child should attain twenty-one, unto and amongst all his children, share and share alike, and in case of the death of any, leaving lawful issue, the share of the parent so dying to such issue:—Held, that the gift of the parent's share to such issue applied both to the original and accruing shares of the residue, but not to the specific legacies mentioned in the former clause. *Leeming* v. *Sherratt*, 2 Hare, 14; 11 L. J., Ch. 423; 6 Jur. 663.

A will contained this clause: "With regard to the residue of my estate my executors shall pay the interest in equal parts half-yearly to my sons F., E. and A., the share of a predecessor to be equally divided to the survivors or survivor." A. alone survived the testator:—Held, that A. was entitled to the capital of the residue. *Tandy, In re, Tandy* v. *Tandy*, 34 W. R. 748—C. A.

Accrued Shares whether subject to Limitations of Original Shares.]—A testator gave the proceeds of real and personal estate to trustees upon trust to divide the same into six equal shares, one share for each of the testator's children; the shares of sons to be paid to them as soon as conveniently might be after his decease, the shares of daughters to be vested interests immediately after his decease, and to be settled

upon them and their children. The will contained a proviso that, if any of his sons should die without having any issue living at their deaths, the share intended for the son so dying should accrue for the benefit of the survivors of his said children, their executors, administrators and assigns, in equal shares. One of the sons died in the testator's lifetime :—Held, first, that the surviving children took his share as well as their original shares absolutely, and not as an interest defeasible on their death without issue ; secondly, that the accruing shares of the daughters belonged to them absolutely, and were not subject to the trusts for the settlement of the original shares. *Ware* v. *Watson*, 7 De G. M. & G. 248 ; 3 W. R. 496.

A father bequeathed a fund equally for the use of his five sons, Edward, John, Charles, Crofton and Henry, but directed that they were only to receive the interest on their legacies during their lives, and that after their respective deaths the interest was only to be applied for the use of their wife and children, if any, until the youngest of the children should reach twenty-one, and then the principal be divided among the survivors ; and in case of those not leaving a wife or children, their proportion was to go to the next elder brother down to the youngest. Charles having died unmarried, and Crofton, his next younger brother, having subsequently died leaving a wife and children :—Held, that the accrued share which Crofton took on the death of Charles remained his absolute property. *Fitzgerald* v. *Fitzgerald*, Ir. R. 7 Eq. 436.

Testator gave a sum of stock to his wife for life, and, after her death, to his sons and daughters, and he directed the interest of his daughter's share to be paid to her for her separate use for life, and, at her decease, the capital to be divided amongst such children as she should have living at his decease, the shares of the sons to be paid at twenty-one, and the daughters at twenty-one or marriage, provided their mother was then dead, otherwise her children's shares were not to be paid to them until her decease ; her share was to be equally divided amongst such of his sons as should be then living, and if any of his said sons and daughters should die before his wife, and without leaving issue, their shares were to be divided amongst his other children :—Held, that the daughter's children living at the testator's death took absolute vested interests at twenty-one, though their mother was still living ; and that her interest in the share of one of the testator's sons, who died in the lifetime of his widow, was not subject to the same trusts as her original share, but vested in her absolutely. *Gibbons* v. *Langdon*, 6 Sim. 260.

A testator bequeathed the residue of his personal estate to trustees in trust for his daughter, and after her decease, for all and every the child or children of his daughter, share and share alike, when they should respectively attain twenty-one, with maintenance in the meantime ; and in case any of the said children should die under twenty-one, and have one or more child or children who should survive the testator's daughter, and live to attain twenty-one, such child or children to be entitled to his or their parent's share ; provided, also, that in case any child or children of his daughter should die before attaining twenty-one the share or shares of such child or children should go to the survivor or survivors, and the issue of any deceased child or children who should marry and die under twenty-one to be equally divided between them if more than one, the issue of any deceased child or children to stand in the place of the parent or parents ; with a limitation over, provided there should be no child of his daughter, or there being any such, no one of them should live to attain twenty-one, nor leave any issue who should live to attain that age :—Held, that the limitation over was intended to take effect only on failure of grandchildren who should survive the testator's daughter, and not live to attain twenty-one, and was therefore not too remote. *Trickey* v. *Trickey*, 3 Myl. & K. 560.

A testator gave his real and personal estate to A., B. and C., as tenants in common. By a codicil he declared that if any of the devisees should die in his lifetime, his estate and interest should "go to the survivors or survivor of them, and the heirs, executors, administrators and assigns of such survivor." A. died in the testator's lifetime :—Held, that B. and C. took as joint tenants the share intended for A. *Leigh* v. *Mosley*, 14 Beav. 609. And see *Jones* v. *Hall*, ante, col. 957.

A., by will, directed as to his general residue, to pay and divide same, with the accumulations from the time of the decease of his mother (who had a life interest therein), between and amongst a brother and four sisters, naming them, "and he did further will and direct that in case his brother, or any of his sisters, should depart this life before his or her share or shares of such residue should become payable, without leaving lawful issue him or her surviving, that in such case the share or shares of him or her so dying should be paid to the survivors or survivor in equal shares," with directions for maintenance and education of infant children of his brother and sisters so dying :—Held, that the original and accruing shares of any of the legatees so dying without issue went to the survivors in equal shares. *Spilsbury* v. *Kent*, 5 L. T. 343.

Held, also, that the children of either of the legatees took vested interests in the parent's share or shares on the death of such parent. *Ib.*

Three annuities for a term of years bequeathed in trust for three children, A., B. and C. respectively for life ; in case of the death of either leaving any child or children, his or her annuity to be equally divided between such child or children, share and share alike ; in case of the death of either without issue, his or her annuity to go to the survivor or survivors of them equally, share and share alike, with a limitation over in case of the deaths of all without issue as aforesaid ; A. died without issue ; A.'s annuity went to B. and C., subject to the contingent limitation over ; and upon B.'s death, leaving children, belongs in moieties absolutely to his administrator and C. *Vandergucht* v. *Blake*, 2 Ves. 553.

A father gave his residuary estate upon trust for his three daughters for life, and if any of his daughters should die leaving issue, a share proportioned to the number of his daughters was to go to the issue of such daughter, and if only one of such daughters should die leaving issue the whole to such issue, and if all his daughters should die without issue then to his sisters. He had three daughters. One died leaving four children, one of whom died leaving two children born after their grandmother's death ; afterwards another of his daughters died a spinster :—Held, that there were implied cross limitations, so that the surviving daughter had a life

interest in half the share of the daughter so last dying. *Ridge, In re*, 41 L. J., Ch. 787 ; L. R. 7 Ch. 665 ; 27 L. T. 141 ; 20 W. R. 878.

Held, also, that the gift to issue was to the issue living at the death of the daughter, and therefore the three survivors of the four children and the representative of the dead one were entitled to the second moiety, and would, if the third daughter of the testator died without issue, become entitled to the whole. *Ib.*

Gift by testator to his daughters, "the share or shares of such daughters to be for their sole and separate use," followed by a contingent gift over to the survivors :—Held, that the separate use attached to the accrued as well as the original shares. *Jarman's Trusts, In re*, L. R. 1 Eq. 71.

And see *Eyre* v. *Marsden*, supra, col. 960 ; *Cursham* v. *Newland*, supra, col. 960 ; *Macgregor* v. *Macgregor*, 2 Coll. C. C. 192 ; *Walker* v. *Main*, post, col. 1052.

d. Words of Survivorship, to what Period Referable.

Principles.]—Under a bequest over, after an interest for life by words importing both a joint interest and a tenancy in common as to three, "or the survivor, share and share alike," the period to which the survivorship relates depends not on any technical words, but on the apparent intention collected from the particular disposition, or the general context. *Newton* v. *Ayscough*, 19 Ves. 534.

In construing limitations to a parent for life, and afterwards to his children, with a provision relating to survivorship annexed, whether occurring in wills or settlements, the rule for determining both the class who are to take, and the contingency to which the survivorship refers, is to lean to that construction which will include as many objects of the gift as possible, consistently with the declared purpose of the author of the instrument. *Bouverie* v. *Bouverie*, 2 Ph. 349 ; 16 L. J., Ch. 411 ; 11 Jur. 661. Reversing the judgment below.

Words of survivorship are to be referred to the period of division and enjoyment, unless the contrary intent be especially shewn. *Cripps* v. *Wolcott*, 4 Madd. 11 ; 20 R. R. 268.

A testator gave and bequeathed three legacies of 3,000*l.* each to his three brothers, in the words following : "I leave and bequeath to my brother James 3,000*l.*, in trust to his surviving child or children ; to my brother Robert W., 3,000*l.*, in trust to his surviving child or children ; failing issue, I leave the 3,000*l.* to my brother William W., in trust to his surviving child or children ; failing such issue I leave the 3,000*l.* to my brother Daniel O. W., in trust to his surviving child or children ; failing issue, I leave the 3,000*l.* to the children of my brother James W." Similar legacies of 3,000*l.* each were given to the brothers Robert and Daniel, with the same phraseology as to "failing of issue, &c." :—Held, that the word "surviving" in the bequest meant surviving at the deaths of the respective fathers, and that the brothers of testator took life interests in these legacies. *Blount* v. *Wheble*, 21 L. T. 259.

A., by will, in 1841, gave the residue of his estate and effects, subject to a life interest vested in his wife, to his six grandnephews and nieces equally, share and share alike, and to their respective heirs or assigns, "declaring that if any of his residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing, the same shall belong to and be divided equally, share and share alike, among the survivors of his grandnephews and grandnieces equally" :—Held, that the word "vest" did not alter the general rule, but that "survivors" meant the survivors at the death of the tenant for life. *Young* v. *Robertson*, 8 Jur. (N.S.) 825. *S. C.*, nom. *Richardson* v. *Robertson*, 6 L. T. 75.

It is a settled rule of construction that words of survivorship in a will should be referred to the period appointed by that will for the payment or distribution of the subject-matter of the gift. *Ib.*

The word "vest" means primâ facie "come into possession," and not "accrue in point of interest." *Ib.*

If a testator gives a sum of money, or the residue of his estate, to be paid or distributed among a number of persons, and refers to the contingency of any one or more of them dying, and then gives the estate or the money to the survivor, the period of distribution is the period of the death of the testator ; and accordingly the event of the death upon which that contingency is to take place is referable to the interval of time between the date of the will and the death of the testator, and the words are construed to provide for the event of the death of any one of the legatees during the lifetime of the testator. But where a testator gives a life estate in a sum of money, or the residue of his estate, and at the expiration of that life estate directs the money to be paid or the residue to be divided among a number of objects, and then refers to the possibility of some one or more of those persons dying, without specifying the time, and directs, in that event, the payment to be made or the distribution to be made among the survivors, it is understood and regarded by the law that he means the contingency to extend over the whole period of time that must elapse before the payment is made or the distribution takes place ; and in such case the survivors are to be ascertained in like manner by a reference to the period of payment or of distribution, namely, the expiration of the life estate. *Ib.*

A testator bequeathed to his executors the sum of 3,000*l.* in trust, to apply the interest thereof for the support and maintenance of his son W. during his life, and on the death of his said son W. then the testator bequeathed the said sum to be divided between his sons I. and S. and his daughter S., share and share alike, or to the survivors or survivor of them attaining the age of twenty-one years. All the children attained to age of twenty-one years. The daughter alone survived her brother W. :—Held, that the period of survivorship was the death of the tenant for life, and that the daughter was entitled to the entire fund. *Shaw* v. *Shaw*, 25 L. R., Ir. 30.

A testator left five sons, and by his will he gave a specified portion of his real estate and an equal share of the residue to each, so that each son took for life with remainder to his children, if more than one, as tenants in common in tail, with cross-remainders between them. Then followed this clause : "I do hereby declare that, in case any or either of my said five sons shall depart this life without leaving any child or children him or them surviving, then I devise the share or shares of such son or sons unto and equally between the survivors or survivor of

them my said sons and their respective heirs as tenants in common in tail." There was no gift over in the event of all the sons dying without issue. W., the youngest son, survived all his brothers, and died without issue. Three of the other sons had left children. The eldest son died without issue and intestate:—Held, that the survivorship indicated in the accruer clause was survivorship with reference to the person on whose death the share was to go over, and that W.'s share was not disposed of. *King* v. *Frost*, 15 App. Cas. 548; 63 L. T. 422—P. C.

A testator by his will bequeathed to his wife for life so much of the income of railway shares as would amount to 200*l.* per annum, and to his children A. and B. during the life of his wife, as much more of the income as would produce 100*l.* per annum; and after the death of his wife, bequeathed the said annual sums of 200*l.* and 100*l.* per annum, derivable from the said shares, to and amongst his three children, A., B. and C., and their executors and administrators, in equal shares, with benefit of survivorship between them. All three children survived the testator, but predeceased the widow. C. survived A. and B.:—Held, that A., B. and C. took vested interests, liable to be divested, as to each, in the event (which did not happen) of his or her dying before their mother, leaving others or other of them who should survive the mother, and that the capital representing the annual sums of 200*l.* and 100*l.* per annum belonged, in equal shares, to the personal representatives of A., B. and C. *Wiley* v. *Chanteperdrix*, [1894] 1 Ir. R. 209.

Immediate Gift, but not Expressly Contingent.]—Bequest to A. and B. in equal moieties, but, in the event of the death of either, the whole to the survivor; and on the demise of either, should they have no children, then over:—Held, that the survivorship was confined to death in testator's lifetime. *Clarke* v. *Lubbock*, 1 Y. & C. C. C. 492; 6 Jur. 548.

A testator gave a leasehold house, which was let for twenty-eight years, to trustees to pay the rents and profits for the benefit of his five children, whom he named, or the survivors or survivor of them, in equal shares and proportions, share and share alike:—Held, that the words "survivors or survivor" referred to the death of any of them in his lifetime; that the words "share and share alike" referred to those children who should survive him, and created a tenancy in common; and that the interests were vested in the children on the death of the testator. *Ashford* v. *Haines*, 21 L. J., Ch. 496.

Bequest to the children of A. who should be living at the testator's decease, equally, with survivorship in case of death without leaving issue; if leaving issue, the issue to have the parent's share. The survivorship cannot be restrained to the period of the testator's death, as upon the construction the clause would be repugnant. *Shergold* v. *Boone*, 13 Ves. 370; 9 R. R. 195.

Bequest of personal estate in equal shares "to each and every of my children and their issue, whether sons or daughters, with benefit of survivorship":—Held, that the period of survivorship was the death of the testator. *Caulfield* v. *Giles*, 12 Ir. Eq. R. 427.

Bequest to four persons in equal shares; and in case of the death of any one in the lifetime of the other or others, the share or shares of him or them so dying to go to the survivor or survivors:—Held, that the survivorship referred to the period of distribution, that is, the testator's death; and that consequently, on the death of one of the four legatees in the testator's life, there was not a lapse. *Howard* v. *Howard*, 21 Beav. 550.

By a will property was given to trustees, to apply the rents, interest and proceeds for the maintenance of the testator's son Edward for his life, and not to be paid to any person under an assignment by or execution against the son; and after the decease of the son, for the two daughters of the testator absolutely. By a codicil it was declared, that, in case of assignment by Edward, the trustees should stand possessed of the property upon trust for the daughters of the testator, in the same manner and form as declared by his will in the event of the death of Edward. By another codicil the testator gave 600*l.* stock to Edward, in addition to what he had left him by his will, subject to the same controlling powers and restrictions as were appointed by the will; and he gave a like sum to his son William, subject to the like control, "and to the survivor of them, and in the event of both their deaths" for the benefit of the said daughter:—Held, that the true construction of the second codicil was that, in the event of the death of either of the legatees, both the legacies of stock should go to the survivor, and not that on the death of either his legacy should go to the survivor, which would cut down an absolute gift into a life interest. That, although in one codicil the words "in the event of the death of Edward" meant upon the death of Edward, it did not follow that the words in another codicil "in the event of both their deaths" meant upon both their deaths; for one expression was applied to a life interest and the other to a capital sum. That the period of survivorship must be referred to the period of distribution, namely, the death of the testator. That therefore Edward, having survived the testator, took the legacy of stock absolutely. *More's Trust, In re*, 10 Hare, 171.

Future Gift not Expressly Contingent—No Prior Estate.]—A. B. bequeathed 1,000*l.* to such persons, and in such proportions, as his wife should by deed or will appoint; and in default of appointment he bequeathed the 1,000*l.* unto, and to be equally divided between her surviving brothers and sisters. The wife, by her will, which was held not to be an exercise of the power, not referring at all to her husband, or to his will, or to the power, bequeathed many legacies, to the exact amount of 1,000*l.*, and gave her clothes (she having no other property) to one of her sisters. When A. B. made his will, one brother of his wife had died. When A. B. died, there were two brothers and three sisters of his wife. When the wife died, there were no brothers and only two sisters living:—Held, that, under the words "surviving brothers and sisters" of the wife, the two sisters of the wife living at her death were entitled to the 1,000*l.* in equal moieties. *Davies* v. *Thorns*, 3 De G. & Sm. 347; 18 L. J., Ch. 212; 13 Jur. 383.

Testator gave a portion of his personal estate to the seven children of his son and his wife, naming them, "together with every other child hereafter to be born of the said (wife) during the life of the said (husband), or within nine months after his decease, in equal shares, with benefit of survivorship." He then directed their maintenance with the dividends until the

youngest child should attain thirty; then upon trust for them respectively and the survivors and survivor of them in equal shares, with power to the trustees to make such distribution sooner if they think fit, provided the youngest child should have attained twenty-one:—Held, that the period of division was the death of the husband, or the short period limited after his death; that the clause of maintenance till thirty, and proposing payment till then, did not disturb the previous vesting in the children surviving at the death of the husband, so as to introduce remoteness; and that consequently one child having died living the father, her share went over to those who should be surviving at his death. *Hodson* v. *Micklethwaite*, 2 Drew. 294; 2 Eq. R. 1157; 23 L. J., Ch. 719; 2 W. R. 440.

Future Gift, not expressly Contingent, after Prior Interest—Death of Testator.]—J. devised lands to his son M., and other lands to his son J., and in case both of them should die unmarried, and without lawful issue, then his three daughters were to have the lands as tenants in common, and not as joint tenants. Both the sons died unmarried, and without issue; and two of the daughters died in the lifetime of the surviving son, leaving issue:—Held, that the three daughters had such a contingent interest vested in them upon their father's death as was transmissible to their representatives, and that the surviving daughter was not entitled to the whole. *Wilson* v. *Bayly*, 3 Bro. P. C. 195.

A testator gave to his wife an annuity, and 100*l.* a year for each of his three children during their minority, and from and after the decease or marriage of his wife, then the 300*l.* to be divided amongst his said children; and subject thereto, he bequeathed his leasehold and personalty unto three children, and the survivors and survivor of them. One died under twenty-one:—Held, that he took a vested interest at the death of the testator. *Bass* v. *Russell*, Tam. 18; 7 L. J. (o.s.) Ch. 177.

On a bequest of stock to the wife for life, and afterwards a moiety to be received and divided equally amongst the testator's brothers and sisters, and their issue:—Held, that the brothers and sisters living at the testator's death took vested interests, liable to be divested by their dying, leaving issue, before the period of division, and that the issue took by substitution. *Shailer* v. *Groves*, 6 Hare, 162. *But see* 16 L. J., Ch. 367; 11 Jur. 485.

W. S. by his will directed the interest of the residue of his estate to be paid to his children during their respective lives; and, after their decease, to be divided equally between all his surviving grandchildren who should be then living, share and share alike, until the youngest should attain twenty-one years, when he directed the whole to be turned into money, and to be divided equally between all such of his said grandchildren, and the children and child of any such grandchild as might then be dead leaving lawful issue, such children or child to take only his or their parent's share; and if there should be only one such grandchild who might live to attain the age of twenty-one, then upon trust for such grandchild, his or her heirs, executors, &c.:—Held, that the bequest was confined to the children of the grandchildren who should be living at the death of all the testator's children; and that the children of a grandchild who died in the lifetime of some of the testator's children did not take any interest under his will. Quære, if the bequest was not void for remoteness. *Smith* v. *Farr*, 3 Y. & C. 328; 8 L. J., Ex. Eq. 46.

Gift by a testator of his real and personal estate to his wife for her life, and the residue to be equally divided between her brothers and sisters, and, in case any of them should be dead at the time of her decease leaving issue, such issue to stand in their parent's place:—Held, that the brothers and sisters who survived the testator, and afterwards died without issue in the lifetime of the wife, were entitled to shares in the residue. *Gray* v. *Garman*, 2 Hare, 268; 12 L. J., Ch. 259; 7 Jur. 275.

Testator gave 5,000*l.* stock to his sister for life; and at her decease the stock was to be equally divided among the testator's nieces, E. T., M. R. R., F. R. B., M. A. G. R., and A. L. R., or the survivors of them; and, after bequeathing another legacy, the testator directed that the remainder of his property should be divided into two equal shares, of which he gave one to his niece M. R. R., and the other between his nieces E. T. and F. R. B. The will then contained the following clause: "In case my niece E. T. should not survive me, her child or children are to inherit what I have bequeathed to her, and the same of any other of my nieces who may marry and leave children":—Held, that the words of survivorship occurring in the gift of the 5,000*l.* stock to the testator's nieces were to be referred to the testator's death. *Rogers* v. *Towsey*, 9 Jur. 575.

Gift for life followed by a gift to the surviving children of B. and C., "or their heirs and assigns":—Held, that *Cripps* v. *Wolcott* (supra, col. 965) did not apply, and that the period of survivorship was the death of the testator. *Hopkins, In re*, 2 H. & M. 411.

Held, also, that the "heirs and assigns" could not be read next of kin, and that all who survived the testator took vested interests. *Ib.*

Survivorship as to a class, in a gift after the death of the tenant for life, referred to the death of the testator, and not to the death of the tenant for life. *Evans* v. *Evans*, 25 Beav. 81.

Gift to A. for life, and after her decease to "the surviving children of B. and C., except the youngest son of B.," who was to have 30*l.* to his share more than the other. The will proceeded: "Should either of these children die leaving no issue, his or her share to be then equally divided amongst the survivors":—Held, that the children of B. and C. took vested interests at the death of the testator in remainder expectant on the decease of A., with a gift to the survivors in the event of any one dying without issue in that interval. *Ib.*

A testator gave his residuary estate upon trust to pay to A. an annuity during her life, and to accumulate the surplus income till the expiration of six months after A.'s death, and then to divide the residue and accumulations into as many shares as there should be children "living" of A. and of B. who should have lived to attain twenty-one, or in case of any of them being dead under that age who should have left issue, and pay and apply one share to each of the children of A. and B. that should have lived to attain twenty-one, and to their respective executors, administrators, and assigns, and one share to the issue of each child who should have died under that age leaving lawful issue:—Held, that

the word "living" was not referable to the period of distribution, but to that of the testator's death, so that each child on attaining twenty-one took a vested interest absolutely. *Kidd* v. *North*, 3 De G. M. & G. 947.

A gift of residuary estate to A., and such of the children of B. as should be living at the death of C., their respective heirs, executors, &c., in equal shares as tenants in common, and not as joint tenants; but if any such children should die under twenty-one, their shares to be in trust for the survivors and other or others of them (the said children of B. and the said A.) living at the decease of C., and his and their respective heirs, executors, &c., in equal shares, as tenants in common, and not as joint tenants, so and in such manner that the children of B. attaining twenty-one, and surviving C. and the said A., in case A. survive C., should take equally her capital:—Held, that A. surviving the testator, and dying in the lifetime of C., took nevertheless, with the children of B. who survived C., a vested share in the residuary estate. *Falkner* v. *Grace*, 9 Hare, 282.

A testator devised and bequeathed his residuary estate in trust for his widow for life, and at her death to sell and pay, assign, or transfer the moneys arising therefrom to the testator's four children by name, equally to be divided between them, share and share alike, "or equally to divide the aforesaid effects between the survivors of" his children, immediately after his wife's decease, in case the youngest of the said children for the time being should then have attained twenty-one years; but if the youngest should not then have attained twenty-one years, the testator directed the trustees to receive the annual interest, produce, profits, and proceeds of the trust moneys, and pay and apply so much of the interest as should arise from the equal share of each child in the maintenance and advancement of each such child as the trustees should deem expedient:—Held, that there was a clear gift to the children equally, that the provision as to survivors was not sufficiently clear to control it, and that consequently all the children took vested interests, which were not divested by their dying in the lifetime of the widow. *Blackmore* v. *Snee*, 1 De G. & J. 455.

S. gave all his hereditaments to his wife for life, or until her second marriage, and after her decease or marriage to trustees to sell and dispose thereof, and the money to arise therefrom, he directed, should be considered as part of his personal estate. After bequeathing legacies to his sons, he gave to his three daughters, S., E., and C., 600*l*. each; and after directing that his wife should be permitted to carry on the farming business during her life or widowhood, the testator directed that if she should marry again, his trustees should sell his effects, pay her a certain sum out of the produce, and the residue thereof unto and amongst all his children living at his decease (except A.), in equal shares and proportions, with benefit of survivorship and accruer among them in the event of the death of any one of them without issue. But in case C. S. should continue his widow, then he directed his effects to be sold at her death, and gave the produce thereof amongst all his children living at his decease (except A.), in equal shares and proportions, with benefit of survivorship and accruer among them. All the residue of his personal estate not disposed of he gave unto and amongst all his children (except A.), in equal shares and proportions, with the usual benefit of survivorship and accruer among them. And as to the legacies given to his daughters, S., E., and C., he directed that, in case any one of them should die under twenty-one without having been married, the legacy of such one should be equally divided amongst all his surviving children living at his decease (except A.), in equal shares and proportions, with benefit of survivorship and accruer among them. C. S. survived her co-executors, and died a widow and intestate in 1854. The testator left eight children surviving, including A. All attained the age of twenty-one, and his daughters, S., E., and C., married. E. died in 1836, leaving her husband surviving, who subsequently married again, and died in 1854. The plaintiff, as the executor of this husband, claimed his first wife's share of the testator's estate and residue. On bill for the administration of the estate, the court held that the three daughters took absolute interests in the property. *Gooch* v. *Slater*, 3 Jur. (N.S.) 881.

—— **Death of Testator where Tenant for Life predeceases him.**]—A testatrix bequeathed her property to her mother for life, and at her decease gave a legacy of 200*l*. to A., directing that then the residue should be equally divided between her surviving brothers and sisters:—Held, that the word "surviving" referred to the period of distribution, and the mother having died before the testatrix, that the brothers and sisters living at the death of the testatrix were entitled to the benefit of the gift, and that there was in the events which happened no bequest to the brothers and sisters who died before the testatrix. *Spurrell* v. *Spurrell*, 11 Hare, 54; 1 Eq. R. 192; 22 L. J., Ch. 1076; 17 Jur. 755; 1 W. R. 322.

Where there is a gift to several persons, or the survivors of them, after the determination of previous life estates, the period of distribution of the fund is the period of ascertaining the persons in whom the fund vests. *Ib.*

—— **Period of Division.**]—Legacy after limitations for life, and in default of children to be paid equally between two persons, or the whole to the survivor of them:—Held, not vested till the time of division. *Daniell* v. *Daniell*, 6 Ves. 297; 5 R. R. 308.

Gift of real and personal estate, after a life interest to the testator's widow, to trustees to be converted into money, and divided among several persons named, and the survivor or survivors of them. Those only are entitled who survived the widow. *Hoghton* v. *Whitgreave*, 1 J. & W. 146; 20 R. R. 259.

A testator bequeathed the residue of his personal estate to his widow in trust, to apply the interest and proceeds for her own use, and after her decease he gave what should be remaining of such residuary moneys unto and equally amongst all the daughters of T. D. and their issue, with benefit of survivorship and accruer. T. D. had three daughters living at the testator's death. One of them died without issue in the lifetime of the testator's widow. The two others survived the widow, and had issue living at her death:—Held, that the parties only in existence at the time when the property to be taken was to be ascertained were entitled, and that the two surviving daughters at the widow's death were absolutely entitled. *Gibbs* v. *Tait*, 8 Sim. 132; 5 L. J., Ch. 344.

Upon a bequest to one for life, with remainder

to two others, with clause of survivorship between the latter, "if one or the other should die":—Held, that the survivorship had reference to the death of the tenant for life, and that one of the remaindermen having survived the testator, but predeceased the tenant for life, the surviving remainderman was entitled by survivorship. *Whitton* v. *Field*, 9 Beav. 368.

Testator bequeathed his residuary estate to his wife for life, after her death to his son and daughter, and their respective issue, with benefit of survivorship unto and between his said children or their issue respectively:—Held, that the survivorship was to take place only in the event of death and failure of issue of the son or daughter happening during the lifetime of the testator's widow, and that upon her death the son and daughter were absolutely entitled. *Turner* v. *Capel*, 9 Sim. 158.

Devise and bequest of real and personal estate to trustees upon trust (subject to certain legacies and annuities) for A. for life, and after his decease upon trust to convey, assure, and pay the whole of the said real and personal estate to and amongst the children of A. and the issue of such children, but in case A. should die without issue, then to pay and distribute the same equally amongst all and every the children of B. and C. and the survivors of them; but in case any such children should be then dead leaving issue of his, her, or their body or bodies lawfully begotten, then such issue to have as well such original share or shares as the father or mother of such issue so dying would have been entitled to if then living, as also such other share or shares thereof as the father or mother of such issue so dying might have been entitled to by survivorship or otherwise. A. survived the testator, and died without issue:—Held, that the period of the survivorship of the children of B. and C. is not to be referred to the time of the death of the testator, but to that of the death of A., being the period of distribution; and that the children of B. and C. living at the date of the will, and those born after that date and before the death of A., were entitled to the real and personal estate, with survivorship between them in case of the death of any such children without issue before the death of A., the children of such of the said children as died before A., leaving issue, being substituted for the original legatees. *Buckle* v. *Fawcett*, 4 Hare, 536; 9 Jur. 891.

Testator bequeathed his personal estate to his wife for life, and after her death to a trustee in trust to pay the rents and profits of his personal estate for and towards the support and maintenance of his six nephews and nieces, and in case of the death of any of them for the maintenance and support of the survivors. All the nephews and nieces survived both the testator and his widow. One of the nieces then died:—Held, that her share did not become undisposed of, but that she by surviving the testator's widow had become absolutely entitled to it. *Clarke* v. *Gould*, 7 Sim. 197.

A testator, after various bequests, gave to his wife, for her life only, all his remaining estates, and also gave her all his capital in trade, with three-quarters of the profits arising therefrom, for her life, but, nevertheless, in trust at his death for his then surviving children, share and share alike, independent of the rental of his said estates, which he gave and bequeathed to his surviving female children to be paid to them as he directed. The testator then proceeded thus: "On the decease of any of these children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then their share to go to the said child or children, and from my last female child to the males of my body lawfully begotten, with the same restrictions as before expressed, and to the heirs and assigns of the last of them." One of the testator's daughters, after his death, married, and died in the lifetime of his widow, leaving children:—Held, that such children did not take any interest under the will, the word "surviving" having reference to testator's widow's death, and not his own. *Wordsworth* v. *Wood*, 1 H. L. Cas. 129; 11 Jur. 593. Affirming 4 Myl. & Cr. 641; 9 L. J., Ch. 29.

Where there is a gift to one for life, and after her decease to be equally divided between three persons and the survivors of them, it is a gift vested subject to be divested, depending upon a special contingency, which not occurring, it was not vested; and therefore, two out of the three persons dying in the lifetime of tenant for life, that one who survived her took the whole. *Bowyer* v. *Currall*, 2 W. R. 328.

A testatrix by her will gave thus: "to my sister C. N.'s surviving children 30*l.* each"; she then gave to C. N. thus: "the interest of my funded property for and during her natural life, and after her decease such property to be equally divided between her surviving children":—Held, that though on the construction of the word "surviving" in the first clause the period of vesting and distribution was referable to the death of the testatrix, yet that the period of vesting in the last clause was to be referred to the death of C. N., and that those children who survived C. N. were entitled. *Neathway* v. *Reed*, 3 De G. M. & G. 18; 22 L. J., Ch. 809; 17 Jur. 169.

A testatrix made a gift to her daughter C. S. to be paid to her weekly for "her natural life, and from and immediately after her decease" she directed the same to be divided among "her surviving children":—Held, that the remainder was to the children who survived C. S. *Pritchard's Trusts, In re*, 3 Drew. 163.

A testator gave some property to his wife for life, and proceeded thus: "At the decease of my wife, I leave the last-named sum to be equally divided between the families of my two brothers, viz., one-half to the widow and children of my deceased brother J. B., the widow, if surviving, to have an equal share with the children":—Held, that the survivorship had relation to the death of the tenant for life, and not of the testator; and, secondly, that the children took in joint tenancy. *Hesketh* v. *Mugennis*, 27 Beav. 395.

A testator gave all his real and personal property to his wife for life, and he gave a sum of stock to his five cousins by name, or the survivors of them, to be equally divided between them, and to be paid as soon as possible after the death of his wife:—Held, that, following the rule in *Cripps* v. *Wolcott* (supra, col. 965), the survivorship must be referred to the death of the testator's wife, so that one of the cousins who survived the testator, and died in the lifetime of his widow, took nothing. *Hearn* v. *Baker*, 2 Kay & J. 383.

Held, also, that "survivors" must be construed to include a sole survivor, so that where only one

of the legatees survived the widow such survivor took all the stock. *Ib.*

A testator bequeathed a fund in trust for his sister A. for life, and after her death to be divided between the children of his sisters, B., C., and D., who should survive the testator, such children taking per stirpes "with benefit of survivorship among members of the same family":—Held, that the latter words of themselves meant survivorship at the death of the tenant for life, and could not be otherwise interpreted by comparison with other bequests in the same will, shewing an intention that those bequests should not go over if the legatee had children. *Crawhall's Trusts, In re*, 8 De G. M. & G. 480; 2 Jur. (N.S.) 892.

A testator gave certain dividends to his son, and at his death to his (the testator's) surviving daughters and their lawful offspring. The testator left his son and also four daughters him surviving. The will was attested by two of the daughters, and of these two one died in the son's lifetime, and the other survived the son:—Held, that the period for ascertaining the survivorship was the death of the son; that the word "offspring" meant "issue"; and that therefore the daughters took absolutely as joint tenants. *Young* v. *Davies*, 2 Dr. & Sm. 167; 32 L. J., Ch. 372; 9 Jur. (N.S.) 399; 11 W. R. 452.

A legacy to A. for life, and at her death to be equally divided between her two sons (who were named), or given to the survivor of them; the survivorship has reference to the death of the tenant for life. *Naylor* v. *Robson*, 34 Beav. 571.

A testator bequeathed a house, described as a copyhold, to his wife for life, "and at her death to be disposed of for the benefit of his surviving children, share and share alike." The house was, in fact, leasehold:—Held, that only those children who survived the widow were entitled to share in the proceeds of the house. *Thompson* v. *Thompson*, 29 Beav. 654; 7 Jur. (N.S.) 1263; 9 W. R. 728. And see *Cripps* v. *Wolcott*, supra, col. 965.

—— **Period of Division where several Life Interests.**]—A testatrix bequeathed stock to T. P. and J. S. for their lives, and from and after their decease to the surviving children of the said T. P. and J. S., share and share alike:—Held, that the children living at the death of the survivor of T. P. and J. S. were alone entitled, and that they took per capita, and not per stirpes. *Stevenson* v. *Gullan*, 18 Beav. 590.

Devise to trustees in trust to pay the yearly produce to A. and B. in equal shares for life, with survivorship in case of the death of either "without issue"; but if either should die "leaving issue," then her part to be paid to her "children" equally; and after the death of both A. and B., to convey "to the heirs of the body" of A. and B., share and share alike, or to the survivors, and if but one, then to such "only child." There was a gift over if A. and B. should die "without issue":—Held, the children took as purchasers, and that a child of A. which survived its parent but died in the lifetime of B. was entitled to a share. *Gummoe* v. *Howes*, 23 Beav. 184; 26 L. J., Ch. 323; 3 Jur. (N.S.) 176; 5 W. R. 219.

Bequest to A., and at his death (with certain exceptions) to B., and at her decease to be divided amongst four named persons, "or as many of them as may be living":—Held, that those only took who survived both A. and B. *Knight* v. *Poole*, 32 Beav. 548.

Devise of residue to the testator's wife for life, then to his daughter A., upon her decease equally between his surviving brothers and sisters and those of his wife. The wife and daughter survived the testator, but the daughter predeceased the widow. Some of the brothers and sisters predeceased the daughter; the others survived her, but predeceased the widow:—Held, that the words "surviving brothers and sisters" referred to those who should survive the last living tenant for life, and that, in the events that happened, there was an intestacy. *Howard* v. *Collins*, L. R. 5 Eq. 349.

The period for ascertaining the survivorship among a class of legatees is the time for the distribution of their legacy, unless the testator has himself otherwise directed. *Drakeford* v. *Drakeford*, 33 Beav. 43; 9 L. T. 10; 11 W. R. 977.

Where a testator left all his unfunded property in cash, bills, jewels, plate, furniture, &c., to his widow, and bequeathed the interest on his funded property to his widow for life, and then to H. for his life, at whose death the principal was to be equally divided amongst H.'s surviving legitimate children and the testator's niece and grand-daughter, R., H. died in the lifetime of the widow; R. died in the lifetime of the testator, and two of the surviving children of H. died in the lifetime of the testator's widow:—Held, that the survivorship had reference to the death of the brother only. *Ib.*

Bequest of successive estates for life in residuary personal estate to the widow and sister of the testator, and after the death of the sister a direction to divide the residue among the testator's surviving brothers and sister and their children. The widow survived the sister and brothers of the testator. Two of the brothers left issue:—Held, that the class of persons to take was to be ascertained at the death of the widow, and that they took per capita. *Fox, In re*, 35 Beav. 163; 6 N. R. 374; 11 Jur. (N.S.) 735; 13 W. R. 1013. And see *Beckwith* v. *Beckwith*, ante, col. 955.

After two successive life estates, a testator devised freehold houses (which were sub-demised) to "J. S. and W. S., or the survivor of them, the N. Street front to go to J. S., the H. Street front to W. S., and an equal portion of the back-ground to go to each tenement after the lapse of the present lease, whatever time the holding becomes the property of J. S. and W. S., provided the lease now in existence has not terminated; the rent to be divided equally between them, after paying the chief rent, until the fall of said lease":—Held, that the survivorship was to be referred to the determination of the tenancies for life, and therefore J. S., who had then survived W. S., was entitled to the houses. *Belfast Town Council, In re, Sayers, Ex parte*, 13 L. R., Ir. 169.

—— **Rule in Case of Gifts of Real Estate.**]—The word "survivor" in gifts of personal estate may be taken as referring to the period of distribution. It is not equally settled that with regard to real estate it applies to the determination of the prior limitation. *Taaffe* v. *Conmee*, 10 H. L. Cas. 64; 8 Jur. (N.S.) 919; 6 L. T. 666.

The benefit of survivorship may be given to those who have life interests as tenants in common. *Ib.*

In gifts of personalty the word "survivor" is considered as referring to the period of distribution; and if the same rule were applicable in

respect of real estate, it would be referred to the determination of the prior limitations; but the law in respect of real estate is unsettled. *Ib.*

A testator gave real estate to his wife for life, and directed that after her death it should be divided, share and share alike, amongst twelve persons mentioned by name "or the survivors of them." All those persons survived the testator, but some of them died before the widow:—Held, that the rule laid down in *Cripps* v. *Wolcott* (supra, col. 965), applies to real as well as personal estate, and that the estate belonged to such of the twelve persons as survived the tenant for life. *Gregson, In re*, 2 De G. J. & S. 428; 5 N. R. 99; 34 L. J., Ch. 41; 10 Jur. (N.S.) 1138; 11 L. T. 460; 13 W. R. 193.

Gift Expressly Contingent — Survivorship whether referred to Death of Tenant for Life, or happening of Event.]—W. devised all his real and personal estate to R. and E. during their lives, and after their deaths he devised "the whole of his estate unto the seven children of R. and E.," to be equally divided amongst the survivors or survivor of them, share and share alike; and should any of the children die leaving issue then the share of him so dying to be equally divided among such issue, the surviving parent or parents of such children receiving the interest of such share until the youngest should attain twenty-one. The seven children survived their parents:—Held, that they took absolute interest in the estate as tenants in common in fee. *Bird* v. *Swales*, 2 Jur. (N.S.) 273; 4 W. R. 227.

Bequest to A. for life, and after her decease to eight persons in equal shares, their interests therein to be vested from the time of the testator's decease; and in case of the death of any of the eight legatees before the tenant for life, the share or shares of him, her, or them, so dying to be paid to the survivors or survivor equally. The eight residuary legatees survived the testator, but all died before the tenant for life:—Held, that survivorship was to be referred to the death of the tenant for life; and that as none of the residuary legatees survived her, the divesting clause had no operation, and each of the residuary legatees took his original gift. *Marriott* v. *Abell*, 38 L. J., Ch. 451; L. R. 7 Eq. 478; 20 L. T. 690; 17 W. R. 569.

Immediate gift to four residuary legatees and devisees in equal shares, "with benefit of survivorship" in case any of them should die without issue; and in case any of them should die leaving children, then the share, whether original or accruing, of each so dying to go to such children:—Held, that the clause of survivorship, and the limitation over to children of the legatees, were not confined to the lifetime of the testator, and intended merely to guard against lapse; and that the residuary legatees did not upon surviving the testator at once acquire absolute indefeasible interests in their shares. *Bowers* v. *Bowers*, 39 L. J., Ch. 351; L. R. 5 Ch. 244; 23 L. T. 35; 18 W. R. 301.

A testator, by will, made in 1851, having directed his executors to invest his personal estates, after payment of his debts, upon trusts therein expressed, thus proceeded: "As to 5,000*l.*, or the stocks, funds or securities upon which the same shall be from time to time invested, upon trust to pay the dividends, interest and produce thereof unto my wife for and during the term of her life, to and for her own absolute use and benefit; and from and after her decease, upon trust to pay, transfer and assign the 5,000*l.*, or the stocks, funds or securities upon which the same shall be invested, between my son E. and my grandson A., in equal shares and proportions; and in case of the death of either of them in the lifetime of my wife, then upon trust to pay the whole of the trust fund and interest as aforesaid unto the survivor of them, E. and A., his executors, administrators or assigns." E. died in the lifetime of testator's wife:—Held (reversing 6 Jur. (N.S.) 209; 8 W. R. 267), that A. was absolutely entitled to the whole fund, subject to the life interest of the widow. *White* v. *Baker*, 2 De G. F. & J. 55; 29 L. J., Ch. 577; 6 Jur. (N.S.) 591; 8 W. R. 533.

A testator bequeathed to trustees 800*l.* upon trust to invest and pay the income equally amongst his four daughters, A., B., C. and D., for their lives, to their separate use; and in case of the decease of any or either of them, leaving issue of her or their body or bodies, then he bequeathed one-fourth of the said principal sum to be equally divided amongst such issue, and if but one to such one only; and in default of issue, then the share of her or them so dying he bequeathed to the survivors of them equally, and if but one to such only. By a subsequent clause in his will, the testator directed that, in case any or either of his children, to whom or to whose benefit any legacy or bequest was given by his will, should die before such legacy or bequest should have become vested in her or them, leaving lawful issue, then such legacy or bequest should descend to and become the property of such issue. A. died before the testator, but after the date of the will, leaving issue, and B. survived the testator and died without issue:—Held, that, by the effect of the subsequent clause in the will, the issue of A. were entitled to participate with C. and D., the surviving children, in the one-fourth share given over in the event of the death of B. without issue. *Willetts* v. *Willetts*, 7 Hare, 38; 17 L. J., Ch. 457; 12 Jur. 670.

Under a direction, that, after the decease of A., a fund "should be transferred to A. B. and C. D., or the survivor or survivors":—Held, that A. B., who survived C. D. but died in A.'s lifetime, was entitled to the whole. *Antrobus* v. *Hodgson*, 16 Sim. 450; 18 L. J., Ch. 93.

Interest of legacy to A. for life, remainder to B. and C., or in case one should die, living A., then to the survivor. B. and C. both die in the life of A.; the legacy was vested, and went to the survivor. *Scurfield* v. *Howes*, 3 Bro. C. C. 90.

A testator devised copyholds, subject to life interests, to his cousins A. and B., their heirs and assigns, as tenants in common; but if either should die in the lifetime of the tenants for life, and without having lawful issue then living, he devised her share to the survivor of them, her heirs and assigns. A. died, leaving issue; then B. died without issue; afterwards the tenant for life died:—Held, that B.'s share went to A.'s representative, though A. did not survive B. *Johnson, In re, Hickman* v. *Williamson*, 53 L. J., Ch. 1116.

A testator gave certain property to trustees upon trust for his widow for life; and after her death directed the same to be sold, and the proceeds divided into two equal shares, one of which he gave, in five equal shares, to A., B., C., D. and E., and directed that, in case of the death of any or either of them before the widow,

their respective shares should go to their respective husbands or wives, if any, and if not, then to their children, and, in failure of children, to the survivors of them, share and share alike. He gave the residue of the other moiety, after payment of a legacy, as follows: "To F., G., H., I. and K., and in case of the death of any or either of them, then their respective shares to their children, if any, and if not, then to the survivors of them, share and share alike":—Held, that the second moiety was given to F., G., H., I. and K., in five equal shares, as tenants in common; held, also, that the words "in case of the death," in the gift of the second moiety, meant in case of death before the period of distribution, and applied to death in the testator's lifetime as well as to death after the decease of the testator, but before the decease of the testator's widow; held, also, that although F. was dead when the will was made, the gift in favour of her children took effect; held, as to each moiety, that the share of each legatee who died before the period of distribution vested absolutely in such of his children as were living at the death of their parent, or at the death of the testator, whichever last happened. G. died a bachelor in the testator's lifetime, leaving H., I. and K. surviving him. H. died in the testator's lifetime. K. survived the testator, but died before the period of distribution. I. survived that period:—Held, that under the gift to the survivors G.'s share was divisible in moieties between I. and the personal representatives of K. *Ive* v. *King*, 16 Beav. 46; 21 L. J., Ch. 560; 16 Jur. 489.

Devise of real estate to three daughters for life, and after their decease to three grandchildren as tenants in common in fee; and in case of either of the grandchildren dying in the lifetime of the daughter, the share of them so dying to be "transferred" to the "survivors," and if only one should be living, then to him or her so "surviving." The survivor of the daughters outlived the three grandchildren:—Held, that the survivorship had reference to the death of the last tenant for life, and not to a survivorship between the grandchildren; that the divesting clause never took effect, and that on the decease of the survivor of the three daughters the heirs of the three grandchildren took as tenants in common in fee. *Littlejohns* v. *Household*, 21 Beav. 29.

A. gave his residuary estate, upon trust, that the whole should, on his youngest child attaining twenty-one, be valued, and specifically divided into three equal parts for his widow and two daughters respectively, and at the death of the widow her share was to be equally divided between the daughters, with a proviso that if either of the daughters should die before such division of the property should have been made, leaving no surviving issue, then the part of the deceased should be given to the surviving sister; but if either should die and leave surviving issue, the part of her so dying should be equally divided amongst her surviving children. The income to go to the support of the widow and children. Both daughters having died before the widow:—Held, that the real and personal residuary estate of the testator had devolved on the two daughters in equal moieties, subject to the widow's life interest in one-third thereof. *Maddison* v. *Chapman*, 1 J. & H. 470.

A married woman, having power to dispose of 1,500*l.*, by her will gave the interest of it to her husband for his life, and directed that, after his decease, the principal should be divided equally between the five daughters of her sister B.; and if any of them should die during her husband's lifetime, leaving issue, that the respective issue of such deceased daughters should have equally divided among them their mother's share; but in case any of them should die during her husband's lifetime without lawful issue, that the 1,500*l.* should be divided, share and share alike, among the surviving daughters:—Held, that the word "surviving" had reference to the testatrix's husband; and therefore, as all the daughters died in his lifetime, and only one of them left issue, that four-fifths of the 1,500*l.* were undisposed of. *Watson* v. *England*, 15 Sim. 1; 9 Jur. 648.

A testator bequeathed his residue to his widow for life, with remainder to his nephews and nieces living at her decease, and he substituted their children for any who should die in her life. But if any of the nephews and nieces should die in the life of the wife without having any child "then living," he directed his share to go to the survivors of the nephews and nieces. A nephew died without children, in the life of the widow:—Held, that his share did not go to the survivors at his death, but the survivors at the death of the widow. *Essex* v. *Clement*, 30 Beav. 525.

Gift by a testator to his widow, for life, and after her death amongst his four children, naming them, as tenants in common; but if any of his children should die before his, her or their share or shares should become payable, leaving issue, then such issue to take his, her or their parents' share or shares; but if any one or more of his children should die before his or her share or shares should be payable, leaving no lawful issue, then such share or shares to devolve and go to his surviving child or children:—Held, that survivorship was not to be referred to the period of distribution, but to the time of the death of the legatees dying in the lifetime of the widow. *Wilmott* v. *Flewitt*, 11 Jur. (N.S.) 820; 13 L. T. 90; 13 W. R. 856.

Bequest of 3,000*l.* to trustees, upon trust to invest same either in a purchase or at interest, and pay interest to testator's wife during her life, and after her decease to divide the whole, principal and interest, "among his four children, share and share alike, and the survivors of them, but not before they should have respectively attained the age of twenty-one years, or days of marriage." C., the plaintiff's wife, who was one of the four children, attained twenty-one, but died in the lifetime of her mother. Trustees laid out greatest part of the money in the purchase of freeholds and copyholds, and lent another part on bond:—Held, that C. had a vested interest, and that survivors meant such as should be living at the death of the child before twenty-one, and not such as were living at the death of the mother, and that representative of C. was entitled to a fourth of the bond, and a fourth of the whole in government securities, and which had not been invested in land. *Weedon* v. *Fell*, 2 Atk. 124.

A testator devised all his real and personal estate to his wife for life, and after her decease to such of his children as should be then living, their heirs, executors, administrators and assigns, share and share alike, as tenants in common, with benefit of survivorship, in case any died without issue under twenty-one; but if any

of them should die, leaving lawful issue, the testator willed that such issue should take their father's or mother's share. The testator left several children, of whom one only, a son, survived the wife, but one of the others, a daughter, left issue:—Held, that the son was entitled to the whole property. *Hunter, Ex parte*, 3 Y. & C. 610.

A testator, by deed of disposition according to the Scotch law, after giving annuities to three persons, went on to direct that "the capital sums to be set apart to answer such annuities as and when the same should become tangible by the deaths of the said annuitants respectively, should be paid to and amongst seven persons nominatim (being respectively the children of two of the annuitants), and the survivors or survivor of them, on the first term of Whit-Sunday or Martinmas after their respectively attaining twenty-one or marriage." Then followed a provision for maintenance of the legatees during minority, also a power of advancement as to one of the legatees, and then a declaration that in the event of the deaths of any one or more of the said legatees before the term of payment of their shares as aforesaid, leaving lawful issue, and such issue should be in life at the time their fathers and mothers would have been entitled to receive payment of their shares, had they survived, then the share of the parent should go to the issue:—Held, affirming the judgment of the Court of Session, that the legatees had not a vested interest during the lifetime of the annuitants, the survivorship spoken of having reference to the periods of the deaths of the latter. *Pearson* v. *Casamajor*, Macl. & R. 685.

A husband gave moneys in trust to pay the income to his wife for life, on her death to divide the trust fund amongst his six children, share and share alike, with benefit of survivorship to be paid to them when the youngest survivor shall attain the age of twenty-one:—Held, that the period of survivorship was the death of the wife. *Wellock* v. *Ostle*, 27 L. T. 481; 21 W. R. 118.

Bequest of a fund to three grand-daughters, in equal shares, for their respective lives, and afterwards to their respective issue; and in case any of the three should die without issue, her share to accrue and survive to the survivors, and the accrued shares to be subject to the same conditions:—Held, that the survivorship as to each share had reference to the death of each grand-daughter, and that on the death of the last surviving grand-daughter without issue, her share fell into the residue. *Nevill* v. *Boddam*, 28 Beav. 554; 29 L. J., Ch. 738; 6 Jur. (N.S.) 573; 8 W. R. 490.

A. gave a life interest in all his property to his wife, and, after her death, he directed that all his property in the funds or elsewhere, of every description, should be sold, and equally divided between his children, B., C., D., E. and F.; and he further directed that his executors should, upon dividing the whole of his said property equally as above directed, immediately lay out the whole of the moneys that would belong to D., E. and F., his above three daughters, as their shares of his said property, in 3 per cent. consolidated annuities; and that neither of them, his before-mentioned daughters, should have the power of receiving more than the dividends due upon their respective shares. But in case of the marriage of all or either of his aforesaid daughters, the child or children of either of them his said daughters that should outlive their mother or mothers, should have his, her or their mother's shares at their own disposal, both principal and interest; and in case of the death of one or more of his aforesaid children that might die unmarried, his, her or their shares and share should be equally divided among the survivors of the aforesaid children or their children; and he gave and bequeathed unto his executrix and executor all the rest and residue of his estate and effects, both real and personal. The testator's widow died in 1838; and one of the daughters, who outlived the testator and the tenant for life, died without having been married:—Held, (affirming the decision of the court below), that the period of division as to the daughters' shares was, not the death of the tenant for life, but the deaths of the daughters; and that the gift over, upon dying unmarried, was not to be restricted to dying unmarried in the lifetime of the tenant for life. *Walker's Trust, In re*, 16 Jur. 702; 1 W. R. 408—L.JJ.

A testator bequeathed a money fund to trustees, to be invested for his "five daughters, share and share alike, for their lives, and after the respective deaths of such of his daughters as should die without leaving issue, or leaving issue, if such issue should die under twenty-one years, to divide the fifth part or share of each of his said daughters who should so die without leaving lawful issue as aforesaid, in the following manner: "immediately, or as soon as conveniently can be after her decease, unto and amongst my son George and the survivors of them, my five daughters, share and share alike, to whom I do give and bequeath the same accordingly, or to their respective personal representatives":—Held, that the word "survivors" referred to the death of the tenant for life whose share was to be divided. *Bate's Trust, In re*, 2 N. R. 265; 9 L. T. 226; 11 W. R. 768.

On the death of the last survivor of the five daughters without issue:—Held, that "personal representatives" were to be construed in their ordinary sense, and her entire share was directed to be paid to the executors of George, the son. *Ib.*

A testator by his will gave all his real and personal estate remaining after payment of debts, &c., to J. S., for life, and at her decease he gave the same to M. A. and W. A. "if they are both living at the time of her decease, and in case of the death of either of them before J. S.," he gave "the whole to the survivor of them for their own use and benefit absolutely." The testator died seised of real estate; after the testator's death W. A. died, then M. A., and J. S. last of all:—Held, that upon the true construction of the will the word "survivor" in the ultimate gift meant the survivor of M. A. and W. A. living at the death of J. S. the tenant for life; that since M. A., though she survived W. A., had predeceased J. S., she had not come within the terms of the ultimate gift, and that upon the death of J. S., there was an intestacy as to the property given by the will, and the real property consequently passed to his heir-at-law. *Hill* to *Chapman, In re*, 54 L. J., Ch. 595; 52 L. T. 290; 33 W. R. 570—C. A. And see *Jenour* v. *Jenour*, 10 Ves. 562; *Page* v. *May*, infra, col. 987.

—— **Survivorship referred to Death of Testator.**] — A testator gave stock to trustees, the

interest to be paid to A. for life, and after his death the capital to be divided amongst the children of the testator's late daughter B., or their descendants, but should there be none of them surviving, then the capital to be equally divided amongst such other grandchildren as might then be living, or in default thereof to his legal representative. B. had seven children, three of whom died without children in the lifetime of testator; of the remaining four one alone survived, A., the tenant for life; three died before A., and only one of these three left issue:—Held, that the words "should there be none of them surviving" referred to the testator's death, and that the children of B. who survived the testator took vested interests. *Dawes, In re*, 4 Ch. D. 210. And see *Bowers* v. *Bowers*, supra, col. 977.

—— **Gift to a Class at Twenty-one after a Life Interest, with Benefit of Survivorship.**]—The word "survivors" in a bequest to children:—Held, upon the context of the will, to mean surviving so as to attain their respective ages of twenty-one. *Crozier* v. *Fisher*, 4 Russ. 398; 6 L. J. (o.s.) Ch. 118.

A testator bequeathed the interest of 3,000*l.* to his daughter for life; and, after her death, he bequeathed the principal in trust for her children, in equal shares, to be paid to sons at twenty-one, and to daughters at that age or on marriage, with interest in the meantime for their maintenance, with "benefit of survivorship in the event of any of the said children dying without issue":—Held, that the period of survivorship was limited to the time appointed for payment; and that therefore a daughter of the legatee for life, who died in the lifetime of the latter without having been married, but having attained twenty-one, took a vested interest, which did not become divested by the survivorship clause. *Tribe* v. *Newland*, 5 De G. & Sm. 236; 21 L. J., Ch. 283; 16 Jur. 286.

On a gift, after a tenancy for life, to a class equally, with benefit of survivorship, upon their severally attaining twenty-one, the survivorship held to refer to the attaining twenty-one; and the representatives of one who attained twenty-one, but died in the lifetime of the tenant for life, held entitled to a share. *Knight* v. *Knight*, 25 Beav. 111.

A testator gave a fund to trustees upon trust to pay the income to A. during his life, and after the decease of A. leaving issue, upon trust to pay, apply, assign and transfer both principal and interest to and amongst all and every the child and children of A., equally to be divided between them, and if but one, then to such only child, to be paid to them, if sons, at twenty-one, and, if daughters, at that age or marriage, with benefit of survivorship; and in case there should be no child or children of A. at the time of his death, or if all and every such child or children should die before attaining twenty-one or marriage, then over. A. had eight children, of whom three died infants in their father's lifetime, two attained twenty-one and died in his lifetime, and three attained twenty-one and survived him:—Held, that the two children who attained twenty-one and died in their father's lifetime took vested interests, and that their representatives were entitled to share in the fund along with the children who survived their father. *Corneck* v. *Wadman*, L. R. 7 Eq. 80.

Devise of a sum of money to A. for life; then to her daughters and younger sons in such shares as she should appoint; and in default of appointment for the daughters and younger sons equally, and to the survivors; and in case no daughter or younger son, or that they should die before twenty-one or marriage, then over:—Held, that the portions vested in A.'s children at twenty-one, though they died in her lifetime. *Salisbury* v. *Lambe*, Ambl. 384; 1 Eden, 465.

A husband gave property to his wife for life, and after her death to their children, share and share alike, "and the survivors and survivor of them," to be paid on the youngest of them attaining twenty-one; with a gift over in the event of "such issue dying before majority":—Held, that the survivorship was to be referred to the period of attaining twenty-one, and not to the death of the tenant for life. *Alty* v. *Moss*, 34 L. T. 312.

A testator bequeathed a reversionary interest, to which he was entitled on the death of a tenant for life, to such of the children of his three daughters as should attain twenty-one, and directed their several shares to be paid on their attaining twenty-one, with benefit of survivorship:—Held, that a grandchild of the testator who survived the testator and attained twenty-one, but died in the lifetime of the tenant for life, was entitled to a share. *Reid* v. *Worsley*, 14 Jur. 325.

Bequest of stock to trustees on trust for testator's sister for life, and after her death then to pay the stock to her children, with a direction that the same should be paid to them in the manner therein mentioned, and with a gift over in case there should be no child of his sister living at her death, the stock to be paid in the same manner and in the same proportions as was thereinbefore "directed, had any or either of the children of" his sister "survived so as to have become entitled thereto":—Held, that the word "survived" here meant survived the sister, and that consequently on the whole will the interests of the children did not vest until the death of the tenant for life, and a sole surviving child took the whole fund. *Daniel* v. *Gosset*, 19 Beav. 478.

G. F. bequeathed his personal estate upon trust for the benefit of his wife for life, and at her death upon trust to transfer the same unto his three sons, G., W. and S., or to the survivors of them, if they, or the survivors of them, should all have attained the age of twenty-one years; but in case they should not have attained that that age, upon trust to pay the rents, &c., for the maintenance, &c., of his said sons until they should have attained that age, and then upon trust to convey the trust estate to his said sons, or the survivors of them, as aforesaid; but in case neither of his said sons should survive his said wife, then upon trust to dispose of the said trust estate as his said wife should appoint. G. F. died in 1818, leaving his wife and his three sons surviving. Each of the sons attained twenty-one, but G. alone survived his mother:—Held, that G. F. did not intend that any son dying in the lifetime of the widow should have a vested interest. *Fisher* v. *Moore*, 1 Jur. (N.S.) 1011; 3 W. R. 584.

Bequest to A. for life, and "at her decease to her surviving children," when they have attained twenty-one:—Held, that the survivorship had reference to the death of A., and that those children only who survived her were entitled. *Huffam* v. *Hubbard*, 16 Beav. 579.

After certain bequests for life, the general residue was bequeathed to the surviving children of A., who was living :—Held, that the survivorship had reference to the death of the testator. *Lill* v. *Lill*, 23 Beav. 446.

A testatrix gave the interest of the residue to her brother during his life, and, after his death, she gave the residue to her executors, in trust for four persons by name, and the survivors and survivor of them, to be paid to them respectively when they should attain twenty-one, with interest in the meantime ; of those four persons, two died during the life of the brother :—Held, that they did not take a vested interest in any part of the residue, but that the whole of it belonged to the two survivors. During the lifetime of the testatrix's brother, one of the two survivors assigned all her furniture, plate, &c., and all the other estate and effects of or to which she was then possessed or entitled, to trustees upon trust for her creditors ; the assignment did not pass her contingent interest in the testatrix's residuary estate. *Pope* v. *Whitcomb*, 3 Russ. 124 ; 6 L. J. (O.S.) Ch. 53.

Testator devised certain messuages to trustees upon trust to pay the rents to his wife for her life, and after her decease he gave and devised the said messuages to the same trustees in trust to sell, &c., and apply the proceeds amongst all his (the testator's) nephews and nieces, children of his brothers A. and B. and his sister C., and the survivors and survivor of them, share and share alike, to be paid to them respectively as they attained the age of twenty-one years. The testator's wife survived him :—Held, that the property was divisible among such only of the children of A., B., and C. as survived the widow. *Williams* v. *Tartt*, 2 Coll. C. C. 85.

Testator bequeathed 50,000*l.* to trustees in trust for his wife for life, and after her death he gave one-fifth of that sum to the same trustees in trust to invest it and pay the interest to his daughter for her life, and, upon her demise, to appropriate the interest for the use of any of her child or children until they reached the age of twenty-one years, and then the principal to be paid to the survivor or survivors of the children of his said daughter, share and share alike. The testator also gave 2,000*l.* to the same trustees in trust to invest it and to pay the interest to his daughter for her life, and after her decease to appropriate the interest for the use of any of her child or children until they reached the age of twenty-one years, when the 2,000*l.* was to be paid to the survivor or survivors of the said children of his said daughter. The daughter had two children who attained twenty-one, but only one of them survived her :—Held, that that child became entitled on her death to the whole of the trust funds in which she had a life interest. *Turing* v. *Turing*, 15 Sim. 139 ; 15 L. J., Ch. 272 ; 10 Jur. 366.

Testator bequeathed a fund in trust for Elizabeth D. for her life, and after her decease in trust for four of her children, whom he named, "or the survivor or survivors of them, for their maintenance until they severally attain the age of twenty-one years, when each of them will be entitled to claim a fair proportion of the principal." Only one of the children survived the mother :—Held, that that one was entitled to the whole fund, though two of the deceased children attained twenty-one. *Dorville* v. *Wolff*, 15 Sim. 510 ; 16 L. J., Ch. 179 ; 11 Jur. 160.

Gift of residue in trust for a testator's wife during widowhood, and on her death or marriage to pay it amongst his five children, or the "survivor or survivors" of them, at such ages as his wife should appoint, or in default at twenty-one ; but in case of the death of any before his share should become "payable" leaving issue, then to pay his share to such issue. A child attained twenty-one, and died in the life of the wife, leaving issue. No appointment having been made :—Held, that the survivorship had reference to the cesser of the wife's estate, and that the issue, and not the representatives of the child, took the share. *Hind* v. *Selby*, 22 Beav. 373.

—— **Direct Gift at Twenty-one.**]—A testator bequeathed to his four children, A., B., C., and D., 8,000*l.*, to be equally divided between them, share and share alike, as tenants in common, and not as joint tenants, but with benefit of survivorship, the same to be paid and payable to them respectively upon their attaining the age of twenty-one years, the interest thereof in the meantime, or so much as by his executors should be considered sufficient, to be applied to their maintenance and education ; and he left to B. and C. all the residue of his personal estate, and, in case of their decease before twenty-one, he bequeathed the said residue to A. and D. or the survivor of them, share and share alike, and, in case of the decease of all his before-named children before twenty-one, he gave the residue, including his lapsed legacies, to his brother. By a codicil he gave to his children E., F., G., and H. (who were born after the will), 4,000*l.* sterling, in equal shares, with the benefit of survivorship, not only as to them, but to the rest of the children named in the will, payable at twenty-one, maintenance to be granted by the Court of Chancery :—Held, that the share of G., who died under twenty-one, went to all his surviving brothers and sisters, and not to his widow and child. *Forrester* v. *Smith*, 2 Ir. Ch. R. 70.

The cases as to the period to which survivorship is to be referred reviewed and classified. *Ib.*

Personal estate was bequeathed upon trust to pay the income to the testator's wife till his youngest child attained twenty-one, she maintaining the children during their minorities, and then the capital was to be divided among the wife and children (by name), with benefit of survivorship :—Held, that the survivorship referred to the period of distribution, and that a child did not, on attaining twenty-one, acquire an indefeasible interest. *Vorley* v. *Richardson*, 8 De G. M. & G. 126 ; 25 L. J., Ch. 335 ; 2 Jur. (N.S.) 362 ; 4 W. R. 397.

—— **Gift on a Contingency to a Class of Survivors.**]—A testator bequeathed his residuary estate to R. S., the eldest son of P. S., and failing him, to the next male child of P. S., and failing the male children of P. S., to seven persons whom he named, and the survivors and survivor of them, in equal proportions. R. S. died in the lifetime of his father, and P. S. died without any other issue. All the legatees died in the lifetime of P. S. :—Held, that the word "survivors" referred to the period of distribution at the death of P. S., and therefore the gift to the legatees failed, and the residue went to the next of kin of the testator. *McDonald* v. *Bryce*, 16 Beav. 581 ; 22 L. J., Ch. 779 ; 17 Jur. 335 ; 1 W. R. 261. *But see next case.*

The case of *Cripps* v. *Wolcott* (supra, col. 965) is a decision binding on this court. *Ib.*

On a bequest to A. for life, and after her decease to three legatees, to be equally divided, or in case of the demise of each or either of them to be divided between the survivors or survivor or their representatives:—Held, that, the three legatees having predeceased A., the plaintiff, who was the legal personal representative of all three, was entitled. *McDonald* v. *Bryce* (supra) overruled. *Page* v. *May*, 24 Beav. 323; 27 L. J., Ch. 242; 3 Jur. (N.S.) 1047; 5 W. R. 840.

A testator bequeathed as follows: "I give to my daughter S. 50*l.* per annum for life. I give to each of my other daughters 5,000*l.*, the interest of which for their use independent of any husband they may have, and if they should have any children, the principal to be divided among them after her death if they should attain the age of twenty-one years; if not, it is to be divided between her surviving sisters, share and share alike." The testator died, leaving S. and four other daughters, A., B., C., D., surviving; of these A. afterwards died, leaving two children, both of whom died under twenty-one, and B. survived A., but died before the survivor of her children:—Held, that the 5,000*l.* bequeathed to A. became, upon the death of the survivor of her children, divisible amongst her sisters, including S., then surviving, in exclusion of the representatives of B. *Carver* v. *Burgess*, 7 De G. M. & G. 96; 3 Eq. R. 421; 24 L. J., Ch. 401; 3 W. R. 308.

Testator, by will, directed his executors to place out upon government securities such a sum of money as should be sufficient out of the interest thereof to produce an annuity of 50*l.*, which he gave unto his daughter J. for her life; and after her decease, in case she should leave issue, he gave the principal unto and equally amongst his surviving children and their legal representatives, share and share alike. The testator had four children living at the date of his will and of his death, of whom the daughter J. was the survivor; she died without leaving issue:—Held, that the words "surviving children" meant children surviving the daughter J., and that the words "legal personal representatives" must be construed in their ordinary sense, and not as importing kindred or representatives in blood; consequently that the fund, of which the testator's daughter was the tenant for life, fell into the testator's residuary estate. *Taylor* v. *Beverley*, 1 Coll. C. C. 108; 13 L. J., Ch. 240; 8 Jur. 265.

4. Distribution per Stirpes or per Capita.

Per Capita—Gift to the Children of A. and B.]—One devises the surplus of his personal estate to the children of A. and B.; neither of them has a child at the making of the will or the death of testator; the devise is executory, and shall extend to any children that A. and B. shall afterwards have; and the children of each shall take per capita, and not per stirpes. *Weld* v. *Bradbury*, 2 Vern. 705.

Bequest of stock to testator's wife for life, and then as she should by will direct amongst A., B., and C. and their respective children, and in default of appointment the same at his wife's death to go amongst all the said children equally. No appointment was made:—Held, first, that A., B., and C. took nothing; secondly, that the children of A., B., and C. took per capita. *Pattison* v. *Pattison*, 19 Beav. 638.

Testator gave the residue among his five grandchildren, A., B., C., D., and E., his grandson A.'s two children, and the two children of his niece, one of them a son, the other a daughter; and in case any of the said last-mentioned children should die before twenty-one, and should leave no lawful issue, then the survivors were to have his or her share. One of the children of A. died under twenty-one without issue:—Held, that his share was divisible among all the surviving legatees, children, and grandchildren. *Walker* v. *Moore*, 1 Beav. 607; 8 L. J., Ch. 333.

Bequest of shares, the profits to be invested, and the interest applied in the education of the children of A. and B. in equal shares; "and on their attaining twenty-one, the whole to be sold and divided equally among them." There was a gift over if A. and B. should die without issue. A. and B. had no child at testator's death:—Held, that all the children of A. and B. took, and that the class was not limited to those born when the first attained twenty-one; and, secondly, that the children of A. and B. took per capita, and not per stirpes. *Armitage* v. *Williams*, 27 Beav. 346.

On construing an appointment of stock in these words, "unto and among my said brother and my sisters and my nephews and nieces living at the decease of my wife, in equal shares and proportions," it was held, that the qualification of living at the death of the wife attached only to the nephews and nieces, the last antecedent. The direction as to the shares and proportions in which the legatees are to take the property does not affect the construction of the words which describe the persons who are to take. The legatees took per capita. *Baker* v. *Baker*, 6 Hare, 269; 11 Jur. 585.

Testator directed the residue of his personal estate, after the death of his wife, who was tenant for life, to be divided as follows:—to his five nephews and nieces, A., B., C., D., and E., two shares each, and to their children one share each. The nephews and nieces survived the testator:—Held, that the residue vested in the nephews and nieces and their children living at the testator's death or born in the lifetime of the tenant for life, the children taking per capita, but the shares of each of the nephews and nieces being double that of each child. *Cooke* v. *Bowen*, 4 Y. & C. 244.

—— **Gift to the Children of A. and the Children of B.**]—Bequest of one-fourth to the children of A., and one other fourth among children of B.:—Held, distributable per capita. *Lincoln (Lady)* v. *Pelham*, 10 Ves. 167; 7 R. R. 370.

Testatrix gave 200*l.* to her brother R., and in case of his dying before her, the 200*l.* to go to his children, and 200*l.* to her sister M., to go to her children in the event of her predeceasing the testatrix. The testatrix, after sundry other pecuniary gifts to other parties, gave all her residue "to all the children of my brother R. and my sister M. equally." R. had five children, and M. two children, at the date of the will, and also at the decease of the testatrix:—Held, that all these seven children took equally as tenants in common. *Lloyd's Estate, In re*, 2 Jur. (N.S.) 539.

—— **Gift to A. and the Children of B.**]—Bequest "to A. and to the children of B., to be equally divided":—Held, that they took per

capita. *Dowding* v. *Smith*, 3 Beav. 541; 10 L. J., Ch. 235.

Gift of a legacy to A. for life, with remainder to B. for life, and after the death of the survivor upon trust to pay it "to, between, or amongst C., if then living, but if then dead, to, between, and amongst C.'s children and the children of B. then living equally, &c." :—Held, that C. and the children of B. took per capita. *Rickabe* v. *Garwood*, 8 Beav. 579.

J. H. gave all his residuary real and personal estate to trustees upon trusts for conversion, and directed the trustees to divide the proceeds amongst the brothers and sisters of S., and the nephews and nieces of C., and "my late housekeeper, H." On the question whether this was a gift in equal third parts to the classes, or a gift per capita to all the individual members of the three classes :—Held, to be a gift per capita to all the individual members of the classes. *Amson* v. *Harris*, 19 Beav. 210.

Legacy to A. and B. and the children of C. equally; they take per capita. Legacy to the descendants of A. and B. equally; all descendants (children and grandchildren) take per capita. *Butler* v. *Stratton*, 3 Bro. C. C. 367.

Gift in equal shares to Mrs. M., Mr. and Mrs. W. and children, likewise H. H. :—Held, that Mrs. W. was entitled to an equal share as tenant in common with her husband and her children, and with Mrs. M. and H. H. *Paine* v. *Wagner*, 12 Sim. 184.

One having had five children, A., B., C., D., and E., B. is dead, leaving several children, and by will the testator devises the residue of his personal estate to his son A., and to B.'s children, and to his daughter C. and D.'s children, and to his daughter E.; D. is living, and has children :—Decreed, the children of B. and the children of D. shall take per capita, and not per stirpes, as if all named. *Blackler* v. *Webb*, 2 P. Wms. 383.

Testatrix bequeathed residue to one for life, and then to be equally divided between her two nieces A. and B., and C., a third niece, and her children. C. had eight children at the death of the testatrix, and one born afterwards, during the life of tenant for life :—Held, that all the children, including this one, took equally per capita with the nieces. *Lenden* v. *Blackmore*, 10 Sim. 626.

Bequest of the residue to executors, in trust to invest and pay the interest, dividends, and premiums, as the same shall be received, "to my living brothers and sisters, and the children of my brothers and sisters who have deceased, or who may die before me, share and share alike" ; —Held, to be a gift per capita. *Hyde* v. *Cullen*, 1 Jur. 100.

A testator gives 400*l.* to his executors, to divide equally between his son P. and the children of his son R. P. and the children take equal shares per capita. *Williams* v. *Yates*, C. P. Cooper, 177; 1 Jur. 510.

Testator directed his residuary real and personal estate to be divided by his trustees, in such shares and at such times as they should think proper, amongst his nephews, A., B., and C., and his other nephews and nieces, sons and daughters of his late sisters, T. and H., who should be living at his decease, and the children of any other such nephews and nieces who, having died in his lifetime, had left issue. There were several children, and children of deceased children, both of T. and H., living at the testator's death. The trustees not being able to agree as to the division of the property, the court ordered it to be divided amongst the children, and the children of the deceased children of T. and H., per capita. *Tomlin* v. *Hatfield*, 12 Sim. 167.

A testator had a son and two daughters (A. and C.) living; another daughter (B.) was dead, having left five daughters. He bequeathed 15,000*l.*, as to 5,000*l.* for A. for life, with remainder to her children. He then gave the residue "equally amongst his son, his daughter A., the five daughters of B., and his daughter C., to be settled as he had directed the three sums of 5,000*l.* upon them and their issue" :—Held, that the five daughters of B. took per capita, so that each was entitled to one-eighth of the residue. *Tyndale* v. *Wilkinson*, 23 Beav. 74; 2 Jur. (N.S.) 963; 4 W. R. 695.

A father gave his residuary estate to his children, A., B., C., D., E., "and to the children of" his daughter F., deceased, "and the children of" his daughter C., deceased, "to be divided amongst them in equal shares and proportions" : —Held, that the grandchildren took per capita and not per stirpes. *Payne* v. *Webb*, 31 L. T. 637; 22 W. R. 43.

—— **Gift to A. and B. and their Children.**]—A testator gave his property (all being personalty) to trustees, upon trust to pay his debts, and he gave certain legacies and three annuities to three ladies, and he gave the residue of the dividends arising during the lives of the three annuitants to H. S. and A. C., married ladies, for their lives; and after the deaths of the three annuitants, as to all the rest of his estate, he bequeathed the same to the said H. S. and A. C. and their several children, to be divided between them in equal shares :—Held, that the gift to H. S. and A. C., and their several children, was a gift per capita, and not per stirpes. *Cunningham* v. *Murray*, 1 De G. & Sm. 366. *S. C.* on appeal, 17 L. J., Ch. 407; 12 Jur. 547—C. A.

Bequest of residue, in moieties, in trust for two tenants for life, and at death of each in trust, as to her moiety, to the children of the two who should be living at the death of the deceased tenant for life, and the issue of such of the children who should then be dead :—Held, to take effect per capita. *Abbay* v. *Howe*, 1 De G. & Sm. 470; 16 L. J., Ch. 437; 11 Jur. 765.

Under a disposition by will to A.'s and B.'s families, the children are entitled exclusively of their parents, and per capita. *Barnes* v. *Patch*, 8 Ves. 604; 7 R. R. 127.

—— **Gift to a Class and their Children.**]—Residuary bequest in trust for A. for life, and after her decease to be distributed "between the testator's brothers and sisters and such of their children as should be then living, the parents and children to be classed together and to share in equal proportions" :—Held, that those brothers and sisters and children only who survived A. were entitled, and that they took per capita. *Turner* v. *Hudson*, 10 Beav. 222; 16 L. J., Ch. 180.

A testator devised "one-half of the freehold houses and property to his brothers and sisters for their life and then to come to their children, and in the same manner to his wife's brother and brothers' children and grandchildren." He had but one brother alive at the date of the will, and left no brother or sister surviving him, and only one brother of the testator's wife was alive at the date of the will, but he survived the testator :—Held, that under these circumstances all the

children living at the testator's death of all his brothers and sisters took per stirpes shares in one moiety, and that, subject to the life interest of the wife's surviving brother, the other moiety was divisible amongst all the children and grandchildren living at his death or coming into existence during the lifetime of the tenant for life, of himself and the other wife's brothers, who left children or grandchildren, the families taking per stirpes and the children and grandchildren of such family per capita. *Barnaby* v. *Tassell*, L. R. 11 Eq. 363; 24 L. T. 221; 19 W. R. 323.

A testator gave all his property to trustees upon trust for his wife for life, and at her death upon trust to sell and pay debts and legacies, and after payment thereof he gave the residue of the money to his sister E., his sister H., H. D., daughter of his late sister M. D., and to the children of his said two sisters E. and H. as should be living at the death of his wife, to be equally divided between them his said niece H. D., his sisters E. and H., and the respective children of them his said sisters, share and share alike. The sisters and niece died in the lifetime of the tenant for life, the wife, one sister leaving three children:—Held, that the three children and the representatives of the deceased niece and sisters took equally per capita. *Boughen* v. *Farrer*, 3 W. R. 495.

A testator gave real estate to his daughter for life, remainder to his "children and issue," and if but "one such child" that child to take the whole, and if she died without leaving "such issue," then over. He gave the residue of his personal estate to his daughter for life and her children and issue; and if she died without leaving such children or issue, then over:—Held, that the children of the daughter and their children took pari passu. *Cancellor* v. *Cancellor*, or *Chancellor* v. *Chancellor*, 1 N. R. 12; 2 Dr. & Sm. 194; 32 L. J., Ch. 17; 8 Jur. (N.S.) 1146; 7 L. T. 307; 11 W. R. 16. And see *Shailer* v. *Groves*, infra, col. 1004.

A testator by his will, after giving life estates to his widow and his sister successively, directed that after the death of his sister his residuary personal estate should go to his surviving brothers and their children, to be divided equally between them. The widow survived her sister-in-law, as also her brothers-in-law, two of whom only left issue surviving the widow:—Held, that the class was to be ascertained at the death of the widow, and that the surviving children of the two brothers took per capita. *Fox, In re*, 6 N. R. 374; 35 Beav. 163; 11 Jur. (N.S.) 735; 13 W. R. 1013.

—— **Gift to the Descendants of A.**]—Under a devise to the descendants of F. T. in a certain district, grandchildren and great-grandchildren take per capita. *Crosley* v. *Clare*, 3 Swan. 320, n. *S. C.* nom. *Crossly* v. *Clare*, Ambl. 397.

—— **Gift to Next of Kin, both Paternal and Maternal.**]—Bequest of 2,000*l.* to be equally divided amongst testator's next of kin, both maternal and paternal:—Held, that the fund was divisible between the two classes per capita, and not per stirpes. *Dugdale* v. *Dugdale*, 11 Beav. 402. *And see cases* ante, col. 834.

Per Stirpes.]—A bequest of a fund to be divided among the children of A., the children of B., the children of C., the children of D., and to E. if he should be then living, and if not E.'s share to be divided into four parts and paid to the children of A., B., C., and D. "in manner aforesaid":—Held, that the fund was divisible among the children per stirpes, and not per capita. *Nettleton* v. *Stephenson*, 18 L. J., Ch. 191; 13 Jur. 618.

Bequest of 1,200*l.* to A. and B., upon trust to appropriate and apply in two equal shares to and for the benefit of all their children respectively:—Held, on the context, to give legacies of 600*l.* to each family severally. *Overton* v. *Banister*, 4 Beav. 205.

A legacy to three families equally. The children of the families shall take per stirpes, and not per capita. *Alexander* v. *Douglas*, Romilly's Notes of Cases, 93.

A testator bequeathed 800*l.* to trustees upon trust to pay the income to A. for her life; and after her decease he gave the principal to her children and their representatives in equal shares, with a gift over in the event of A. dying without issue of the representatives of such issue. A. left one child surviving her, and children and grandchildren of another child of A.; and A. had also had other children, who died without issue:—Held, that the surviving child of A. was entitled to one moiety of the trust fund, and that the other moiety was to be equally divided among the children of the deceased child of A. *Alker* v. *Barton*, 12 L. J., Ch. 16.

Money bequeathed to A. for life, and if she died in the life of her husband to go to the children of her sister B. in such shares as A. should advise. Some of the children of B. died, leaving issue, and then A. dies in the life of her husband, making no appointment:—Decreed, the money to be distributed among the children of B. and their representatives per stirpes, and not per capita. *Crook* v. *Brooking*, 2 Vern. 50.

Testator bequeathed the residue of his personal estate as follows: "As to the residue of my fortune, I will and desire that the descendants or representatives of each of my first cousins deceased partake in equal shares and proportions with my first cousins now alive." The residue is divisible per stirpes amongst the first cousins who were living at the testator's death and such of the descendants of his first cousins who died before him as were next of kin of the deceased first cousins, and living at the time of the death of the testator. *Humphreys* v. *Humphreys*, 2 Cox, 187.

A., by will, bequeathed property in trust for all his grandchildren (the children of his son and daughter) who should be living at his decease, equally to be divided between them, such shares to be vested in possession in the grandsons at twenty-one, and the grand-daughters at twenty-one or marriage, with a gift over, in case any of the grandchildren should die before attaining a vested interest in possession, to the surviving brothers and sisters of the deceased grandchild. By a codicil he gave a sum of money to his executors to be invested, and directed the interest to be paid in equal moieties to his son and daughter during their lives, and at their decease the same to be for the benefit of his grandchildren, agreeably to the instructions contained in the will:—Held, that the effect of the codicil was to create a tenancy in common between the son and daughter during their lives in the fund directed to be invested, and that on the death of the son one moiety of the fund became divisible among his children, the grandchildren taking their shares under the will and codicil per stirpes,

and not per capita. *Archer* v. *Legg*, 31 Beav. 187 ; 10 W. R. 703.

Gift of personal estate, to divide the principal and interest among the children of A. and B. living at the time of the respective deceases of A. and B. with a proviso that the share of any such child or children dying under twenty-five, without issue, should go over to the survivors and survivor of them equally :—Held, that this was a gift to the children of A. living at his decease, and to the children of B. living at his decease, and that the fund was divisible per stirpes in moieties. *Ayscough* v. *Savage*, 13 W. R. 373.

A testator directed his residuary estate to be equally divided between his two sisters and the lawful issue of his two deceased sisters, in equal shares if more than one of such respective lawful issue :—Held, that it was divisible not per capita but into four parts, each surviving sister taking one part, and the issue of each deceased sister taking another part, as tenants in common. *Davis* v. *Bennet*, 4 De G. F. & J. 327 ; 31 L. J., Ch. 337 ; 8 Jur. (N.S.) 269 ; 5 L. T. 815 ; 10 W. R. 275.

Gift of residue to be equally divided between the testator's sisters J. and M., and the lawful issue of his deceased sisters E. and A., in equal shares, if more than one of such respective lawful issue. There were living at the testator's decease children, grandchildren and great-grandchildren of one of the deceased sisters :—Held, that J. and M. were entitled to two equal fourth parts, the issue of E. were entitled to another equal fourth part as tenants in common, and the issue of A. to the remaining equal fourth part as tenants in common. *Ib.*

A testatrix directed her trustees to divide the rents, &c., of her real estate equally between A., B., C. and D. the widow of E., until E.'s children attained twenty-one ; and upon their attaining twenty-one, the trustees were to sell and divide the produce between A., B., C. and the children of E., in equal shares and proportions as tenants in common ; but if D. married, her part of the income was to be applied to the maintenance of E.'s children ; and she gave the residue of her real and personal estate "equally between" A., B., C. and the children of E. who attained twenty-one. There were four children of E. who attained twenty-one :—Held, that they did not take the property per capita with A., B. and C., but one fourth only between them. *Brett* v. *Horton*, 4 Beav. 239 ; 10 L. J., Ch. 371 ; 5 Jur. 696.

A testator gave his real and personal estate to trustees on trust, to sell and convert the same and pay the interest and annual produce to his ten nephews and nieces nominatim for their respective lives, and after their respective deceases the share of such nephew or niece so dying "to be held in trust for all and every the children or child of my nephews and nieces, who being a son or sons should attain the age of twenty-one, or being a daughter or daughters should attain that age or marry, to be divided between and amongst such last children, if more than one, in equal shares and proportions ; and if any one or more of them my nephews and nieces shall not have any child, who being a son shall attain twenty-one, or being a daughter shall attain that age or marry under it, then and in each or any such case, as well the original share or shares of, as also the share or shares surviving or accruing to each or any such last-mentioned nephew or niece and his or her child or children, or to such child or children only in possession or expectancy, &c., shall go and accrue to and vest in the survivors or survivor or others or other of them my nephews and nieces and their respective children, at and in such and the same times, shares and proportions, and manner as are hereinbefore expressed of and concerning their respective original shares," &c. One of the nephews having died, leaving an only child, an infant :—Held, that such only child exclusively became presumptively entitled to his father's share, subject to its going over as provided by the will in the event of his dying under twenty-one without children. *Hunt* v. *Dorsett*, 5 De G. M. & G. 570 ; 1 Jur. (N.S.) 1053. Reversing 3 W. R. 531.

The testator gave a residuary fund to his brothers and sisters for life, and from and after the decease of the survivor to pay the principal to their issue who should live to attain twenty-one, or the issue of such of them as should be then deceased, such class of issue, whether in first or second degree, to take only as amongst themselves the shares which their parents would have been entitled to if living :—Held, that the children of the brothers and sisters took per stirpes, and that the children of one of the testator's nephews who died in the testator's lifetime took with their uncles and aunts the share which their father would have taken if living. *Shand* v. *Kidd*, 19 Beav. 310.

Testator gave one-third of his residue to his niece, which he desired might be settled by his executors on her for her separate use for her life, but to devolve to her issue at her death ; and failing issue, then to revert to his nephew. The court directed the third to be settled in trust for the niece for her separate use for life, and after her death in trust for her issue then living, and if there should be no such issue then in trust for the nephew. *Stonor* v. *Curwen*, 5 Sim. 264.

A testator gave his personal estate to A. for life, and after the decease of A. he directed his executors to divide it among the six children of his late sister, A. J. (naming them), "who should be living at the time of his decease, and the issue of such of them as should be living at the time of his decease, and the issue of such of them as should then be dead leaving issue then living ; the issue to take only such part or share as their parents if then living would have taken." If any of the children should die without leaving issue, his or her share was to go over to the others ; and if any of the children should die leaving issue, they were to take as therein mentioned. All the six children of A. J., survived the testator and the tenant for life, and some of them had issue :—Held, that the six children were entitled to the fund absolutely, and that in the events which had happened their issue took nothing. *Johnson* v. *Cope*, 17 Beav. 561 ; 2 W. R. 90.

A testator gave some houses to trustees upon trust to receive the rents and to pay the same in equal moieties to his son and daughter during their lives, and after the death of either of them without issue living, upon trust to pay the whole thereof to the survivor during the life of such survivor ; but if there should be issue living of the first of them so dying, then upon trust to pay one moiety to the survivor and to divide the remaining moiety between the children of the one so first dying ; and after the decease of the survivor of the testator's children, on trust to sell the property and to divide the proceeds equally amongst all and every the child or children of each of them the testator's son and daughter who

should attain twenty-one in equal shares and proportions :—Held, that the proceeds of sale were divisible among the grandchildren per stirpes and not per capita. *Campbell's Trusts, In re*, 55 L. J., Ch. 911 ; 33 Ch. D. 98 ; 55 L. T. 463 ; 34 W. R. 629—C. A. And see *Pearson* v. *Stephen*, post, col. 1071.

—— **Gift to Next of Kin.**]—A testator directed that the residue of his personal estate after the death of his widow, the tenant for life, should be paid by his trustees or the survivor of them, his executors or administrators, to A. and B., to be equally divided between them, share and share alike, if then living ; but if dead, to go and be equally divided to and amongst the respective next legal representatives of A. and B., share and share alike. A. and B. died in the lifetime of the testator's widow :—Held, that the next of kin of A. and B., according to the Statute of Distributions, living at the death of the testator's widow, were entitled to the fund per stirpes. *Booth* v. *Vicars*, 1 Coll. C. C. 6 ; 13 L. J., Ch. 147 ; 8 Jur. 76.

A testator devised real estate in trust for the persons who at his decease should be the next of kin of R. D., deceased, according to the Statute of Distributions, and their heirs, as tenants in common ; the next of kin consisted of great-grandchildren's children and the children of great-grandchildren's children :—Held, that they took per stirpes, and not per capita. *Mattison* v. *Tanfield*, 3 Beav. 131 ; 4 Jur. 933.

A testator directed his executors to pay and divide the residue "unto and amongst his own next of kin under the Statute of Distributions" : —Held, that brothers and deceased brothers' children took per stirpes. *Lewis* v. *Morris*, 19 Beav. 34.

Whether per Stirpes throughout.]—Testator bequeathed to G. two sums of stock, and in case of his death in the testator's lifetime without issue, the two sums were to be equally divided amongst the testator's nieces thereinafter named, under the same conditions and restrictions as were thereinafter mentioned respecting the several bequests thereinafter to them respectively given. The testator then gave 12,000*l.* stock to trustees, upon trust to pay the dividends (in thirds) to the testator's three nieces, A., B. and C., for their lives, and after their respective deaths to transfer the capital (in thirds) to the children of the nieces, with limitations over in the nature of cross-remainders, in the event of any of the nieces dying without leaving children, witn an ultimate limitation in the event of all the nieces dying without leaving children, in favour of the residuary legatee, a stranger. G. died without issue in the testator's lifetime. The nieces had children :—Held, that the children took the same interest in the stock given to G. as they did in the 12,000*l.* consols. *Ross* v. *Ross*, 2 Coll. C. C. 269 ; 9 Jur. 795.

A testator, in an obscure will, gave a life interest to A., with remainder to his children, and in the event of A. dying without leaving a child who should attain twenty-one, directed his estates to be converted, and the moneys arising therefrom to be divided, "share and share alike, amongst the children of X., Y. and Z., each and every of the persons so to be benefited, then living, to have an equal share one with the other ; and if any of the persons so intended to be benefited shall be then dead, and leave a child or children, grandchild or grandchildren, such child or children, grandchild or grandchildren, is and are to be entitled to the same share as their father, mother, grandfather or grandmother, as the case might be, would have been entitled to had each such person thereby intended to be benefited been then living." A. died a bachelor : —Held, first, that the children of X., Y. and Z., who were living at A.'s death, were alone, of the first class of takers, entitled to a share. *Palmer* v. *Crutwell*, 8 Jur. (N.S.) 479.

Held, secondly, that the children or grandchildren of the first takers, dying in the lifetime of the tenant for life, must themselves be living at A.'s decease to be entitled to a share. *Ib.*

Held, thirdly, that such last-named children or grandchildren took per stirpes, and not per capita. *Ib.*

P. gave all the residue of his real and personal estate to trustees "upon trust for all my brothers and sisters who shall be living at the time of the death of my wife and the children and issue of such of them as shall be then dead leaving children or issue, nevertheless such children or issue of any of my deceased brothers and sisters to have and take among them in equal shares such proportions of my residuary real and personal estate as such deceased brother or sister would have taken and been entitled to had he or she been living at the death of my wife." Nine of the testator's brothers and sisters survived him, but predeceased the wife, who died in 1869, some of them leaving children, and some of them also issue :—Held, that the children and issue of the testator's deceased brothers and sisters did not take concurrently with their parents, but took per stirpes the shares to which their respective parents would have been entitled. *Powell* v. *Powell*, 28 L. T. 730 ; 21 W. R. 725.

A testator gave the interest of 400*l.* during the life of J., his daughter, and after her decease, in case she should die without issue, the principal to his other eight children then living, equally ; and if any should be then dead, his or her issue (if any) should be entitled to the shares or share of him or her then dead ; but if J. should happen to leave any issue surviving, then the 400*l.* to be divided into nine equal shares, one to go to such her issue, and the other eight to be divided in such manner as the whole was directed to be divided in case of her dying without issue. J. died unmarried, the eight other children having survived the testator, but died in her lifetime, leaving issue :—Held, that the legacy should be divided into eighths, and go to the grandchildren and remoter issue living at the death of J. *Southam* v. *Blake*, 2 W. R. 446.

N. gave to trustees all his real estates in trust, after payment of debts, for the benefit of his wife and daughter for their lives ; and in the event of his wife dying in the lifetime of the daughter (which happened), then he directed the trustees after the death of the daughter to convey the fee-simple of the estates unto and equally between A., B., C. and D., share and share alike, or unto such of them as should be then living, and the issue of such of them as should be then dead leaving lawful issue, and to his, her and their heirs, executors, administrators and assigns for ever. But in case any one of them should happen to die in the lifetime of his wife or daughter leaving issue, such issue then living should be entitled equally among them to the share only which his, her or their parent

or parents would have been entitled to if living. N. died in 1834. A. died in 1840, leaving three children, X., Y., Z., all of whom died in the lifetime of the testator's widow and daughter, and all of whom left children surviving, viz., X. four, Y. one, and Z. six children :—Held, that the grandchildren of A. took his share of the property per capita, and not per stirpes. *Birdsall* v. *York*, 5 Jur. (N.S.) 1237.

Under a bequest to a daughter for life, and after her death to her children ; but if she died without issue, then to her two sisters if then living ; but if either sister should be then dead, the testator gave her share to her issue equally divided among them :—Held, that under the last bequest children, grandchildren and remoter issue took per capita. *Weldon* v. *Hoyland*, 4 De G. F. & J. 564 ; 5 L. T. 96. And see *Orton, In re*, post, col. 1077.

Effect of Words "per Stirpes."]—The words per stirpes held to import not only distribution, but succession or some species of representation. *Dick* v. *Lacy*, 8 Beav. 214 ; 14 L. J., Ch. 150 ; 9 Jur. 21.

Upon a gift over, after an estate for life of residue real and personal, to "daughters of B., and their decendants, per stirpes, to hold to them, their heirs and assigns, for ever," paying an annuity to L. for her life. B. left three daughters, one of whom survived the testator, and died in the lifetime of the tenant for life without ever having had issue :—Held, that the residuary estate belonged to the two surviving daughters. The words per stirpes are to be taken in a distributive sense, and "decendants per stirpes" to be considered as words of purchase, giving an absolute estate to the children, who took not concurrently with their parents, but by substitution. *Ib.*

Bequest to the brothers and sisters of A. living at the testator's death, "such descendants to take as tenants in common per stirpes, and not per capita" :—Held, that the fund was primarily divisible into as many equal shares as there were brothers and sisters of A. of whom any descendant was living at the testator's death ; that such shares respectively were divisible into as many equal shares as there were children of such brothers and sisters of A. respectively living at the testator's death, or having died and left any descendant then living ; that the same principle was to be applied to every subdivision, and that no descendant was entitled to any share concurrently with a living ancestor. *Gibson* v. *Fisher*, 37 L. J., Ch. 67 ; L. R. 5 Eq. 51 ; 16 W. R. 115.

A testator directed his property to be divided and paid "to the persons being such descendants as next hereinafter mentioned in equal shares among and to the lawful descendants living at the time of my death of such of the brothers and sisters of my late grandfather as have died leaving lawful descendants, such descendants respectively to be entitled to share the same moneys in a course of distribution per stirpes, and not per capita" :—Held, that the words per stirpes and not per capita were applicable to the descendants, who were to be classified secundum stirpes, or according to their families, and that the property was to be divided into as many shares as there were stirpes or families, each stirpes or family taking an equal share. *Robinson* v. *Shepherd*, 4 De G. J. & S. 129. And see *Selby* v. *Whittaker*, 47 L. J., Ch. 121 ; 6 Ch. D. 239 ; 37 L. T. 514 ; 26 W. R. 117.

—— **"According to the Stocks."**]—A testator gave the income of a trust fund to his wife for her life, and subject thereto the fund was to be held in trust for such of his cousins (the children of four deceased aunts and two deceased uncles of the testator named in the will) living at the determination of the wife's life interest, and such issue then living (if any) of his said cousins then dead as, either before or after the determination of such life interest, should attain twenty-one, or should die under twenty-one leaving issue living at his, her or their death, to take (if more than one) in a course of distribution according to the stocks, and not according to the number of individuals. At the time of the death of the tenant for life, there were living one cousin of the testator (a child of one of the uncles named in the will) and children and other issue of fifteen deceased cousins (children of the other uncle and of the four aunts named in the will):—Held, that the words, "according to the stocks," applied to the descendants of cousins, and not to the cousins themselves, and that the fund was divisible into sixteen shares. *Robinson* v. *Shepherd* (supra) preferred to *Gibson* v. *Fisher* (supra). *Wilson, In re, Parker* v. *Winder*, 53 L. J., Ch. 130 ; 24 Ch. D. 664.

Gift to A. and B. for their Lives—Remainder to their Children — Construed per Capita.]—Bequest of a legacy "to be equally divided between A. and B., after which to be equally divided between their children, that is to say, the children of A. and B. above named" :—Held, that the children of A. and B. took per capita, and that on the death of A. and his wife a moiety became divisible, equally, amongst the children of A. and B. *Abrey* v. *Newman*, 16 Beav. 431 ; 22 L. J., Ch. 627 ; 17 Jur. 153 ; 1 W. R. 156.

A testator gave a residue upon trust to pay the produce thereof between his grandchildren A. and B., during their respective lives, in equal shares, and after the death of A. and B. to transfer the capital unto and amongst the children of A. and B. in equal shares, and if there should be no children living at their decease, then upon trust for his personal representatives. A. died, leaving children, in the lifetime of B. :—Held, that B. was entitled to the whole for life, and that the capital was to be divided per capita among the children of A. and B. who might be living at B.'s death. *Pearce* v. *Edmeades*, 3 Y. & C. 246 ; 8 L. J., Ex. 61 ; 6 Jur. 245.

B. devised copyholds to his sons, G., J. and F., upon certain trusts during the life of his wife, and after her death upon trust to pay the rents equally between his three daughters, R., M. and H., or to sell the same and invest the produce as therein mentioned, and to pay it to his three daughters during their lives for their separate use, and upon further trust "that in case my daughters shall depart this life leaving lawful issue," then the trustees should appropriate "the share of such daughter or daughters to the maintenance and education of such child or children until the age of twenty-one," and directed that his copyhold estates or their produce should be divided amongst "the whole of my grandchildren, share and share alike, in case there should be no lawful issue but of one of my daughters, that is, the children of George, James and Frederick, with the child or children of only one of my daughters, share and share alike," and directed that his trustees should then sell if they

had not before done so, the produce to be divided amongst such grandchildren, share and share alike, and as they should respectively attain the age of twenty-one, but should he have no grandchildren or not one who should attain the age of twenty-one, then the estate was to go to K.; and as to all the rest, residue and remainder of his estate and effects, he devised and bequeathed the same to his wife for her own use. All the daughters survived their father; R. died without leaving children, H. died leaving children, M. died having survived her children, but leaving grandchildren:—Held, that the word "issue" was to be read in its widest sense, and would include grandchildren, and that the respective issue of M. and H. took their respective shares by implication, and that they took per capita. *Mitchison* v. *Buckton*, 32 L. T. 11; 23 W. R. 480.

By his will a testator gave all the residue of his property (after payment of debts and legacies) to trustees, to get in, convert and invest, and declared the trusts to be, as to one-third of the annual proceeds, for his daughter A. for life, to her separate use; and after her decease the trustees were to apply, for the maintenance, education and advancement of her children, such one-third of the income, or so much thereof as the trustees should in their judgment think fit, until the decease of the survivor of his three daughters A., E. and M.; and as to another one-third of the income, for his daughter E. and her children; and as to the remaining one-third of the income, for his remaining daughter M. and her children; and on the decease of the survivor of A., E. and M., the whole of the principal moneys, and all such income as should happen to be due and unapplied as aforesaid, was to be divided among all and every the children and child of A. E., and M. in equal shares. A. had one child, E. had four, and M. had seven children:—Held, that on the decease of the survivor the whole residue was to be divided per capita, and not per stirpes, among the testator's grandchildren. *Nockolds* v. *Locke*, 3 K. & J. 6; 2 Jur. (N.S.) 1064; 5 W. R. 3.

Held, that there was in the will no gift of the income of each one-third share to the children of any one daughter; but that the whole, or so much as should be unapplied at the decease of the survivor of the daughters, fell into the residue. *Ib.*

The direction as to maintenance of the grandchildren:—Held, not to afford grounds for presuming that the testator intended a division per stirpes of the capital. *Ib.*

Bequest of stock after previous life estates to T. P. and J. S. during the term of their natural lives, and from and after their decease to the surviving children of J. S. and T. P., share and share alike:—Held, that the survivorship must be referred to the death of the last tenant for life, which is the period for distribution; and that the persons then taking took per capita, not per stirpes. *Stevenson* v. *Gullan*, 18 Beav. 590.

A mother gave the income of one moiety of her residuary estate to her daughter Margaret for life, and the income of the other moiety to her daughter Mary Ann for life, and then directed her trustees to stand possessed of one moiety of her estate from and after the death of Margaret, and of the other moiety from and after the death of Mary Ann, to pay, transfer and assign the same unto and amongst all the children of Margaret living at her decease, and the issue then living of any children of hers who should have died in her lifetime, and all the children of Mary Ann who should be living at her decease, and the issue then living of any children of hers who should have died in her lifetime, to be equally divided between or among them if more than one, and if there should be but one such child and no issue of any deceased child, or no such child and only one grandchild or such other issue, then the whole to such one child, grandchild, or other issue; the issue of a deceased child taking their parents' share:—Held, that the full and elaborate language of the will, which clearly imputed a distribution of the whole fund per capita among the children of both daughters, could not be controlled on the ground of the inconvenience of keeping a moiety of the fund in suspense from the death of one daughter till the death of the other, though in some cases, where the language was very concise and obscure, the court had held the share of each of the tenants for life divisible on his death among his own children exclusively. *Swabey* v. *Goldie*, 1 Ch. D. 380; 33 L. T. 306.

Bequest to executors of 4,000*l.* in trust to pay one-half of the interest to A., and the other half to B., during their lives; "and as their lives drop and expire, I direct that the principal and interest be reserved and equally divided among their children, when they shall severally attain twenty-one." A. died without issue; the entire principal vests in the children of B., on their severally attaining twenty-one. *Smith* v. *Streatfield*, 1 Mer. 358; 15 R. R. 132.

A testator having three species of property, viz., his own property, property derived from his wife, and a reversion in 10,000*l.* consols, bequeathed his own property to his two sisters with benefit of survivorship, his wife's property to his cousin Margaret, and he proceeded thus: "In case of the death of the above three females, the interest to be divided amongst my cousins (naming four) for their lives," and the property, including the 10,000*l.* trust money, "to devolve" to the children of three of those cousins (naming them) in equal proportions:—Held, that Margaret was not, by implication or otherwise, entitled to more than the wife's property. Held, also, that the four cousins took life interests in the trust fund, as tenants in common, and that on the death of each of their shares then set free, went over to the children of the three cousins per capita, and not per stirpes. *Swan* v. *Holmes*, 19 Beav. 471.

By a will the residue was given to seven persons as tenants in common for life, and on the death of the survivor was to be divided amongst their children then living per stirpes. By a codicil the gift to the children was revoked, and the residue was to be divided from and after the several deceases of the seven, and after the decease of the survivor of them, amongst their children per capita:—Held, that the words "from and after," &c., were to be read disjunctively, and that, on the death of any of the seven, one-seventh was divisible amongst children of the seven per capita. *Cope* v. *Henshaw*, 35 Beav. 420.

—— **Construed per Capita.**]—Bequest to testator's wife of the use and usage of all his effects for her life, and at her death bequest of the same to four nieces by name, to be by them equally divided, share and share alike, and at their deaths to go equally, share and share alike, to

their children :—Held, to give the respective children their parents' shares only. *Arrow* v. *Mellish*, 1 De G. & Sm. 355.

Legacy of 600*l.* to F., and at her death to two daughters in equal shares, and at their death to their children. One daughter having died without issue :—Held, that children of other did not take her share. *Tuniere* v. *Peurkes*, 2 Sim. & S. 383 ; 4 L. J. (O.S.) Ch. 81 ; 25 R. R. 229.

Gift in trust to be equally divided between A., B. and C., separate from "their" husbands, and for "their" sole use, and at their decease to be divided amongst "their" daughters :— Held, that A., B. and C. each took one-third for life, with remainder as to her one-third to her daughters. *Wills* v. *Douglas*, 10 Beav. 47 ; 11 Jur. 702.

An annuity to wife, and after her death "the annuity to be equally divided between my two sons, but not the principal ; that I bequeath to their children, to be equally divided between them at the death of my sons" :—Held, that upon the death of either of the sons his children took their parent's share. *Turner* v. *Whittaker*, 23 Beav. 196 ; 2 Jur. (N.S.) 848 ; 4 W. R. 689.

A testator bequeathed renewable leaseholds and copyholds to the four grandchildren equally, and after their death "for such children as they, or any or either of them, should leave her or him surviving" :—Held, that on the death of each grandchild his "children" then surviving took as tenants in common. *Waldron* v. *Boulter*, 22 Beav. 284.

Gift to A. and B. equally for life, and after their death in trust for and to the use of all and every the child or children of A. and B., both or either of them, if more than one, share and share alike, and until the youngest should attain twenty-one :—Held, on the death of A., that his children living at his death were entitled in equal shares to his moiety of the rents and profits until the youngest of the children of A. and B. had attained twenty-one. *Prankerd* v. *Baker*, 14 L. T. 11.

A testator gave certain leaseholds for 999 years, and a share in the R. Waterworks, and all his estate and interest therein to M. and A. and their assigns during the term of their respective natural lives, as tenants in common, and not as joint tenants, and from and immediately after the decease of them (the said M. and A.) he gave the same unto all and every the lawful child and children of the said M. and A. equally as tenants in common, and not as joint tenants, and their respective executors, administrators and assigns for all the residue unexpired of the term of 999 years, or during all his estate and interest therein, subject to the payment of the rent and the performance of the covenants, with a gift of the residue to M., A. and others. M. and A. both survived the testator ; M. had seven children: A. died leaving two children surviving. M. was in possession of the estate ; and upon the question what was the effect of the gift to M. and A. and their children :—Held, that the estate was given in equal moieties to M. and her children on the one hand, and A. and her children on the other, and that on the death of A. her share was divisible amongst her children. *Milnes* v. *Aked*, 6 W. R. 430.

Devise to trustees to pay the rents to and amongst testator's four daughters, share and share alike, during their lives ; and in case either should die leaving issue, the share of her so dying to be paid to the child or children of each daughter so dying ; but in case either of the daughters should die without leaving issue, then her share was to be paid to A. and B. :—Held, first, an estate tail in the daughters in remainder after the life estates of them and their children ; secondly, the children of the daughters took their life estates per stirpes. *Coles* v. *Witt*, 2 Jur. (N.S.) 1226.

A testator, after certain legacies and bequests as to 400*l.*, directed his executors to invest, raise and pay the dividends to his son Richard for life, "and after his decease upon further trust to pay or assign the principal sum of 400*l.*, with the accruing dividends or interest on the securities in which the same had been invested, unto his sons John, William and James Blackwell, and his daughter Mary Garner, to be equally divided between them, share and share alike, or such of them as should be living at the time of the decease of the said Richard, and the issue of such of them as should be then dead leaving issue ; such issue to take no greater or other share or shares than his, her or their respective parent or parents would have been entitled to if living." The three sons and the daughter died before the tenant for life. He died on the 6th April, 1863. Each of the sons left children. The daughter died without issue :—Held, that the legacy vested in fourths ; that the children of the three sons took one-third each as joint tenants, and the personal representatives of the daughter took the other fourth. *Blackwell, In re*, 11 L. T. 335.

Under a gift to three persons by name for their respective lives, and subject thereto for their respective children as tenants in common, the life tenants are tenants in common, and the children take per stirpes. *Sutcliffe* v. *Howard*, 38 L. J., Ch. 472 ; 17 W. R. 819.

Gift of the income to arise from residue to A. and B. for their lives, share and share alike, and, after their death, of the principal to the children of A. and the children of B., to be divided between them, share and share alike :—Held, that the children of A. and the children of B. took per stirpes. *Notts, In re*, 26 L. T. 679 ; 20 W. R. 569.

J. L. "gave and bequeathed unto his niece C. B. and his nephew J. T. all his houses situate at W., each to have one-half, to be share and share alike ; and what debts he should owe at his decease, they should pay both of them a like share of the same ; all the above premises he gave, devised, and bequeathed unto his niece C. B. and his nephew J. T., each to enjoy one-half during their lives, and at their decease the said premises to go to their children." J. L. died in 1786. J. T. died in 1804, without children and intestate, leaving C. B. his heiress-at-law, and the heiress-at-law of J. L. C. B. had thirteen children, six of whom survived her. (Part of the premises were taken by the commissioners under the Whitby Improvement Act, and the purchase-money paid into court.) C. B. devised all her estate, right, title and interest in and to the premises and the purchase-money unto her daughter J. B. :—Held, that C. B. and J. T. each took an estate for life in a moiety of the property ; that upon the decease of C. B. and J. T. their children took their parents' moieties respectively as joint tenants in fee ; but that as J. T. had no children, C. B. took his moiety as his heiress-at-law, and that that moiety passed to her devisee. *Laverick's Estate, In re*, 18 Jur. 304 ; 2 W. R. 113.

A testator gave real and personal estate to

trustees during the lives of eight nephews and nieces whom he named, and the survivors and survivor of them, upon trust to pay one-eighth of the rents to each during their respective natural lives; and directed that, in case any should die without leaving issue, the share of him, her or them so dying should go among the survivors in the same manner as their original shares; and in case any of the eight legatees should die leaving issue, the share original and accruing of him, her or them, so dying, should be paid to and equally among such issue; and after the decease of the survivor of the eight legatees, the testator devised such real and personal estate unto the issue then living of the eight legatees and their heirs, the share of the issue in the fee simple to be in the same proportion as the rents and profits he or they might then be in receipt of:—Held, that on the death of the survivor of the eight legatees who had died and left children such children to take per stirpes, but the members of each stirps to take equally. *Bradshaw* v. *Melling*, 23 L. J., Ch. 603.

A testatrix bequeathed personalty in trust for A. B. for life, and after his decease for his issue, and on failure of his issue to F. H. S. and R. S. share and share alike, "and after the decease of the said F. H. S. and R. S. to their children share and share alike, and to their heirs for ever." F. H. S. died without having had issue, R. S. survived him and died leaving children, and A. B., who survived them both, died without issue. Upon a petition by the children of R. S. for payment out of a portion of the trust fund which was in court:—Held, that, upon the authorities, the bequest must be construed as a gift after the respective deaths of F. H. S. and R. S. to their respective children, and that, there having been an absolute gift to each of them in the first instance only cut down in favour of his children, in the events which happened the fund was divisible in moieties between the representatives of F. H. S. and the children of R. S. *Hutchinson's Trusts, In re*, 51 L. J., Ch. 924; 21 Ch. D. 811; 47 L. T. 573. And see *Flinn* v. *Jenkins*, 1 Coll. C. C. 365; 8 Jur. 661.

—— **Construed per Stirpes to Families and per Capita to Children and Grandchildren of each.**]—A testator devised "one-half of the freehold houses and property to his brothers and sisters for their life and then to come to their children, and in the same manner to his wife's brother and brother's children and grandchildren." He had but one brother alive at the date of the will, and left no brother or sister surviving him, and only one brother of the testator's wife was alive at the date of the will, but he survived the testator:—Held, that under these circumstances all the children living at the testator's death of all his brothers and sisters took per stirpes shares in one moiety, and that, subject to the life interest of the wife's surviving mother, the other moiety was divisible amongst all the children and grandchildren, living at his death or coming into existence during the lifetime of the tenant for life, of himself and the other wife's brothers who left children or grandchildren, the families taking per stirpes, and the children and grandchildren of each family per capita. *Barnaby* v. *Tassell*, L. R. 11 Eq. 363; 24 L. T. 221; 19 W. R. 323.

When Gift to Children Substitutionary—Per Stirpes.]—Bequest (in effect) to A. for life, and in default of her appointment equally amongst "her sisters, or their children, living at her decease":—Held, first, that the children took by substitution, and therefore that the children of a sister who was dead at the date of the will could not take; and, secondly, that such of the children as were entitled took per stirpes. *Congrere* v. *Palmer*, 16 Beav. 435; 23 L. J., Ch. 54; 1 W. R. 156.

Distinction between a gift to several with remainder to their children and one to several with a substitutionary gift to their children in respect to the children taking per stirpes or per capita. *Ib.*

On a bequest of stock to the wife for life, and afterwards a moiety to be received and divided equally amongst the testator's brothers and sisters and their issue:—Held, that the brothers and sisters living at the testator's death took vested interests, liable to be divested by their dying, leaving issue, before the period of division, and that the issue took by substitution. *Shailer* v. *Groves*, 6 Hare, 162. But see this case as reported in 16 L. J., Ch. 367; 11 Jur. 485. See also 2 Jarm., 4th ed., page 737, n.

Bequest of residue upon trust for A. for life, and then to divide unto and equally between all the children of A. living at his death except B., and amongst the issue of any children of A. who should be then dead, and also among the issue of B., such issue taking their respective parents' share:—Held, that the issue of B. took per stirpes, as though a share had been given to B. with the other children of A., and B.'s issue were taking such share by substitution. *Minchell* v. *Lee*, 17 Jur. 727.

A testator bequeathed to his daughter a perpetual annuity of 250*l.* a year. By a codicil he directed, that instead of the money being paid to her it should be paid to trustees for her, and he proceeded thus: "After my daughter C.'s death, I give the above money to be divided as follows: to her sister A. 100*l.* a year, and all the rest to be equally divided between her other brothers and sisters or their children." All her brothers and sisters predeceased C.:—Held, first, that A. was entitled to a capital sum sufficient to produce 100*l.* a year; secondly, that the grandchildren who survived their parents took by substitution; and thirdly, that they took per stirpes. *Timins* v. *Stackhouse*, 27 Beav. 434.

Bequest to A. for life, and after her decease to the testator's four children, the survivor or survivors of them, equally, or their heirs lawfully begotten. One of the four children died in the life of A.:—Held, that his children took one-fourth by substitution. *Price* v. *Lockley*, 6 Beav. 180; 7 Jur. 143. And see *Armstrong* v. *Stockham*, 7 Jur. 231.

A testator gave a legacy of 200*l.* to each of his twelve first cousins, nominatim, and then, noticing that one was dead, he gave the legacy intended for him to his children. He gave his wife a life interest in his residuary and personal estate, to be enjoyed in specie; and, from and immediately after his wife's decease, he gave his executors full power to collect all his property together, and sell the houses and other estates, and to convert into money all his funded property, and then to pay first certain legacies, and then the whole of the remainder of his property was to be divided, share and share alike, among his aforesaid twelve first cousins and their children. By a codicil he took away the legacy given by his will to his cousin Mrs. B., but expressed his

intention not to exclude her children from the benefit she might thereafter possess in the final division of his property after his wife's decease :—Held, that the cousins who survived the testator took vested interests absolutely, subject, as to those who died leaving issue, to be divested for the benefit of their children, by way of substitution, and that the children of the cousin alluded to by the testator as already dead were entitled to a twelfth share of the residuary estate, as representing such deceased cousin. *Burrell* v. *Baskerfield*, 11 Beav. 525 ; 18 L. J., Ch. 422 ; 13 Jur. 311.

—— **Per Capita.**]—Bequest to the testator's two sisters for their lives, and after the death of the survivor "to be equally divided between the testator's surviving brothers and sisters, or their children equally." The brothers and sisters having all died in the life of the last tenant for life :—Held, that those children only who survived the tenant for life participated, and that they took per capita. *Atkinson* v. *Bartrum*, 28 Beav. 219 ; 9 W. R. 885.

Survivorship held to apply not only to the original, but to the substituted class. *Ib.*

Bequest to executors in trust, that they shall pay, &c., unto and amongst the testator's two brothers and his sisters, or their children, in such shares, &c., as the trustees or the major part of them, or the survivor, his executors, &c., shall think fit. All the children living at the death of the testator held entitled with the parents per capita, the court not having a discretion. *Longmore* v. *Broom*, 7 Ves. 124.

Where a testator gave the income of certain property equally among his brother and his three sisters, the share of any one who should die going among his or her children, and directed that on the death of all the corpus should be equally divided between the children of the same brother and sisters, share and share alike :—Held, that, on the construction of the ultimate gift, the corpus was clearly divisible among the children per capita, and the case of *Brett* v. *Horton* (4 Beav. 239) did not oblige the court to direct, contrary to the testator's obvious intention, that the ultimate division should be per stirpes. *Stone, In re, Baker* v. *Stone*, 64 L. J., Ch. 637 ; [1895] 2 Ch. 196 ; 12 R. 415 ; 72 L. T. 815 ; 44 W. R. 235—C. A.

—— **Per Stirpes to Families, per Capita among Issue.**]—A testator gave, devised and bequeathed the residue of his estate unto all and every his brothers and sisters, or their issue, to be equally divided between or amongst them, share and share alike, as tenants in common, and not as joint tenants, and to their respective heirs, executors, administrators and assigns. The testator had four brothers and three sisters. All the brothers died several years before the date of the will. Two of the sisters survived the testator, and three of the brothers and the deceased sister left issue :—Held, that the residue was divisible into six equal shares, the surviving sisters each to take one share, and the issue of each deceased brother who left issue and of the deceased sister to take respectively one share, the issue of each stirps, of whatever degree, to take inter se equally per capita. *Gowling* v. *Thompson*, 19 L. T. 242 ; 16 W. R. 1131.

A testator, after giving his residuary personal estate to all and every the children of his uncle F. or their issue in equal shares, gave his real estate to A. for life, and after her death upon trust for sale, and to hold the proceeds upon trust for "all and every the children of F. or their issue in equal shares per capita." Four of the six children of F. were dead at the date of the will, and two survived the tenant for life :—Held, that the issue of the four deceased children of F. alive at the death of the testator or born during A.'s lifetime took as by substitution the shares of their deceased ancestors in the proceeds of the realty, the issue of each of the four taking, inter se, in equal shares. *Sibley, In re*, 46 L. J., Ch. 387 ; 5 Ch. D. 494 ; 37 L. T. 180.

Gift to Children of A. and B.—Children per Capita—B. taking no Interest.]—Bequest between and amongst all and every the child or children of Thomas T., deceased, and Henry T., in equal shares :—Held, that all the children of Thomas and Henry took equally per capita, and not per stirpes, and that Henry himself took nothing. *Davies, In re*, 29 Beav. 93 ; 7 Jur. (N.S.) 118 ; 9 W. R. 131.

A testator bequeathed life interests in four distinct funds to four nieces respectively, and directed that, upon the decease of any or either of them, the principal of the fund, the interest of which was to be received by her or them, should be held in trust for "the benefit of all and every the lawful children of her or them so dying and of the survivors or survivor of my other nieces hereinbefore named in equal shares." One of the nieces having died, leaving two children :—Held, that her fund was divisible among these children, and among the children of the three other nieces, it being proper to give some force to the word "of," and that word being referable to the word "children" as the last antecedent. *Peacock* v. *Stockford*, 3 De G. M. & G. 73.

A bequest of residue "to all the children of my brother R. and my sister M., to be equally divided between them, share and share alike." R. and M. having equal legacies in a former part of the will, and there being nothing in the context from which an intention could be inferred that M. was personally to take an equal share in the residue with the children of R., this construction was rejected, and the gift was held to pass the residue to the children of R. and the children of M. in equal shares. *Mason* v. *Baker*, 2 K. & J. 567.

Testator bequeathed to J. W. 1,000*l.* ; to his sister M. W. 200*l.* ; to their mother 200*l.* ; and to the three aunts of J. W. and his sister M. W. 100*l.* each :—Held, that under the last bequest the aunts only, and not the sister, took. *Trail* v. *Kibblewhite*, 12 Sim. 5 ; 10 L. J., Ch. 200 ; 5 Jur. 501.

—— **B. taking with Children of A. per Stirpes.**]—A testator devised and bequeathed his real and personal estate to trustees absolutely, upon trust, as to one moiety of the personalty, to pay and divide the residue equally between and amongst his nephew John and his niece Hannah (whom he described as the children of his late brother Joseph), "and all and every the children of my late nephew Mark Ingle and my niece Eliza Wheelwright," share and share alike. He then desired his trustees to stand possessed of a moiety of the proceeds of the sale of his realty, upon trust to divide the same as before mentioned. In a codicil he referred to the "legacy left and apportioned to my niece Eliza." Some years before the date of the will a brother of the testator, named Mark, had died, leaving three sons,

one of whom was named Mark. The evidence shewed that, at the testator's death, the nephew Mark, who had had a son born to him in England, and had emigrated to America, where he had another child, was still living; also that the testator knew of the birth in England of the child of Mark, and of his emigration to America, and that from such circumstances he (the testator) had, shortly before the date of the will, been led to suppose that Mark might be dead:—Held, that by the words "and my niece Eliza" the testator intended a gift to Eliza, and not a gift to the children of Eliza. *Ingle, In re*, 40 L. J., Ch. 310; L. R. 11 Eq. 578; 24 L. T. 315; 19 W. R. 676.

A bequest of a residue to be divided equally "amongst all the children of my late cousin E., and my cousin P., and their lawful representatives," is a bequest to the children of E. and to P. himself, and not to the children of P. *Lugar* v. *Harman*, 1 Cox, 250; 2 Bro. C. C. 85.

A testator directed some property to be divided at a future period amongst the then surviving children of John and Sarah Worn, and Catherine Hales. Sarah was a sister of the testator, but Catherine was a stranger, and Sarah had children, but Catherine was a spinster at the date of the will:—Held, that Catherine personally, and not her children, was entitled to participate. *Lugar* v. *Harman* (supra) followed. *Stummvoll* v. *Hales, Johnstone, In re*, 4 N. R. 473; 34 Beav. 124; 10 Jur. (N.S.) 716; 10 L. T. 807; 12 W. R. 1137.

A testator gave his real estate to trustees upon trust to sell, the proceeds to be subject to the disposition of his personal estate to the same trustees upon trust to pay certain legacies, and subject thereto "unto and equally amongst all the children of my said brother-in-law, Dr. J. D., and the said R. A., of C., and I direct that the same shall be vested legacies at the time of my decease":—Held, that the gift was to the children of Dr. J. D. and R. A. himself. *Featherstone's Trusts, In re*, 52 L. J., Ch. 75; 22 Ch. D. 111; 47 L. T. 538; 31 W. R. 89.

Gift to A. and B. for Life, Remainder "on Death of either to Children of each."]—Real and personal property was devised and bequeathed to trustees on trust to pay a moiety of the income to J. for her life, and the other moiety of the income to E. for her life; and on the death of "either" the property was to be held in trust for all the children of "each" who should be living at her decease when and as they should respectively attain the age of twenty-three years, or, being daughters, should marry under that age, in equal shares:—Held, that on the death of J., who died first, her children took the moiety held in trust for her of the property in exclusion of the children of E. *England* v. *England*, 20 L. T. 648; 17 W. R. 719.

Held, also, that the gifts to the children of J. and E. were not void on the ground of remoteness. *Ib.*

5. VESTED AND CONTINGENT INTERESTS.

See VESTED CONTINGENT AND FUTURE INTERESTS.

6. DEATH SIMPLY REGARDED AS A CONTINGENT EVENT.

Immediate Gift — Construed strictly.] — Bequest to the use and behoof of A., and in case of her decease to the use and behoof of her children, share and share alike:—Held, a life interest only in A., the capital to her children after her decease. *Douglas (Lord)* v. *Chalmer*, 2 Ves. 500.

Bequest of 1,000*l.* to testator's sister, and, in case of her demise, 800*l.* to A., and the remaining 200*l.* to B. The sister entitled for life, then to go in the proportions. *Billings* v. *Sandom*, 1 Bro. C. C. 393.

The will of S. C., after bequeathing her property to A. C. and J. C., continued thus: "In case of the demise of either the said A. C. or J. C., I do hereby bequeath the same . . . to the survivor for her sole use and benefit during her or their natural lifetime":—Held, that the residue was not disposed of, and that A. C. and J. C. took only as tenants for life. *Watson* v. *Watson, Clarke, In goods of*, 51 L. J., P. 13; 7 P. D. 10; 47 L. T. 24; 30 W. R. 275.

—— **Construed Death before Testator.**]—Rule that a bequest to any person, and in case of his death to another, with no reference to the period within which that event is to take place, vests absolutely if such person survive the testator. *Home* v. *Pillans*, Coop. t. Brough. 198; 2 Myl. & K. 15.

Testatrix bequeathed as follows: "I give the legacy of 4,000*l.* to A., and in case of his decease I give the same legacy to his wife, and at her decease to their eldest daughter":—Held, that A., having survived the testatrix, was absolutely entitled to the legacy. *Crigan* v. *Baines*, 7 Sim. 40.

Words of will after giving legacy were, "and in case of legatee's death then to children":—Held, that words referred to legatee's death before testator, and that legatee surviving him took absolutely. *Slade* v. *Milner*, 4 Madd. 144.

Bequest to A., and, in case of her death, to B.:—Held, an absolute interest in A. *Hinckley* v. *Simmons*, 4 Ves. 160.

Legacy to "A., or in case of his death," &c., construed to mean to A. absolutely, if living. *Turner* v. *Moor*, 6 Ves. 557.

A clause of survivorship between two legatees, if either of them should die, confined to a case of lapse, and did not prevent the legacies vesting. *King* v. *Taylor*, 5 Ves. 806; 5 R. R. 172.

Legacies to two sisters, with a direction, in case of the death of either, reciprocally to devolve to the other; that direction confined to the case of lapse by the death of either in the life of the testator, and did not prevent the vesting absolutely. *Cambridge* v. *Rous*, 8 Ves. 12; 6 R. R. 199.

Residuary bequest in trust for the use and benefit of A., and in case of her death to be equally divided between the children of B. Payment decreed to the executor of A., as having taken the absolute interest. *Ommaney* v. *Bevan*, 18 Ves. 291.

A testator resident abroad gave a legacy to A., "or in case of his decease, or at his decease, to be equally divided amongst his children." He gave other legacies in similar terms to B., C., &c., and he directed these sums to be paid to the above persons, then residing in Wales; and he appointed executors in trust, to send them to the respective individuals within six months:—Held, that the parents took absolute interests. *Arthur* v. *Hughes*, 4 Beav. 506.

Legacy of stock in trust for the use, exclusive right, and property of A., but should she happen

to die then in that case among her children; another legacy of stock to A., to be paid her as soon as possible, or, in the event of her death, among her children; another legacy of stock to B., and in case of her death among her children; all these legacies held absolute in the respective mothers. *Webster* v. *Hale*, 8 Ves. 410; 7 R. R. 103.

One devises to A. 500*l*., to B. 500*l*., and so to five others the like sum; "and if any to whom I have given any money legacy happen to die, then his or her legacy, and also the residue of my personal estate, to go to such of them as shall be then living." Decreed, it should be taken to be living at the death of the testator, and not at any time after, so that the death of any of the legatees after would not carry it to the survivors. *Trotter* v. *Williams*, Pre. Ch. 78.

Residuary personal property held to be vested in A. and B. in equal moieties, and descendible in the same proportions to their respective children, notwithstanding words giving the property to the survivor "in the event of the death of either," the word "death" being held to refer to death in the testator's lifetime. *Clarke* v. *Lubbock*, 1 Y. & C. C. C. 492; 6 Jur. 548.

Bequest of a legacy to the plaintiff for her sole use and benefit, and "in the event of her death, then" to her youngest surviving son:—Held, that the event contemplated a death in the testator's lifetime, and that the plaintiff, having survived him, was entitled absolutely. *Schenk* v. *Agnew*, 4 K. & J. 405.

Bequest to four persons equally, and "in case of the death" of any or either of them, "in the lifetime of the other or others," their shares to go to "survivor or survivors of them":—Held, that the survivorship had reference to the period of the testator's death. *Howard* v. *Howard*, 21 Beav. 550.

A testator gave certain gifts to different persons, including some express estates for life. He then gave certain leaseholds to his daughter M. (a married woman) for her own proper and absolute use and benefit; and afterwards provided, that in case she should die, the premises should go and be for the sole use and benefit of her children living at her decease. The testator appointed M. his sole executrix. M. survived:—Held, first, that the gift was not for her separate use independent of her husband. *Taylor* v. *Stainton*, 2 Jur. (N.S.) 634; 4 W. R. 538.

Held, secondly, that the subsequent gift for the benefit of her children was only substitutionary, to prevent a lapse in case of her decease before the testator; and that, as she survived the testator, it did not cut down the absolute interest given to her in the first instance; and the property was therefore held to belong to her husband, and to pass to his assignees in bankruptcy. *Ib.*

A testator gave legacies to his two brothers, and directed that if either of them "die in my lifetime" his legacy should go to his children, but the legacies were not to be paid till six months after his wife's death. By a codicil reciting the effect of his will and the death of one of his brothers, he directed his legacy to be held for the benefit of his widow for life, and after her death the principal to be paid to her children; and he directed that if his other brother "shall die leaving a widow," such widow should have an interest in the legacy given him in like manner as he had directed the legacy of the deceased brother:—Held, that the words "shall die leaving a widow" meant die in the testator's lifetime, and that interest was payable from the death of the widow. *Hood* v. *Hood*, 18 W. R. 88.

A testator left legacies to three persons, and if any of them died their share was to go to the others. One of the legatees and the testator died at the same instant:—Held, that "death" must, according to the ordinary rule, mean death in the testator's lifetime, and that the legacy of the legatee so dying became part of the residue. *Elliott* v. *Smith*, *Elliott*, *In re*, 52 L. J., Ch. 222; 22 Ch. D. 236; 48 L. T. 27; 31 W. R. 336. And see *Chalmers* v. *Storil*, 2 V. & B. 222.

—— **Construed Death during Minority.**]—Devise to "children, share and share alike." First codicil appointed a guardian "during minority,"—second codicil "in the event of the death of any of the children, their portion to be divided among the survivors share and share alike":—Held, that "in the event of the death" meant death during minority. In a will "in the event of the death of the devisee" are never construed to mean the event of a lapse by death before the testator, except from necessity. *Montgomery* v. *Montgomery*, 2 Ir. Eq. R. 161.

Future Gift—Construed strictly.]—A testatrix bequeathed a legacy to A., his executors, &c., "but in case he should die leaving lawful issue," she bequeathed it to A.'s children. A. survived the testatrix:—Held, that A. took a life interest only. *Johnston* v. *Antrobus*, 21 Beav. 556.

In order to advance the apparent intention of the testator, the words "if he should die" were construed "when he should die." *Smart* v. *Clark*, 3 Russ. 365; 5 L. J. (O.S.) Ch. 111; 27 R. R. 96.

A testator gave his whole property to his wife, upon condition that she should pay an annuity of 150*l*. to his mother during her life, and after her death to his wife, to be equally divided between those of his children who should survive her, share and share alike. All the testator's children died in the lifetime of his widow, who married again, and died leaving her husband surviving her:—Held, upon her death, that in the events which had happened, the testator's property was undisposed of, and that the next of kin, and not the second husband in right of his wife, were entitled to it. *Joslin* v. *Hammond*, 2 Myl. & K. 113; 3 L. J., Ch. 148.

A testator gave freehold and leasehold property to his wife for life, and after her death, to A., B. and C., share and share alike (there being neither words of inheritance nor of restriction as to their interest), and after their decease to their children. A., after the death of the testator and tenant for life, died without issue:—Held, that A. was not absolutely entitled, and that his share fell into the residue. *Waters* v. *Waters*, 26 L. J., Ch. 624; 3 Jur. (N.S.) 654.

—— **When construed Death before Testator.**]—Whether the expression in a will, "in case of death," refers to a death in the lifetime of the testatrix, or to a death at any time, depends upon the context. *Tilson* v. *Jones*, 1 Russ. & M. 553.

Legacy of 3,000*l*. to testator's wife A. for life, and after her death one-third to each of his daughters, M. and H., with proviso that if either daughter should die unmarried, or without issue, benefit of survivorship; and if both should die unmarried or without issue, then to son. Also,

two-thirds of residue in same manner subject to such contingencies in favour of their issue, and with like benefit of survivorship as was before declared as to the 3,000*l.* A. died in life of testator:—Held, on her death the daughters M. and H. took vested interests in shares of 3,000*l.*, and of the residue. *Laffer* v. *Edwards*, 2 Madd. 210.

Bequest over in case of death of devisee generally, and not expressly referable to any certain event or time, within or before which such dying must occur, to give effect to the remainder:—Held, not necessarily to refer to a dying in the lifetime of the testator, but will be construed so as to give effect to such intention on part of testator as may be presumed from the language of the will to have been his object. *Hervey* v. *M'Laughlin*, 1 Price, 264; 16 R. R. 713.

The expression "in case of either of their deaths," in a gift over:—Held, not to be confined to deaths taking place during the life of the tenant for life after the testator's death only. *Le Jeune* v. *Le Jeune*, 2 Keen, 701; 1 Jur. 235.

Bequest of copyhold and leasehold property to the testator's widow for life; and at her death, the whole to be sold and divided into five parts, one of which was to be paid to each of the testator's four sons living at her decease; and in case of either of their deaths, his share to be paid to his issue; and in case either should die without issue, his share to be divided amongst the surviving children:—Held, that the child of a son who died in the testator's life was entitled to such share as her parent, if he had survived the widow, would have been entitled to. *Ib.*

—— Construed Death before Tenant for Life.]—The words "in case of the death" construed to refer to death in the life of the tenant for life. *Galland* v. *Leonard*, 1 Swan. 161; 1 Wils. Ch. 129; 18 R. R. 44.

Words importing contingency applied to an inevitable event, construed to refer to the occurrence of the event under peculiar circumstances. *Ib.*

Bequest to A. for life, and after her death to B. and C. or their children, in case of their decease. B. died in the lifetime of the tenant for life, leaving children:—Held, that B. took a vested interest, liable to be divested in the event which happened. *Bolitho* v. *Hillyar*, 34 Beav. 180; 11 Jur. (N.S.) 526; 13 W. R. 600.

Bequest to A. for life, and afterwards to the testator's brothers and sisters, share and share alike, or their children in case of their decease:—Held, that the children of a brother, who survived the testator, but died in the life of the tenant for life, were entitled. *Ib.*

In a bequest of 1,000*l.* to certain persons for life, and (after their decease) of 400*l.*, part thereof, to A. and B., part and part alike; viz., 200*l.* to A. and 200*l.* to B. for the trouble they might have in the execution of the will; "but in case of either of their deaths," to the survivor, "and in case of both their deaths, to the heirs, executors and administrators of such survivor, 200*l.* only." The words, "in case of death," were held to refer to death in the lifetime of the tenant for life of the 1,000*l.* *Green* v. *Barrow*, 10 Hare, 459; 1 W. R. 197.

A. bequeathed stock to his aunt for life, and, after her death, to his father; "and, in case of his death, then to devolve on his brothers and sisters, or their representatives." The father and two brothers predeceased the aunt:—Held, that the death of the father meant death in the life of the tenant for life; that the brothers and sisters who survived the aunt, and the representatives of those who predeceased her, were entitled to the stock. *Henderson, In re*, 28 Beav. 656. And see *Astley* v. *Declieve*, 8 L. J. (o.s.) Ch. 20; *Ive* v. *King*, ante, col. 979.

Devise of Real Estate.]—The rule established in numerous cases, that a bequest to A., and in case of his death to B., gives A. an absolute interest in case he survives the testator, is not to be extended to devises of real estate. Accordingly, upon a devise of a certain share of a real estate to the testator's sisters, Mary and Lucy, share and share alike; "and in case of their demise," to be equally divided amongst their children, or their lawful heirs:—Held, that the sisters took estates for life only, with remainder to their children as tenants in common in fee. *Bowen* v. *Scowcroft*, 2 Y. & C. 640; 7 L. J., Ex. 25.

7. Words "Death without Issue."

a. Whether they refer to Indefinite Failure of Issue or Failure at the Death.

i. *Gifts of Personalty.*

General Rule—Indefinite Failure—Void for Remoteness.]—Limitation of personal property after an indefinite failure of issue void, as too remote, otherwise if confined to the time of the death. Courts endeavour to support such limitation, taking advantage of any expression to construe the event, never having had issue, or to confine it to the death. *Widdison* v. *Hodgkin*, 2 L. J. (o.s.) Ch. 9.

Personal estate bequeathed to F., her executors, administrators and assigns; but in case of the death of F. without issue, remainder over; this remainder over too remote, as it must be construed a general dying without issue. *Bigge* v. *Bensley*, 1 Bro. C. C. 187.

No personal property can be limited on so remote a contingency as the death of a person dying without issue generally. *Grey* v. *Montagu*, 3 Bro. P. C. 314. Affirming 2 Eden, 205. S. P., *Pearse* v. *Reeve*, Pol. 29; *Green* v. *Rod*, Fitzg. 68; *Warman* v. *Seaman*, Pol. 114; *Gibbs* v. *Barnardiston*, Pre. Ch. 323; *Exel* v. *Wallace*, 2 Ves. Sen. 120; *Everest* v. *Gell*, 1 Ves. 286; 2 R. R. 107; *Boehm* v. *Clarke*, 9 Ves. 580; *Beauclerk* v. *Dormer*, 2 Atk. 308; *Jeffrey* v. *Sprigge*, 1 Cox, 62.

Limitation of sum of money to K. for life, then to her children, and if no children to L., is void. *Boucher* v. *Anthram*, Pol. 37.

Limitation of trust of term to A. after death of B., without heir of his body, is void. *Burges* v. *Burges*, Pol. 40.

Remainder of trust of term limited after another's dying without heirs is void. *Backhouse* v. *Bellingham*, Pol. 33. S. P., *Bodens* v. *Galway (Lord)*, 2 Eden, 297.

Devise of leasehold for years to A., if he dies without issue, remainder over, the whole interest vests in the first taker; otherwise if a lease for lives; for if the taker makes no use of his power on his death, it vests in the remainderman, who takes as special occupant. *Saltern* v. *Saltern*, 2 Atk. 376.

Bequest of money to testator's wife, and the

issue of her body, and failing such issue, to such of her heirs whom she should appoint by written will :—Held, that the subsequent words did not control the previous limitation, and, therefore, that a bequest over of the money was void, as being too remote. *Howston* v. *Ives*, 2 Eden, 216.

Bequest of money to A., upon condition that he should pay an annuity to B., and in case B. should die without issue, then to be equally divided amongst such of the testatrix's nearest relations as should at that time be living :—Held, the bequest over was too remote. *Destouches* v. *Walker*, 2 Eden, 261.

Legacy given upon a man's dying without issue ; the man dies leaving issue, which issue within six months after died without issue ; the legacy not due, it not being intended to arise upon any remoter contingency than the man's dying without issue living at his death. *Nichols* v. *Hooper*, 1 P. Wms. 198 ; 2 Vern. 686.

A., possessed of a term, devised it to his wife for life, remainder to his first son for life, and if he died without issue, to his second son, &c. The remainder to the second son was held void. *Love* v. *Windham*, 1 Lev. 290 ; 2 Ch. Rep. 14.

Residue of personal estate bequeathed to the children of the testator's two daughters, their executors, &c., with a limitation over in case both his daughters should die without issue, a vested interest in the grandchildren, and the limitation over, is too remote. *Rawlins* v. *Goldfrap*, 5 Ves. 440.

Testator bequeathed 5,000*l.* in trust to pay the interest to his nephew John for life, remainder to John's first son for life, remainder as to the principal for the children of John, and *for default of such issue* to pay the interest to the second and other sons of John successively and to their respective issue ; and *for default of issue male of John*, to pay the interest to the testator's nephew Charles for life, &c., &c. :—Held, that the words in italics did not mean "if John shall never have a son," so as to make the limitation to Charles take effect by way of substitution, but that that and all the other limitations subsequent to the limitation to the first son of John were void for remoteness. *Burley* v. *Evelyn*, 16 Sim. 290 ; 12 Jur. 712.

Testatrix gave all her estate, real and personal, to her daughter and her heirs, and half the navigation money for her natural life, and in case she died without issue all to be divided between four nephews and nieces named ; the part of one only for life, and then to be divided between the survivors. The limitation over too remote, there being no expression or circumstance to limit the the generality of the words to a failure of issue at the time of the death : as to what property it extends to, quære. *Barlow* v. *Salter*, 17 Ves. 479.

Devise for life, and in default of issue to another for life and in default of his issue remainder over ; the limitation over void, as to the personal property, either as too remote, or an estate tail by implication. *Id.* 484.

A., by will, gives the surplus of his personal estate to his daughter, whom he makes executrix, and willed, that if she died without issue, it should go over to B., and that she should give security that if she died without issue it should go over accordingly. The devise is void ; but whether the directing a bond to be given, &c., does not alter the case, quære. *Deering* v. *Hanbury*, 1 Vern. 478.

A gift over of money upon the death of a legatee without issue is void, unless from the words of the will it can be collected that the testator meant a death without issue at the time of the death of the legatee. A testator gave to his brother 300*l.* per annum during his life, and to each of two nephews 150*l.* during their lives ; but if either of the nephews died, the other to inherit the whole 300*l.*, and, if the brother died without issue, the two nephews to inherit from the brother ; and he then proceeded to state that the reason why he left only the interest to his brother and two nephews, was, that if they died without issue, the money might go to his three cousins, to be divided equally between them. The brother and nephews all died without issue :—Held, that the gift over to the cousins was void, as being too remote. *Lepine* v. *Ferard*, 2 Russ. & M. 378 ; 1 L. J., Ch. 150.

A. limited 10,000*l.*, on failure of issue of the body of husband and wife, to B. in tail ; the remainder is void as an executory devise, being too remote ; otherwise, where the limitations are for life, that confining it to a failure of issue during the lives in being ; and in the case of executory devises, it has been held to be a reasonable construction, if it falls within the compass of ever so many lives in being at the same time. *Trafford* v. *Boehm*, 3 Atk. 449.

A testator, who was an Armenian merchant, by his will, made in India in the year 1791, directed that his property of every description should be administered according to the law of England. He then gave various legacies, and directed the residue of his estate and effects to be divided into sixteen shares, six of which were to be placed in the government funds of Great Britain, there to remain for ever in the testator's name, and the interest thereof to be received by his three sons, Alexander, John and Lewis, successively for life, and after the death of the survivor of his three sons the interest to be received by the first and other sons of Alexander, and their issue in succession for life ; and in default of issue of Alexander, the interest to be received by the first and other sons of John, and their issue in succession for life, with a similar direction in default of issue of John, for the benefit of the issue of Lewis :—Held, that after the life estates to the testator's three sons, the rest of the gifts were void for remoteness. *Raphael* v. *Boehm*, 22 L. J., Ch. 299.

A father, by will made in 1821, after a gift of leaseholds to his daughter, gave all the remainder of his property whatsoever to his wife, the income to her for life, and at her death to his daughter, for her own benefit and her children, or one only child if she should have any (all that was given to her being for her own benefit, and not to be subject to the debts, control or disposition of any husband she might marry) ; but if she should die without issue the leaseholds were to be enjoyed by his wife for life, and at her death to his sister S. for her life, and at her death, together with all that was left to his wife for her life, to be equally divided between all the grandchildren of his sister. The daughter died without having had a child :—Held, that she was entitled absolutely both to the leasehold specifically bequeathed to her and to the residue given subject to the widow's life interest, and that the limitations over, if the daughter "should die without issue," were void for remoteness. *Fisher* v. *Webster*, 42 L. J., Ch. 156 ; L. R. 14 Eq. 283 ; 26 L. T. 765. And see *Att.-Gen.* v.

Hall, Fitzg. 314; *Down* v. *Penny*, 19 Ves. 548; 1 Mer. 20.

When restricted to Failure of Issue at the Death.]—Devise of 400*l.* to A., and if A. die without issue, then to B.; this is good, and must be intended, if A. die without issue living at his death. *Pleydell* v. *Pleydell*, 1 P. Wms. 748.

If the court should admit of a distinction between chattels real and personal, it would introduce confusion. *Ib.*

Limitation of personal property, if A. should die without issue male, to B. if living, if not C. and D. in succession of age to enjoy, &c., not too remote. *Southey* v. *Somerville* (*Lord*), 13 Ves. 486.

A father is the judge of the quantum, and also of the time when his daughter's provision shall take place, and a limitation to a daughter on failure of issue male of an eldest son or sons, is not too remote, but shall be considered as a provision. *Goring* v. *Nash*, 3 Atk. 191.

A father limited a copyhold estate to a first son in tail, and to a second, third, fourth and fifth son, but not having surrendered it, the second son brought his bill to have the want of a surrender supplied. The court will decree it for all the sons in the same order that the father left it; for where it does not introduce a hardship, or leave other children in distress, the court will always decree the provision made for one child to be as extensive as he intended. *Ib.*

A. gives all his worldly substance to his daughter J., provided she marries with the consent of his executors; but if she should marry without such consent, or should die without issue, then he gives his estate to other persons; the daughter married with consent, but died without ever having any issue; upon a question when this bequest over took effect, it was held to take effect upon the death of the daughter without issue living at that time. *Kelly* v. *Fowler*, 3 Bro. P. C. 299.

Bequest of personal estate after a contingent limitation in tail, which did not take effect, established. *Phipps* v. *Mulgrave* (*Lord*), 3 Ves. 614; 2 R. R. 607.

A devise of real estate to A., and the heirs of his body lawfully begotten, and in case of his death without leaving issue of his body, to go over. The testator then bequeathed the residue of his personal estate to A.; and in case he should happen to die without issue of his body lawfully begotten, that in such case the residue should also go over. The bequest over of the residue not too remote, but a good executory bequest, as depending on the same event on which the real estate had been limited over. *Foley* v. *Irwin*, 2 Ball & B. 435.

A. limited 10,000*l.* on failure of issue of the body of husband and wife to B. in tail, the remainder is void as an executory devise, being too remote; otherwise where the limitations are for life, that confining it to a failure of issue during the lives in being, and in the case of executory devises, it has been held to be a reasonable construction if it falls within the compass of ever so many lives in being at the same time. *Trafford* v. *Boehm*, 3 Atk. 449.

A testator, by his will, gave his residuary estate to trustees, upon trust to permit his two sisters to receive the income thereof for their lives, and after the death of the survivor to pay the capital among their children. If they should die without issue, then in trust for the testator's brother Thomas; but if he should be dead, in trust for his children; and if Thomas and his children should be then dead, in trust for the testator's next of kin. By a codicil, the testator gave as follows: "In addition to my will, I do leave my effects, failing my brothers and sisters and their heirs, to my cousins," naming them. The testator had, in addition to his sisters and brother, one other brother. They all died without leaving any children:—Held, that the gift in the codicil was to take effect or to fail at the time of division; that the bequest to the cousins was not too remote, but took effect. *Pattison, In re*, 5 De G. & Sm. 591; 22 L. J., Ch. 286.

A testator bequeathed to his daughters A. and C. 1,000*l.* each, to be left at interest by his executors and trustees, and the interest regularly paid to them; and should they marry, it must be with the consent of their brother; and even in that case their husbands were to have no control over principal or interest; and the receipt of his daughters was to be a sufficient discharge of the interest. Should either of his daughters die, or both of them, without issue, they might by their last will and testament dispose of 500*l.* each of 2,000*l.* to any of their brothers or sisters, or nephews and nieces, but to no other person; the remaining 1,000*l.* to be divided amongst his surviving children, share and share alike; and should his daughters, or either of them, wish to purchase an annuity with their share of the 2,000*l.* for their life or lives, with the consent or under the direction and advice of their guardians, they were to be at liberty to do so. C. died intestate and without issue:—Held, first, that the daughters took life interests only in the 1,000*l.* *O'Neill* v. *Montgomery*, 12 Ir. Ch. R. 163.

Held, secondly, that as to 500*l.* of C.'s share, a trust was created for the brothers and sisters, and nephews and nieces, living at her death, and that they were entitled equally to the 500*l.* in default of appointment. *Ib.*

Held, thirdly, that the brothers of C. who survived her were entitled to the remaining 500*l.*, her sisters having died before her. *Ib.*

And see *Chamberlain* v. *Jacob*, Ambl. 72.

—— **Death without leaving Issue.**]—One possessed of a term devises it to A. and B., and if either of them die and leave no issue of their respective bodies, then to C.: this held a good limitation to C., if A. or B. left no issue at their death. *Forth* v. *Chapman*, 1 P. Wms. 664.

According to Lord Hardwicke's note of *Forth* v. *Chapman* (supra), Lord Macclesfield held, that the words "leave no issue" must relate to the time of the deaths of the testators' two nephews, and could not be extended to a dying without issue generally. See *Beauclerk* v. *Dormer*, supra, col. 1012.

Devise of a term to A. for life, remainder to such children as the testator shall leave at his death; and if all his children die without leaving issue, then to B. The children die without leaving any issue at the time of their death; this is a good devise over to B. *Atkinson* v. *Hutchinson*, 3 P. Wms. 258.

Where the words of a devise of leasehold would make an express estate tail in the case of a freehold, there a devise over of such leasehold is void; secus, if the words in the former devise would, in the case of a freehold, make an estate tail only by implication. *Id.* 259.

Devise of bank stock to daughter for life, remainder to such child or children of hers as should be living at her death; and if she should not leave any child, or if all children should die without issue, then to J.; the daughter had a son born at the time of making the will:—Held, the words "without issue" were to be construed "without leaving issue," and that the remainder over to J. was a good remainder, and not too remote. *Sheppard* v. *Lessingham*, Ambl. 122.

Personal estate may be limited on life of child in esse, and twenty-one years after. *Id.* 124.

The court never held a limitation after the death of a person not in esse, without issue, good. *Ib.*

In general a limitation of personalty, after dying without issue, is void; but the court will, if possible, so construe the words "dying without issue" as to support the limitation over. *Ib.*

Testator devises leasehold premises to his executor, after payment of certain sums, to pay the rents to A. for life, and then that his natural daughter should have the same for her life; and in case she should die leaving no lawful issue, he bequeathed the premises to his executors, to be sold for the purposes of the will:—Held, the devise over to the executors not too remote. *Taylor* v. *Clarke*, 2 Eden, 202.

A man gives his estate to his wife so long as she shall remain unmarried, but if she marries then to his daughter; and in case the daughter should die without leaving issue, then to J. The daughter died without issue in the mother's lifetime, who still remained a widow:—Held, that the reversionary interest belonged to J. upon the death of the daughter without issue then living. *Gordon* v. *Adolphus*, 3 Bro. P. C. 306.

Devise of freehold and leasehold estate to A. and B., as tenants in common, and if either of them should die without leaving issue, then, as to the share of such of them as should so die without issue as aforesaid, to the use of the survivors of them (the said A. and B.) and the heirs of his body; and in case both of them should die without issue of his or their body or bodies, then to the use of C. for life, with remainder to the trustees to preserve, &c., and divers remainders over:—Held, that the limitation to the survivor was a good limitation by way of executory devise, that by the word issue in the succeeding clause, the testator intended such issue as were to take under the prior limitation, and that consequently the limitation over to C. was not too remote. *Radford* v. *Radford*, 1 Keen, 486; 6 L. J., Ch. 138.

Bequest of 2,000*l.* in trust for testator's niece, who was then unmarried, with a bequest over if she should die without leaving any issue to attain twenty-one:—Held, not to give her an absolute vested interest in the 2,000*l.*, as the death referred to could not be construed to mean a death in the lifetime of the testator. *Daniel* v. *Warren*, 2 Y. & C. C. C. 290; 7 Jur. 462.

Bequest of residue to A. for his life, and his heirs male after him; and, if he should not leave any son, then to go to B. and his heirs male. Upon the death of A. without leaving male issue, the limitation to B. takes effect. *Mansell* v. *Grove*, 2 Y. & C. C. C. 484; 7 Jur. 666.

Testatrix by her will gave 500*l.* to each of her two nieces, to be settled as she should thereinafter describe, and directed that the provision therein made for her nieces should not be subject to the control of any husbands they might marry, but should remain vested in her executors in trust until a proper settlement was made; and by a codicil she directed that if either of her nieces should die without leaving issue, the legacy given to her should devolve to the other niece and her children, with a gift over if both should die without issue:—Held, that this was an executory trust, and that the nieces took life interests with remainder to their children and cross-remainders between them. *Holloway* v. *Collier*, 1 W. R. 266.

As to limitation of personal estate after contingent limitation in tail. See *Sabbarton* v. *Sabbarton*, Cas. t. Talb. 245.

A testator, by his will, dated in 1850, gave all his property real and personal, whether land in New South Wales, or in the island of Ceylon, or funds in the hands of A. & Co., of Calcutta, or of G. in England or elsewhere, to the members of the firm of A. & Co., in trust for the benefit, in equal portions, to the extent of the annual income of his property, of his brothers E. and C., or the heirs of their bodies lawfully begotten; and the meaning of his will was, that if either brother should die leaving lawfully begotten heirs of his body, then should the share or portion of such brother descend to such lawfully begotten heirs; but if one brother should die without lawful issue, then should the whole annual income be paid to the surviving brother, or in case of his death also to his lawfully begotten heirs; but in case both brothers should demise without lawfully begotten heirs, then should the whole property be divided among his nearest of kin. The testator then appointed executors, with power to appoint other executors, also with full power to get in all moneys, and to sell, dispose of, and convert into money all his real and personal estate, either by public auction or private contract, as to his executors should seem meet:—Held, that the testator's personalty was subject to an executory gift over on the death of his two brothers without leaving issue living at his death. *Greenway* v. *Greenway*, 2 De G. F. & J. 128; 29 L. J., Ch. 601. Affirming 6 Jur. (N.S.) 138; 8 W. R. 176.

—— **Gift Over "at Decease."**]—Testator gave fourth of personal estate to son absolutely, but by codicil directed that son's share should be only for life of himself and wife, provided they had no issue, and that at their death it should fall into the residue:—Held, son did not take absolutely, but subject to executory bequest over in case there was no issue of him and wife living at death of survivor. *Rackstraw* v. *Vile*, 1 Sim. & S. 604; 2 L. J. (O.S.) Ch. 102; 24 R. R. 252.

—— **"After Decease."**]—Testator gave the residue of his personal estate to trustees for the use of B. during his life, and to the lawful heirs of his body after his demise; "but in case of his dying without issue of his body after his decease I give all such residue to O."; this creates a contingency with a double aspect, and in the event of B. having no child, the limitation to O. is good. *Trotter* v. *Oswald*, 1 Cox, 317.

One by will gives all his lands, money, &c., to his wife, provided if wife dies without issue, then 80*l.* shall remain to his brother after his wife's death. The brother dies in the lifetime of the wife. It was decreed, the legacy good. *Pinbury* v. *Elkin*, 2 Vern. 758, 766; Pre. Ch. 483; 1 P. Wms. 563.

—— **"In Case of Death."**]—Bequest to testator's daughter and her children, and in default of such issue, and in case of her death, to A. and B.; the limitation over takes effect on her dying without children. *Gawler* v. *Cadby*, Jac. 346.

A testatrix bequeathed a moiety of her residuary estate to her daughter E. B. O., so that the annual interest thereof should be received by her for her natural life, and upon her decease to go and be equally divided amongst all and every her children lawfully begotten; and in case of her decease without lawful issue, then to J. O. E. B. O. married, and had only one child, which died an infant in her lifetime:—Held, that the word "then" did not mean the instant of death of E. B. O., the mother, but death without issue generally, or without ever having had issue; and that the child of E. B. O., notwithstanding its death in its mother's lifetime, took under the will of the testatrix an absolute vested interest in a moiety of her residuary estate. *Pye* v. *Linwood*, 6 Jur. 618.

—— **To Several and the Survivor.**]—One having two nephews, A. and B., devises his personal estate to them; and if either die without children, then to the survivor; this is good. *Hughes* v. *Sayer*, 1 P. Wms. 532.

If separate legacies are given to two or more persons, with a limitation over to the survivor or survivors in case of the death of either without issue, the presumption, primâ facie, is that the testator had not in his contemplation an indefinite failure of issue. Where pecuniary legacies were bequeathed to several persons for their lives, and if any of them should die without issue, their proportions to be divided among the survivors, the sums were directed to be secured in court, and the dividends paid to the legatees for their respective lives, with liberty to any person to apply upon the death of each legatee. Whether such legatees took an absolute interest in their respective legacies, subject to an executory bequest over in case of their death leaving no issue, or whether they took an interest for life only, quære. *Ranelagh* v. *Ranelagh*, 2 Myl. & K. 441; 1 L. J., Ch. 183.

A testator, who had two sons and one daughter, gave the interest, dividends, and annual proceeds of 3,000*l.* stock, standing in his name, to W., one of his children, for life; and, after his decease, he gave the said principal stock or sum of 3,000*l.* unto all and every the child and children of W., to be equally divided between and amongst them, if more than one, share and share alike, and if but one, the whole to such one, to be paid or transferred to him, her or them, on his, her or their attaining twenty-one, and the interest to be in the meantime applied for maintenance and education. He gave similar legacies to each of his other two children and their children; "and upon the death of either of my said sons or daughters without issue, then I direct that the interest, dividends and produce so, as aforesaid, given and bequeathed to him, her or them so dying, shall be paid and payable to the survivors or survivor of them (my said sons and daughter) in equal shares and proportions." The testator's son W. survived him and had one child, who predeceased him:—Held, that the limitation over referred to the death of either of the testator's children without leaving issue living at his death; that the child of W. took a vested interest at his birth, but liable to be devested by the death of W. without leaving issue living at his death, and that the gift over, therefore, took effect. *Westwood* v. *Southey*, 2 Sim. (N.S.) 192; 21 L. J., Ch. 473; 16 Jur. 400.

Testatrix, before the statute 1 Vict. c. 20, bequeathed the residue of her personal estate to her son A. and her daughter B., to be divided equally between them in case they were both living at the time of her decease; but if either of them should happen to die before her, or at any time after, without issue, then she bequeathed the share of him or her so dying, and without issue, to the survivor of them. A. and B. survived the testatrix. A. died unmarried in the lifetime of B.:—Held, that the moiety of the residue given to A. devolved to B. *Turner* v. *Frampton*, 2 Coll. C. C. 331; 10 Jur. 24.

A., seised and possessed of real and personal estates, devises a chattel interest to B., her executors, administrators and assigns, and freehold and chattel estates and interests to C., her heirs, executors, administrators and assigns, with a proviso that in case either should die unmarried, or being married should die without issue, then that the bequests so appointed for such of them so dying unmarried, or being married so dying without issue, should go to and remain to the survivor of them, her heirs, executors, administrators and assigns:—Held that the words "without issue" meant an indefinite failure of issue, and not issue living at the time of the death of the devisee. *O'Donohoe* v. *King*, 8 Ir. Eq. R. 185.

Devise of an estate charged with two several legacies to A. and B.; and in case A. or B. die without lawful issue, then the whole of the said two legacies to go to the survivor, his executors, &c. A. dies without issue in the testator's lifetime:—Held, the legacy lapsed, the contingency on which it was given over being too remote. *Massey* v. *Hudson*, 2 Mer. 130; 16 R. R. 158.

—— **To Persons then living.**]—J. H., by his will, gave to C. H., his adopted daughter, 20,000*l.* 3 per cent. consols, and his house and landed property at C. and M. The will then proceeded in the following terms: "But in case of her death without lawful issue, I then will the money so left to her to be equally divided betwixt my nephews who may be living at the time; and the land, &c., at C., to my nephew the Rev. J. H.; and that at M. to my nephew Lieut. J. H., &c. I request R. C. and D. S. to be her guardians, and allow whatever they please for her education annually, and after she has left school; and if she marries, it must be with their consent, and the property to be solely settled upon herself and children, and in no way changed or alienated":—Held, that, under this limitation, the 20,000*l.* consols vested absolutely in C. H. *Candy* v. *Campbell*, 8 Bligh (N.S.) 469; 2 Cl. & F. 421.

A testator directed that as his sons attained twenty-five his executors should pay them a share of his estate and effects, it being his will that his sons and daughters should receive equal shares of his estate; and as his daughters attained twenty-five, the executors were to invest 1,000*l.* each for them for life, and the difference between this and their share was to be paid to them. In case any daughter "should die without issue," the 1,000*l.* was to be divided "amongst such of his children as might be then living and the issue of such as might be dead, share and share alike," the issue to take the like share as

the parent would if living have been entitled to :—Held, that the gift over was on an indefinite failure of issue ; that there was an absolute gift of the 1,000*l.*, in the first instance, to the daughters, which had not effectually been cut down, and that the daughters were absolutely entitled to the 1,000*l.* *Webster* v. *Parr*, 26 Beav. 236.

H., after devises and bequests to his son S., and to his daughters M. and E., gave the whole that was contained in the lease upon the White Lion premises between his wife and his daughter E., share and share alike, during his wife's life ; and after her death he devised her share to his daughter E., but should she die without legal issue, then he devised the White Lion property between such of his aforesaid children as might be then living ; or, if none of them should happen to be then alive, he gave the same between his grandson R. and the legal issue of his son S. Upon his death his widow and his daughter E. entered into possession of the White Lion premises, and they continued in such possession until 1853, when E. died, without ever having been married :—Held, that as the gift over was so framed as to shew that a personal benefit to R. was intended, the words "should A. die without legal issue," did not mean an indefinite failure of issue, but issue living at the death of E. ; and that, in the event which had happened, the testator's children living at the death of A. were entitled. *Jones* v. *Cullimore*, 3 Jur. (N.S.) 404 ; 5 W. R. 539.

A testator, after making a gift to the issue of his nephew, directed that if there should be no child or children, or remoter issue, of his nephew, who should survive him and his nephew, and should live to attain the age of twenty-one, then the gift should go over :—Held, that the will must be construed to mean issue born in the lifetime of the testator and his nephew, and that the gift over was not void for remoteness. *Gee* v. *Liddell*, 35 L. J., Ch. 640 ; L. R. 2 Eq. 341 ; 12 Jur. (N.S.) 541 ; 14 W. R. 853.

A. bequeathed to his son Hugh and to his heirs a chattel interest in certain premises, and should his son die without lawful child, he directed that the yearly produce of the premises should be divided in equal portions between the testator's wife and his daughters Isabella and Mary Jane, or such of them as might then be in existence. The wife predeceased Hugh, who died unmarried :—Held, that upon the death of Hugh Isabella and Mary Jane became entitled in equal shares to the testator's interest in the premises. *Wilson* v. *Chesnut*, Ir. R. 1 Eq. 559 ; 16 W. R. 417.

Testator, after giving property to his three children, and the longest liver of them and their heirs, directed "that, should all his children die without heirs, the property was to be divided between the children of his brothers and sisters alive on the death of his last child" :—Held, that the limitation over was void for remoteness. *Garratt* v. *Cockerell*, 1 Y. & C. C. C. 494 ; 6 Jur. 909.

—— **On Death under Twenty-one.**]—Devise of a term to J. S. and his assigns for ever ; but if he dies without issue before twenty-one, then to go over to his brother. This is a good devise over. *Martin* v. *Long*, 2 Vern. 151 ; Pre. Ch. 15.

Bequest of 1,300*l.* to testator's daughter, provided if she died before twenty-one, and without issue, the legacy should go over to A. ; decreed, the devise over in case of the grand-daughter's dying without issue under twenty-one is good, the contingency being to happen before the legatee attains twenty-one. *Pawlet* v. *Dogget*, 2 Vern. 86.

Bequest of 100*l.* to A., to be improved till he should attain the age of twenty-one ; and in case he should die before twenty-one, or afterwards without issue, then the money to be equally divided between the testator's sons and daughter :—Held, the limitation over too remote. *Gray* v. *Shawne*, 1 Eden, 153.

Bequest to the testator's two natural sons with survivorship upon the death of either before twenty-one and without issue, but in the event of both dying without issue, over ; the interest beyond maintenance to be added yearly to the principal for their benefit to be paid when they attain twenty-one. The limitation over upon the death of both established : as to the accumulation :—Held, a vested interest : and the payment only postponed. *Kirkpatrick* v. *Kirkpatrick*, 13 Ves. 476 ; 9 R. R. 212.

A. devises portions to his four children, payable at their respective ages of twenty-one or marriage ; and in case any of them should die before the time of payment, or should die without issue, then his or their share to the survivor or survivors of them. One of them died under age, and without issue. This, though a limitation of a personal estate, is good, but liable to the contingency of survivorship till it comes to the last of the four children. *Nicholls* v. *Skinner*, Pre. Ch. 528.

—— **Where Implied Gift to Issue.**]—Testator gave a legacy to his son, an estate in fee to a nephew, then several parts of his freehold estates, and the future purchase of freehold to be made with part of his personal property, and all his leasehold to his wife for life ; then to his son and his issue lawfully begotten, or to be begotten, to be divided among them as he should think fit. If he die without issue, as well present freehold and leasehold as the estates to be purchased to be sold, the produce to go over, no part of his present freehold and leasehold, or the estates to be purchased, to be sold during life of wife and son ; all the rest, residue and remainder of his property and effects whatsoever and wheresoever, after paying debts, &c., to the wife ; the son is tenant for life, and the devise over is good : but estates not mentioned do not pass by it. *Hockley* v. *Mawbey*, 1 Ves. 143 ; 1 R. R. 93.

Bequest of a term of years to R. for life, remainder to the issue of R., in such manner as he should appoint, and for want of appointment, remainder to the first son of the body of R., and if no issue male, to the daughters of R., as tenants in common, and not as joint tenants, and for default of such issue remainder over :—Held, that R. took an estate for life only. *Keating* v. *Keating*, Ll. & G. t. Plunk. 291.

A testator gave all his real and personal property in trust to be disposed of for the benefit of his daughter for life, and at her decease that she should be at liberty to will the same to issue as she might think fit, but in case of her dying without issue, then he wished the property to go to his brother and sister for their lives, or if his brother should die in the lifetime of his daughter then to his brother's children :—Held, that the daughter took an estate tail in the realty, and an absolute interest in the personalty. *Simmons* v. *Simmons*, 8 Sim. 22 ; 5 L. J., Ch. 198.

Absolute Interest taken under Words giving Estate Tail in Realty — Where Interest only Given.]—A bequest that 4,000*l.* and a further sum of 1,500*l.* shall pertain to J. after the death of R. without lawful issue is too remote, and the whole shall vest in R. *Glover* v. *Strothoff*, 2 Bro. C. C. 33.

Interest of money is devised to A. for life, and if he die without issue, then the principal to go over to another. The remainder over is good. *Smith* v. *Clerer*, 2 Vern. 38.

N. devised an annuity of 300*l.* per annum to his wife for life, then to accumulate to make a portion for his first daughter who should marry, then in order to raise portions for other daughters, then to remain to his eldest son, and on his decease to the heirs male of his body, and, in case of his having no issue, remainder to the next eldest son and his heirs male. The daughters married in the life of the wife: the eldest and two other sons of testator died, leaving the wife without issue: this is not personal estate vesting absolutely in the eldest son (on the principle that it would be an estate tail in land), neither does it vest as an executory devise in the fourth son of testator, who survived; but it is an annuity, and being exhausted by the events, there being nobody to take it as such, sinks into the residuary estate of the testator. *Turner* v. *Turner*, 1 Bro. C. C. 317; Ambl. 776.

A testator gave to each of his five daughters 400*l.* per annum for their lives, and after their respective deceases he gave the same to their children respectively, share and share alike, such children not to be entitled to more than their deceased parent's share; and in case any or either of his daughters should die without issue, then he directed such annuity to cease, and fall into the residue of his estate:—Held, that the words, "in case any or either of his daughters should die without issue," did not give to the daughters an absolute interest in the annuities. *Hedges* v. *Harpur*, 3 De G. & J. 129; 27 L. J., Ch. 742; 4 Jur. (N.S.) 1209; 6 W. R. 842.

—— **Where Corpus given.**]—Personal estate bequeathed to F. H., her executors, administrators and assigns; but in case of the death of F. H. without issue, remainder over; this remainder over too remote, as it must be construed a general dying without issue. *Bigge* v. *Bensley*, 1 Bro. C. C. 187.

A testator, by his will, gave certain real and personal estate to his daughter for life, with power for her "to will the same to her issue as she might think fit; but in case of her dying without issue," the testator directed that the property should go to his brother and sister; but if the brother died before the daughter, then to the brother's children in equal shares:—Held, that the testator's daughter took an estate tail in his real estate, and an absolute interest in his personalty. *Simmons* v. *Simmons*, 8 Sim. 22; 5 L. J., Ch. 98.

A testator, by his will, devises all his real estate to executors for the purposes thereinafter stated; and after empowering them either to continue his business, or to dispose of it, he gives the profits of it in the one case, and interest of the money arising from such sale in the other, and also the interest of the securities on which the rest of his capital should be invested, to his daughter for life, her receipt to be a discharge. He then gives the rents and profits of all his real estates to her during her life, and at her decease he devises and bequeaths to her heirs all his estates, real and personal, as tenants in common; if his daughter has but one child, such child is to possess the whole, but if she should die without issue, then at her decease he gives certain legacies. He next directs all his goods and effects to be sold, his said legacies to be paid, and a sum invested sufficient to purchase 150*l.* a year, which is to be paid to the husband of the daughter. He then orders the real estates to be sold at the decease of his daughter, or at the decease of his brothers and sisters, according as a particular event may turn out; and he gives over to certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates when sold, and the rents of them until they are sold. The daughter died without having had issue:—Held, that the daughter took an estate tail in the freeholds; that, the real and personal estate being given over together, she took the personal estate absolutely; that the annuity of 150*l.* was charged both on the real and personal estate. *Dunk* v. *Fenner*, 2 Russ. & M. 557.

Devise and bequest to A., and the heirs of his body, with limitation over in case of no such heirs:—Held, an estate tail in real estate, and an absolute interest in personal, the limitation over being void; but if expressed "if he leaves no such heirs," it would be good, as confined to the time of the death, and not after an indefinite failure of issue. *Crooke* v. *De Vandes*, 9 Ves. 197.

Bequest of personal estate to one for life, and if he has no heirs, over:—Held, he took an absolute interest. *Boden* v. *Watson*, Ambl. 398.

J. H., by his will, gave to C. H., his adopted daughter, 20,000*l.* 3 per cent. consols, and his house and landed property to C. and M. The will then proceeded in the following terms: "But in case of her death without lawful issue, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be living at the time; and the land, &c., at C., to my nephew the Rev. J. H.; and that at M. to my nephew Lieutenant J. H.; and I request R. C. and S. D. to be her guardians, and allow whatever they please for education annually, and after she has left school; and if she marries, it must be with their consent, and the property to be solely settled upon herself and children, and in no way changed or alienated":—Held, that under this limitation the 20,000*l.* consols vested absolutely in C. H. *Candy* v. *Campbell*, 8 Bligh (N.S.) 469; 2 Cl. & F. 421.

Bequest of portion of a chattel real "to my son J., and if he die without a lawful male heir, his part of the land falls to his brother R. I also order that the part of the lands which I bequeath to my son J. is to fall to his youngest son, without any incumbrance":—Held, that J. did not take an absolute interest in his portion of the lands, and that the gift over to R. was not too remote. *Dodds* v. *Dodds*, 11 Ir. Ch. Rep. 374, 476.

A gift by will of all testator's funded property and other personal and real estate to his daughter S., she paying all his debts; "and S. shall in no way dispose of any of the funded property, but to hold the same for her natural life; and if she should die without issue, the landed property should go to J. for life. I will and direct that all the funded property shall go to W. and her heirs for ever":—Held, that S. took the funded property for life only, and that on her death it belonged to W. *Hovill, Ex parte, Banks' Trust, In re*, 2 K. & J. 391.

ii. *Gifts of Real Estate.*

Death without Issue—Absolute Gift when cut down to Estate Tail.]—A testator, in 1825, left all his property to his executor for the purpose of paying the following bequests, first paying debts and funeral expenses. He then bequeathed lands for ever to his illegitimate son T., giving him power to will and dispose of same if he had a family, but if he shall die without issue, then to go to the use of his daughter J., also illegitimate:—Held, that the executor took the fee in the lands, and that T. took an estate tail, the limitation over being not an executory devise, but a remainder, and that this limitation conferred the fee upon J. on indefinite failure of issue of T., J. taking the entire estate remaining in the executor. *Ormsby* v. *Anderson*, 14 W. R. 379.

A., owner in fee, by his will, left his third son, M., the lands of G. for ever; "but in case he should die unmarried, or without lawful issue, in that case he may will one-half of it as he pleases, and the other half to go, share and share alike, between my surviving sons and their families." The will ended in these words: "All the bequests given my son R., my grandson M., son to my son J., and also my other three sons M., C. and H., of my property, no part of it shall or will be liable or pay any debts they may contract, nor sell or mortgage same; but always go in the male line, free of any debt of theirs." M. did die without issue, having executed a disentailing deed of the lands of G., and devised them to B. and his heirs:—Held, that M. took an estate tail under A.'s will. *Thompson*, *In re*, 14 Ir. Ch. R. 517; 16 Ir. Ch. R. 228.

H., by will, gave his personalty to his wife, and all his real estate by description for the maintenance of herself and his three children, until his son G. attained twenty-one, when he gave him certain portions of the property charged with an allowance to his (testator's) wife; to his son H., when twenty-one, certain portions on the same condition; and to his daughter E., at twenty-one, certain portions; as to some to the wife for life, and at her decease to the daughter absolutely. If G. died without issue, then H. to possess the property: and if H. died before G. without issue, then G. to have H.'s property. If E. died without issue, her property to be equally divided between her brothers, or the survivor; but if she survived them and they left no issue, then she to have all the property. But if the wife survived all the children, to her for life; remainder to his (the testator's) nephews and nieces equally. If there should be an after-born child which survived G. and H., they leaving no issue, the whole to such child; and if such child died without issue, to the wife for life, as if there had been only three children. Testator left four children, one after-born, and nephews and nieces. G. died an infant and unmarried; and on petition by H. to have certain money paid into court by a railway company, paid out to him—ordered accordingly; and held, that the wife took a life estate until eldest son attained twenty-one, and that there were three estates tail successively, and H. was now tenant in tail. The after-born child presented a counter-petition, which was dismissed with costs as against the company; but the costs of the daughter and H. appearing separately:—Held, not costs occasioned by adverse claimants. *Hinks's Estate*, *In re*, 2 W. R. 108. And see *Cole* v. *Goble*, 22 L. J., C. P. 148; 1 W. R. 309; *Bamford* v. *Chadwick*, 2 W. R. 531.

—— **When not cut down.**]—Under a devise of one estate to R. and his heirs, and if he dies without lawful issue then to W., he paying his two sisters 500*l.* apiece, and a devise of another estate to W. and his heirs, and if W. die without lawful issue then his estate to R., he paying his two sisters 500*l.* apiece, and if R. and W. die without lawful issue then to testator's three daughters and their surviving issue; R. took an estate in fee which was not cut down to an estate tail. *Fisher* v. *Barry*, 2 Hog. 153.

A testator devised real estates to his son and his heirs, and then declared that in case his said son should die without leaving lawful issue, then and in such case the estate should go to his son's next heir-at-law, to whom he gave and devised the same accordingly:—Held, that the contingency of death without leaving issue was not confined to death in the lifetime of the testator, but referred to death at any time; and that the gift over was repugnant and void; and that the devisee took an absolute estate in fee simple. *Parry and Daggs*, *In re*, 55 L. J., Ch. 237; 31 Ch. D. 130; 54 L. T. 229; 34 W. R. 353—C. A.

B. by will, dated 1822, gives to his daughter S. certain lands in consideration that she pay to C., or her heirs, 50*l.* by instalments of 10*l.* per annum for five years, to commence twelve months after testator's decease; but in case S. dies without lawful issue, the lands to go to testator's son T. or his heirs, in consideration that he pays to testator's son J. or his heirs the sum of 250*l.* twelve months after the decease of testator's daughter S. After the testator's death S. executed a disentailing deed, by which she affected to convey the property to trustees upon trust for the survivor of herself and her husband. S. died without issue, leaving her husband surviving, and the title deeds of the property were in his possession. On a special case, submitting the questions whether the husband of S. was entitled to retain the deeds, and whether the charge of 250*l.* in favour of J. was a valid charge upon the property:—Held, having regard especially to the two charges of 50*l.* and 250*l.* created by the testator's will, that S. took an estate in fee-simple with an executory devise over in the event of her dying without leaving issue living at her death, and therefore that the husband of S. was not entitled to the deeds, and that the 250*l.* was a valid charge on the property. *Blinston* v. *Warburton*, 2 K. & J. 400; 25 L. J., Ch. 468; 2 Jur. (N.S.) 858.

A testator devised realty to trustees on trust to pay the rents and income thereof to his wife for the maintenance, education, and benefit of his infant son until twenty-one, without liability to account for the same, and upon his said son attaining twenty-one, then upon trust for him absolutely; but if he should die under twenty-one without leaving issue, then upon trust for his said wife during life or widowhood, with remainder over:—Held, that the infant son was a tenant in fee-simple in possession, with an executory limitation over. *Morgan's Estate*, *In re*, 24 Ch. D. 114; 48 L. T. 964; 31 W. R. 948.

Death "under Twenty-one and without Issue."]—A testator by his will devised S. and

H. estates to trustees upon trust for R. and the heirs of his body, but in case he should die under twenty-one, and without issue, H. estate was to be in trust for A. and the heirs of her body, but in case she should die under twenty-one, and without issue, upon the same trusts as were thereinafter declared concerning S. estate; and if R. should die under twenty-one, and without issue, as to S. estate, for the testator's son and daughter-in-law for their lives and subject to the trusts thereinbefore thereof declared, in trusts for other persons named. Both R. and A. attained twenty-one, and died without issue. Per Lord St. Leonards:—The proper construction of the devise is, that the estate should go over if R. died at any time without issue. *Grey* v. *Pearson*, 6 H. L. Cas. 61; 26 L. J., Ch. 473; 3 Jur. (N.S.) 823; 5 W. R. 454.

Death without leaving Issue.]—Death without leaving issue signifies, as to real estate, a general failure of issue. *Franklin* v. *Lay*, 6 Madd. 258.

Feme covert, by will pursuant to power, leaves to her husband "all the profits and revenues of my estate of A. and B. for life, and after his death my said estates to my children, if I should leave any to survive me; but if I leave no such child or children, nor the issue of such, the said estates to J. H., making him sole heir in default of issue, and after the death of my husband." The children take an estate tail, not fee-simple, and the remainder to J. H. is good, not a contingent executory limitation on her dying without children living at her death, but a general dying without issue. *Southby* v. *Stonehouse*, 2 Ves. 611.

A gift of real estate to A. for life, with remainder to her children as tenants in common, and in case A. should die without leaving lawful issue, then with remainder over, is a gift to A. for life, with remainder to her children for life, with remainder to A. in tail. *Parr* v. *Swindels*, 4 Russ. 283; 6 L. J. (O.S.) Ch. 99; 28 R. R. 90.

Devise to A., B. and C., &c., share and share alike, for their lives, remainder to their respective children, for their lives, and so to be continued from issue to issue for life; but if any of them die, leaving no issue, their shares to go to the survivors for their lives, and the issue of such of them as shall be dead, and for default of any issue then over:—Held, that A., B., C., &c., take estate tail with cross-remainders. *Mortimer* v. *West*, 2 Sim. 274; 29 R. R. 104.

Devise to A. for life, with remainder to B. and his heirs, but if B. died in the lifetime of A., without leaving lawful issue, then immediately after the death of A. the lands were to be sold, and the produce divided. And in case B. should outlive A. and die "without leaving any lawful issue," then the lands were to be sold by B.'s executors, and the proceeds divided. B. survived A.:—Held, that he took an estate tail, and not an estate in fee, with an executory devise over, and therefore that he could make a good title to a purchaser. *Feakes* v. *Standley*, 24 Beav. 485.

—— **Confined to Life of Tenant for Life.**]—Where a testator, after making particular dispositions during the lifetime of his widow, and certain absolute dispositions in favour of his children to be effected by conveyance from the trustees of the will at her decease, directed that "if any of my said children shall die without leaving lawful issue them surviving the property hereby devised and bequeathed to each of my said children shall be equally divided amongst my surviving children":—Held, that, according to the whole scope and intention of the will, the time of dying without lawful issue was confined to the time before the grant of the absolute interest, that is during the lifetime of the widow; and that after conveyance of the absolute interest, no defeasance was contemplated. *Lewin* v. *Killey*, 13 App. Cas. 783; 59 L. T. 675—P. C.

Death without leaving Heirs of the Body.]—Devise to A. and the heirs of his body, but if he leaves no such heirs, over:—Held, that limitation over would be good as confined to the time of his death and not after an indefinite future of issue. *Crooke* v. *De Vandes*, 9 Ves. 197.

Gift over after Legitimate Heirs.]—Limitation over after legitimate heirs, too remote, unless capable of being confined to the period of the party's death. *Barret* v. *Beckford*, 1 Ves. Sen. 519.

Death leaving no Son.]—One devises all his lands, after the death of his executors, to A. and his heirs for ever; but if he die, leaving no son, then to B. This is a good executory devise to B. if A. dies without issue, because the contingency must happen within the compass of a life. *Fairfax* v. *Heron*, Pre. Ch. 67.

Gift over on Failure of Testator's own Issue.]—The testator, being married and in ill health, devised the estates in question, after failure of issue male of his own body (and issue male would have taken under his marriage settlement), to the defendant, who was his heir-at-law, for life, with remainder over:—Lord Northington declared, that the devise, being after a general failure of issue male, was too remote and void, and that the defendant took as heir-at-law; but reversed upon a bill of review. *Lytton* v. *Lytton*, 4 Bro. C. C. 441.

A testator was tenant for life of two estates with remainder to his wife for life, with remainder to their first and other sons in tail male, with remainder to himself in fee. By his will (made before 1837) he devised one of the estates, "in default of issue of his body, and subject to the life interest of his wife," to trustees for his brother E., for life, with remainder to his first and other sons in tail male. And he devised his other estate, "in the same terms," to the same trustees, to raise money to pay his debts and subject thereto, in trust for his brother R. for life, with remainder to his first and other sons in tail male. The testator died without issue:—Held, that by the words "in default of issue," the testator in the case of the estate devised to pay debts, clearly referred, not to a general failure of issue, but to a failure at the time of his death; that the same construction must prevail as to the other estate; and consequently that both estates were well devised. *Bagot* v. *Legge*, 4 N. R. 492; 34 L. J., Ch. 156; 10 Jur. (N.S.) 994; 10 L. T. 898; 12 W. R. 1097.

A devise to A. and B. and their heirs in default of issue male and female of the testator's own body, is, at the testator's death, a devise in possession, and not an executory devise; the contingency being determined at the instant the will takes place, viz., at the death of the testator without issue. *French* v. *Caddell*, 3 Bro. P. C. 257.

An estate at C. was settled on A. for life,

remainder to his first and other sons in tail male, remainder to A. in fee. A. devised as follows: "As to the reversion and inheritance of the freehold estate at C., purchased by me in pursuance of my marriage articles, bearing date, &c., in case of failure of issue of my body by my said wife, I give and devise the same," &c. He then limited the estate to his brothers in succession, and to their respective first and other sons in tail male. The court was of opinion that the devise was good. *Egerton* v. *Jones*, 3 Sim. 409; 1 Russ. & M. 694; 30 R. R. 178.

A term being limited in trust for H. in tail, remainder if I die without male issue in the life of H. to C. in tail: the remainder is good. *Howard* v. *Norfolk (Duke)*, 2 Swan. 454.

If personalty be bequeathed to wife and children, and in case she die without issue by him a bequest over:—Held a good executory bequest. *Evit* v. *Williams*, 9 Mod. 209.

Estates settled on the husband for his life, with remainder to his sons successively in tail, remainder to the husband in fee, were devised by the husband, in case he should die without having any issue by his wife, to his wife for her life, remainder to his brother for his life, with remainder in trust for sale, with a direction to pay 4,000*l.* out of the proceeds, rents and profits, to the eldest daughter of the brother, to be a vested interest on her attaining twenty-one or on day of marriage:—Held, that, upon the true construction of the will, the ulterior limitation depended on the failure of issue at the death of the testator, and not on the general failure of issue, and that the daughter was entitled to the 4,000*l.* *Rye's Settlement, In re*, 10 Hare, 106; 22 L. J., Ch. 345; 16 Jur. 1128; 1 W. R. 29.

Where the ulterior limitations in a will are made to depend upon a failure of issue of the testator, and there are found amongst the ulterior limitations provisions which could not reasonably be meant to depend upon a general failure of issue, the will is to be construed as referring to a failure of issue at the death, and not to a general failure of issue. *Ib.*

The fixing of the time of the death of living persons as the period of payment, considered as inconsistent with the notion that the legacy was to take effect only on general failure of issue. *Ib.*

—— **"At Decease."**]—A testator who died in 1833, devised his residuary real and personal estate to his eldest son and his heirs, executors, &c.; provided that his will was, that, in case his said son should die without leaving any lawful issue of his body, such part of his said residuary estate as was freehold and situate in certain places should at his death be divided into two equal parts, one of which parts he gave to his second son and his heirs, and the other to his daughter and her heirs:—Held, as to such part of the testator's residuary estate as was freehold and situate in the places named, that his eldest son took, not an estate tail in it, but an estate in fee, with an executory devise over to take effect at his death, in case he should have no issue then living. *Davies, Ex parte*, 2 Sim. (N.S.) 114; 21 L. J., Ch. 135; 15 Jur. 1102.

A devise to J., W., C., &c., and their heirs, each in due succession as named, with usual limitations in failure of issue in A. B., and on the decease of A. B., does not import an indefinite failure of issue in A. B., but the limitation over to J., W., &c., is good by way of executory devise, these words meaning issue living at the time of decease of A. B., the first taker. *Stratford* v. *Powell*, 1 Ball & B. 1.

—— **"After Decease."**]—A testator devised lands to his son A. and his heirs for ever, and in case A. should die without lawful issue, desired that, after his death, all the property should go to his daughter and her heirs; and in case both A. and the daughter should die without lawful issue, desired the property should go to his brothers:—Held, an estate tail in A., and not fee-simple, with an executory devise over. *Jones* v. *Ryan*, 9 Ir. Eq. R. 249.

A devise of real estate to A., "and his heirs and assigns for ever," and, from and after his decease without issue, "to be equally divided amongst the then surviving legatees, share and share alike":—Held, that the first limitation to A., being of an estate in fee in the largest terms, and the gift over being to the survivor of certain ascertained persons, a personal benefit was intended for them, and therefore the gift over must be taken to refer, not to an indefinite failure of issue, so as to cut down A.'s estate in fee to an estate tail, but to a failure of issue to take place within the lives of the executory devisees; and that event not having happened:—Held, that the executory devise had failed, and the estate in fee of A. became absolute. *Greenwood* v. *Verdon*, 1 K. & J. 74; 3 Eq. R. 181; 24 L. J., Ch. 65; 3 W. R. 124.

—— **"In Case of Death."**]—A devise to A. and to his heirs and assigns for ever, and in case he should die without child or children of his body lawfully begotten, a gift over to the children of B., their heirs and assigns for ever, on the decease of A.:—Held, to confer an estate in fee-simple upon A., subject to be defeated by an executory devise, if, at his decease, there should be no issue of A. living. *Parker* v. *Birks*, 1 K. & J. 156; 24 L. J., Ch. 117; 3 W. R. 102.

A testator was possessed of two estates in Ireland, Flesk Castle and Dick's Grove. The former he held under a lease for lives renewable for ever; the latter he held in fee. In 1833 he made a will, in which he said, "I give, devise, and bequeath to my son John Coltsmann all those my property, lands, tenements, and premises at and about Flesk Castle," together with plate, furniture, &c. "I also devise and bequeath to my son John Coltsmann my lands, tenements, and premises at Dick's Grove." All his estates, &c., were made chargeable with an annuity to his wife. He afterwards made a codicil, in which he said, "If it should happen that my son John Coltsmann die without heirs of his body lawfully, &c., in that case, and in default of such heirs, I do hereby devise and direct that my lands, &c., at Flesk Castle, and the plate and furniture in my will specified, also my lands, &c., at Dick's Grove," all charged with the annuity to his wife, "and also with a reasonable provision, made with my consent, by my son for his wife, payable for her life, shall at my son's death descend and be transferred to my grandson Daniel Cronin, his heirs, &c., for ever, the heir for the time being to add the name of 'Coltsmann' to the name of Cronin." In the event of the contemplated death of the son without heirs, a charge was created in favour of a married daughter. The son never had any child. While in possession he executed disentailing deeds of both estates, and devised them to his wife:—Held, that, reading the will and codicil together,

John Coltsmann took the estate of Flesk Castle in fee, with an executory devise over to Daniel Cronin, in the event that happened of John Coltsmann dying without heirs of his body living at his death; and, as to Dick's Grove, that as the law then (1835) stood, the gift was a gift of that estate to John Coltsmann for life only, with a contingent remainder to Daniel Cronin, in the event of John Coltsmann dying without heirs of his body living at his death. *Coltsmann* v. *Coltsmann*, L. R. 3 H. L. 121; 16 W. R. 943. See also *Fay* v. *Fay*, 5 L. R., Ir. 274.

Implied Gift to Issue.]—Testator devised the residue of his freehold estates to his son S. for life, remainder to such issue male or female as S. should appoint; but if S. should die without issue male or female, testator devised same to his daughter M., if she married with consent, and to the issue of such marriage male or female. M. married with consent, and S. died without issue:—Held, that the defendant, a son of M., took no estate under the will. *Beasley* v. *Hourigan*, Hay. & J. 497.

Devise to testator's son A., and to his issue male and female, in such shares, manner and proportions as he might by deed or will appoint, with power to jointure a wife; and in case of the death of A. without lawful issue, then to testator's three daughters equally, share and share alike, as tenants in common, and not as joint tenants, and to their heirs and assigns:—Held, that A. took an estate tail. *Whitsitt* v. *Thompson*, 12 Ir. Eq. R. 119.

A testator devised the lands of A. to his son S. during his natural life sans waste, remainder to trustees to preserve, &c., and from and after the decease of the said S. to the use of the heirs male of the said S., in such shares and proportions and subject to such charges as the said S. should by deed or will appoint; and in case of the said S. dying without issue male, to permit his second son J. to receive the rents for his life sans waste, remainder to trustees to preserve, &c.; and from and after the decease of the said J. to the use of the male children of the said J. in the same manner and with the like power of appointment, and charging as he had hereinbefore devised the same to the male children of his son S., with remainders over in the same terms to testator's third son T., and remainder to his male children, and remainder to his own right heirs. He then devised the lands of B. to his son J. for life, with remainder to his male children as he should appoint, and in default of appointment to the first son of J. and the heirs male of his body, remainder in like manner to the second, third, and every other son of J., and if J. died without issue male to S., to be disposed of among his issue as he should think proper; and he directed that if S. should die without issue male, and that in consequence thereof the lands of A. should descend to his second son J. and issue male, then the lands of B. should immediately descend and go to T. and his issue male, and he gave powers of leasing to S., J. and T., as they should respectively become seised of the said estates:—Held, that S. took an estate tail in the lands of A. *Phillips* v. *Phillips*, 10 Ir. Eq. R. 518.

Express Gift for Life enlarged into Estate Tail by Implication.]—An express limitation for life, followed by a limitation over, in case the taker should die without issue not leaving any children:—Held, on objection to title taken in a suit for specific performance, to confer an estate tail. *Machell* v. *Weeding*, 8 Sim. 4; 5 L. J., Ch. 182.

Devise in trust for the testator's daughters, M. and C., for their lives, for their separate use; and in case both M. and C. should die without leaving issue, then over-implied estates tail to M. and C., with cross-remainders in tail. *Stanhouse* v. *Gaskell*, 17 Jur. 157; 1 W. R. 77.

An estate for life cannot be enlarged to an estate tail by connecting it with a gift on failure of issue living at a particular time, as it may by connecting it with a gift upon the failure of issue generally. *Jenkins* v. *Hughes*, 6 Jur. (N.S.) 1043; 8 W. R. 667.

A gift of real estate to A. for life, with remainder to her children as tenants in common, and in case A. should die without leaving lawful issue, then with remainder over, is a gift to A. for life, with remainder to her children for life, with remainder to A. in tail. *Parr* v. *Swindells*, 4 Russ. 283; 6 L. J. (O.S.) Ch. 99; 28 R. R. 90.

In a devise of land to A. for life, and if A. die without issue then to B.; though here is an express estate for life to A., yet the subsequent words will turn it into an estate tail: but where lands are devised to A. for life, remainder to trustees, &c., remainder to his first, &c., son in tail male, &c., and if A. dies without issue, then, &c., this will not give an estate tail to A.; but the words "without issue," must be intended "without such issue." *Blackborn* v. *Edgley*, 1 P. Wms. 606.

J. being seised of some lands in fee and cestui que trust or other lands, devises them to A. for life; remainder to his first and second son in tail male (going no further); and after A.'s death without issue male, then to a charity:—Held, that A. was tenant in tail until issue born, saving as to the trust estate. *Att.-Gen.* v. *Sutton*, 3 Bro. P. C. 75; 1 P. Wms. 754.

Devise to S. for life, remainder to his eldest son and his issue male, and for want of issue of S., to, &c. S. died without issue, and:—Held, he took an estate tail in remainder, as in *Langley* v. *Baldwin*, 1 Eq. Cas. Abr., pl. 29, cited in 1 P. Wms. 759; 1 Ves. Sen. 26. *Stanley* v. *Lennard*, Ambl. 355; 1 Eden, 87.

The court held, upon the particular language of a will, that an estate tail would not be implied in A. and B., though an estate was given to them for life, and the property was, upon failure of their issue male, limited over to their grand-daughters, and there was no express limitation which would include all their issue male. *Houston* v. *Platt*, 7 L. J. (O.S.) Ch. 20.

A testator, in a very ungrammatical and obscure will, devised real and personal property, so as to vest the whole legal interest in trustees, in trust for A. and B., during their lives to their separate use. Some unfinished and unconnected portions of sentences succeeded, and these were followed by a direction that, after the decease of A. and B., and failure of their male issue, the property should go to the grand-daughter. A. and B. had each only one child, a daughter, and both these daughters were mentioned in the will:—Held, upon the whole context of the will, that A. and B. were only tenants for life, and that an estate in tail male was not to be raised in them by implication. *Houston* v. *Hughes*, 5 Russ. 116.

When the general intent is to make a strict settlement, it shall prevail, though some of the limitations may seem contingent; but where the intent to create an estate tail is not plain, but

doubtful, the court will lay hold of anything, rather than put it in the power of a person on a remote contingency to bar all subsequent remainders. *Lethieullier* v. *Tracy*, 3 Atk. 781, 797.

J. devised all his lands, &c., to his daughter, B., for life, remainder to trustee to preserve, &c., remainder to the use of the first son of B., remainder to the heirs male of the body of said first son, with divers remainders over, and in case of the death of B. without issue of her body living at her decease, then testator devised said lands to his trustees until his cousin C. should attain the age of twenty-one; and in case of the death of C. under twenty-one without issue, then to B. for life, remainder to his first, &c., son in tail, remainder to E. for life, remainder to his first, &c., son in tail, remainder over. The Lord Chancellor inclined to confine the contingency in the will of J. of B.'s dying without issue of her body living at her death to the death of C. under twenty-one, and that the subsequent limitations to C. after attaining twenty-one, and to D. and E., are not contingent but vested remainders. *Ib.* 775; Ambl. 204. *And see* 2 Ken. Ch. 40.

Testator devised to S. K. certain real estate for life, charged with the annuities mentioned in his will, and then proceeded: "But in case the aforesaid annuitants, or any of them, shall survive the said S. K., I then give the aforesaid estate unto the eldest surviving son of S. K., charged with the aforesaid annuities; but in default of issue male, I give the above-demised premises unto his brother T. K., charged in like manner with the aforesaid annuities, and unto his eldest surviving son on the same conditions; but in default of issue male, my will is, that the aforesaid demised premises do descend unto my heirs-at-law, charged nevertheless with the above-mentioned annuities." S. K. survived all the annuitants mentioned in the will, and after his death J. K., his eldest son and heir-at-law, enjoyed the estate during his life, and then died, leaving a widow and an only daughter:—Held, first, that the dispositions of the devised estate after the death of S. K. were not meant to be contingent on his being survived by all or any one of the annuitants mentioned in the will; secondly, that S. K. took an estate in tail male, and this estate not having been barred either by himself or by his eldest son J. K., his second son S. K. was entitled to the estate as tenant in tail male, subject to the dower of J. K.'s widow. *Key* v. *Key*, 4 De G. M. & G. 673; 1 Eq. R. 82; 22 L. J., Ch. 641; 17 Jur. 769.

Devise to T. during his natural life, and from and after his decease unto his eldest son if he should have arrived at the age of twenty-one years, and in default of his having a son, then over. T. died leaving an eldest son a minor:—Held, that on the death of T. the eldest son took an estate in fee liable to be devested on his death under the age of twenty-one, with an executory devise over in that event to T. in tail. *Andrew* v. *Andrew*, 45 L. J., Ch. 232; 1 Ch. D. 410; 34 L. T. 82; 24 W. R. 329.

G., who died in 1837, by will devised certain freehold hereditaments to W. B. for life, and if he should die without having a son, over. W. B. entered into possession of the property and died in 1882, leaving a son, W. E. B., who entered into possession of the property, and contracted to sell it. The purchaser having objected to the title, a summons was taken out under the Vendor and Purchaser Act:—Held, that there was an implied gift to the son of W. B., and this implied gift following on the gift to W. B. for life, was equivalent to a word of limitation, and, therefore, by the rule in Shelley's case, gave W. B. an estate in tail male, and as this had not been barred, W. E. B. was entitled to the property for an estate in tail male. *Bird and Barnard, In re*, 59 L. T. 166. And see *Grattan* v. *Langdale*, 11 L. R., Ir. 473.

iii. *Effect of the Wills Act.*

Object of s. 29.]—The object of the 29th section of the 7 Will. 4 & 1 Vict. c. 26 is to redress the inconvenience arising from the words "dying without issue," and similar words having acquired a legal meaning different from the popular meaning. *Greenway* v. *Greenway*, infra.

Operation when Excluded.]—In ascertaining whether the words "die without issue," in a will made subsequently to the 1 Vict. c. 26, mean an indefinite failure of issue, a contrary intention, within the meaning of s. 29, is not to be inferred from the use of those very words. *O'Bierne, In re*, 1 Jo. & Lat. 352; 7 Ir. Eq. R. 171.

Under a bequest of personalty by will executed subsequently to the 1 Vict. c. 26, to "A. and B., to be divided equally, with a request to A. that, should he die without lawful issue, the property which I bequeath him shall revert back to the sons of B.," A. does not take an absolute interest in the moiety. *Ib.*

Mere presumption of intention is not sufficient to exclude the operation of the 29th section of the Wills Act. *Mid-Kent Ry. Act*, 1856, *In re, Bate, Ex parte*, 1 N. R. 470; 11 W. R. 417.

A testator, seised in fee of one moiety of estates, of the other moiety of which he was tenant for life, with the remainder to his eldest son T. in tail male, after reciting in his will that he had expended large sums of money in improvements on his house and demesne of M., of which T. would have the advantage, charged the moiety which he held in fee, and which he stated he intended leaving to T. as thereinafter mentioned, with 1,000*l.* for his second son G., and 1,500*l.* for his third son J. R., to be secured to them by T. at the testator's death or on T. coming of age; and in case either should die without issue, his portion was to be paid or secured to the survivor; and in case T. should die without issue, or G. should become possessed of the estates, that then he should secure that sum of 2,500*l.* to J. R.; and after reciting that the house and demesne of M., as well as a moiety of estates, were settled on his marriage in tail male, he left the other moiety to his son T. during his life and to his eldest son and his heirs in tail male; and in default of his issue male, then to his son G. for life and his issue in tail male; and in default of his issue male, to his son J. R. and his issue in tail male; subject to 3,000*l.* for any younger child or children of any of them who inherited; and in default of male issue, he devised his said estates to the daughter or daughters of T., G. or J. R. respectively; and in default of issue male or female, to his (the testator's) daughters in fee, as tenants in common:—Held, (1) that T. took an estate for life, with remainder to his eldest son in tail male, and reversion to him in tail male; and (2) that the will did not come within the Wills Act (1 Vict. c. 26, s. 29), as the words "in default of issue male" appeared from the context to mean an indefinite failure of issue male. *Neville* v. *Thacker*, 23 L. R., Ir. 344—C. A.

—— **By Variation of Words Used—Death without Issue under Twenty-one.**]—The 29th section of the Statute of Wills has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one," which additional words, upon the authority of decided cases, modify their meaning. *Morris* v. *Morris*, 17 Beav. 198; 1 Eq. R. 167; 17 Jur. 966; 1 W. R. 377.

A testator devised an estate in fee to his son, but if he should die under twenty-one, over. By a codicil he limited the estate over in the event of the son dying without issue, "or" under twenty-one:—Held, that "or" must be read "and," and that the executory devise over took effect only on the happening of both events, and consequently that A., on attaining twenty-one, had an absolute estate in fee simple. *Ib.*

Semble, also, that if the clauses were construed disjunctively, the devisee would have an estate tail by virtue of the words "die without issue," notwithstanding the 1 Vict. c. 26, s. 29. *Ib.*

—— **Death without Male Issue.**]—The principle of construction applied, in the case of wills made since 1837, to the words "die without issue" by the Wills Act (7 Will. 4 & 1 Vict. c. 26), s. 29, is not affected by the limitation over being in case the first taker shall "die without male issue." *Upton* v. *Hardman*, Ir. R. 9 Eq. 157.

By a will made in 1839, a perpetually renewable freehold was devised to A., subject to payment of debts and legacies, and in case he should "die without male issue," to B., but with a power to A. to charge the lands with a jointure and portions for his female issue:—Held, first, that A. took an estate quasi in fee, with an executory devise over in the event of his dying without leaving male issue at his death. *Ib.*

Held, secondly, that the language of the will did not evince any contrary intention excluding the application of the rule. *Ib.*

The words "die without leaving any male issue" are words importing an indefinite failure of issue within the meaning of s. 29 of the Wills Act. *Upton* v. *Hardman* (supra) followed. *Edwards, In re, Edwards* v. *Edwards*, 64 L. J., Ch. 179; [1894] 3 Ch. 644; 8 R. 618; 43 W. R. 169.

—— **Death of A. without Issue in Lifetime of B.**]—A testator since the Wills Act devised real estate to A., and if he should die without leaving lawful issue in the lifetime of B., then over. A. died in the lifetime of B., leaving issue one child, who also died in the lifetime of B.:—Held, that the gift over took effect. *Jarman* v. *Vye*, 35 L. J., Ch. 821; L. R. 2 Eq. 784; 14 W. R. 1011.

—— **Death without Heirs of the Body.**]—A., by will dated in May, 1839, bequeathed to his illegitimate son R. certain leaseholds, and if R. should die without "heirs or issue," over:—Held, that as s. 29 of the 7 Will. 4 & 1 Vict. c. 26 is expressly confined to the word "issue," it makes no change in the meaning of the expression "die without heirs of the body," and therefore ("without heirs," in the will, meaning "without heirs of the body," R. being illegitimate) the will did not confer the absolute interest on R., with an executory devise over in the case of his dying without issue living at his death, but an estate tail, and, the property being leasehold, the absolute interest. *Sallery, In re*, 11 Ir. Ch. R. 236.

A testator, in 1846, gave his residuary real and personal estate to J. S. L. and the heirs male of his body lawfully begotten for ever; but in case of his death without heirs male of his body lawfully begot, then the property to go to P. C. L. in the same manner; and if P. C. L. should die without heirs male of his body lawfully begot, then the property to go to A. in the same manner. By a codicil the testator, after reciting that by his will he had directed that in the event of the death of J. S. L. "without leaving male issue him surviving" the residue of his real and personal estates should go to P. C. L., revoked that bequest, and in the event of the death of J. S. L. "without leaving male issue him surviving," gave the residuary estate to the eldest daughter (if any) of J. S. L.:—Held, that the Wills Act (1 Vict. c. 26), s. 29, did not apply, and that the gifts over to P. C. L. and A. were void as to the personalty, as being on an indefinite failure of heirs male, and that the codicil did not alter their effect, and that under the will and codicil J. S. L. took an absolute interest in the personalty, subject only to an executory gift over in favour of his eldest daughter if he died leaving no male issue surviving him. *Dawson* v. *Small*, L. R. 9 Ch. 651.

—— **"Death without Issue" following Gift to Heirs.**]—A. gave his real and personal estate upon trust as to the income for his brothers, E. and C., or the heirs of their bodies, and declared that if either brother should die leaving heirs of his body, then the share of such brother should descend to such heirs, but if one brother should die without lawful issue, then the whole income should be paid to the surviving brother, or in case of his death also to his lawfully begotten heir; but in case both brothers should demise without issue lawfully begotten, then the whole property should be divided among the testator's nearest of kin; and he appointed executors, with power to appoint other executors, as to them might seem fit, also with full power to get in and receive all moneys or securities for money, and to sell, dispose of, and convert into money all other his real and personal estate, either by public auction or private contract, as to them should seem meet:—Held, that there was an effectual gift over of the personalty to the next of kin in the event of E. and C. dying without leaving issue at their respective deceases. *Greenway* v. *Greenway*, 2 De G. F. & J. 128; 29 L. J., Ch. 601. Affirming 1 Giff. 131; 5 Jur. (N.S.) 888.

A testator devised his fee simple lands to be equally divided between his sons J. and T., and then proceeded as follows: "The fee simple estates and the freeholds to descend to the heirs of J. and T. for ever; but in the event of both sons dying without issue, then to be equally divided between my daughters, share and share alike":—Held, that J. and T. took estates tail with cross-remainders between them. *Fay* v. *Fay*, 5 L. R., Ir. 274.

A testator bequeathed 1,000*l.* to trustees upon trust for his son A. for life, with remainder to the children of A. He then gave the residue of his estate and effects to his trustees, upon trust for all his children in equal shares, and the heirs of their respective bodies. The following words were then added in a parenthesis: "except as to my son A. and his children, whose share, in consequence of the 1,000*l.* set apart for him and them as aforesaid, shall be rated at 1,000*l.* less than that of any other child." The will then

declared that, in case of a failure of issue of any child, the share of him or her whose issue should fail should be held on the trusts therein mentioned. The testator left freehold estates and personalty applicable to the trusts declared of the residue :—Held, that the words "failure of issue" were not made by the 29th section of the Wills Act to mean failure of issue at the death of A. *Green* v. *Green*, 3 De G. & Sm. 480 ; 18 L. J., Ch. 465 ; 14 Jur. 73.

See also cases, post, col. 1275.

b. When Referable to the Objects of a Prior Devise.

i. *Gifts of Personalty.*

"Issue" read "Such Issue" and confined to Children.]—The words "if he shall happen to die without issue" may be so controlled by the context of a will as to mean children, and the remainder over will in that case not be too remote. *Att.-Gen.* v. *Bayley*, 2 Bro. C. C. 553.

Three annuities for a term of years bequeathed in trust for three children, A., B. and C., respectively for life ; in case of the death of either leaving any child or children, his or her annuity to be equally divided between such child or children, share and share alike ; in case of the death of either without issue, his or her annuity to go to the survivor or survivors of them equally, share and share alike, with a limitation over in case of the deaths of all without issue as aforesaid. A. died without issue ; A.'s annuity went to B. and C., subject to the contingent limitation over ; and upon B.'s death leaving children, belongs in moieties absolutely to his administrator and C. *Vandergucht* v. *Blake*, 2 Ves. 533.

Produce of estate devised for sale directed to be paid between J. and A., the wife of B., in equal proportions, share and share alike ; and in case either should die leaving children, trustees to stand possessed of moiety so given to J. and A. to and for the use and benefit of such child or children at twenty-one, equally to be divided if more than one, and until twenty-one money to be invested in funds, interest for children's maintenance. If either J. or A. should die without children, survivor to take share :—Held, J. and A. only tenants for life. *Farthing* v. *Allen*, 2 Madd. 310 ; 17 R. R. 223.

Limitation of a trust of a term to a man for life, remainder to his first, &c., son in tail, and for want of issue male then to all his daughters ; there never having been a son, adjudged the trust to the daughter good. *Higgins* v. *Dowler*, 1 P. Wms. 98 ; Salk. 156 ; 2 Vern. 600.

Bequest of an annuity to A. and B., and to the survivor for life ; and if A. should have any "children," then to be equally divided between them ; but if A. should die "without lawful issue," then to C. and his heirs for ever :—Held, that the children of A. took absolute interests in a perpetual annuity. *Robinson* v. *Hunt*, 4 Beav. 450.

Bequest of personal estate to A. for life, remainder to the children of A. equally, and in default of issue of A., upon trust to sell and divide equally amongst B. and C. and all their children "then" living, share and share alike : —Held, that the gift was not too remote, and that B. and C. and their children living at the death of A. alone took the personal estate as tenants in common absolutely. *Cormack* v. *Copous*, 17 Beav. 397.

Gift to daughters for life, with remainder to the child or children of such daughters as they should appoint in default of appointment equally, and on the death of such of the said daughters after attaining twenty-one as should die without issue her share to be paid to her personal representative :—Held, that "issue" meant issue who should be entitled under the former gift, i.e., children. *Wyndham's Trusts, In re*, L. R. 1 Eq. 290.

A testator bequeathed a sum of stock to trustees upon trust to pay the interest to his son during life, with a direction, if he married a woman with a fortune of a specified amount, to settle the fund upon her and the issue of such marriage ; but in case of the son's decease leaving no issue of his body, the stock was given over to various persons ; and the testator also disposed of the residue of his estate. The son married a woman who had not the fortune required by the will, and died leaving issue of that marriage :—Held, that the son's life interest in the stock was not extended by implication to a quasi estate tail ; that the issue of his marriage took no interest in the stock ; that the gifts over failed ; and that after the son's death the stock belonged to the residuary legatee. *Andree* v. *Ward*, 1 Russ. 260 ; 4 L. J. (o.s.) Ch. 98 ; 25 R. R. 36 ; and *Greene* v. *Ward*, 1 Russ. 262 ; 4 L. J. (o.s.) Ch. 99 ; 25 R. R. 38.

Upon a bequest of equal legacies to testator's six children, to be paid on their respectively attaining twenty-one or the marriage of the daughters, the interest to be paid in the meantime, and the principal as they might direct to their issue, but in case they should die without issue the principal to go among "the survivors" of his children in equal proportions ; after directing his freehold estate to be sold, and all the residue of his personal estate, he declared the trusts to be equally to pay and divide the money therefrom, so soon as his youngest child should attain twenty-one, unto and amongst all his children, share and share alike, and in case of the death of any, leaving lawful issue, the share of the parent so dying to such issue :—Held, that the first bequest was limited to issue living at the death of the children, and that the gift over, on failure of issues, referred to the same objects. *Leeming* v. *Sherratt*, 2 Hare, 14 ; 11 L. J., Ch. 423 ; 6 Jur. 663.

Termor devises the term to A. for life, remainder to such of his issue as he shall appoint ; and if A. die without issue, remainder to B. This is a good devise to B. *Target* v. *Gaunt*, 1 P. Wms. 432 ; Gilb. Eq. R. 149 ; 10 Mod. 402.

The testator gave his real and personal estate in trust for his nephew John for life, and after his death to be conveyed and transferred to the eldest son of John on his attaining twenty-one, with limitations over in like manner, if there were no such son of John, to two other nephews of the testator, and their sons successively ; and in case none of them (the said three nephews) should have a son who should survive the survivor of them, and attain twenty-one, the testator then devised the estate in like manner to a fourth nephew and his sons, with remainders over to their respective daughters :—Held, that the testator, in the words of devise to the fourth nephew, must be construed to mean that such limitation should take effect in case none of the first three nephews should leave a son surviving his parent and attaining twenty-one, a different construction being repugnant to specific direc-

tions as well as to the general scheme of the will, creating cases of intestacy, and supposing a capricious and irrational intention; and that, therefore, a son of John, surviving his father and attaining twenty-one, was entitled to an absolute conveyance and transfer of the real and personal estate. *Hillersdon* v. *Lowe*, 2 Hare, 355; 12 L. J., Ch. 321; 7 Jur. 482.

A testator by his will gave to C., described as his natural daughter, a sum of stock, and his house and land at C., with a direction that if she married, the property should be settled solely upon herself and children, but in case of death without lawful issue, the money so left to her to be equally divided betwixt his nephews and nieces who might be living at the time, and the land at C. to his nephew J. H.:—Held, that C. took an absolute interest in the stock. *Campbell* v. *Harding*, 2 Russ. & M. 390.

By a settlement made in 1811 the Cardigan family plate was settled upon trust for Robert Earl of Cardigan for life, and after his death for James Thomas Lord Brudenell, the son and heir apparent of Robert Earl of Cardigan, for his life, and after his death in trust for the first son of the body of James Thomas Lord Brudenell, his executors and assigns; but if such first son should die under twenty-one without leaving issue male living at his death, then for the second son, his executors, administrators and assigns, with like executory trusts in favour of the other sons of James Thomas Lord Brudenell; and if he should not have any son or sons, or having such, all of them should die under twenty-one, and some of them should leave issue male living at his death, then in trust for the second son of Robert Earl of Cardigan, his executors, administrators and assigns; but if such second son should die under twenty-one without leaving issue male living at his death, then in trust for the third and other sons of Robert Earl of Cardigan; and if there should not be any son of Robert Earl of Cardigan or James Thomas Lord Brudenell who should live to attain twenty-one or should die under that age leaving issue male living at his death, then in trust for the settlor. Robert Earl of Cardigan had only one son, James Thomas Lord Brudenell, who attained twenty-one and died without issue:—Held, that upon his death the ultimate trust in favour of the settlor took effect, the words "any son" in the gift over being read "any such son as is hereinbefore mentioned." *Cardigan* v. *Curzon-Howe*, L. R. 9 Eq. 358; 22 L. T. 640.

Under a gift by a testator to his daughter for her life, with remainder to her children, with remainder, in the event of any such children dying under twenty-one, to their children who should survive his daughter and attain twenty-one, and after several intermediate limitations with a limitation over, provided there should be no child of his daughter, or, being such, they should not attain twenty-one, or leave issue who should attain twenty-one:—Held, that the limitation over was intended to take effect only on failure of grandchildren who should survive the testator's daughter, and not attain twenty-one, and was therefore not too remote. *Trickey* v. *Trickey*, 3 Myl. & K. 560.

A testator gave his residuary estate to such children as his nephews and niece W. T. and D. should leave at their respective deceases, one-third to the "child or children" of W. and the two other thirds similarly to the "child or children" of T. and D. respectively, and directed that, in case of the death of a nephew or niece without leaving any "children or child," then that third share should be paid to the "children or child" of the other or others leaving "children or a child"; but that if W., T. and D. should all die "without leaving any issue lawfully begotten," the whole residue should go to the children of G. W., T. and D. All died without leaving children, but one of them left grandchildren:—Held, that "children" must be construed in its natural sense, and not so as to include grandchildren; that "issue" was not to be read "such issue," so as to be confined to children; and that therefore, in the events which had happened, the fund was undisposed of. *Pride* v. *Fooks*, 3 De G. & J. 252; 28 L. J., Ch. 81; 5 Jur. (N.S.) 158; 1 L. T. 292; 7 W. R. 109.

A father gave a fund of 66,666*l.* 13*s.* 4*d.* consols to trustees, upon trust to pay 1,000*l.* a year to each of his two daughters for their lives, and after the death of each daughter he gave 33,333*l.* 6*s.* 8*d.* consols, which he described as the share of each daughter, unto and among all and every such child or children she might happen to leave at her decease, to be equally divided between them when and as they should attain the age of twenty-one years, and if but one child, then to such only child; and in case either of his daughters should die without issue, he directed that the 33,333*l.* 6*s.* 8*d.* consols, being the share of her so dying, should be transferred by his trustee to such person or persons, and in such manner, as she by her will and testament in writing duly executed might direct and appoint. There was a general residuary gift. One of the daughters executed the power and died, having had one child, who died in her lifetime, leaving children who survived their grandmother:—Held, that the words "die without issue" meant such issue as were previously mentioned, and that the power was validly exercised. *Merceron, In re, Davies* v. *Merceron*, 4 Ch. D. 182; 35 L. T. 701. And see *Carter* v. *Bentall*, post, col. 1046; *Hockley* v. *Mawbey*, ante, col. 1022.

—— **Where Word "Such" expressly Used.**]—Devise of a personal estate to A. for life, and afterwards for her children, and the yearly interest and produce to be for their maintenance till the sons attain twenty-one, and the daughter eighteen, at which ages their respective portions to be paid, and for want of such issue, then to B. A. dies without issue, and the devise over to B. was held good, the words "for want of such issue" being the same as "for want of such children." *Staines* v. *Maddock*, 3 Bro. P. C. 108. *S. C.*, nom. *Maddox* v. *Staines*, 2 P. Wms. 421.

One possessed of a term devises it to A. for life; remainder to his first, &c., son in tail successively; remainder to his daughter; and if A. shall have neither son nor daughter, then to J. S. A. dies, having never had a son or daughter; the devise over to J. S. is good. *Stanley* v. *Leigh*, 2 P. Wms. 686.

Limitation of trust of term to several persons for life successively, then to the child, &c., of one of them, and for want of such issue, or after their decease, to S. for life, is a good limitation to S. *Oakes* v. *Chalfont*, Pol. 38.

A term was limited to A. for life, then to B. for life, then to such child as B. should leave at his death, and for want of such a child to C.

Quære, if the remainder to C. is good. *Heyward* v. *Rogers*, 1 Vern. 461.

Bequest to the children of testator's daughter, to the number of four, of the sum of 1,000*l.* each, if more the 4,000*l.* to be divided between such as should be living at testator's death; but if his daughter should die without issue, then over: a child by another husband, born after testator's death, cannot take, and the bequest over is good, being not a limitation over, but an absolute legacy. Bequest of the residue to his daughter and her issue, and for want of such issue over; the limitation over too remote, and therefore void. *Salkeld* v. *Vernon*, 1 Eden, 64.

ii. *Gifts of Real Estate.*

"Issue" read "Such Issue."]—Where real and personal estates are given together for life, and so limited over that a child of the tenant for life would take a vested interest in the real estate at its birth, and in the personal estate, at twenty-one, being a son, or at twenty-one or marriage, being a daughter, and there is a gift over in the event of the tenant for life dying without issue, it is to be intended a dying without such issue as would take by force of the prior limitations. *Malcolm* v. *Taylor*, 2 Russ. & M. 416.

A testatrix devises to A. for life, remainder to A.'s first and other sons in tail male, remainder to A.'s daughters as tenants in common in tail, with cross-remainders between them in tail, remainder to trustees for a term of years upon trusts to raise and pay such legacies as she had thereafter given or should give by any codicil; and in a subsequent part of the will she bequeaths various legacies from and immediately after the decease and failure of issue of A.:—Held, that "failure of issue" in the gift of the legacies must be construed "failure of such issue" as were included in the limitation of the estate; and that therefore the bequests were not too remote. *Morse* v. *Ormonde* (*Lord*), 1 Russ. 382; 25 R. R. 85; 4 L. J. (o.s.) Ch. 158; 5 Madd. 99; 21 R. R. 284.

Devise to A. for life, with power for trustees to settle a jointure on his wife, and subject thereto in strict settlement on the issue of such marriage; but if A. should die without any issue of his body, then over. The latter words give him an estate tail by implication. *Allanson* v. *Clitherow*, 1 Ves. Sen. 24.

On a gift of real and personal estate to A. and B. for life, with estates tail to their issue in certain events only, as it was held, followed by a limitation over on a general failure of issue male of A. and B., estates tail were raised by implication in A. and B. *Franks* v. *Price*, 3 Beav. 182; 9 L. J., Ch. 383. And see *S. C.* at law, 5 Bing. (N.C.) 87; 6 Scott, 710.

Testator, after giving various life estates in his real and personal property, directed that, if M. H. should, after the death of J. and certain other first tenants for life, die before N. H., the last tenant for life, leaving issue male, then his trustees should convey one moiety of his real estate to trustees, to the use of the first and other sons of M. H. successively in tail male, with remainder to N. H. for life, with remainder to his sons in tail male; and he directed one moiety of his personal estate to be invested in the purchase of real estate to be settled to the same uses. The testator then gave corresponding directions with regard to the other moiety, in the event of N. H. dying before M. H. And in case M. H. and N. H. should both die without issue male, then the testator directed his trustees to convey his real estate to such persons as would be his right heirs at the death of the survivor of M. H. and N. H., and to transfer his personal estate to such persons as would be his next of kin. M. H. died without issue in the lifetime of J., &c. On J.'s death N. H. claimed an absolute interest in the personal estate, and suffered a recovery of the real estate, and afterwards died without issue:—Held, that although M. H. died in the lifetime of J., and although, from the circumstance of M. H. dying in the lifetime of N. H., the events in which the estate was limited to the issue of N. H. did not take place; still, under the terms of the will, N. H. became entitled, on the death of J., to both moieties; and that he took the personal estate absolutely, and took an estate tail in the real estate. *Ib.*

A testator by his will expressed his desire of bequeathing his estates to his children, "in such manner that the same shall be enjoyed by them respectively only for and during the period of their natural lives; in order, therefore, to limit the same strictly in entail on them, my said children, and to their several and respective heirs of their bodies respectively." He then devised his real estates to trustees, upon trust, as to part of his real estates, to his son W., for life, "and after his decease the same to go and descend to his first and other sons and daughters in tail in order of primogeniture, males to be preferred to females, and to the several and respective heirs of their bodies, so as that each possessor shall take only a life estate and interest in the same"; and in the event of W.'s decease without issue, then he devised his estates to his trustees, upon trust to allow his other children, whom he enumerated, "to possess and enjoy the same, strictly limited to life interest, and in tail to each of them respectively, in the order of primogeniture, males to be preferred to females":—Held, that W. took an estate for life only. *Towns* v. *Wentworth*, 11 Moore, P. C. 526; 6 W. R. 397.

V. bequeathed his residuary estate to M., in trust to be invested in land, and to go with the entail as in his father's (N.'s) will. N. had devised his estates to V. for life; remainder to his first and other sons successively in tail; remainder to his son J. for life; and similar remainders to the first and other sons of J. in tail; remainder as to one moiety, to the use of his eldest daughter Marianne during natural life; remainder to the use of the first son of Marianne and the heirs of his body; remainder to the use of the second, third, and every succeeding son of Marianne, and their heirs, according as they should be in seniority of age and priority of birth; remainder to the use of the daughter or daughters of Marianne and their heirs, share and share alike, as tenants in common, &c.; remainder to the use of his second daughter Eliza Maher during her natural life, with the like remainders and limitations over to the sons and daughters of Eliza, and their heirs, as thereinbefore contained respecting the sons' daughters of Marianne; and as to and for the other remaining moiety of the devised lands to the use of his daughter Eliza Maher during her natural life, with the like remainders and limitations over to the sons and daughters of Eliza and their respective heirs as thereinbefore contained respecting the sons and daughters of Marianne as to the first-mentioned

moiety. And in default of issue of Eliza, to the use of his daughter Marianne during her life, with the like remainders and limitations over to the sons and daughters of Marianne and their respective heirs as thereinbefore contained respecting the sons and daughters of Eliza. J. survived V., and died in 1850. Both died without issue. Marianne died in 1854, leaving two sons: Edmond, who died without issue in 1870, and Lory. Eliza died in 1875, without ever having had issue. Edmond, after his mother's death, barred the entail in the moiety, in which she took a life estate, and was paid the half of the residuary estate in a cause instituted to administer V.'s assets:—Held, that on Eliza's death, Lory, the then surviving son of Marianne, became tenant in tail of the half of V.'s residuary estate, in which she had a life interest, and that he, having barred the entail, was absolutely entitled to that half of the funds; as, on the true construction of N.'s will, Eliza's second and other children would take successive estates tail, as well as her first son, and as (although her daughters would take as tenants in common in fee) the words which prefaced the gift over "in default of issue" were to be construed in default of her children, according to the rule approved of in *Foster* v. *Hayes* (4 El. & Bl. 717, 734). *Smyth* v. *Power*, Ir. R. 10 Eq. 192.

—— **Where Gift to some only of the Issue.**]—Devise to S. for life, remainder to his eldest son and his male issue, and for want of issue of S., to, &c. S. died without issue:—Held, he took an estate tail in remainder, as in *Langley* v. *Baldwin* (1 Eq. Cas. Abr., pl. 29, cited in 1 P. Wms. 759; 1 Ves. Sen. 26). *Stanley* v. *Lennard*, Ambl. 355; 1 Eden, 87.

J. being seised of some lands in fee and cestui que trust of other lands, devises them to A. for life; remainder to his first and second son in tail male (going no further); and after A.'s death, without issue male, then to a charity:—Held, that A. was tenant in tail until issue born, saving as to the trust estate. *Att.-Gen.* v. *Sutton*, 3 Bro. P. C. 75; 1 P. Wms. 754.

Devise to trustees to invest in stock and pay dividends to testator's son for life, and after his decease to his eldest son and his heirs for ever; and in case of their death without issue, to his (testator's) nearest relation, and the nearest relation of such nearest relation for ever. This is double contingency, and in the event of the son dying without issue, is good. *Marsh* v. *Marsh*, 1 Bro. C. C. 293.

A testator, before the Wills Act came into operation, devised his "estate" at A. to S. K. for life, charged with life annuities; but in case the annuitants, or any one of them, survived S. K., he gave the aforesaid "estate" to S. K.'s eldest surviving son, charged with the annuities; but in default of issue male he gave the aforesaid "estate" to T. K., charged in like manner, and unto his eldest son upon the same conditions; but in default of issue male the premises were to descend to the testator's heirs, charged as above:—Held, first that the limitation to S. K.'s eldest surviving son ought not to be construed literally so as to make it dependent on S. K. being survived by one of the annuitants; secondly, that the words "in default of issue male" were not to be construed referentially as meaning in default of an eldest surviving son, but generally, so as to give S. K. an estate in tail male; thirdly, that the use of the word "estate" was not in the above will sufficient to give the eldest surviving son of S. K. an estate in fee simple; fourthly, that where, upon the careful perusal of an instrument, it is impossible not to be satisfied that a strict and ordinary interpretation of its language would disappoint the intention with which it was framed, such an interpretation is not to be adopted. *Key* v. *Key*, 4 De G. M. & G. 73; 1 Eq. R. 82; 22 L. J., Ch. 641; 17 Jur. 769.

A devise to trustees and their heirs, in trust for A. for life, and his first, &c., sons in tail; but if A. dies without an heir male of his body begotten, then to go over. A. is only tenant for life, and the words "if he dies without an heir male," &c., do not give him an estate tail by implication. *Bamfield* v. *Popham*, 2 Vern. 427; 1 P. Wms. 54; Salk. 236.

Devise to A., and after his death to his first and other sons, and in default of male issue then unto his eldest and other daughters, and to their heirs male for ever, an estate in tail male in A. *Wight* v. *Leigh*, 15 Ves. 564; 10 R. R. 120.

A. being seised of an estate for lives renewable for ever, devised it to B., C. and D. as tenants in common for their respective lives, with remainder to the issue male of B., C. and D. respectively, in such shares as B., C. and D. respectively should appoint, with powers to each of charging for daughters' portions; and in case either should die without issue male or female, then the share of B. to go to C. and his issue male with like powers; that of C. to D., and that of D. to B. And in failure of issue male of B., C. and D., then to their issue female as tenants in common during their lives. And in default of such issue, then to E. and his issue:—Held, that C. took an estate quasi in tail. *Briscoe* v. *Briscoe*, Hayes, 34.

J. M. by his will devised the Maytham Hall estate, being of gavelkind tenure, to trustees, upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P. M. for life, and after his decease for the first son of P. M. for life, and after his decease for the first son of such first son and the heirs male of his body, and in default of such issue for every other son of P. M. successively for the like interests and limitations, and in default of issue of the body of P. M., or in case of his not leaving any at his decease, for T. G. M., the eldest son of T. M., for life, and after his decease for the first son of T. G. M., and the heirs male of his body; and in default of issue of the body of the said T. G. M. for every other son of T. M. successively, for the like estates and interests, and on failure of all such issue of the body of T. M. upon trust for him and his heirs and assigns for ever. P. M. never had any children:—Held, that P. M. took an estate for life, with remainder to his first unborn son if such son had been born, and that all the remainders over were void; held, also, that effect was to be given to the gift over to T. M. and his sons, in default of issue of the body of P. M., &c., as an independent claim, and that it was subsequently valid. *Monypenny* v. *Dering*, 2 De G. M. & G. 145; 22 L. J., Ch. 313; 17 Jur. 457. And see *S. C.*, 7 Hare, 568; 14 Jur. 1083; 15 Jur. 1050.

Devise to A. for life, with remainder to his first son who should attain twenty-one, in fee, and in default to all his daughters in fee; but in the event of A. dying without any issue male who should attain twenty-one, or any issue female, then over:—Held, that A. took for life only, and that his estate was not enlarged by

the gift over in default of issue. *Sanders* v. *Ashford*, 28 Beav. 609.

Bequest of a residue upon trust for the testator's grandson, B., the son of Isaac, at twenty-five, for life; and, after the death of B., in case he shall have a son who shall attain twenty-one, then for such son of B. who shall first attain twenty-one, absolutely; and in default of such son of B., and after B.'s death, then upon like trust for the testator's grandson J., &c., with like limitations successively in favour of any other grandsons, sons of Isaac, born in the testator's lifetime, and their respective sons first attaining twenty-one; and in default of a son of any such grandson attaining twenty-one, then upon trust for any son of Isaac, born after the testator's decease, who shall first attain twenty-one, absolutely; and in case no son of any son of the testator's son Isaac then born, or thereafter to be born in the testator's lifetime, nor any son of his son Isaac, born after his decease, shall live to attain twenty-one, then from and immediately after the decease of all the sons and grandsons of his son Isaac, upon trust for the testator's nephew G., for life; and upon the decease of his nephew G., in case he shall have a son who shall live to the age of twenty-one, then upon trust for such son who shall first attain twenty-one, absolutely:—Held, upon the whole context of the will, that the words "after the decease of all the sons and grandsons" must be read as if they had been "after the decease of all the aforesaid," or "all such sons and grandsons"; and that the limitation over in favour of the first son of G. attaining twenty-one was therefore not too remote. *Ellicombe* v. *Gompertz*, 3 Myl. & Cr. 127.

A gift to children in tail not comprehending all the issue, followed by a limitation over in terms "on failure of issue," will generally be read as meaning all such issue as are before mentioned, unless it appears from the context that other issue than those provided for were intended to take. If the question had arisen entirely under the will making the gift, and the words "there being a failure of issue of," &c., had been found in that will, following limitations to the issue like those contained in a previous will, in this case those words would have been construed to refer to a failure, not of issue generally, but of such issue as the will had previously provided for. For the purpose of determining the meaning of such a limitation, the principles of construction must be the same whether the instrument be a deed or a will. *Eno* v. *Eno*, 6 Hare, 171; 16 L. J., Ch. 358; 11 Jur. 746.

It is a rule of construction that where there is a gift to some only of a class, and then a gift over upon failure of all the class, it is to be construed upon failure not of the whole class, but of those only who are specified before. *Bryan* v. *Mansion*, 5 De G. & Sm. 737; 22 L. J., Ch. 233; 17 Jur. 202.

A testatrix gave a fund to trustees, upon trust to pay the dividends to her niece; and, after her decease if her husband should survive her, and she should leave no "issue" living at her decease, then to the husband for life; but if she should leave "issue," then upon trust to pay a moiety of the dividends to the husband, and to apply the other moiety, during his life, for the benefit of "such issue" during their minorities. After the decease of the niece as to one moiety of the fund, and after the decease of the survivor of her and her husband then as to the whole of the fund, the trust was to transfer and divide the same unto and amongst the "children" of the niece, the shares of sons to be vested at twenty-one, and of daughters at that age or marriage with consent, with survivorship in case of the death of any child before his portion should become vested, with a provision for maintenance for "children," during minority; and in case the niece should die in the lifetime of the husband leaving issue, and all should die unmarried, then the trust was to pay the whole of the dividends unto the husband. "And from and after the decease of my said niece and her husband, and the survivor of them, and failure of issue of my said niece, upon trust to transfer the fund to other persons":—Held, that the word "issue" in previous parts of the will obviously meant "children," and that the gift over on failure of "issue" meant a failure of "children," and that the gift over took effect. *Ib.*

—— **Where Word "Such" expressly used.**]—In a devise of land to A. for life, and if A. die without issue, then to B., though here is an express estate for life to A., yet the subsequent words will turn it into an estate tail; but where lands are devised to A. for life, remainder to trustees, &c., remainder to his first, &c., son in tail male, &c., and if A. dies without issue, then, &c.; this will not give an estate tail to A., but the words "without issue" must be intended "without such issue." *Blackborn* v. *Edgley*, 1 P. Wms. 606.

A testator gave the income of his personal and the rents of his real estate to his daughter for life for her separate use; and after her decease and that of his wife, he gave the residue of his real and personal estate to trustees in trust, to sell and pay half the produce "to the issue" of his daughters equally, to be paid at twenty-one; and if only one child, then to such one child; and he directed the trustees to apply the interest in the maintenance and education of such issue; "and in default of such issue," he gave such moiety of the residue between his nephews and nieces living at the death of his daughter; and he gave the other moiety of the residue at the decease of his wife and daughter, without issue, to the trustees to permit his godson to take the income for life, and after his decease to certain charities:—Held, that "issue" in the first clause was to be construed "children," but in the second clause in its ordinary, unrestricted sense, and consequently that the gift over of the first moiety upon the death of the daughter without issue was good, but was too remote as to the second. *Carter* v. *Bentall*, 2 Beav. 551; 9 L. J., Ch. 303; 4 Jur. 691.

J. devised all his lands, &c., to his daughter B. for life, remainder to trustees to preserve, &c., remainder to the use of the first son of B., remainder to the heirs male of the body of said first son, with divers remainders over; and in case of the death of B. without issue of her body living at her decease, then testator devised said lands to his trustees, until his cousin C. should attain the age of twenty-one; and in case of the death of C. under twenty-one without issue, then to D. for life, remainder to his first, &c., son in tail, remainder to E. for life, remainder to his first, &c., son in tail, remainder over. The Lord Chancellor inclined to confine the contingency in the will of J. of B.'s dying without issue of her-

body living at her death to the death of C. under twenty-one, and that the subsequent limitations to C. after attaining twenty-one, and to D. and E., are not contingent but vested remainders. *Lethieullier* v. *Tracy*, 3 Atk. 775; Ambl. 204. *And see* 2 Ken. Ch. 40.

A testator devised to his grandson C. an estate for his own use during his life, remainder to the first son of the body of C. lawfully begotten, severally and successively in tail male, of the name of C.; and for want of such lawful issue of that name, "either by my grandson C. or my son, then I give and devise it amongst my daughters and their children, share and share alike, to hold unto them, his or her or their heirs for ever, as tenants in common, and not as joint tenants": —Held, that C. took an estate for life, with remainder to his first and other sons in tail. *Parker* v. *Tootal*, 5 N. R. 378; 11 H. L. Cas. 143; 34 L. J., Ex. 198; 11 Jur. (N.S.) 185; 12 L. T. 89; 13 W. R. 442. And see *S. C.*, nom. *Barrow* v. *Tootal*, 7 H. & N. 962; 8 Jur. (N.S.) 991; 6 L. T. 472; 10 W. R. 357.

Testator devised an estate to A. for life, remainder to trustees to preserve, &c., remainder to all the children of A., as tenants in common, and not as joint tenants, and for want of such issue to B. for life, remainder to trustees to preserve, &c., remainder to all the children of B. as tenants in common, and not as joint tenants, and for want of such issue to C. in fee:—Held, that the children A. took estates for life, with cross-remainders between them for life, with remainder to B. for life, with remainder to her children, as tenants in common, with cross-remainders between them for life, with remainder to C. in fee. *Ashley* v. *Ashley*, 6 Sim. 358; 3 L. J., Ch. 61.

Devise to several for life; and after the death of the surviving tenant for life, to a son of my nephew A. and his heirs and assigns, and for want of such issue over:—Held, that this was a gift in fee to the first-born son of A. *Ashburner* v. *Wilson*, 17 Sim. 204; 19 L. J., Ch. 330; 14 Jur. 497.

Testator devised lands to his son A. F. for life, and after the decease of A. F. to his first son lawfully issuing, and for default of such first issue to the use of the second, third, and every other son, and the heirs of his or their bodies, the elder to be always preferred before the younger of such sons and the heirs of his body, and for default of such issue, then to the use of all and every the daughters of A. F. and the heirs of the body of such daughter and daughters, with remainders over:—Held, that the first son of A. F. took neither by construction nor by implication an estate tail, but a life estate only. *Barnacle* v. *Nightingale*, 14 Sim. 456; 9 Jur. 221.

A. being seised in fee, devised one moiety of his estate to his sister M. for life, remainder to her first and other sons in tail male, and for want of such issue, remainder to her issue female and the heirs of their body, with power to M. to charge 1,000*l.* for younger children, and for want of such issue, remainder to his sister I. for life, with precisely similar remainders to her issue. The other moiety was limited to I. for her life, and to her issue, and then to M. and her issue, in precisely the same way as the first moiety; and for want of issue of M. and I., the whole to L. for life, with remainders over. By codicil, reciting the marriage of M. and D., he devised one moiety to M. for life, remainder to the issue of M. successively, and the heirs of their bodies, "as in said will limited, and for default of such issue to D. for life, with remainder over, as in said will limited." The codicil contained the following clause: "I ratify my will with respect of my real estate in every particular not hereby altered; the only alteration I intend hereby is, that if my sister Margaret should die without issue, or failing issue, that the said D., her husband, or any other husband she may have, should hold a moiety of my estate during his life." M., after the death of D., suffered a recovery to the use of herself, her heirs and assigns for ever:—Held, that under the limitations in the will, M. took only an estate for her life, and that she did not take an estate tail female, after the estate in tail male to her first and other sons:—Held, also, that from the words "in default of such issue to D." &c., in the codicil, there was no ground for implying an estate tail in M., the word "such" being referential to the devise in the will of her sons in tail male, and her daughters in tail general:—Held, also, that the devise in the codicil to D., or any future husband, if M. should die without issue, or failing issue, was to take effect on the determination of the express limitations in the will to M.'s first and other sons in tail male, and to her daughters in tail general, and not on a general failure of M.'s issue, and that therefore M. did not take an estate tail by implication. *Hamilton* v. *West*, 10 Ir. Eq. R. 75.

A. devised an estate to his daughter for life, and after her decease to her son or sons, daughter or daughters, to him, her or them, or his, her or their heirs for ever; but should his daughter die without having such heir or heirs, then the estate to be sold within three months after her death, and the produce divided amongst other persons. The daughter died without having had any issue:—Held, that the gift over was valid, and took effect. *Polley* v. *Polley*, 29 Beav. 134.

In a will of a testator, who died in 1804, he devised real estate to his daughter for life, with remainder to her sons successively in tail, with remainder to her daughters as tenants in common (without words of limitation), and in default of such issue, to his son in fee:—Held, that the daughters took for life only. *Arnold, In re*, 33 Beav. 163; 9 Jur. (N.S.) 1186; 9 L. T. 530; 12 W. R. 4.

A devise for life contained in a will cannot be enlarged by a recital in a codicil that such devise was in tail. *Ib.*

A testator devised lands in question to trustees, to the use of A. for life, remainder to the use of the first and other sons of A., and in default of such issue over:—Held, that the words "in default of such issue" did not operate to enlarge, by implication, A.'s life's estate. *Purcell* v. *Purcell*, 2 Dr. & War. 217; 1 Con. & L. 371; 4 Ir. Eq. R. 558.

Devise of real estates, upon trust to pay the rents and profits unto or to the use of R. L. and his assigns, for his life; and from and after his decease, unto the first and other sons of R. L.; and in default of such issue, in trust for the first and other daughters of R. L.; and in default of such issue, to pay the rents and profits as therein mentioned; and an ultimate remainder over:—Held, that R. L. did not take an estate tail in the devised premises, nor an estate for life with remainder to his first and other sons successively in tail, nor an estate for life, with remainder to his first son in fee. *Bridger* v. *Ramsey*, 10 Hare, 320.

A. devised lands in trust for J. B., a reputed son, for his life, and after his decease for and to his first and every other son successively in tail male, and in default of such issue to his daughter or daughters, to hold to them, if more than one, and their heirs, as tenants in common; and in default of issue of the said J. B., to and for the testator's right heirs:—Held, that J. B. took only an estate for life, and that no remainder in tail to him could be implied after the limitation to the daughter. *Baker* v. *Tucker*, 3 H. L. Cas. 106; 14 Jur. 771. Affirming 11 Ir. Eq. R. 104.

A devise of "all my real and personal fortune" to A. for life, and after his decease to "the first and every other son in succession of A."; and "in default of such issue," to B. for life, with the same limitations to his sons; and in default of such issue, to the daughters of A. and B.; and in default of such issue, to C. for life, with the same limitations repeated as to her sons and daughters; and in default of such issue, to X. in fee:—Held, to give successive life estates in all the limitations previous to the gift to X. *Bevan* v. *White*, 7 Ir. Eq. R. 473.

Devise of Reversion.]—A., having a reversion in fee of lands settled upon the marriage of B., his son, in the usual manner, devises all the lands in that settlement on failure of issue of the body of B., and for want of heirs male of his own body, to his daughter F. and the heirs of her body. This will does not give an estate tail by implication to B. The devise to F. is executory, and is void as being on too remote a contingency. *Lanesborough* (*Lady*) v. *Fox*, Cas. t. Talb. 262.

A., by a deed on his marriage, settled his estate upon the issue of the marriage, remainder to his own right heirs; and if he should die without issue male and leave one daughter, then the lands to be charged with 3,000*l.* for her at twenty-one, and 150*l.* yearly maintenance in the meantime. A. having then no issue, by his will devised thus: "And whereas by the settlement made on my wife I have reserved the inheritance of my lands in myself after the estate tail therein is spent, now in case I die without issue, or that such issue shall die without issue of his, her or their body, or that the estate tail limited by that settlement shall determine, I give all my said manors to my kinsman B., and to his first and other sons in tail male, remainder to C. in fee." A. had afterwards a daughter:—Held, that this daughter was entitled under the will to the whole estate as a tenant in tail, and that B. took nothing. *Cornwall* v. *Williams*, Colles's P. C. 117.

A. devises lands to his eldest son for life, remainder to the heirs male of his body lawfully begotten; remainder to the youngest son in like manner; remainder to any after-born son of the testator's for life; remainder to the heirs male of the body of such after-born son; and for want of such issue, to his brother J. for life, with remainder to the heirs male of his body. The testator was on his death-bed at the time of making his will, and died in about three weeks afterwards. The younger son, however, died before him, and the eldest son enjoyed the estate, but died without having barred the entail. Upon a question whether the limitation over to the testator's brother ought not to be considered as depending upon a general failure of issue, and consequently too remote:—Held, that a remainder after estates tail was vested in the brother, and that the testator had not the event of a second marriage in contemplation. *Jones* v. *Morgan*, 3 Bro. P. C. 323.

A testator, who was entitled, under his son's marriage settlement, to a reversion on the death of the survivor of his son and his son's wife without issue living at the death of such survivor, devised to trustees upon trust to sell, after the several deceases of his son and his son's wife without issue. The proceeds of the sale were to be divided between the testator's six daughters or such of them as should be then living, and the children of such of them as should be dead leaving issue. But in case only one of his said daughters or only one child of his said daughters should be living at the time of the death of the survivor of his son and his son's wife (they leaving no issue), then the whole was to go to such child or grandchild:—Held, that the trust for sale was not void for remoteness, as the will sufficiently referred to the issue mentioned in the settlement. *Lewis* v. *Templer*, 33 Beav. 625; 10 L. T. 638; 12 W. R. 128.

8. Death Coupled with a Contingency.

a. Death of Object of Prior Gift in Testator's Lifetime, and Substitution.

Gift over on Death of A. under a given Age—Where A. dies under given Age.]—Bequest over, in case of the death of a legatee before a certain period, takes effect on his death within that period during the testator's life. *Humberstone* v. *Stanton*, 1 V. & B. 388; 12 R. R. 243.

One devises portions to his children, A., B. and C., and if any die before twenty-one or marriage, the portion of the child so dying to go to the survivor. One of the children dies in the lifetime of the testator. This is not a lapsed legacy, but shall go over to the surviving children. *Perkins* v. *Hicklethwaite*, 1 P. Wms. 274.

Legacies of 300*l.* each to three children at twenty-one or marriage, and if any should die before that time his legacy to survive to others. One died before testator:—Held, his legacy survived. *Hickman* v. *Stroud*, 2 Eq. Abr. 541.

J. devised 3,000*l.* apiece to his three daughters, A., B. and C., at twenty-one or marriage; if any died before, to go to the survivors. B. died in the lifetime of the testator; her legacy shall go to the surviving daughters. *Ledsome* v. *Hickman*, 2 Vern. 611.

Legacy to A., in case she shall be living with the testatrix at her decease, with limitations over upon the death of A. before twenty-one or marriage, fails by the death of A. in the lifetime of the testatrix. *Allen* v. *Callow*, 3 Ves. 294.

One gives a legacy of 200*l.* apiece to his children, payable at twenty-one, and if any of them die before twenty-one, then the legacy given to him so dying to go over to the surviving children. One of the children dies in the life of the testator; though the legacy lapses as to the legatee dying under twenty-one, yet it is well given over to the surviving children. *Willing* v. *Baine*, 3 P. Wms. 113.

Devise of a legacy of 1,500*l.* to A., payable at his age of twenty-one, and if A. died before then to B. A. dies in the lifetime of the testator, yet B. shall have the legacy. *Miller* v. *Warren*, 2 Vern. 207. Sed quære, note there.

—— On Death before Legacy Payable or Received.]—Divers legacies given by a will, and the will is, that if any legatee died before his

legacy was payable, it should go to his brothers and sisters. A legatee died in the testator's lifetime. No lapsed legacy, but shall go to his sister. *Darrel* v. *Molesworth*, 2 Vern. 378.

A testator gave to A. a sum of stock to be paid to him within six months after the testator's decease, and in case it should happen that A. should die not having received the legacy, and he should leave any children, such children should be entitled to the same in equal proportions, payable at twenty-one or marriage. A. died during the testator's lifetime, leaving three children who had attained twenty-one, and were living at the testator's decease :—Held, that the legacy lapsed, and the children took no interest therein. *Smith* v. *Oliver*, 11 Beav. 481; 18 L. J., Ch. 80; 13 Jur. 159.

A. devises 500*l*. legacy to the second son of I. S., and devises other legacies to the other sons of I. S., and declares that if any of the younger sons of I. S. should die before they are capable of receiving their share, the share or legacy of them so dying shall go to the survivor; the second son dies in the testator's lifetime; this 500*l*. given to the second son shall not survive. *Rider* v. *Wager*, 2 P. Wms. 330.

A testator gave the residue of his estate to trustees, upon trust to pay the dividends to A. during her life, and after her death to transfer the trust moneys to his two nephews B. and C., share and share alike, and if either of his nephews died before his share of the trust moneys became payable without leaving issue, the share of him so dying was to go to the survivor; B., one of the nephews, died in the testator's lifetime, and left no issue :—Held, that there was no lapse as to any part of the residue, and that the whole went, upon the death of A., to the surviving nephew C. *Humphreys* v. *Howes*, 1 Russ. & M. 639; Tam. 497; 8 L. J. (O.S.) Ch. 165.

A testatrix directed her trustees to place out a sum of 1,000*l*., and to pay the interest to B. R. for life, and after his decease the principal to be divided between his son and daughter, but in case of the decease of either of them before the same should be payable, then such principal and interest to be paid to the survivor of them. The daughter of B. R. died before the testatrix :—Held, that the daughter's share in the 1,000*l*. did not lapse, but that the whole legacy was vested in the son subject to his father's life interest, and was not liable to be divested by the death of the son during the life of his father. *Hues* v. *Jackson*, 2 Eq. R. 462; 23 L. J., Ch. 51; 2 W. R. 83.

A testator left his residuary estate to M. for life, with remainder over to certain beneficiaries, and he directed that, in case any of them should depart this life before the time of distribution, leaving issue, and such issue should die before attaining twenty-one, the share of the beneficiary so dying should be equally divided amongst the survivors of the class :—Held, that the beneficiaries who survived the testator took an absolute interest in the gift, and that there was no lapse as to the shares of those dying in the testator's lifetime. *Taylor* v. *Sparrow*, 13 L. T. 494; 14 W. R. 124. Reversing 12 Jur. (N.S.) 593; 14 W. R. 881—L.JJ.

Devise of real estate, to be sold after the death of tenant for life, and bequest of specific sums out of the produce to several grandchildren and a child, and of the residue to other children, "to be respectively paid at twenty-one or marriage." "But if any of my said children or grandchildren should happen to die before the time of such legacy becoming due and payable, then I give and bequeath the share or part of such child or children, or grandchildren, so dying, unto and among those that shall be then living, share and share alike." Two of the children died before the testator; their shares are to be divided among the other children and grandchildren equally. Another child and a grandchild, having survived the testator and attained twenty-one, died before the tenant for life; their shares transmissible to their representatives; no implication that the survivorship was to take place among the children and grandchildren distinctly from the inequality of legacies, or from the bequest to each class being made by distinct clauses. *Walker* v. *Main*, 1 J. & W. 1; 20 R. R. 202.

A testator declared that the trustees of his will should stand possessed of the residue of the money to arise from his real and personal estate upon trust "for all and every my first cousins-german, to be divided equally amongst them, share and share alike; and in case any of my said cousins shall depart this life before their respective shares shall become due or payable leaving any lawful issue, I direct that such issue shall have the same share or shares of the same residue as his, her or their parent or parents would have been entitled to if living." The testator had several first cousins-german living at the date of his will, two of whom died in his lifetime; the others survived him. One of those who died left seven children; the other left no issue :—Held, first, that the words "due or payable" referred to the time of the testator's death; secondly, that the issue of the deceased cousin were entitled to their parent's share; thirdly, that the share of the cousin who died without issue did not lapse. *Coort* v. *Winder*, 8 Jur. 770.

—— **"In Case of Death"—Construed Death before Distribution.**]—A testator gave certain property to trustees, upon trust for his widow for life; and after her death directed the same to be sold, and the proceeds divided into two equal shares, one of which he gave, in five equal shares, to A., B., C., D. and E., and directed that, in case of the death of any or either of them before the widow, their respective share should go to their respective husbands or wives, if any, and if not, then to their respective children, and in failure of children, to the survivors of them, share and share alike. He gave the residue to the other moiety after payment of a legacy as follows: "to F., G., H., I. and K., and in case of the death of any or either of them, then their respective shares to their children, if any, and if not, then to the survivors of them, share and share alike" :—Held, that the words "in case of the death," in the gift of the second moiety, meant in case of death before the period of distribution, and applied to death in the testator's lifetime as well as to death after the decease of the testator, but before the decease of the testator's widow :—Held, also, as to each moiety, that the share of each legatee who died before the period of distribution vested absolutely in such of his children as were living at the death of their parent, or at the death of the testator, whichever last happened. *Ive* v. *King*, 16 Beav. 46; 21 L. J., Ch. 560; 16 Jur. 489.

—— **On Death without Issue.**]—Devise of an estate charged with two several legacies to A. and B., and in case A. or B. die without lawful issue, then the whole of the said two legacies to

go to the survivor, his executors, &c.; A. dies without issue in the testator's lifetime:—Held, the legacy lapsed, the contingency on which it was given over being too remote. *Massey* v. *Hudson*, 2 Mer. 130; 16 R. R. 158.

Executory trust for three for their lives as tenants in common; if any died without issue living at their deaths, their shares to go to survivors with contingent remainders in tail, and remainders over. Two of them dying in testator's lifetime:—Held, their shares lapsed and went over. *Sperling* v. *Toll*, 1 Ves. Sen. 70.

Bequest of chattels to two legatees, share and share alike, and, upon the demise of either of them without lawful issue, then the share of her so dying to go to the other. One of the legatees died in the testator's lifetime:—Held, that the other was absolutely entitled by survivorship. *Mackinnon* v. *Peach*, 2 Keen, 555; 7 L. J., Ch. 211.

A testator gave his real and personal estate to trustees upon trust to pay the income to his wife until his youngest child should attain the age of twenty-one, and then upon trust to pay the income in fifths to his wife for life, and to his four daughters for life, and on the death of his daughters respectively to convey and assign their respective shares to their children respectively; and on the death of his wife, he directed the shares given to her to be divided amongst the daughters in the same manner as the original shares given to them. And his will was, that in case any or either of his children should die without issue, the share or shares of her or them so dying should go and belong to all and every the child or children of such of his said daughters as should happen to leave issue, his, her and their heirs and assigns, as tenants in common; but in case all his said children should die without leaving lawful issue, then he devised and bequeathed his said real and personal estate unto his brothers and sisters to hold to them, their heirs, executors, administrators and assigns as tenants in common:—Held, that the share of one of the daughters, who died under age and without issue, did not pass under the gift over to the brother and sisters; but that there was an intestacy as to that share in the events that had happened. *Bastin* v. *Watts*, 4 Jur. 791.

A testator gave the residue of his estate to trustees, upon trust to pay the dividends to A. during her life, and after her death to transfer the trust moneys to his two nephews B. and C., share and share alike, and if either of his nephews died before his share of the trust moneys became payable without leaving issue, the share of him so dying was to go to the survivor; B., one of the nephews, died in the testator's lifetime, and left no issue:—Held, that there was no lapse as to any part of the residue, and that the whole went, upon the death of A., to the surviving nephew C. *Humphreys* v. *Howes*, 1 Russ. & M. 639; Tam. 497; 8 L. J. (O.S.) Ch. 165.

Bequest to the children of A. who should be living at the testator's decease, equally, with survivorship in case of death without leaving issue; if leaving issue, the issue to have the parents' share. The survivorship cannot be restrained to the period of the testator's death, as upon that construction the clause would be repugnant. *Shergold* v. *Boone*, 13 Ves. 370; 9 R. R. 195.

—— **On Death leaving Issue.**]—Testator ordered the interest of the residue to be paid to his sisters for life, and, in case any of them should die leaving issue, then to transfer the principal of the residuum to the children of the sister so dying at twenty-one; one of the sisters died in the life of the testator: her children shall take her share. *Rheeder* v. *Ower*, 3 Bro. C. C. 240.

When a testator devised real estate upon trust for A. and the testator's brothers and sisters for their lives, with benefit of survivorship where any of them should die without leaving children, but where any should die leaving children upon trust to let such children have their parents' share until the death of the survivor of A. and his brothers and sisters, and upon the death of such survivor upon trust to convey the shares of their parents among the children of A. and his brothers and sisters:—Held, that in the case of A. and of a brother and sister of the testator who were living at the date of his will, but who died before him, their children were entitled to shares during the continuance of the life estate of the testator's surviving brothers and sisters, but that the children of a brother who was dead at the date of the will were excluded from such shares. *Habergham* v. *Ridehalgh*, 39 L. J., Ch. 545; L. R. 9 Eq. 395; 23 L. T. 214; 18 W. R. 427.

—— **On Death under Age leaving Issue.**]—A testator gave to A. a legacy to be vested in him when and as he should attain the age of twenty-one, or if he should die under that age leaving lawful issue at his death; and in case he should die without attaining a vested interest in his legacy, the testator gave the legacy over to other persons. The legatee attained the age of twenty-one, and died in the testator's lifetime, leaving issue:—Held, that the gift over took effect. *Gaitskell, In re*, L. R. 15 Eq. 386; 28 L. T. 760; 21 W. R. 768.

—— **On Death before Tenant for Life leaving Issue.**]—Testator bequeathed a sum of stock to his wife, and after her decease to his three sons, to be equally divided amongst them, if they should be all living at the decease of his wife; but if any or either of them should die in her lifetime leaving a child or children, such child or children who should be living at the time of the wife's death should be substituted in the place of such of his sons who should so happen to die, and take his, her or their parent's share. All the sons died in the wife's lifetime, two of them leaving children who survived the wife; the third died a bachelor:—Held, that one-third of the stock fell into the residue. *Hustler* v. *Tillbrook*, 9 Sim. 368.

Gift of personalty to A. for life, remainder to the children of tenant for life nominatim, or such of them as should be living at the death of tenant for life. If any of them should die in the lifetime of tenant for life, leaving issue, such issue to take the share the parent would have been entitled to. There were four children of the tenant for life, who all died in lifetime of tenant for life. Two died in the lifetime of testatrix, and one of those two left issue. None of the others left issue:—Held, that the children of the deceased child took the whole fund. *Ashling* v. *Knowles*, 3 Drew. 593.

—— **On Death before A. leaving Issue.**]—A., by his will, gave his residuary personal estate and the proceeds of his real estate in trust for his nephews and nieces, the children of

his brother F., and his late sister, E. B., and the brother and sister of his wife; and in case either of his nephews or nieces should die in the lifetime of his wife leaving child or children, such children to be entitled to the father or mother's share. A nephew died in the lifetime of the testator leaving a child:—Held, that such child was entitled to her father's share of the residue, as being a gift to individuals, and not to a class. *Jones* v. *Frewin*, 3 N. R. 415; 10 L. T. 330; 12 W. R. 369.

—— **On Death in Life of A. without Issue.**]—A testator gave the income of a fund to trustees, in trust to pay the same to A. B. for life, and after her decease to pay the principal money to her daughters, C. and D., in equal shares, with a gift over to the issue of either of them dying in the lifetime of A. B.; and should either C. or D. die in the lifetime of A. B. without leaving issue, then the whole fund was to go over to the survivor of the two daughters; but in case both of them should die in the lifetime of A. B. without leaving issue, then in trust for W. W. absolutely. The testator died in 1844, leaving A. B. and her daughter D. surviving. C., the other daughter, died in his lifetime unmarried:—Held, that upon the death of A. B. the surviving daughter was entitled to the whole fund. *Domville's Trusts, In re*, 22 L. J., Ch. 947; 17 Jur. 361.

—— **On Death of A. in Testator's Lifetime.**]—A testator by his will bequeathed personal estate to J. W. upon trust for his (the testator's) wife absolutely, and in case his said wife should die in his lifetime, he directed that all his said estate should be held by his said trustee upon certain trusts (which failed), and subject to those trusts he bequeathed all his property to J. W. absolutely:—Held, that the gift to J. W. was dependent on the event of the testator surviving his wife, and that J. W. did not become entitled from the mere fact of the gift to the wife failing to have practical operation. *Underwood* v. *Wing*, 4 De G. M. & G. 633; 24 L. J., Ch. 293; 1 Jur. (N.S.) 169; 3 W. R. 228.

—— **On Death without Child Entitled.**]—A testator gave his residuary estate in trust for his wife for life, and after her death he directed that one-sixth of the fund should be held to pay the income to his daughter H. for life, and after her death for her children who being a son or sons should attain twenty-one, or being a daughter or daughters attain that age or marry. He gave other shares upon similar trusts for others of his children by name, and their children respectively. The will contained a proviso, that if any of his children should die without having any child who, under the above trust, should become absolutely entitled to a share of the trust fund, then as well the original share given as also the share accruing under the proviso to each child whose issue should so fail and his or her children or child should go to the survivors or survivor of the testator's children; and if more than one, in equal shares during their lives, and after their deaths the shares to be respectively transmitted to such their respective children or child as thereinbefore expressed with respect to their original shares. H. was living at the date of the will, but died childless in the testator's lifetime:—Held, that her share was not undisposed of, but that the gift over in the proviso took effect. *Rackham* v. *De la Mare*, 2 De G. J. & S. 74; 3 N. R. 398; 10 Jur. (N.S.) 190; 9 L. T. 699; 12 W. R. 363.

Death of Object of Prior Gift before Date of Will—Where Gift to Individuals Nominatim.]—Distinction between a substitutional gift after a bequest to persons as a class and one following a gift to individuals nominatim. *Ive* v. *King*, 16 Beav. 46; 21 L. J., Ch. 560; 16 Jur. 489.

Bequest to A. for life, and afterwards equally between a number of persons by name; and in case of the death of any of them before A., their respective shares to go to their respective children, and on failure of children to the survivors. The following points were decided as to the several original legatees: first, Ann was deceased at the date of the will:—Held, nevertheless, that her children took by substitution; secondly, William was living at the date of the will, but he died before the testator:—Held, also, that his children took his share, and that the class was to be ascertained at the death of the testator; thirdly, Thomas survived the testator, and died in the lifetime of the widow:—Held, that his children took, but were to be ascertained at Thomas's death; fourthly, it was held, that, to entitle a child to take, it was not necessary that he should survive the tenant for life; fifthly, Charles died without issue:—Held, that the survivors were to be ascertained at his death, and not at the death of the tenant for life. *Ib.*

A testator directed his residue to be divided on the death of his wife (who survived him) equally between his brothers and sisters by name, and declared that if any of them should die leaving issue, his, her or their shares should go to his, her or their respective issue:—Held, first, that the class was to be ascertained, as to the issue of a legatee who had died before the testator, at the death of the testator, and as to the issue of a legatee who had survived him at the death of the legatee. *Hobgen* v. *Neale*, 40 L. J., Ch. 36; L. R. 11 Eq. 48; 23 L. T. 681; 19 W. R 144.

Testator bequeathed a sum of stock in trust for three persons nominatim in equal shares and proportions, to be transferred to them when they shall attain twenty-one, but if any of them shall depart this life under age and unmarried, then the share original and accruing of him, her or them so dying to go to the survivors; and if all of them should die under twenty-one and unmarried, the stock to fall into residue. One of the three persons named died prior to the making of the will:—Held, that the share of the one so dying passed to the other two persons named. *Shepard's Trust, In re*, 1 K. & J. 269.

Gift by will to the testator's wife for life, and after her death to A. for life, and after the death of the survivor to the testator's brothers and sisters, nominatim, and the brothers and sisters of his wife also, nominatim, "now living," and the children of her deceased brother and sister; but in case any or either of his brothers and sisters, or the brothers and sisters of his wife "now living," should happen to die in the lifetime of his wife and of A., or of the survivor of them, without leaving issue, then the share or shares of such of them as should so die should be equally divided between the survivors; but in case any or either of the testator's brothers and sisters, and the brothers and sisters of his wife, so dying should leave children, then the share or shares of him, her or them so dying should be equally divided among the children

of him, her or them so dying that should be living at the death of the testator's wife and A. Prior to the date of the will one of the testator's brothers (H.) had died leaving children, but the testator made his will in ignorance of the death of such brother:—Held, that the words "now living" applied only to the brothers and sisters of the testator's wife, and that the children of his brother H. were entitled to the share to which their father would have been entitled if he had survived the testator. *Hannam* v. *Sims*, 2 De G. & J. 151; 27 L. J., Ch. 251; 4 Jur. (N.S.) 863; 6 W. R. 347.

Bequest to "each of the present nieces of P. E., for her own absolute benefit, and in case any of them shall die in my lifetime, leaving a child or children who shall survive me, then in every or any such case the legacy intended for her so dying shall go to her child or children, in equal shares, if more than one." P. E. had seven nieces, but at the date of the will only one was surviving, and she was a widow, seventy-five years of age, without children then living, but there were living several daughters and granddaughters of the deceased nephews and nieces of P. E.:—Held, that the children of nieces who were dead at the date of the will were not substituted for their deceased parents. *Crook* v. *Whitley*, 7 De G. M. & G. 490; 26 L. J., Ch. 350; 3 Jur. (N.S.) 703; 5 W. R. 383—C. A.

—— **Children let in to take Original Shares.**] —Testator devised an estate to trustees in trust for R. T. for life, and after the death of R. T., in trust, to convey the estate unto, between and amongst all and every, and such one or more of the child or children of R. T., who should be living at his decease, and the issue of such of them as should be then dead leaving issue, such issue to take between or amongst them the share which their parent or parents would have been entitled to if then living. R. T. survived the testator, and died, leaving several children, and the issue of another child who was dead at the date of the will:—Held, that such issue were entitled, amongst them, to an equal share of the estate with the surviving children. *Tytherleigh* v. *Harbin*, 6 Sim. 329.

Testator bequeathed his residuary estate to his grandchildren, and in case they should all die without leaving issue then to the children of A. and their issue in equal shares, or unto such of them as should prove their right within two years after the death of his grandchildren without issue. A. had five children, two of whom were living at the date of the will and survived the testator; the others died before the date of the will, but two of them left issue:—Held, that all A.'s descendants who were living at the death of all the testator's grandchildren without issue, or who should be born within the two years, would be entitled to participate in the residue. *Clay* v. *Pennington*, 7 Sim. 370; 6 L. J., Ch. 183.

Testator, by will dated 1828, bequeathed a fifth of his residuary estate to W. R., E. R. and J. R., and all other the children of J. R. the elder, and the issue of such of his children as should have departed this life, such issue to take the share which their parent would have taken if living. One of the children of J. R., not named in the will, had gone abroad in 1809, and had not been heard of since 1815:—Held, by the court, that he must be presumed to have died before the date of the will, and that his children were entitled to the share which he would have taken if he had survived the testator. *Rust* v. *Baker*, 8 Sim. 443; C. P. Cooper, 172.

Bequest in trust for all the children of the testator's late uncle J. B. deceased, to be divided equally amongst them and the issue of such of them as should be deceased, share and share alike, such issue to be entitled to the share of their deceased parents equally amongst them:—Held, that a grandchild of J. B., whose parent was dead at the date of the will, was entitled to take. *Bebb* v. *Beckwith*, 2 Beav. 308.

Where a sum directed by a testatrix to be set apart for an annuity was bequeathed, on the death of the annuitant, to such of the testatrix's nephews and nieces as should be "then" living, and the child or children of such of them as should be "then" dead:—Held, that the children of a nephew who was dead at the date of the will were entitled to participate, and that their interest vested at the death of the testatrix. *Faulding, In re*, 26 Beav. 263; 28 L. J., Ch. 217; 4 Jur. (N.S.) 1289.

The grammatical construction of a will will be followed so as to give a child the share of its deceased parent, even though the parent was dead at the date of the will, when the testator is shewn to be acquainted with that fact. *Jordan, In re*, 2 N. R. 57; 8 L. T. 307.

When a gift to a child of its deceased parent's share of an estate is made in such terms as shew that the testator did not contemplate the future death of the parent, the gift does not come within the strict definition of a "substitution" gift. *Ib.*

Therefore, the rule, that where issue are substituted for parents, the parent must have been capable of taking, in order to entitle the issue, does not apply. *Ib.*

Children cannot take by substitution for their deceased parent who forms one of a class, unless the parent, if living, could himself have taken. *Coulthurst* v. *Carter*, 15 Beav. 421; 21 L. J., Ch. 555; 16 Jur. 532.

A father gave property to the children of A. living at a prescribed period, and the issue of deceased children, so as such issue should have no greater share than their parents would have taken if living, and he afterwards provided that if any one or more of such issue should be then dead, having left lawful issue, then the issue of such issue as should be so dead should receive the share which their, his or her parent would have taken if living:—Held, that the effect was to create a joint tenancy amongst the members of the various families, subject to this, that if any one died leaving issue it must be considered for the purpose of determining the share which such issue were to take, as if he had survived the period of distribution, but had severed the joint tenancy at the date of his death. *Heasman* v. *Pearse*, 41 L. J., Ch. 705; L. R. 7 Ch. 275; 26 L. T. 299; 20 W. R. 271.

Held, also, that the issue of grandchildren of A. must be confined to children, and that the issue of a grandchild who was dead at the date of the will took. *Ib.*

The words "then living," though in one clause of a will they were held by virtue of the above-mentioned proviso to refer to the period of distribution, were in another clause, to which the proviso was held inapplicable, considered to refer to the death of a tenant for life. *Ib.*

A testator gives all his property, real and personal, to trustees, directing them to stand seised

and possessed of all his said estates, real and personal, upon trust to receive the rents, dividends and annual profits, and pay the same from time to time to his son G. during his life until he should become bankrupt or insolvent, or make a composition with his creditors, and from and after any of such events, upon trust to receive the rents, dividends and profits, and accumulate the same at compound interest, and lay out the same on mortgage, such accumulations to continue to be made for twenty-one years after his the testator's death. There was then power to the trustees to apply such sums as they should think fit towards the maintenance of his son's wife (if he should have one) and the maintenance and education of his children (if any), until the expiration of twenty-one years, and then to apply the rents, dividends, profits and accumulations equally amongst his son's children until the younger attained twenty-one, and the issue of such as were then dead, such issue to take only the share the parent would have been entitled to if living; and when the youngest attained twenty-one, the testator gave all his real and personal estate and accumulations amongst his son's children in the same words as he had used in the former clause relating to the accumulations for twenty-one years. And in case his son should die without leaving lawful issue living at his death, then over to the testator's brothers and sisters equally, and the issue of such as should be then dead, the issue to take only the parents' share. The testator then gave to his trustees power of leasing during his son's life for seven years, and of sale and exchange at any time. G., the son, died without issue, and never having become bankrupt or insolvent, or made any composition with his creditors; a sister of the testator died before the date of the will, leaving children; the rest survived him, some dying and leaving children before the death of G., the testator's son:—Held, first, that the gift to the issue was original, and the children of a sister deceased before the date of the will took. *Etches* v. *Etches*, 3 Drew. 447; 4 W. R. 487.

Held, secondly, that a brother surviving the testator, but foredeceasing the tenant for life, took a vested interest, and his representatives were entitled. *Ib.*

Held, thirdly, as to a sister who survived the testator, but died before the tenant for life, leaving a child who also died before the tenant for life, the representatives of that child were entitled. *Ib.*

The testator devised and bequeathed his real and personal estate (subject to certain trusts for the benefit of his wife) to his son absolutely; but if his son should die under twenty-one without issue, the testator gave the same to his wife during her widowhood, with remainder (subject to certain legacies) as she should by will appoint; and in default of appointment, or in case she should marry again after the testator's decease, he directed, that from and after the second marriage or decease of his wife, which should first happen, a moiety of the trust estate, or so much thereof as the appointment should not extend to, should be held in trust for all and every the daughter and daughters who should be then living of his sister Mary Miles, and the issue then living of such of them as should be then dead, equally amongst them, per stirpes. The testator's son died under twenty-one, without issue, in the testator's lifetime; and the testator's wife also died in his lifetime:—Held, that the time of the testator's death was the period at which the persons entitled to take under the said residuary bequest were to be ascertained; that, notwithstanding a daughter of Mary Miles was dead at the date of the will, the children of such daughter, having survived the testator, were entitled, per stirpes, to a share of the said moiety of the residuary estate; that the children of a daughter of Mary Miles, such daughter being living at the death of the testator's wife, but having died in the lifetime of the testator, were also entitled per stirpes to an equal share of the said moiety of such residuary estate; and that the share of the child of a daughter would not lapse by the death of such a child in the lifetime of the testator, but the entire share of the class would be divisible amongst the children belonging to such class who survived the testator. *Gaskell* v. *Holmes*, 3 Hare, 438; 8 Jur. 396.

—— **Where Gift to a Class or their Issue.**]—Bequest to be equally divided between G. and "my brethers and sisters, or their children," and unto J.:—Held, that the children of such of the brothers and sisters as were dead at the date of the will could not take by substitution. *Wood, In re*, 31 Beav. 323.

A testator, after giving his residuary personal estate to all and every the children of his uncle F. or their issue in equal shares, gave his real estate to A. for life, and after her death upon trust for sale, and to hold the proceeds upon trust for "all and every the children of F. or their issue in equal shares per capita." Four of the six children of F. were dead at the date of the will, and two survived the tenant for life:—Held, that the issue of the four deceased children of F. alive at the death of the testator or born during A.'s lifetime took as by substitution the shares of their deceased ancestors in the proceeds of the realty, the issue of each of the four taking inter se, in equal shares. *Sibley, In re*, 46 L. J., Ch. 387; 5 Ch. D. 494; 37 L. T. 180.

Bequest of a legacy to A. for life, and after her death equally to and amongst her sisters living at her death, or their children:—Held, first, that the children of a sister who was dead at the date of the will took no interest; secondly, that the children of the surviving sister took per stirpes. *Congreve* v. *Palmer*, 16 Beav. 435; 23 L. J., Ch. 54; 1 W. R. 156.

—— **To a Class or their Descendants.**]—The testator, by will, bequeathed all his share in an estate in Barbadoes "to all the children of" his dear departed wife's sister, M. H. M., "or in event of decease, to their descendants, share and share alike." M. H. M. had six children, of whom five were living at the date of the will and at the death of the testator, and one had died prior to the date of the will, leaving issue an only daughter:—Held, following the decision in *Christopherson* v. *Naylor* (1 Mer. 320; 15 R. R. 120), that the issue of the child of M. H. M., who was dead at the date of the will, was not entitled to a share of the property, but that it went to the five children of M. H. M. who survived the testator. *Webster's Estate, In re*, *Widgen* v. *Mello*, 52 L. J., Ch. 767; 23 Ch. D. 737; 49 L. T. 585.

—— **To a Class or their Legal Personal Representatives.**]—Gift to one for life, and after his death to his children "then living, or

their legal personal representatives, share and share alike":—Held, that the representatives took, as a distinct class, and not by substitution, and that the representatives of children who died in the lifetime of the testator, and of those who were dead at the date of the will, participated. *King* v. *Clearelaud*, 26 Beav. 26; 4 Jur. (N.S.) 702. Affirmed, 4 De G. & J. 77; 28 L. J., Ch. 835; 7 W. R. 602.

—— **To a Class or their Heirs.**]—A testator directed that certain stock should, after the death of his wife, be divided among his "children then living, or their heirs." Two of the children were dead at the date of the will; three survived the testator and died in the lifetime of his wife; and two survived her:—Held, first, that the "heirs" of the children who predeceased the wife (including the two who were dead at the date of the will) were entitled to share in the fund along with the children who survived her. *Philps' Will, In re*, L. R. 7 Eq. 151; 19 L. T. 713.

Held, secondly, that by "heirs" were meant the statutory next of kin of the children. *Ib.*

Held, thirdly, that such next of kin were to be ascertained, in the case of the children who survived the testator, at the time of the death of each child; but in the case of the children who predeceased the testator, at the time of the testator's death. *Ib.*

A testator gave real and personal estate to A., charged with the payment of annuities to the testator's six children "or their heirs respectively":—Held, that the annuities were personal estate, and that the statutory next of kin of one of the six children who was dead at the date of will were entitled to one of the annuities. *Parsons* v. *Parsons*, L. R. 8 Eq. 260; 17 W. R. 1005.

A testatrix by her will, dated in 1836, gave all her personal property and also her real property to trustees on trust for payment of her debts and legacies, and subject thereto she gave "all her personal and real property as aforesaid," between her five sisters, nominatim, and the survivors of them, in equal shares during their lives and spinsterhood, and upon the death or marriage of all her said sisters she directed that her "property should be divided into equal proportions or shares between her brothers and sisters then living or their heirs." She had twelve brothers and sisters, of whom one brother died before the testatrix was born, one sister died before the date of the will, two brothers and one sister died in her lifetime after the date of the will, and the rest survived her. The last survivor was one of the five sisters named in the will, who died a spinster:—Held, first, that (notwithstanding the will was before the date of the Wills Act) the word "or" in the gift in remainder could not be read "and," and that there was no intestacy. *Wingfield* v. *Wingfield*, 47 L. J., Ch. 768; 9 Ch. D. 658; 39 L. T. 227; 26 W. R. 711.

Held, secondly, that the word "heirs" must be construed distributively so as to mean heirs-at-law as to the real estate, and statutory next of kin (including widows) as to the personal estate. *Ib.*

Held, thirdly, that such heirs-at-law and next of kin were to be respectively ascertained, as regarded brothers and sisters who predeceased the testatrix, at the death of the testatrix, and as regarded those who survived her at their respective deaths. *Ib.*

—— **Where Direction that Issue should take their Parents' Share.**]—Bequest "to each and every the child and children of my brother and sisters which shall be living at the time of my death; but if any child or children of my said brother and sisters shall happen to die in my lifetime, and leave issue, then the legacy or legacies hereby intended for such child or children so dying shall be for his, her or their issue." The issue take only by substitution; therefore only the issue of such children as were living at the date of the will are entitled in the event of the death of their respective parents during the testator's lifetime. *Christopherson* v. *Naylor*, 1 Mer. 320; 15 R. R. 120.

A testator, in 1858, gave legacies to his cousins, the sons and daughters of the brothers and sisters of his late mother and father; and if it should happen that any of those cousins should die during his lifetime, and leave issue which should survive him, he directed that the legacies which would have been payable to any deceased parent should be paid to the children; and if the executors should fail to discover any one or more of his said cousins who might be living at the time of his decease, or any one or more of the children of his cousins as might have died during his lifetime, and an application should be made to the executors by any one or more of his cousins, or by the children, within eighteen months after his decease, the bequests were to be void:—Held, that the children of cousins who had died before the date of the will were entitled to legacies. *Christopherson* v. *Naylor* (supra) commented upon. *Phillips* v. *Phillips*, 5 N. R. 102; 10 Jur. (N.S.) 1173; 11 L. T. 472; 13 W. R. 170.

Testator, by will in 1860, gave property to trustees on trust for his sister for life, and after her death on trust to pay the principal to the child or children of his sister equally at twenty-one, "and if any of them die leaving issue the share or shares of such of them as shall so die shall go to their respective issue," and if any should die under the age of twenty-one without issue, the share or shares of such of them as should so die should lapse. The testator died in 1861. His sister died in 1881, having had three children, two of whom were dead at the date of the will, one leaving issue, and the other without issue:—Held, that the issue of the child dead at the date of the will were not entitled under the will. *Christopherson* v. *Naylor* (supra) followed. *Barker, In re, Asquith* v. *Saville*, 51 L. J., Ch. 835; 47 L. T. 38.

Testatrix directed her residuary estate to be equally divided between her nephews and nieces not before named, "but should any of them be dead before me I then direct that his or her share shall be equally divided between his or her children":—Held, that the children of nephews and nieces dead at the date of the will were not entitled to take under the bequest. *Christopherson* v. *Naylor* (supra) approved and followed. *Musther, In re, Groves* v. *Musther*, 59 L. J., Ch. 296; 43 Ch. D. 569—C. A.

Where a testator gave the residue of his property, in trust to divide it per capita, and not per stirpes, among his nephews and nieces, the children of his brother and sister; and in case any or either of his nephews or nieces should die in his lifetime, leaving lawful issue, then to pay the share of each so dying unto his or her children:—Held, that the children of a nephew who died before the date of the will were entitled to the shares which their parent would have taken.

Parsons v. *Gulliford, Tarry, Ex parte*, 10 Jur. (N.S.) 231 ; 10 L. T. 60.

A mother, among other legacies, gave to the children of her late cousin, H., 1,000*l*. The will contained a proviso that if any legatee should die in her lifetime leaving children, such legacy should not lapse, but should be paid to the children of the deceased legatee. One of the children of H. was dead at the date of the will, leaving children :—Held, that the children of the deceased child could not take under the proviso in the will, inasmuch as the deceased child was not a "legatee" within the meaning of the clause. *Hunter* v. *Cheshire*, L. R. 8 Ch. 751 ; 29 L. T. 383 ; 21 W. R. 778.

A testator bequeathed the residue of his estate, after the death of two persons, to such children of B. as should be then dead, leaving children ; he directed that the children should stand in the place of their parents :—Held, that the children of such children of B. as died in the testator's lifetime and who were also dead at the date of the will took no share of the residue. *Butter* v. *Ommaney*, 4 Russ. 73 ; 6 L. J. (O.S.) Ch. 54 ; 28 R. R. 6.

Gift by a testator of his real and personal estate to his wife for her life, and the residue to be equally divided between her brothers and sisters ; and in case any of them should be dead at the time of her decease, leaving issue, such issue to stand in their parents' place :—Held, first, that no brother or sister who died before the date of the will was capable of taking under the bequest, and, therefore, the issue of any brother or sister who was dead before the date of the will could not take by substitution ; secondly, that it was not an original and substantive gift to the issue of those brothers and sisters who were dead at the death of the wife. *Gray* v. *Garman*, 2 Hare, 268 ; 12 L. J., Ch. 259 ; 7 Jur. 275.

A testatrix, having a power of appointment over a fund, bequeathed all her money under settlement to be divided, share and share alike, between her nephews and nieces, the children of those who might be deceased to be entitled to the share of their parents :—Held, that the children of a nephew who was dead at the date of the will were not entitled to a share of the fund. *Atkinson* v. *Atkinson*, Ir. R. 6 Eq. 184.

A testator gave the surplus of his property to trustees to divide among his nephews and nieces, and directed that, "in case any of them should be dead or die leaving issue," such issue were to take their parents' share :—Held, that the issue of three who were dead at the date of the will were entitled to their parents' shares. *Jenks, In re*, 18 W. R. 1085.

A testator devised his real estate to trustees, upon trust during the lives of the children of A., B. and C. (all deceased), and of the survivors and survivor of them, to pay the rents and profits to them in equal shares, and directed that the shares of such of them as should die in the lifetime of the others or other of them leaving issue should be paid to such issue, the share of the parent being divided equally among the issue if more than one. He further directed that after the death of the survivor of the children of A., B. and C., his real estates should be sold, and the proceeds of sale divided between the children of A., B. and C., equally ; and that the shares of such of them as might die under age and without issue should accrue to the other or others of them, but that the shares of such of them as might die under age leaving issue should belong to such issue, and be divided amongst them equally if more than one :—Held, that the representatives of those children of A., B. and C., who died without issue in the lifetime of other members of the same class, were not entitled to a share of the rents and profits ; and that the issue of such of the children of A., B. and C. as were dead at the date of the will took no benefit under it. *Kelsey* v. *Kelsey*, 38 L. T. 471.

A father gave his residuary estate to his wife for life, and after her decease to such of the children of his two late sisters as should survive his wife and should attain twenty-one or marry, in equal shares ; but in case any of such children should be dead at his decease, then he directed that such issue should take the share of their deceased parent :—Held, that the gift to the issue of deceased children was a substitutionary gift, and that the issue of a child who was dead at the date of the will could take nothing. *West* v. *Orr*, 47 L. J., Ch. 294 ; 8 Ch. D. 60 ; 38 L. T. 5 ; 26 W. R. 409—C. A.

A testator bequeathed a legacy to his first cousins, to be equally divided between them. He then gave the share or shares of those of his first cousins, if any, who might die in his lifetime, unto all and every the children of all his first cousins who might so die in his lifetime, share and share alike ; such shares to be taken per capita and not per stirpes :—Held, that the children of a first cousin who had died before the date of the will were not entitled to participate in the legacy. *Hotchkiss' Trusts, In re*, 38 L. J., Ch. 631 ; L. R. 8 Eq. 643.

Testator bequeathed the proceeds of his real estate upon trust for the equal benefit of his sisters, nephews and nieces as follows : As to the shares of his nephews upon trust to pay the same to them absolutely, and as to the shares of his sisters and nieces upon trust to invest and pay the dividends unto each such sister and niece for life for her separate use, and after the death of each sister upon trust to apply her share for the benefit of his said nieces upon the trusts of the original shares of such nieces, and after the death of each niece upon trust to pay her share to such of her children as she should by will appoint, and in default of appointment to her children equally on attaining twenty-one, and if no such children then in trust for the survivors or survivor of his said nieces. And the will provided that if any niece should die in the testator's lifetime her share should be for the benefit of her child or children, but if no such children who should live to attain twenty-one then such share should be for the benefit of his surviving nieces equally and upon the same trusts :—Held, that the child of a niece who was dead at the date of the will was not entitled. *Smith's Trusts, In re* (5 Ch. D. 497, n.), not followed. *Chinery, In re, Chinery* v. *Hill*, 57 L. J., Ch. 804 ; 39 Ch. D. 614 ; 59 L. T. 303.

The testator gave his residuary estate upon trust to divide the income thereof "equally amongst all my children during their respective lives, and from the death of any such child whether before or after my death" to hold the corpus upon trust for "all or any the child or children of such child who being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry" :—Held, that the child of a child dead at the date of the will did not take. *Christopherson*

v. *Naylor* (supra); *Chinery, In re, Chinery* v. *Hill* (supra), and *Musther, In re, Groves* v. *Musther* (supra), followed. *Wood, In re, Tullett* v. *Colville*, 63 L. J., Ch. 790; [1894] 3 Ch. 381; 7 R. 495; 71 L. T. 413—C. A. See also *Habergham* v. *Ridehalgh*, supra, col. 1054.

—— **Where Direction to take Share to which Parent would have been Entitled if living.**]—A testator may so express himself as to cause a child of a deceased child to represent, and be substituted for, that deceased child, though he never intended a share for the deceased child. *Loring* v. *Thomas*, 1 Dr. & Sm. 497; 30 L. J., Ch. 789; 7 Jur. (N.S.) 1116; 5 L. T. 269; 9 W. R. 919.

A. gave property to trustees to divide equally between the children of D., provided that in case any child or children of D. shall die in her lifetime, then the child or children of each such child or children so dying should stand in the place of his, her or their deceased parent, and should be entitled to the same share or shares which his, her or their parent would have been entitled to if living at the time of the decease of the testatrix:—Held, that the words "shall die" did not necessarily refer to a death after the date of the will, but that the children of a child who was dead at the date of the will would share. *Ib.*

A gift to a composite class consisting of two or more generations may be made in such terms that all take as original members of the class. In such a case a direction "that the issue of deceased children may take by way of substitution the share which their parents would, if living, have taken," does not prevent the children of a child dead at the date of the will from taking, as original members of the class, the share which their parent would have taken if living at the period of distribution. *Loring* v. *Thomas* (supra) followed. *Parsons, In re, Blaber* v. *Parsons*, 8 R. 430.

Bequest to the testator's nephews and nieces living at his death, with a proviso, that in case any of his nephews or nieces should die in his lifetime, leaving children him surviving who should attain twenty-one, then such children were to stand in the place of their respective parents, and were to be entitled to the same share as their deceased parent would have been entitled to if living at the testator's decease:—Held, that the child of a niece (who died before the date of the will) having survived the testator, and attained twenty-one, was entitled to her parent's share. *Chapman, In re*, 32 Beav. 382; 9 Jur. (N.S.) 657; 11 W. R. 578.

A brother bequeathed to his sister Susan all the property he might die possessed of for life, and after her death he desired the property to be equally divided among his brothers and sisters, and should any of his brothers or sisters die leaving issue during the lifetime of his sister Susan, the share which would have been theirs to be equally divided among their children:—Held, that the children of a brother who died fifteen years before the date of the will were entitled to take the share of their deceased parent. *Adams* v. *Adams*, L. R. 14 Eq. 246; 27 L. T. 505; 20 W. R. 881.

A testatrix by her will gave a sum of money to trustees on trust, after the death of the widow of a cousin, for the children of the cousin, share and share alike; provided that, in case of any of the children dying in the lifetime of the testatrix leaving issue, such issue should take the share to which their parent would have been entitled if living. One of the children was dead when the will was made, and a codicil shewed that the testatrix was aware of this:—Held, that the issue of that child took a share in the money. *Lucas's Will, In re*, 17 Ch. D. 788; 29 W. R. 860.

Gift by will in trust for A. for life, and after her death for the children of A. who should be living at her death equally, with a proviso that if any child of A. should die in the lifetime of A. leaving issue who should be living at A.'s death, the issue of such child should take the share which his, her or their parent would have taken if living at the death of A., and with a gift over if there should be no such child or children or issue of a child or children of A. so living at her death. One child of A. died before the date of the will, leaving issue who survived A.:—Held, that the gift to issue was original, not substitutional, and that, therefore, the issue of the deceased child of A. were entitled to take. *Woolrich, In re, Harris* v. *Harris*, 48 L. J., Ch. 321; 11 Ch. D. 663.

A testator bequeathed his residuary estate and effects to trustees upon trust to pay the income to certain persons for their lives, and subject thereto bequeathed one-fourth of his estate and effects to his nephews and nieces, the children of L., in equal shares; and in case of the death of any of his said nephews and nieces leaving issue, he directed that such issue should take the share that his, her or their deceased parent would have taken if living:—Held, that the children of nephews and nieces who died before the date of the will, and of a nephew who died after the date of the will, but before the testator, took, by substitution, the shares which their respective parents would have taken if living at the testator's death. *Potter, In re*, 39 L. J., Ch. 102; L. R. 8 Eq. 52; 20 L. T. 649.

A testator gave a sum of 5,000*l.* in the event of the death of his nephew, J. W., without leaving issue, to be equally divided among all the brothers and sisters of J. W. who should be living at the time of his death and the children then living of any of his brothers and sisters who should have previously departed this life, but so that the children of such deceased brother and sister should take only the share that their parent would have taken if living:—Held, that a child of a brother of J. W., which brother was dead at the making of the will, took no share of the 5,000*l.* *Waugh* v. *Waugh*, 2 Myl. & K. 41.

—— **Effect of Words "Such" and "Said."**]—Testator bequeathed his residue to trustees in trust for all his children living at the decease of his wife, as tenants in common; and if any such children should die before his wife, and should leave issue, then the children of such his son or daughter should be entitled to the portion of such his son or daughter who might be deceased before the decease of his wife, provided that until the portions thereby provided for any of the said children of his said sons or daughters who might have died before their mother should become vested it should be lawful for his trustees to apply the interest of the portion to which any such child might be entitled in expectancy for the maintenance of such child. The testator at the date of his will had four sons and one daughter, and he had had another daughter who was then dead, leaving children who survived the testator:—Held, that those children

were entitled to a share of the residue. *Giles* v. *Giles*, 8 Sim. 360; 6 L. J., Ch. 176; 1 Jur. 234.

Testatrix, having two sons and two daughters living, gave a legacy to each of them, and then gave the residue to Mary, one of her daughters, for life, "and after her decease I will that the said property be equally divided amongst such of my sons and daughters as may be living at the decease of the said Mary, and in case of the decease of any of my said sons or daughters, the surviving children of any of my sons or daughters to have their father's or mother's part." The testatrix had another son and daughter, both of whom were dead at the date of her will, leaving children:—Held, that their children were entitled to shares of the residue. *Jarvis* v. *Pond*, 9 Sim. 549; 8 L. J., Ch. 167.

A testator bequeathed stock in trust for a daughter for life; and in case there should be no child of the daughter living at her decease, or being such, they should all die under twenty-one, then he bequeathed the stock unto all and every his children then living, and the child or children of such of his children as should be then dead, in equal shares, but so that such his grandchildren should only have among them such share as their parents would respectively have been entitled to in case they had been then living:—Held, that children of a child of the testator, known by him to be dead at the date of the will, did not take any interest. *Thompson's Trusts, In re*, 5 De G. M. & G. 280; 2 Eq. R. 236; 2 W. R. 218, 445.

When a testator gave legacies to his brother and three sisters nominatim, and gave his residue in trust for his brothers and sisters who should be living at the death of his wife, and the child or children of such of his said brothers and sisters as should have died in the lifetime of his wife, equally to be divided between his said brothers and sisters and child or children of deceased brothers or sisters, such child or children taking nevertheless no more than his, her or their parent would have taken, and it appeared that he had one brother only surviving at the date of his will, but had had two other brothers, who were then dead, leaving children:—Held, that such children were entitled to a share in the residue. *Thompson's Trusts, In re* (supra), explained. *Jordan's Trusts, In re*, 2 N. R. 57; 8 L. T. 307.

A testator gave property to trustees to pay the income after the death of his wife to "all the children of my sisters or late sisters who shall be living at the decease or second marriage of my wife, and the issue then living of such of the said children of my sisters as shall be then dead":—Held, that the issue of one of the nieces, who was dead, to the testator's knowledge, at the date of the will, took the share to which their mother would have been entitled had she survived the wife. *Hall* v. *Woolley*, 39 L. J., Ch. 106; 18 W. R. 129.

Testator bequeathed one-sixth part of his residuary estate amongst the children of his late sister J. T., and directed that their share should be paid to them at twenty-one, and that, in case any of them should die under that age leaving issue, their shares should be paid to their issue at a certain time, but if any died without leaving issue their shares to be paid to the surviving children, and the issue of such of them as were dead, per stirpes; and he bequeathed another sixth part to his sister M. C. for life, and after her death unto and amongst her issue, and to be payable at the like time, and with the like benefit of survivorship, and in like manner as before expressed as to the other sixth part. M. C. had six children living at testator's death, and had had another, who had died before the date of the will, leaving a daughter:—Held, that she was not entitled to take either in her own right under the description of issue, which by reference meant the children of M. C., or by substitution for her mother, as she died in the lifetime of the testator. *Peel* v. *Catlow*, 9 Sim. 372; 7 L. J., Ch. 273; 2 Jur. 759.

Bequest to each of A.'s sisters and brothers, or to such of them as may be living at the time of my decease, in case of those who may not be in existence at my death, to go to their respective descendants:—Held, that the descendants of a sister who was dead at the date of the will were excluded. *Smith* v *Pepper*, 27 Beav. 86.

See also *Parker* v. *Tootal*, ante, col. 1047.

Death of Object of Prior Gift between Date of Will and Death of Testator.]—Devise of estate to B. for life, then to testator's nephews, &c., and to the children of them that should then be dead. Issue of nephews who died in testator's lifetime not entitled. *Thornhill* v. *Thornhill*, 4 Madd. 377; 20 R. R. 315.

Testator gave the residue of his estate in trust for his wife for life, and after her death for his children who might then be living, the shares of each to be paid at twenty-one, with benefit of survivorship as to the shares of any dying in the wife's lifetime and without issue, provided that if any did die in the wife's lifetime leaving issue, such issue should have their parent's share. One of the children, after he had attained twenty-one, died in the lifetime of the testator, leaving issue:—Held, that such issue was entitled to the parent's share. *Smith* v. *Smith*, 8 Sim. 353; 6 L. J., Ch. 175. Overruling *Thornhill* v. *Thornhill*, supra. And see *Collins* v. *Johnson*, 8 Sim. 356, n.; 4 L. J., Ch. 226.

A testator bequeathed his residuary personalty to trustees in trust for the children of L., to be divided equally between them, and directed that, "in case of the decease of either of them leaving a family, then such share as the parents would have taken shall be equally divided amongst the children of such deceased parents":—Held, that "decease" meant decease during the testator's life—that the children of L. who survived the testator took absolutely, and that the children of one child of L., who died between the date of the will and the death of the testator, took the share which this parent would have taken. *Hayward, In re, Cherry* or *Creery* v. *Lingwood*, 51 L. J., Ch. 513; 19 Ch. D. 470; 45 L. T. 790; 30 W. R. 315.

Testator bequeathed his residuary personal estate upon trust for his aunt for life, and from and after her decease for all the children of his uncle, "and the lawful issue of such of them as may be then dead." The aunt and all the children of the testator's uncle died in the testator's lifetime, but one of such children died after the tenant for life, leaving issue who survived the testator:—Held, that the word "then" referred to the death of the tenant for life, and not to the period of distribution, and that consequently there was an intestacy. *Milne, In re, Grant* v. *Heysham*, 57 L. T. 828—C. A. Affirming 56 L. J., Ch. 543.

Where a class of beneficiaries under a will is ascertainable at the testator's death (or semble at

any other definite epoch), but the period of distribution is postponed to a different and later epoch, a substitutional gift of the shares of deceased beneficiaries primâ facie applies only to beneficiaries who become members of the class and die before the period of distribution. *Hannam, In re; Haddelsey* v. *Hannam*, 66 L. J., Ch. 471; [1897] 2 Ch. 39; 76 L. T. 681; 45 W. R. 613.

Bequest, after the death of life tenants, "to my brothers and sisters, in equal shares and proportions, the lawful child or children of any deceased brother or sister taking his, her or their deceased parent's share":—Held, that the children of a brother who died after the date of the will, and before the testator, could not take. *Ib.*

Thornhill v. *Thornhill* (supra), and the opinion of Lord Romilly in *Ive* v. *King* (supra, col. 1052) and *King* v. *Cleaveland* (supra, col. 1061), followed. *Smith* v. *Smith* (supra), *Collins* v. *Johnson* (8 Sim. 356, n; 4 L. J., Ch. 226), *Jones* v. *Frewin* (supra, cols. 1054–5), and *Haberghan* v. *Ridehalgh* (supra, col. 1054), explained and distinguished. *Ib.*

Clauses substituting Children for Legatees dying before Distribution — When Children must survive Period of Distribution.]—Bequest to widow for life, and afterwards to transfer to testator's children then living with a gift to the issue of such children if dead, the issue to take only the share their father would have been entitled to:—Held, that the issue took by substitution, and that to entitle them they must survive the tenant for life. *Bennett* v. *Merriman*, 6 Beav. 360.

Testator bequeathed his residuary personal estate to trustees in trust, to pay the interest to and amongst all the children of his brother for their respective lives; and after their deaths, as they should respectively die, he gave the principal of their respective shares to their respective children, and, if any of his brother's children should die without leaving any child, he gave their shares to their surviving brothers and sisters for life, and afterwards to their respective children, in the same manner as their original shares were given. One child of the testator's brother had three children, one of whom was born at the testator's death, and that child and another died in their parent's lifetime:—Held, that, on the death of the parent, the surviving child became entitled to the whole share of which the parent had been tenant for life. *Amies* v. *Skillern*, 14 Sim. 428; 14 L. J., Ch. 165; 9 Jur. 129.

Testator bequeathed one moiety of his residuary personal estate to trustees to pay the interest and dividends equally amongst such of his children as should be living at a certain period for their lives, and after the death of any of them, upon trust to stand possessed of a proportionate share of the fund for the use of the issue of the child or children so dying absolutely; "but in case of such child or children dying without leaving issue, then upon trust to stand possessed of the proportionate share of the child so dying, in trust for, and equally to be divided between and amongst, my other children then living and the issue of such of them as may then be dead, such issue nevertheless only taking the share their, his or her parent would have taken if living." H., one of the children of the testator, who was living at the period of distribution, died, leaving issue a daughter, who died without issue. Afterwards W. and A., two others of the testator's children, died without issue:—Held, that the daughter of H. took no interest in the shares of W. and A. *Macgregor* v. *Macgregor*, 2 Coll. C. C. 192.

A. bequeathed his residuary estate upon trust to pay the dividends to his cousin for life, and as to the principal from and after her decease, in trust for all her children who should be living at her decease and the issue of such of them as should then be dead leaving issue, as tenants in common; but the issue, if more than one, of any deceased child to take as a class as if by representation, and not as individuals:—Held, that the issue of a child who died in the cousin's lifetime were a class to be ascertained at her death. *Penny* v. *Clarke*, 1 De G. F. & J. 424; 29 L. J., Ch. 370; 6 Jur. (N.S.) 307; 8 W. R. 286. And see *S. C.*, Johns. 619.

A testator directed payment of his debts, and gave all his personal estate and effects (by description) to his wife, for her sole use for life. He then gave to her a cottage at B. for her sole use for life, and after her death to fall into the residue of his estate; and he gave two houses in N. Street, one in K. Place, and one in M. Street, to her in the same words; and he directed that the aforesaid properties, and all other his property, real and personal, should be disposed of for the benefit of his children (or any of them) or so many as should survive the death of his wife; nevertheless, if any married and died leaving issue, they should inherit and have the benefit of the father's or mother's share, and that the property therein contained should be kept in repair and let for the best rents; and after deducting the interest on mortgage and repairs, he divided among his sons and daughters, and provided that his property should not be sold, but let until his youngest son attained twenty-one. Then there was a discretionary power to the executors to sell and pay off interest and just claims, and divide the residue equally among his sons and daughters. The widow claimed to be entitled in fee to the premises in N. Street, K. Place, and M. Street, and to be recouped the mortgage money she had paid off; she also claimed dower:—Held, that she was put to her election both as to the property given by the will, and as to dower; also that there was a forfeiture; and that there was a gift to those children who survived the wife, and the issue of those that died in her lifetime leaving issue. *Hilton* v. *Hilton*, 15 W. R. 193.

A testator by his will gave 4,000*l.* to be invested in stock in trust to pay the dividends to his daughter S. during her coverture, and upon the death of G., her husband, to transfer the capital to her for her sole use; but in case G. should survive his daughter, then in trust for H., F., E., A. and W., his five sons, and their respective issue (if any), to be divided among them in equal shares and proportions, such issue to take per stirpes, and not per capita; he gave also the residue of his personal estate to his sons H., F., E., A. and W., "and their respective issue (if any), such issue to take per stirpes, and not per capita, to be divided among them in equal shares and proportions; the shares of such of them as shall have attained the age of twenty-one years to be paid to them respectively forthwith after the testator's decease; the shares of such of them as should be under that age to be paid to them when and as they should

respectively attain such age." Declared, that, S. dying in the lifetime of G., the sons of the testator living at such event would be absolutely entitled to the stock in equal shares, but if any of the sons should die in the lifetime of S. leaving issue, such issue, if living at the death of S., would be entitled to the share or shares of the fund which their parents would have been entitled to if living, such issue to take such shares equally among them, and adjudged, that the sons living at the death of the testator took an absolute interest in the residue. Dictum, that if any of the sons had died in the lifetime of the testator, his children, living at the death of the testator, would have taken, by substitution, the share of the parent. Whether grandchildren, or more remote descendants, would take as issue, and in what proportions, quære. *Pearson* v. *Stephen*, 5 Bligh (N.S.) 203; 2 Dow & Cl. 328.

By a codicil to his will A. desired his son to insure his life for 5,000*l.*, and to bequeath that sum to his wife for life, and at her death, or at the death of the son, to bequeath the 5,000*l.* to A.'s daughters or their "descendants" in equal proportions:—Held, that this was a substitutionary gift to the descendants of those of the daughters of A. who died in the lifetime of the son's wife leaving descendants; that "descendants" included children, grandchildren and great-grandchildren living at the time of distribution. *Flower, In re, Matheson* v. *Goodwyn*, 62 L. T. 216. See *S. C.* in C. A., 63 L. T. 201.

—— **When Children must survive their Parent.**]—A testator left the residue of his estate in trust for his wife for life, and after her decease to belong to all and every such of his brothers and sister as should be living at the decease of his said wife, and all and every the children and child of such of his said brothers and sister as should be then dead, per stirpes, and not per capita. The sister died in the lifetime of the tenant for life, leaving a son and daughter. The daughter also died in the lifetime of the tenant for life, leaving issue:—Held, that the personal representative of the daughter was entitled to participate, together with the son, in the deceased's sister's share. *Cawthorne, In re*, 11 Jur. (N.S.) 9; 13 W. R. 215.

Testator had four daughters, A., B., C. and D., and by his will gave 4,000*l.* to each of his daughters A. and B., with a direction that, if either of them died unmarried, 3,600*l.*, part of the 4,000*l.*, should be divided among his surviving daughters, and the child or children of such of them as should be then dead. A. died unmarried. C. had five children, two of whom survived A., but the other three died in her lifetime. The five children of C. took vested interests in equal fifths of the fund, as well those who died before as those who survived A. *Stanley* v. *Wise*, 1 Cox, 432.

Testator gave his residuary real and personal estate to trustees, in trust to pay the rents, interest and dividends thereof to his wife for her life, and after his decease to sell, convert into money, collect and get in the same, and to pay and divide the moneys to arise therefrom unto and equally between and amongst such of the children of his sisters Martha, Phœbe, Alice, &c., as might be living at the time of the decease of his wife, and the issue of such of them as might be then dead, in equal shares and proportions, such issue only to take the share which their respective parents would have taken if living, provided such children or issue should then have attained twenty-one, otherwise to pay to them the interest of their shares until they should attain that age, and then to pay them the principal. The testator's wife survived him. Each of his sisters had several children. A child of Martha died before the testator's wife, leaving children, and one of those children also died before the testator's wife:—Held, nevertheless, that that one took a vested and transmissible interest in the testator's residuary estate. *Lyon* v. *Coward*, 15 Sim. 287; 15 L. J., Ch. 460; 10 Jur. 486.

A testator gave a sum of money to trustees in trust, to pay the interest to his daughter for life, and after her decease to divide the principal between all and every the children of his said daughter who should be living at the time of her decease and the lawful issue of such of them as should be then dead leaving issue, so as that the issue of each child so dying should take the share which their deceased parent would have taken if living, and so as that such issue of each child so dying should take equally, share and share alike, to be paid to all such children and issue upon their respectively attaining, and in case they should live to attain the age of twenty-one years, with clauses directing the application of the income for the maintenance of the children and issue as the trustees might think fit. One of the children of the tenant for life died in her lifetime, leaving children, some of whom died in the lifetime of the tenant for life:—Held, that the time of the death of the child of the tenant for life, and not the time of the death of the tenant for life, was the period for ascertaining the class of his issue who were to take; and that the children of the deceased child living at his death, though they subsequently died in the lifetime of the tenant for life, took vested interests. *Barker* v. *Barker*, 5 De G. & Sm. 753; 21 L. J., Ch. 794; 17 Jur. 125.

J. B., after giving certain annuities and legacies, gave all the residue of his real and personal estate to trustees, with liberty to sell the same for the benefit of his personal estate, and upon further trust to pay the annuities and legacies, and from and after the decease of the last survivor but one of the annuitants, his children and grandchildren, upon further trust for sale as aforesaid, and to render residue into money, and divide the same equally share and share alike with and among the said survivor, whose annuity should then cease, and all and every the testator's grandchildren as should be living, if any should be born after the date of that his will, and the children of such living grandchildren, either the said annuitants or born after the date of his will, as tenants in common, except only that the child or children of any grandchild should be entitled to the share or part the parent would be entitled to receive, if more than one, in like manner as tenants in common. All the testator's children being dead, and two annuitants being still living, as between whom it appeared that an arrangement had been come to abandoning the right of survivorship:—Held, on a petition by a great-grandchild of the testator claiming to be entitled to a vested interest in the share of his deceased mother, and in opposition to the wishes of an assignee of the share of one of the grandchildren of the testator,

that the great-grandchildren of the testator took vested interests under the will, and that a part of the fund might be distributed under the order of the court. *Bellamy* v. *Hill*, 2 Sm. & G. 328.

Under a deed of appointment the trustees were directed to pay the interest of the trust funds to the husband of the appointor for life; and after his death to divide the property equally between all the children of A., born or to be born, who should be living at the death of her husband, and the children of those who might then be dead, such children to stand in the place of their parents respectively, and to take such share as their parents, if living, would have been entitled to. A. left five children, one of whom died, leaving six children, and four of these six died before the husband of the settlor:—Held, that the six children, or their representatives, were entitled equally to one-fifth of the trust funds, but that there was no substitution. *Harcourt* v. *Harcourt*, 26 L. J., Ch. 536; 5 W. R. 478.

Under a bequest for the testator's daughter A. for life, and in case of her death without issue, her share to go among the survivors of the testator's children and the children of such of them as shall have died leaving issue, such issue to take the share of their respective parent:—Held, that children of testator's children who survived their own parents and predeceased the tenant for life, took vested interests on the death of their parents. *Wildman's Trust, In re*, 1 J. & H. 299; 30 L. J., Ch. 174; 7 Jur. (N.S.) 121.

A husband, who died in 1854, gave all his property to his wife for life, and after giving pecuniary legacies and annuities, devised and bequeathed to his son C. all the residue after his mother's death, and to his heirs; and in case his son should die leaving no issue, then his freehold estate was to be equally divided between his (testator's) surviving children or their families. All the children of the testator survived their mother, who died in 1861, and, excepting one, all (two without issue, two leaving children, one leaving a child, and the issue of another child) died in the lifetime of C., who died, in 1869, a bachelor and intestate:—Held, a gift on the death of C. without leaving issue living at his death to the other children of the testator then living, and to the families of such of them as were dead. *Burt* v. *Hellyar*, 41 L. J., Ch. 430; L. R. 14 Eq. 160; 26 L. T. 833.

A testator gave 500*l.* upon trust to pay income thereof to a daughter for life, and if she died without issue, then to pay the same sum and interest to his four sons (naming them), share and share alike; but in case any of his sons should be then dead, the testator directed that the part or share of him or them so being dead, should be paid to his or their child or children, share and share alike if more than one; or if but one, then to such only child; but if there should be no child, then to his or their legal representatives. One of the sons died a bachelor, and the others leaving children, some of whom died in their parent's lifetime; others survived their parent, but died before the tenant for life; and others survived both their parent and the tenant for life:—Held, that legal representatives meant executors and administrators; that the gift to the sons, being an absolute gift, liable to be divested, the gift to the children was by substitution; and that the gift being substitutional, it was necessary, to entitle the children to take, that they should survive their own parents, but that it was not necessary for them to survive the tenant for life. *Turner, In re*, 2 Dr. & Sm. 501; 34 L. J., Ch. 660; 12 L. T. 695; 13 W. R. 770.

Bequest to H. S. for life, and after her decease to the testator's four brothers and sister, "or such of them as should be then living," equally. And in case any of them should be then dead, then he bequeathed the deceased child's share to the children, "to be paid at the time before mentioned." The brothers and sister all died in the lifetime of H. S., one (A. B.) having had no children:—Held, that the representatives of A. B. were entitled to his share, and that all the children took, whether living at the death of H. S. or not. *Masters* v. *Scales*, 13 Beav. 60.

Gift by a testator of personal estate to his wife for life, remainder between and among his seven children by name, or such of them as should be living at his wife's decease and the issue of such as should be dead leaving issue, with power to apply the presumptive share of such issue for maintenance. A son of the testator died after his father's death, leaving an infant daughter, who died in the lifetime of the testator's widow:—Held, that such infant took a vested share. *Pell, In re*, 3 Giff. 152; 8 Jur. (N.S.) 207; 4 L. T. 544; 9 W. R. 733.

A testator gave his 3 per cent. consols to his wife for life, and after her decease he directed that one-half of his consols should become the property of his cousin M., or in case of her decease he directed that it should be "equally divided between her children living." M. died in the testator's lifetime, leaving one daughter B., who survived the testator, but died before the tenant for life:—Held, that B. took a vested interest in the fund, notwithstanding her death in the lifetime of the tenant for life. *Hodgson* v. *Smithson*, 8 De G. M. & G. 604; 26 L. J., Ch. 110; 2 Jur. (N.S.) 1199; 5 W. R. 3. Affirming 21 Beav. 354.

Devise and bequest of real and personal estate to trustees upon trust (subject to certain legacies and annuities) for A. for life, and after his decease upon trust to convey, assure and pay the whole of the said real and personal estate to and amongst the children of A. and the issue of such children. But in case A. should die without issue, then to pay and distribute the same equally amongst all and every the children of B. and C., and the survivors of them; but, in case any such children should be then dead, leaving issue of his, her or their body or bodies lawfully begotten, then such issue to have as well such original share or shares as the father or mother of such issue so dying would have been entitled to if then living, as also such other share or shares thereof as the father or mother of such issue so dying might have been entitled to by survivorship or otherwise. A. survived the testator, and died without issue:—Held, that the period of the survivorship of the children of B. and C. is not to be referred to the time of the death of the testator, but to that of the death of A., being the period of distribution; and that the children of B. and C., living at the date of the will, and those born after that date and before the death of A., were entitled to the real and personal estate, with survivorship between them in case of the death of any such children without issue before the death of A., the children of such

of the said children as died before A., leaving issue, being substituted for the original legatees. *Buckle* v. *Fawcett*, 4 Hare, 536; 9 Jur. 891.

A testator devised realty to his wife for life, with remainder to A., B., C., D. and E. as tenants in common, and in case of the death of either in the life of his wife, leaving issue, his share was to go among all his children as tenants in common in fee, but in case of the death of any one in the lifetime of the wife without leaving issue living at his death he gave his share to the survivors:—Held, that the gift to children was substitutional, and those children only who survived their fathers could take under it. *Hurry* v. *Hurry*, 39 L. J., Ch. 824; L. R. 10 Eq. 346; 22 L. T. 577; 18 W. R. 829.

A condition of survivorship does not attach to a substitutionary gift. *Merrick's Trusts, In re*, 35 L. J., Ch. 418; L. R. 1 Eq. 551; 12 Jur. (N.S.) 245; 14 L. T. 130; 14 W. R. 473.

A testator, by reference, gave the income of a fund to M., who was unmarried, for life, with a gift to her husband (if any) for his life; and upon the decease of the longer liver of M. and her husband, he directed his trustees to pay, assign and transfer the capital to his four children, A., B., C. and D., who should be then living, "or to the issue of such of them as should be then dead," such issue taking their parents' share. "Issue" as used in the will was clearly equivalent to "children":—Held, that upon the death of any one of the four, A., B., C. and D., whether before or after the termination of the life estates, his children then living took vested interests in the fund, and that his children then dead were wholly excluded. *Ib.*

Bequest to A. for life, and after her death to pay and divide it amongst her children living at her decease, and the issue of such of them as should be then dead leaving issue, such issue to take their parents' share, with a gift over if all the children of A. should die in her lifetime without leaving issue. Two children died in the life of A., leaving children:—Held, that grandchildren of A. who predeceased their parents did not take; but that grandchildren of A. who survived their parents, but died in the life of A., took vested interests, which passed to their representatives. *Thompson* v. *Clive*, 23 Beav. 282.

A bequest of personalty to trustees upon trust to pay the interest thereof to the testator's daughters A. and B. for their lives and the life of the survivor, and upon the decease of the survivor to pay and transfer the capital equally among all the testator's children, and the issue, if any, of A. and B., and of any other deceased child, in such manner that such issue might be entitled to such share or shares as his or their deceased parent or parents respectively if living (A. and B. excepted) would have been entitled to:—Held, that the whole fund belonged to the testator's children other than A. and B., and to the children living at the death of such as had died leaving children. *Bennett, In re*, 3 K. & J. 280.

A testator, who died in 1871, by his will, dated in 1870, gave his residuary estate to trustees upon trust to pay the income thereof to his widow for her life, and after her death he gave the property unto and equally between all and every the children of his brothers and sisters, share and share alike, "the issue of any deceased child to take the parent's share." The testator's widow died in 1881. Some of the children of the brothers and sisters of the testator survived him, but died in the lifetime of the testator's widow, leaving issue. The question was, whether the issue of the deceased children of the brothers and sisters of the testator were respectively entitled to the shares of their deceased parents:—Held, that the substitutional gift took effect in the case of any child of a brother or sister of a testator who had died in the lifetime of the testator's widow. *Gilbert, In re, Daniel* v. *Matthews*, 54 L. T. 752; 34 W. R. 577.

—— **Where Period of Distribution is Death of Parent.**]—Testator gave 20,000*l.* stock in trust for his daughter A. for life, for her separate use, and after her death in trust for her children as tenants in common, to be vested at twenty-one, or death under that age, leaving lawful issue. By a codicil, testator, instead of the 20,000*l.* given by his will, gave 15,000*l.* in trust for his daughter for her life, after her death to her children to be equally divided amongst them or the survivors, share and share alike:—Held, that only those children of A. who survived their mother took shares. *Haley* v. *Bannister*, 23 Beav. 336.

—— **Where Children survive neither Period of Distribution nor their Parent.**]—Bequest of interest to one for life, and after her death upon trust to transfer the principal among the children living at her decease, "or the children of any child who may be then dead." A grandchild who predeceased its parent:—Held, excluded from a share in the fund. *Crause* v. *Cooper*, 1 J. & H. 207.

Where a testator gave a life interest to his wife, and immediately after her death to his two sons, at twenty-one, if then living, and to the issue of either of them that shall be then dead, such issue taking the share the parent (if living) would have been entitled to only, with a gift over, in the event of both dying under twenty-one without lawful issue; and one of the sons died in the lifetime of the wife, without leaving issue, but having had a son who had died in his lifetime:—Held, that the child of the son who predeceased the tenant for life, and who had died in his father's lifetime, did not take, but that there was an intestacy as to the moiety given to the son, who died during the life of the tenant for life. *Humfrey* v. *Humfrey*, 2 Dr. & Sm. 49; 31 L. J., Ch. 622; 8 Jur. (N.S.) 500; 6 L. T. 13; 10 W. R. 286.

When there is a gift by will to such of a class of persons as shall be living at the happening of a particular event, and to the issue of such of the class as shall be then dead leaving issue, the gift to issue is not to be restricted to issue who survive their parent, but all the issue of any member of the class who has predeceased the particular event leaving issue are entitled to share, whether they have or have not survived their parent. *Smith, In re*, 47 L. J., Ch. 265; 7 Ch. D. 665; 26 W. R. 418.

Whether Gift to Issue Original or Substitutional.]—Where a gift to one and his issue is an original gift to the issue, it is not necessary for the issue to survive their own parent, but where it is substitutional it is necessary; but neither in the case of an original nor a substitutional gift is it necessary for the issue to survive the tenant for life. *Lamphier* v. *Buck*, 2 Dr. & Sm. 484; 6 N. R. 196; 34 L. J., Ch. 650; 11 Jur. (N.S.) 837; 12 L. T. 660; 13 W. R. 767.

A testator devised and bequeathed his residuary real and personal estate to trustees, to pay

the annual proceeds to his wife for her life, and from and immediately after her decease to divide and distribute it amongst such of his nephews and nieces named in his will as should be living at her death in equal shares; but if any or either of them should then be dead leaving issue, then such issue to be entitled to their father's or mother's share, but in equal proportions:—Held, that the word "issue" was to be read as "children," and that the gift to the issue was not substitutionary for the gift originally given to the parents, but an original, independent and unconditional gift; and that the only child of one of the testator's nephews, who died after the testator, but before the period of distribution, acquired a vested interest in the share her father would have taken if he had then been alive, even although such child also died before the period of distribution. *Martin* v. *Holgate*, 35 L. J., Ch. 789; L. R. 1 H. L. 175; 15 W. R. 135. Reversing *S. C.* nom. *Holgate* v. *Jennings*, 34 Beav. 79; 5 N. R. 180; 11 Jur. (N.S.) 5; 11 L. T. 501. And see *Smith* v. *Smith*, L. R. 5 Ch. 342.

Real estate was devised upon trust (after the death of the tenant for life) to sell and divide the proceeds equally among such of the testator's five daughters as should be living at the decease of the life tenant, and the children, grandchildren and issue respectively to take and have equally amongst them, if more than one, the part or share which their, his or her parent respectively would have been entitled to had such parent been then living. One of the daughters, whose share was now in question, died before the tenant for life, having had ten children, of whom three survived the period of distribution, the other seven having died before that period, some with, others without, issue:—Held, that the gift to the children, grandchildren and issue was an original gift, and that the share was divisible into tenths, and that one-tenth went to each stock, irrespectively of the objects of gift surviving the mother or the period of distribution. *Orton, In re*, 36 L. J., Ch. 279; L. R. 3 Eq. 375; 16 L. T. 146; 15 W. R. 251.

A gift to the sisters of the testator living at a particular time, or the issue of any or either then dead, is not a substitutionary, but a substantive, gift to the issue. *Attwood* v. *Alford*, L. R. 2 Eq. 479.

Bequest of a fund in trust for A., and his wife B., for life; and after their decease, upon trust to pay the principal sum equally amongst the testator's nephews and nieces, children of A. and B. then living, or their legal personal representatives, share and share alike. A. and B. had seven children; two of them died in the lifetime of the testator, another died before the surviving tenant for life, and the remaining children survived:—Held, that the representatives took as a distinct class, and not by substitution: that the fund was divisible into sevenths, payable to the surviving nephews and nieces, and the representatives of those that were dead. *King* v. *Cleaveland*, 26 Beav. 26; 4 Jur. (N.S.) 702. Affirmed, 4 De G. & J. 77; 28 L. J., Ch. 835; 7 W. R. 602.

b. Death of Object of Prior Gift after Testator.

General Rule—Death at any Time—Where Gift Immediate.] — A testator directed his residuary real and personal estate to be divided into fourteen shares, and gave such shares to persons whom he named, and directed that the whole of them should have the benefit of survivorship between them in the event of any one or more of them dying without issue:—Held, that the "dying" meant was not "dying in the testator's lifetime." *Smith* v. *Stewart*, 4 De G. & Sm. 253; 20 L. J., Ch. 205; 15 Jur. 834.

When there is a gift over in the event of death without issue, the rule is that death without issue must be held to mean death without issue at any time, unless a contrary intention appears in the will; and the introduction of a previous life estate does not alter that principle of construction. *Olivant* v. *Wright*, 45 L. J., Ch. 1; 1 Ch. D. 346; 33 L. T. 457; 24 W. R. 84.

Bequest of residue to the testator's daughters, A. and B., in equal proportions, and in case of the death of either the whole to the survivor of them, and in the event of marrying, and having children, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years, but if not then among the children of C. A. and B. survived the testator, and A., who died without having been married, bequeathed the whole of her property to B.:—Held, that the bequest did not become absolutely vested in A. and B. on the death of the testator, but continued subject to the executory bequest over in favour of C. *Child* v. *Giblett*, 3 Myl. & K. 71; 3 L. J., Ch. 124.

Whenever there is an interest limited by will, either by way of remainder or by way of executory interest, if all the preceding estates are out of the way, or the events on which the executory interest is limited have occurred, it is immaterial whether those estates are taken out of the way, or those events occur in the lifetime of the testator, or after his decease. *Varley* v. *Winn*, 2 K. & J. 700; 25 L. J., Ch. 831; 2 Jur. (N.S.) 661; 4 W. R. 792.

If there be an executory bequest of personalty depending either upon the determination of a preceding limited interest or upon a collateral event of defeating an interest previously given, and such limited interest determine or such collateral event happen during the lifetime of the testator, the executory bequest does not lapse. *Ib.*

Where, therefore, there was a bequest to the testator's five daughters of 6,000*l.* each, to be invested by the executors within seven years from his death, "in trust for them or their children, *but if any of my daughters should die leaving no issue, then the share or portion so invested shall be divided amongst those who have issue*, share and share alike, as they arrive at the age of twenty-one; and if only one, the whole to go to that one only," one daughter died without issue in the lifetime of the testator:—Held, that the 6,000*l.* given to her passed by the gift over to those of the testator's daughters who were living at his death, and had issue then living, absolutely. *Ib.*

Held, also, that the words above printed in italics ought to be read as though in a parenthesis. *Ib.*

As to each daughter's own legacy of 6,000*l.*, it was directed to be invested, and the interest paid to her for life. *Ib.*

A testator gave the residue of his property to be divided between his four sons in equal shares, with a proviso that the share of any son dying

without leaving issue him surviving should be divided between such of his other sons as should be then living, in equal shares, the children of a deceased son to take the share to which their father would have been entitled. All his sons survived the testator, two having issue, and two being unmarried :—Held, that the share of each son was defeasible in the event of his dying at any time without leaving issue. *Woodroofe* v. *Woodroofe*, [1894] 1 Ir. R. 299.

A testator by his will declared that in case both or either of his sons, A. or B., died leaving their children fatherless, he left to such children the sum of 500*l.* to be divided amongst them, share and share alike. Both A. and B. survived the testator. A. died leaving children surviving him ; B. was alive, and had children :—Held, that the gift was not limited to one sum of 500*l.*, and that the contingency was not confined to death in the testator's lifetime ; and accordingly that the children of A. living at his death were entitled to be paid 500*l.*, and that the children of B. (if any) living at his death would be entitled to a similar sum. *Richardson's Trusts, In re*, [1896] 1 Ir. R. 295. Affirmed in C. A.

And see *Farthing* v. *Allen*, ante, col. 1037.

——**Where Future Gift after Prior Interest.**] —Gift by will of freeholds and leaseholds to A., durante viduitate, and then to B. absolutely, with a gift over to B.'s brother and sister, "if he should die and leaving no children." B. survived A. :—Held, that he then took an absolute vested interest not liable to be divested on his subsequent death without children, and that, therefore, the gift over in that event failed. *Edwards* v. *Edwards*, 15 Beav. 357 ; 21 L. J., Ch. 324 ; 16 Jur. 259.

Construction of gifts in the following form : first, to A., and if he shall die, to B. ; second, to A., and if he shall die without children, to B. ; third, to X. for life, with remainder to A., and if he shall die, to B. ; and fourth, to X. for life, with remainder to A., and if he shall die without leaving children, to A. In the first case the contingency has reference to the death of the testator ; in the second, to the death of A. ; in the third and fourth, to the death of the tenant for life. *Ib.*

The fourth rule laid down in *Edwards* v. *Edwards* (supra), that where a life or other estate is given to one or more of the objects of a testator's bounty, and on the determination of that estate the subject disposed of is given to another person with a direction that if the latter shall die without leaving a child, his share shall go over, the words indicating death without issue refer to that event occurring before the period of distribution, that is, before the determination of the estate. as there stated, disapproved of. *Ingram* v. *Soutten*, 44 L. J., Ch. 55 ; L. R. 7 H. L. 408 ; 31 L. T. 215 ; 23 W. R. 363.

The fourth rule would be better stated thus : "The period to which the executory devise will be referred will be the period of the death of the first taker, unless there are directions in the will inconsistent with that supposition"—Per Lord Hatherley. *Ib.*

A husband bequeathed his residuary personal estate to trustees upon trust to pay the income to his wife for life, and after her death upon trust (in the events which happened) to pay the income to his daughter for life, with a gift over, in the event of her death without issue, to his two sons, with a gift over, in the event of both his sons dying without issue, to H. "But in case H. shall die without leaving any issue living at the time of her death," then over. The widow died in 1823 ; his two sons survived her, and both died without issue in the lifetime of his daughter, who died without issue in 1866. H. survived the daughter, and died without issue in 1872 :—Held, that, H. having died without issue, the gift over took effect ; for in such a case death without issue at any time must be taken to be intended, unless there are any expressions in the will pointing to an earlier termination of the trust. *Ib.*

There is no authority that the words introducing a gift over in the case of the "death unmarried or without children" of a previous taker do not indicate, according to their natural meaning, death unmarried or without children at any time, or that the ordinary and literal meaning of the words is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper. *O'Mahony* v. *Burdett*, L. R. 7 H. L. 388 ; 31 L. T. 705 ; 23 W. R. 361. And see *Olivant* v. *Wright*, supra, col. 1078.

Gift Over on Several Events—Immediate Gift.] —A. B. devised real estate to C. D., his heirs, executors and administrators ; he then directed that if C. D. should die without issue, the estate should go to other persons ; and in case C. D. died and leaving issue, they were to take their deceased parent's share :—Held, that the words "in the lifetime of the testator" could not be imported into the will. *Gee* v. *Manchester Town Council*, 19 L. J., Ch. 151 ; 14 Jur. 825. And see *S. C.* at law, 21 L. J., Q. B. 242 ; 16 Jur. 758.

Testatrix bequeathed to trustees 3,000*l.*, upon trust to pay the interest for the maintenance of A., and to pay him the principal when he should attain twenty-one ; but directed that in case he should die before his legacy should become payable, leaving lawful issue, such issue should take his legacy. The testatrix then gave half the residue of her estate upon trust for B. for her life, and after her death she gave this half to A. at the time his 3,000*l.* legacy became payable, and, "in case of his death without leaving lawful issue," then the same to be equally divided between C., D. and E. A. survived the testatrix, attained twenty-one, and died in the lifetime of B., without having been married :—Held, that the share of the residue had vested in him absolutely subject to the life estate of B., and that C., D. and E. took no interest therein. *Woodburne* v. *Woodburne*, 3 De G. & Sm. 643 ; 19 L. J., Ch. 88 ; 14 Jur. 565 ; 2 W. R. 131.

A testatrix made the following bequest : "I give to A. A. the sum of 400*l.*, to be paid at and after my decease, and vested in the public funds, the interest whereof she shall receive when she attains twenty-one. In the event of her decease at, before or after the said period, the sum so bequeathed to be divided between E. M. and A. M." A. A. took a life interest only in the legacy. *Miles* v. *Clark*, 1 Keen, 92.

Bequest of testator's residuary personalty equally between his four children (nominatim), to be equally divided between them share and share alike, and in case of either of them leaving issue, the issue of such child to take the parent's share ; but in the event of their dying without leaving issue, then the share or shares of the one so

dying to form part of the residue:—Held, that the testator's children took for their respective lives only. *Cooper* v. *Cooper*, 1 K. & J. 658; 3 W. R. 470.

A testator by his will (dated in 1841) gave all his real and personal estate to trustees in trust, to convert, and pay, apply and divide the proceeds into three equal shares; one he directed his trustees to invest upon trust to pay the income to his daughter H. for her separate use; and from and after her death leaving issue, to such issue as therein mentioned. And the will contained provisions that, in case any of his said children or grandchildren should happen to die without leaving issue, the share or shares of him, her or them, so dying, should go to the survivors of them, his said children and grandchildren. And also that, if any of his said children or grandchildren should happen to die leaving issue, the share or shares of him, her or them should go to such issue as therein mentioned:—Held, that the sons J. and T. took life interests only. *Clayton* v. *Lowe* (5 B. & Ald. 656; 24 R. R. 509) observed upon. *Gosling* v. *Townshend*, 2 W. R. 23. Affirming 17 Beav. 245.

In a gift to A. (without any limitation of interest), "and if he should happen to die, leaving lawful issue," then to such issue, the contingency has reference to the death of A., and not to that of the testator. A., therefore, does not take an absolute interest. *S. C.*, 17 Beav. 245.

Immediate gift to four residuary legatees and devisees in equal shares, "with benefit of survivorship" in case any of them should die without issue; and in case any of them should die leaving children, then the share, whether original or accruing, of each so dying to go to such children:—Held, that the clause of survivorship, and the limitation over to children of the legatees, were not confined to the lifetime of the testator, and intended merely to guard against lapse; and that the residuary legatees did not upon surviving the testator at once acquire absolute indefeasible interests in their shares. *Bowers* v. *Bowers*, 39 L. J., Ch. 351; L. R. 5 Ch. 244; 23 L. T. 35; 18 W. R. 301—C. A.

Gift over when restricted to Period of Vesting.]—Bequest to a female when and if she should attain twenty-one, to her sole and separate use; and in case of her death leaving children her share to go to her children:—Held, to vest an absolute interest in the legatee on her attaining twenty-one. *Home* v. *Pillans*, 2 Myl. & K. 15; Coop. t. Brough. 198; 4 L. J., Ch. 2.

In applying the rule that a clear gift in a will is not to be cut down by any subsequent provision, unless the latter is equally clear, the plain intention of the testator, and not the comparative lucidity of the two parts of the will, is to be regarded. *Randfield* v. *Randfield*, 8 H. L. Cas. 225; 30 L. J., Ch. 177; 6 Jur. (N.S.) 901; 9 W. R. 1.

A. devised all his freehold and copyhold estates to his son, "when he have obtained the age of twenty-one, upon the following conditions," and directed that his own widow should receive an annuity out of these estates; he then gave to his son all his personal estates, consisting of ships, bonds and funded stock, "but should the hand of death fall on my widow and son, and my having no other children, or my son any issue, my will is then that should he leave a widow, she shall receive an annuity out of my real estates as before mentioned, the residue then to be equally divided, share and share alike, after paying such legacies as I may hereafter name, the division to be" between certain persons specifically mentioned ("they paying all my son's debts, funeral expenses and demands, or my wife's, should she be the longest liver"). The son became twenty-one some years before the will was executed; he married, but died without ever having had issue:—Held, that the gift over affected only the real estate. *Ib.*

A testatrix devised to trustees freehold premises in trust to receive the rents, and after paying thereout all proper outgoings, and applying thereout, if they thought fit, any money towards the maintenance of S., to let the residue accumulate until S. should attain twenty-one, and then to pay such accumulations to him, but if he should die under such age without leaving issue living at his decease, then such accumulations should be for the benefit of the person to whom and in like manner and form as these premises were limited in the like event, and when S. should have attained twenty-one, then the trustees were to stand seised of the premises in trust for him in fee; but if he should not leave any issue living at his decease, then the trustees should stand seised of the premises in trust for A. in fee, and if A. should not leave any issue living at her decease, then over. S. attained twenty-one, and died without ever having had issue:—Held, that the premises vested in S. in fee on his attaining twenty-one, subject to be divested in the event of his dying without issue, which event having happened, the limitation over in favour of A. took effect. *Smith* v. *Spencer*, 6 De G. M. & G. 631; 3 Jur. (N.S.) 193; 6 W. R. 136.

A testator gave to two trustees, in trust for the child or children of his daughter-in-law, the sum of 700*l.* to each child, to be paid by his executors as soon as each child became of the age of twenty-one years; or by mutual agreement the trust was to continue longer after each child should have passed the age of twenty-one; the aforesaid sums to remain in the stock and possession of his executors until the whole sum be paid to the said trustees, for the sole use of the said children; but should either child or both children of his daughter-in-law die without leaving issue, then the 700*l.* for one child; or if both die and leave no issue living 1,400*l.* for the use of other persons:—Held, that the grandchildren of the testator, upon attaining twenty-one, took absolute interest in the money liable to be divested in the event of their dying without leaving issue. *Cotton* v. *Cotton*, 23 L. J., Ch. 489; 2 W. R. 207.

A testator gave the residue of his estate to trustees, upon trust to pay, apply and dispose of it to two women, A. and B., when they should attain their respective ages of twenty-one years, directing that their shares should not be subject to the control of their husbands; but in case both or either of them died without issue living at the time of their respective deceases, then he gave the share of her or them so dying to his nephews and nieces:—Held, upon the whole context of the will, that the executory devise over of the residue was not confined to the death of A. and B., or either of them, under twenty-one, and without leaving issue; but would take effect upon their respective deaths at any time,

without leaving issue then living. *Gray* v. *Folds*, 7 L. J. (o.s.) Ch. 182.

Under a bequest of stock to A. for life, and after the decease of A. to the testator's great-grandchildren, share and share alike, if they were living at the time of A.'s death, but that they should not receive any part of the capital till they arrived at twenty-one; but if any one, or all, of the said children should die before they arrived at the age of twenty-one years, the shares or part of those so dying should go to B. and C., share and share alike:—Held, that the attaining twenty-one was not confined to the event of surviving A., and, therefore, that on the decease of one of the children in the lifetime of A., under twenty-one, the share of such child passed to B. and C., and did not lapse so as to go to the testator's residuary legatee. *Goodchild* v. *Fenton*, 3 Y. & J. 481.

A testatrix in 1823 devised lands to A. and B. as tenants in common in fee, and in case of the death of either under twenty-one and leaving no child, the whole to go to the survivor, and in case of the death of both leaving no child, then over. A. died under twenty-one without issue; B. attained twenty-one:—Held, that the gift over would take effect in case of his death, leaving no child. *Else* v. *Else*, 41 L. J., Ch. 213; L. R. 13 Eq. 196; 25 L. T. 927; 20 W. R. 286.

A testator bequeathed his personal estate to his brothers and sisters absolutely; and declared, that if any of them should die in his lifetime, or afterwards, without leaving lawful issue, his share should go amongst the survivors; and that if any should die in his lifetime, or afterwards, leaving issue, his share should be divided amongst his issue; and he declared, that none of the legatees should be entitled to any bequest until they attained twenty-one:—Held, that on attaining twenty-one the brothers and sisters took absolute interests, and that the limitation over was to take effect only in the event of the death of a legatee under twenty-one, in the lifetime of the testator, or afterwards. *Monteith* v. *Nicholson*, 2 Keen, 719; 6 L. J., Ch. 247.

A testator bequeathed his residue to his children, in terms which gave them a vested interest, subject to be divested in favour of their children on their death under twenty-one. He then provided, that if it should happen that he should leave no such children or child living to attain twenty-one, "or such, if any, dying without leaving lawful issue," then over:—Held, that "the dying" referred to was dying under twenty-one, and that the testator's children, on attaining twenty-one, acquired an indefeasible interest. *Pearman* v. *Pearman*, 33 Beav. 394.

J. devised land to trustees for R. for life, and after her death for sale and investment of the proceeds, and to pay and apply the interest in the educating and bringing up of all and every his nephews and nieces, the children of G. during their minorities, and to pay to his nephews and nieces, his, her or their equal part or share in the proceeds when and as he, she or they should respectively arrive at his, her or their ages of twenty-one; and in case any or either of his nephews or nieces should die without leaving issue, then the share of him, her or them so dying should go to the survivor and survivors of them, and be paid to him, her and them respectively when his, her and their original share and shares should become payable as aforesaid; and if any or either of them should at the time of such sale be of such age, then to be paid to them so of age immediately after such sale, and he gave and bequeathed the same to his nephews and nieces accordingly:—Held, that the shares of the nephews and nieces were indefeasibly vested at twenty-one. *Johnson, In re*, 10 L. T. 455.

A testator bequeathed a legacy to each of his two nephews and his niece, if they should respectively survive him and attain twenty-one, when the legacies to his nephews were "to be paid." In case of the death of either of his nephews or niece, leaving issue, such issue to take the parent's legacy, as by his or her will directed; if no will, equally; but in case of the death of either, before his or her legacy payable, his or her legacy to go to the survivor; during minority income to be applied for maintenance and education; the niece's legacy to be settled:—Held, that the nephews took only a life interest in the legacies, and that after their deaths if they left children, the corpus would go to such children as their parents might appoint by will; if no children, that the nephews would take absolutely. *Martineau* v. *Rogers*, 8 De G. M. & G. 328; 25 L. J., Ch. 398; 4 W. R. 502.

A testatrix bequeathed a legacy of stock upon trust for her nephew R. until he should attain the age of twenty-one, and then over. And she directed that in case any of the four legatees therein named (R. being one of them) should happen to depart this life without leaving lawful issue, then in trust for the survivors or survivor of them, in certain proportions. R. attained his age of twenty-one, but died without issue:—Held, that he took an absolute vested interest in the legacy on his attaining twenty-one. *Hayne, In re*, 18 L. T. 16.

—— **Where Gift Contingent on surviving Tenant for Life.**]—A testator gave his residuary estate to his wife for life, and then to be divided into three shares; and he gave one-third between the children of his brother T. B., living at the death of his wife, one third to his niece F. G., and the remaining one-third to his nephew and niece T. B. and S. B.; and in case such, any or either of them should die, having left a child or children surviving them, he declared that the expectant's share should go between his and her children. T. B.'s children all died in the lifetime of the widow, but some left children:—Held, that the latter were entitled to the first-mentioned one-third. *Garey* v. *Whittingham*, 5 Beav. 268; 11 L. J., Ch. 334; 6 Jur. 545.

C. in 1814 bequeathed the residue of his personal estate to trustees, in trust for the benefit of his wife for life; and after her death he directed that an annuity should out of the same be purchased for his brother; and then he bequeathed the residue to H., "in case he was living at the time of the decease of his wife, or to his children, if he should marry and leave any; but if he should die without leaving issue," then he bequeathed the residue to other persons. The widow died in the lifetime of H., who in 1844 died a bachelor:—Held, that the words "die without leaving issue," referred to the death of H. in the lifetime of the widow, and that as he survived her, his residuary legatee was entitled to the fund. *Andrews* v. *Lord*, 6 Jur. (N.S.) 865; 3 L. T. 803; 8 W. R. 405.

S. bequeathed property to his wife's niece "for her own absolute use, provided that she survived his wife, or if she married before her aunt's death, then the property was to go equally between her children; but if none, then to her husband." If

she died unmarried before her aunt, the testator directed that at his wife's decease the property should go to other persons in the will named. The niece married, and had children in the lifetime of the aunt, whom she survived. The dividends on the fund in court had been, since the death of her aunt, paid to the niece, who petitioned to have the principal transferred to her:—Held, that in the events which had happened, she was absolutely entitled. *Sarjeant, In re*, 9 Jur. (N.S.) 116. *S. C.*, nom. *Serjeant, In re*, 7 L. T. 501; 11 W. R. 203.

—— **When restricted by Express Direction to Pay and Divide.**]—Bequest of personal estate, being in trust, to pay the interest to M., the testator's widow, during her life, and on her death "to pay and divide the trust moneys unto and equally between his daughters, H. and A., for their own use and benefit absolutely, and in case of the death of them, H. and A., or either of them, leaving a child or children living," to apply the interest for the maintenance of the children till twenty-one, then to divide the trust money among them, expressing that the testator's intention was, that the children of his daughters should be entitled to the same shares to which their mother would be entitled if then living, with an ultimate trust in case of the death of H. and A., without leaving issue living at their respective deaths, or of all their children dying minors. On surviving the tenant for life H. and A. become entitled to the absolute interest. *Galland* v. *Leonard*, 1 Swan. 161; 1 Wils. Ch. 129; 18 R. R. 44.

A testator gave all his freehold and leasehold property to trustees, upon trust to pay the rents to his wife for her life, if she should so long continue his widow, and directed that in case of her marrying again she should receive an annuity. He then disposed of the property among his three children, the gift to take effect in possession immediately upon the decease or marriage of the widow. He directed his trustees to make over the shares of the children to them immediately upon the widow's death, as soon as they arrived at the age of twenty-one years; and further directed, that if one of his children should die leaving no children, his or her share should be equally divided between the other two, and for their heirs for ever; and that if two of his children should die leaving no children, their shares should go to the surviving one, and his or her heirs for ever:—Held, that the share of a child who attained twenty-one, and survived the widow, did not go over on his subsequently dying without leaving children. *Edwards* v. *Edwards*, 15 Beav. 357; 21 L. J., Ch. 324; 16 Jur. 259.

A testator, being entitled to a reversionary fund upon the death of a husband and wife without leaving issue who should attain the age of twenty-one years, bequeathed the fund to trustees upon trust to divide the same between "his children living at the time of the decease of the tenants for life, or such others lawfully begotten as would have been entitled to it at the death of their parents":—Held, that the surviving children took, to the exclusion of a grandchild whose father died after the testator, but before the death of the last tenant for life. *Miller* v. *Chapman*, 24 L. J., Ch. 409; 3 W. R. 300—L.JJ.

Real and personal estate, including a business, was devised and bequeathed in trust to pay an annuity out of the income to the testator's widow during her life, and after her decease the property, including all accumulations, was devised and bequeathed to the testator's son W.; but if he should die without leaving issue, the testator directed the trustees to sell and convert, and to distribute the proceeds among certain persons:—Held, that the gift over only contemplated the son's death in the lifetime of his mother, and that the son having survived the widow, took on her death an absolutely vested interest. *Edwards* v. *Edwards* (supra) approved and followed. *Dean* v. *Hanley*, 6 N. R. 95; 11 Jur. (N.S.) 686; 13 L. T. 89.

A testator devised and bequeathed his real and personal estate to trustees, upon trust to stand possessed of the rents and proceeds thereof, and to pay an annuity of 500*l.* a year to his widow for her life, or so long as she should continue his widow; and from and immediately after her death or marriage again, upon trust to pay and apply such annual rents and proceeds for the maintenance and advancement of such of his children as should be under twenty-one as his trustees should think proper; and when the youngest of his children should attain that age, then upon trust to call in all his moneys, and distribute all his property equally between his children, except so much as would secure to his wife (if she should be then alive and married) an annuity or yearly sum of 100*l.* as thereinafter mentioned:—Held, that the period of division among the children of the testator was upon the death or second marriage of the testator's widow, in case the youngest child should have attained twenty-one, and not absolutely upon the youngest child attaining such age. *Beckton* v. *Barton*, 27 Beav. 99; 28 L. J., Ch. 673; 5 Jur. (N.S.) 349.

The testator directed, that in case of the death of any of his children leaving issue, the share or shares of such deceased parent or parents should go to his, her or their children:—Held, to have reference to the death of the children before the period of distribution. *Ib.*

The testator, upon the marriage of his daughter, and after the date of his will, settled a sum of money upon his daughter, her husband and children:—Held, to amount to an advancement, and that the daughter must be put to her election. *Ib.*

A wife gave all her property (consisting of realty and personalty) to her husband during his life to receive the rents and profits, and after his death to be divided amongst her five children, share and share alike; and if any of her children should die without issue, then that child or children's share to be divided, share and share alike, among the children then living; but if any of her children should die leaving issue, then that child, if only one, should take its parent's share; if more than one, to be divided equally amongst them:—Held, that there was a sufficient contrary intention within the meaning of the above-stated rule, that "after his death" meant immediately after his death, at which time the property was to be divided, that this was the time of division referred to throughout the will, that death without issue must be restricted to death without issue in the life of the tenant for life, and that therefore all the children who survived the tenant for life took indefeasible shares in the property. *Olivant* v. *Wright*, 45 L. J., Ch. 1; 1 Ch. D. 346; 33 L. T. 457; 24 W. R. 84—C. A.

A. gave the income of his residuary real and

personal estate to his wife for life, and after her death gave the same to all his children absolutely; but in the event of the marriage of any of his daughters, he directed that the interest should be paid to them for life, and after the death of any of them to their husbands for life; and upon the death of the survivor, that the principal should be divided amongst the children of his married daughters to vest in them at twenty-one, or at twenty-one or marriage, with benefit of survivorship, and with clauses for maintenance and advancement; and if any of such daughters should have no children living at her death, the principal of her share was to be at her own disposal:—Held, that this was an express gift to the children of the daughters, and that the direction applied to all the daughters of the testator, and not to those only who married before the death of the testator's widow. *Witham* v. *Witham*, 30 L. J., Ch. 888; 5 L. T. 133; 9 W. R. 854—L.JJ.

Held, also, that the contingency of a daughter's marrying was not restricted to a marriage in the lifetime of the widow. *S. C.*, 3 De G. F. & J. 758.

A testator bequeathed his residue to his wife for life, and at her decease "to be equally divided between his two daughters B. and C.," and in case of marriage to be settled on themselves. The tenant for life was still living, and B. had never been married:—Held, that B. took an absolute vested interest on the death of the testator. *Smith* v. *Colman*, 25 Beav. 216.

G. by his will bequeathed property to belong to and be given up to his child or children on attaining twenty-five. And he provided that if his eldest son should come to the inheritance of a certain estate, then that the share of such son in the above-mentioned property should be made over to his brothers and sisters equally:—Held, that the eldest son having attained twenty-five without having come to the above-mentioned inheritance, was entitled to his share absolutely. *Glyn* v. *Glyn*, 26 L. J., Ch. 409; 3 Jur. (N.S.) 179; 5 W. R. 241.

A testator gave and bequeathed all his real and personal estate to his trustees in trust for his wife for life, and after death upon trust to convey, assure and divide the same unto and amongst all his children in equal shares as tenants in common on their respectively attaining twenty-one; and in case of the decease of any or either of his said children without issue under that age, or before they should acquire vested interests therein, then the trustees were to convey, assure, pay and divide the shares of the children so dying to the survivors:—Held, that the testator's children, on attaining twenty-one, acquired absolute vested interests in the real and personal estate. *Wheable* v. *Withers*, 16 Sim. 505; 18 L. J., Ch. 156.

Where there was a gift over in the event of a legatee dying "before receiving his legacy," and a legatee died after the period contemplated for payment had arrived, but without receiving the legacy, by reason of a suit having been instituted, and the money paid into court:—Held, that the gift over did not take effect. *Whiting* v. *Force*, 2 Beav. 571; 9 L. J., Ch. 345.

—— **When restricted where no Express Direction for Division — Immediate Gift.**]—Bequest of residue to A. and B. equally; and in case they should be married at the time it became payable, to be paid for her separate use, "and her receipt alone for the same to be a sufficient discharge." There was a gift over to C. and D., in case A. and B. should die without leaving issue:—Held, that this case was an exception to the general rule, and that the gift over was confined to A. and B. dying without leaving issue in the life of the testator. *Anstice, In re*, 23 Beav. 135.

Bequest to four persons equally; but in case any one should die leaving lawful issue, then to his sons at twenty-one, &c.; but in case any of the four should die without leaving lawful issue, then his share should go to the others or other of them, and to A., and to the respective issue of such one or more of them, including A., as should die leaving issue, such issue taking the respective shares which the parent would have taken if living. One of the four legatees died in the lifetime of the testatrix without ever having been married; A. survived the testatrix:—Held, that there was no lapse, and that A. took an absolute interest in a share of the deceased legatee's bequest. *Johnston* v. *Antrobus*, 21 Beav. 556.

Gift over, after an absolute bequest, in the event of death without leaving issue surviving, construed, upon the context, such a death under twenty-one. *Brotherton* v. *Bury*, 18 Beav. 65; 2 W. R. 46.

A testator gave his personal estate, and the produce of his real estate (which was to be sold on his youngest child attaining twenty-one), between his children equally. There was a gift over, if any child should die after the testator's decease, without leaving issue surviving him (omitting the words "under twenty-one"). There was a maintenance clause, out of interest, and an advancement clause, out of capital, until the "shares should become payable and transferable," and which referred to the time when the legatees would be absolutely entitled to receive, as being on attaining twenty-one. A child died after attaining twenty-one, without leaving issue:—Held, that his share did not go over, but belonged to his representative. *Ib.*

A brother gave all his personal estate to his two sisters, one of whom was twenty-five years old, and the other under that age; and he directed that the former should have the immediate control of her share, and the younger upon the age of twenty-five years. And "in case of the death of either of my sisters before me, or before marrying and having children, the whole of the property to go to the survivor":—Held, that the younger sister who after the testator's death attained twenty-five, but had not married and had children, took, at twenty-five, an absolute and indefeasible interest in her share. *Clark* v. *Henry*, 24 L. T. 256. Affirmed, 40 L. J., Ch. 377; L. R. 6 Ch. 588; 19 W. R. 706.

A father gave his residuary estate upon trust to be divided equally amongst all his children in equal shares and proportions, with benefit of survivorship in case of the deaths of any of his children without leaving lawful issue, his, her or their respective executors, administrators and assigns:—Held, that death without issue meant death in the testator's lifetime; that there was no implied gift to the issue of a child dying between the date of the will and the testator's death; and that the children who survived the testator took absolutely. *Smaling, In re, Johnson* v. *Smaling*, 26 W. R. 231.

Residuary bequest to two grand-daughters of testator "in trust till they come of age or marry, the interest to be received in the meantime, and paid to them; but if one of them should die before marriage, or twenty-one, then to survivor and her children; but if both should die leaving no issue, then I give them power to leave it by will as they should think proper." One legatee married, and the other attained twenty-one:—Held, that both acquired vested interests. *Thackeray* v. *Hampson*, 2 Sim. & S. 214; 25 R. R. 186. *S. C.*, nom. *Thackeray* v. *Dorrien*, 3 L. J. (o.s.) Ch. 89.

And see *Ware* v. *Watson*, ante, cols. 962–3; *Cuming* v. *Boswell*, post, col. 1743; *Hood* v. *Hood*, ante, col. 1010; *Apsey* v. *Apsey*, post, col. 1380.

—— **Future Gift after Prior Interest.**]—A testator gave a fund, subject to the life interest of his wife, to A., B. and C., equally to be divided between them; "but in the case of the decease of C. without leaving lawful issue," he gave one-third between A. and B.:—Held, that upon the decease of the wife C., who was then living, became absolutely entitled to one-third of the fund. *Barker* v. *Cocks*, 6 Beav. 82.

Devise of copyholds in trust for the testatrix's sisters E. and N. for life, and after the death of each her moiety to go to her children, to be equally divided between them and their heirs and assigns respectively, with benefit of survivorship as tenants in common in fee, and not by way of entail; and if all of them should die without lawful issue before attaining twenty-one, then the moiety of the children so dying to go to the children of the other sister, the moiety of the children of N. to those of E. in the one case, and, in the other, the moiety of the children of E. to those of N. N. had two children only, who were born after the death of the testatrix, and died infants:—Held, the children of N. took an absolute fee. *Grimshaw* v. *Howarth*, 1 Jur. 558.

A testator, after directing the interest of a sum of stock to be paid to his widow for her life, and after her death to be applied towards the bringing up of his three children until they attained twenty-one years, proceeded: "And upon their severally attaining twenty-one years, after the decease of my wife, to pay, transmit and divide the principal sum unto and amongst my three children in equal shares; and in case all my said three children should die without leaving lawful issue in the lifetime of my wife, then I give and bequeath the same unto my wife absolutely; and if either of my said sons shall depart this life leaving lawful issue, such issue shall have and be entitled to such share as their respective parents would have had or be entitled to." T., a son of the testator, died in the lifetime of the testator's widow, having attained twenty-one, and leaving lawful issue:—Held, that the gift over to the issue of T. had taken effect, and that T. had not acquired an absolute vested interest so as to pass to his administrator; held, also, that as to the share of E. R., a son of the testator, who had died under twenty-one, there had been an intestacy. *Rowell* v. *Saggers*, 1 W. R. 517.

Devise to A. for life, with remainder to B. in fee; but if B. should die leaving issue, then to his children. B. survived A., and died leaving children:—Held, that the gift to his children did not take effect. *Slaney* v. *Slaney*, 33 Beav. 631.

A testator devised the residue of his estate and effects to trustees, upon trust to permit his wife to receive thereout during her life 40*l.* per annum, and after her decease he gave and bequeathed his residuary estate and effects equally between and amongst his three children and their respective heirs, executors, administrators and assigns, share and share alike; and in the event of the death of any or either of his children without leaving lawful issue, the share or shares of him or them so dying without leaving such lawful issue should go and belong to the survivors or survivor of his children, and to the child or children of any deceased child or children which might then be dead, so that the child or children of any deceased child or children should take only the share or shares absolutely which his, her or their parents or parent were or was entitled to or interested in during his, her or their lifetime or respective lifetimes. The widow having died:—Held, that the three children who were living at her decease were entitled absolutely, and not for life only, to equal shares of the property. *Allen, In re*, 3 Drew. 380; 25 L. J., Ch. 286; 4 W. R. 137.

A testator directed his real estate to be sold on the death of his widow, and the produce paid to his six children and the issue of such of them as should die leaving issue equally, "the issue of any such children being respectively entitled amongst them to such share only as their parents would have been entitled to if living." The will contained a gift over in case of any of the children dying in his lifetime or after his decease without having a child:—Held, that a child who survived the widow became absolutely entitled, and that her children took nothing. *Wood* v. *Wood*, 35 Beav. 587.

A mother devised lands to her daughter S. for life, with remainder to her husband for life, and after the death of the survivor of them to all the children of S. by her then husband who should be living at the testatrix's death as tenants in common in fee, and added a proviso giving over the shares of any of the children of S. who should "depart this life without leaving lawful issue" to the survivors or survivor of the children that should leave such lawful issue as tenants in common in fee:—Held, that the words "depart this life without leaving lawful issue" must be restricted to death without issue at the period of distribution, viz. the death of the surviving tenant for life. *Besant* v. *Cox*, 6 Ch. D. 604; 25 W. R. 789.

A husband gave the income of 4,000*l.* to his wife, which he directed after her death to fall into the residue. He gave his residue to his four sons nominatim, with benefit of survivorship; but if they should leave issue, their shares were to go over to their issue:—Held, that the 4,000*l.* belonged absolutely to the sons who were alive at the death of the widow, and the issue of such as were dead. *Hill, In re*, 40 L. J., Ch. 594; L. R. 12 Eq. 302; 24 L. T. 494; 19 W. R. 740.

And see *Johnson* v. *Cope*, ante, col. 994, and *Da Costa* v. *Keir*, post, col. 1105.

9. Gifts Over.

a. On Death without, or without having, Children or Issue.

Construction when Varied.]—The words "if A. die without having any child or children" construed "without having had any child," and

the words "should A. die without any child or children" construed "any child surviving him." *Jeffreys* v. *Conner*, 28 Beav. 328; 6 Jur. (N.S.) 986; 8 W. R. 572.

The duty of the court is, if possible, to give effect to every part of a will; and, therefore, where a testator gave property to his son and niece, and directed that if his son should die without having any child or children, the whole property should go to his daughter and niece equally; and that if his son and daughter should die without any child or children, then the whole property should go to his niece:—Held, that the words in the first clause, "die without having any child or children," must be construed as equivalent to "die without having had any child or children," so that the testator's son having had several children, but who were all dead, the gift over did not take effect; and that the words in the second clause, "die without any child or children," meant without any children living at the death, so that the gift over to the niece would only take effect if the son should die without leaving a child living at his death. *Ib.*

Absolute Interest.]—Residuary bequest to A. in case she should have legitimate children, in failure of which to go over. A., having only one child born alive, who died before her, entitled absolutely. *Wall* v. *Tomlinson*, 16 Ves. 413; 10 R. R. 212.

Bequest to testator's three children, to be equally divided between them, share and share alike; but in case of the death of any without being married and having children, the share of such child so dying to be divided between the surviving children; and so if one should only survive. One having been married, and having had a child, her share vested. *Bell* v. *Phyn*, 7 Ves. 453; 6 R. R. 148.

A testator bequeathed to his daughter an annuity of 100*l.* while she remained single, but on her marriage, and on some adequate provision made, and which he directed to be made by settlement for her life, and to the use of her issue, he bequeathed to and for her use 2,500*l.*, and in default of such issue, he bequeathed that sum for the benefit of his grandchildren who should be then living. The daughter married, but no settlement was made, and the annuity continued to be paid to her. She had an only child, who died in her lifetime under age:—Held, that the gift over did not take effect, and that her personal representative was entitled to the 2,500*l.* *Findon* v. *Findon*, 1 De G. & J. 380; 26 L. J., Ch. 561; 5 W. R. 794. Affirming 24 Beav. 83.

——**Vested Interest subject to being Divested.**]—Bequest to H. D. for his own use, and in case he should die in the testator's lifetime or afterwards without having any child or children, then over. H. D. survived the testator, and died without having had a child:—Held, that the gift over took effect. *Stone* v. *Maule*, 2 Sim. 490; 29 R. R. 150.

A testator directed the interest of his residuary estate "to be divided between his four sons, and at the decease of either without lawful issue, such share to revert to the remainder then living, or their child or children":—Held, that each of the four sons took an absolute interest, subject to being divested in the event of his death without issue. *Dowling* v. *Dowling*, L. R. 1 Ch. 612; 12 Jur. (N.S.) 720; 15 L. T. 152; 14 W. R. 1003.

A devise of real and personal property to the testator's unborn child, and in case of its death under age, to be equally divided between the children, male and female, of testator's two married daughters, L. W. and E. H., when they should arrive at their respective ages; and the interest of that part to the children of E. H. during such nonage to go to the sole and private use of B.; and in case she should not have children, such share to the children of L. W. share and share alike in manner aforesaid. The posthumous child died about a year after its birth, at which time L. W. had several children, and E. H. had not any. L. W. and her husband filed a bill claiming the whole of testator's fortune which had vested in his posthumous child:—Held, that E. H. was entitled to the interest of a moiety of her father's estate, and that on her death without issue the moiety should go to her sister's children. *Williams* v. *Hopkins*, Wal. Lyn. 285.

S. gives the residue of his estate to his daughter E. for life, and after her death to be equally divided among her children when the youngest should attain twenty-one; but if his daughter should die without any child, or the youngest should not arrive at twenty-one, and none of them should have left lawful issue, then he gave the residue to other persons. E. had only one daughter, who married and had four children, but both she and all the children died in the lifetime of E.:—Held, that upon the death of E., without any child then living, the devise took effect. *Thicknesse* v. *Liege*, 3 Bro. P. C. 365.

One devises a term for years to A., and if A. dies without a child, then to B.; this is a good devise to B. upon such contingency. *Studholme* v. *Hodgson*, 3 P. Wms. 304.

Though the freeholds of lands cannot be kept in abeyance, but must vest in somebody, yet there is no such rule with regard to personal estates which may remain in suspense and wait till a contingency happens. *Id.* 305.

Testator devised a term for years, and all his personal estate, to A., an infant, and if A. died during his infancy, and his mother should die without any other child, then to B. A. died during his infancy; though the mother was living, and might have a child, yet the court aided B., the devisee over, by directing an account and discovery of the estate, in order to secure it in case the contingency should happen. *Id.* 300.

b. On Death without leaving Children or Issue.

"Leaving" construed "Having."]—Bequest upon trust to pay and divide equally to and amongst all the children of testator's daughter when the youngest should attain twenty-one, followed by a gift over in case of the death of his daughter "without leaving any child or children":—Held, the youngest child having attained twenty-one, that the fund was divisible equally amongst all the children, and that such interests were not defeasible in the event of the death of the testator's daughter without leaving any child or children. *Kennedy* v. *Sedgwick*, 3 K. & J. 540.

In such a case the gift over being contradictory if the word "leaving" be construed literally,

that word will be read as equivalent to "having." *Ib.*

Devise to A. for life; remainder to all and every the children of her body, their heirs and assigns, as tenants in common: but in case A. should die without leaving any issue of her body, then over. A. had two children, both of whom died before her. One died leaving a child who survived A.; the other died without issue:—Held, that the word "leaving" meant "having"; and that the two children of A. took vested interests as tenants in common in fee. *Hooper, Ex parte*, 1 Drew. 264. And see *Tarbuck* v. *Tarbuck*, 4 L. J., Ch. 129.

In a will by a father giving a life interest in a fund to his daughter, with words importing the gift of a vested interest in remainder after her decease to her child and children, followed by these words: "In case the said [the daughter] shall leave no child or children, or having such, all of them shall happen to die under age without issue," then a gift over in that event:—Held, that it requires very strong words to take away the effect of a prior clear vested gift, and notwithstanding the ordinary sense of "leave," that it was the testator's intention to give the fund over only in case the previous limitations should fail, and that the fund vested absolutely in the only child of the daughter, who died in the lifetime of its mother. *Thompson's Trusts, In re*, 5 De G. & Sm. 667; 22 L. J., Ch. 273; 17 Jur. 16.

Bequest to A. for life and to her child, &c., at twenty-one, is a vested interest at twenty-one, and not divested if child should attain twenty-one, and die in life of A., by subsequent expression in will, that in case A. should die not leaving child, &c., or leaving child, such child should die before twenty-one, gift over. *Maitland* v. *Chalie*, 6 Madd. 243; 23 R. R. 209.

A. devised freehold property to trustees to the use of his daughter for life, and after her decease for such one or more of her children or his, her or their issue as she should appoint by will, and in default of appointment, "in trust for all and every of her children, and the heirs of their body or bodies lawfully begotten, in equal shares and proportions; and in case of the death of my daughter without leaving any child her surviving, and in the event of such child or children her surviving dying without leaving any issue of his or her body, then in trust for my own right heirs for ever." The daughter had one son, who died in her lifetime:—Held, that her son took a vested estate tail under the will, and not an estate tail contingent upon his surviving his mother. *Richards* v. *Davies*, 32 L. J., C. P. 3; 7 L. T. 357; 11 W. R. 38.

Bequest to trustees, upon trust for the six children (by name) of L. F., deceased, for their respective lives, and the capital equally among the children of each tenant for life, per stirpes, to be paid at twenty-one or marriage; and if any of said six children should die without leaving any children or child, then over:—Held, a vested indefeasible interest in each child of a tenant for life on attaining twenty-one. *Casamajor* v. *Strode*, 8 Jur. 14.

Testatrix bequeathed her residuary estate to trustees in trust, to pay and divide the interest between her two nieces equally during their lives, and after their deaths to pay and divide the principal unto and amongst the lawful issue of her said nieces, or of such of them as should leave issue equally, per stirpes, and not per capita; and in default of such issue, to pay the interest to certain other persons for their lives, &c. One of the nieces died, having had seven children, five only of whom survived her:—Held, that those five became entitled on their mother's death to her moiety of the residue. *Cross* v. *Cross*, 7 Sim. 201; 4 L. J., Ch. 38.

A father gave a fund to trustees to pay the dividends to his daughter for life, and after her death to transfer the principal equally amongst all the children of his daughter, whether by her present putative husband, or by any other person whom she might marry, who should attain twenty-one, their executors, administrators and assigns, but in case his daughter should die leaving no issue, then to the testator's other children. Long before the date of the will the daughter was, with the testator's knowledge, living with a gentleman to whom she was afterwards married, and she had one son by that person, who was born four years before the date of the will, and was known by the testator to be illegitimate, and acknowledged by him as his grandson. The daughter being sixty-seven years of age, and having had no other child, and her husband being dead:—Held, that the illegitimate son was entitled absolutely to the capital, and the word "leaving" being construed "having," and he being over twenty-one, the money was ordered to be paid to the mother and son, who petitioned for payment to them jointly. *Brown, In re*, 43 L. J., Ch. 84; L. R. 16 Eq. 239; 28 L. T. 616; 21 W. R. 721.

A testator gave the residue of his estate to trustees to invest and pay one-fourth of the income to each of his four sisters for life, and when and so soon as any of them should die without leaving issue, then he directed that the share in the trust moneys of her or them so dying without issue should be divisible among his surviving sisters, and the issue of any who might then be dead, in equal shares, but such issue to take only their respective parent's share; and when and as soon as any of his sisters should die and leave issue, then upon trust to call in the share of her or them so dying leaving issue, and pay the same unto such respective issue, if more than one child, equally:—Held, that issue here meant children, and that leaving issue meant having had issue. *Bryden* v. *Willett*, L. R. 7 Eq. 472. Affirmed, 20 L. T. 502; 17 W. R. 336.

One of the testator's sisters died having had two children, one of whom survived her mother, and the other died in her mother's lifetime, leaving a family:—Held, that a moiety of her mother's share vested in the daughter who died in her lifetime, and consequently passed to her family. *Ib.*

A testator devised specific real estate to trustees and their heirs upon trust for his daughter R. for life, and after her decease he gave the same unto and equally between all and every her children, if more than one, as tenants in common, their heirs and assigns; and if but one such child, to his or her heirs and assigns; and in case his daughter should depart this life under twenty-one, or afterwards, "without leaving any child or children," the testator gave the hereditaments and premises to his son C., his heirs and assigns:—Held, that the children of R. took at their births indefeasible interests in fee, in remainder expectant on the death of their mother. *White* v. *Hill*, L. R. 4 Eq. 265; 16 L. T. 821.

A testatrix devised and bequeathed the residue of her real and personal estate to trustees, with a direction that they should receive the rents, and invest the same until a daughter should attain her age of twenty-one, and then "to pay the same to and for her sole and separate use and benefit. But if my daughter should die without leaving any lawful child or children, then I direct the same to be paid to the lawful children or child of my brother, if more than one, in equal shares" :—Held, that the gift was an absolute gift of the real and personal estate to the daughter, defeasible in the event of her dying without children. *Drake* v. *Collins*, 20 L. T. 970.

Devise to A. for life, remainder to her first child, and his or her heirs; but if such child should die under twenty-one without leaving issue, in like manner to every other child of A.; for in case of issue, it was the testator's will that they should inherit the estate; but in case A. should die without leaving issue of her body, or having such issue, such issue should die under twenty-one without leaving issue, then he devised the estate over. A. never had issue: —Held, that she took a life estate only, and that the devise over took effect. *Goymour* v. *Pigge*, 7 Beav. 475; 13 L. J., Ch. 322; 8 Jur. 526.

"Leaving" construed Strictly—Where Intention sufficiently Expressed.]—Bequest upon trust for A. B. for life, and in case he should leave any child or children, upon trust for such child or children, to be payable at twenty-one, and the share of each child to be a vested interest; and in case A. B. should not leave any child, then upon trust for C. D. for life; and after the death of C. D. and of A. B. without issue as aforesaid, then over. A. B. survived the testator, and had one child only, who attained twenty-one, and died in the lifetime of A. B., leaving a child, who survived A. B.:—Held, that upon the death of A. B. the gift over took effect. *Bythesea* v. *Bythesea*, 17 Jur. 645. Affirmed, 23 L. J., Ch. 1004; 2 W. R. 667.

A testator devised dwelling-houses to trustees for the life of his niece M., to permit her to take the rents and profits of the same during her life, and from and immediately after the decease of his niece unto her issue, to be equally divided amongst them at their respective ages of twenty-one or days of marriage, and to the heirs and assigns of such issue; and if any of such issue should be under twenty-one at the decease of his niece he directed an equal share of the rents and profits to be appropriated towards the education and maintenance of such issue as should not have attained twenty-one at the decease of his niece; and if his niece should die leaving only one child, then to such only child, and his or her heirs, as soon as he or she should attain twenty-one; but in case his niece should die without leaving any issue of her body at the time of her decease, or in case all such issue should die under twenty-one and unmarried, then to his brother's children. The niece married, and had one daughter, who attained twenty-one, but died in the lifetime of her mother, unmarried:—Held, that, if an estate in fee in remainder vested in her daughter upon her attaining twenty-one, such estate was divested upon her death in the lifetime of her mother. *Young* v. *Turner*, 1 B. & S. 550; 30 L. J., Q. B. 268; 8 Jur. (N.S.) 52; 5 L. T. 56.

Bequest of 4,000*l.* to A. for life, and afterwards, if she shall "leave" any children, upon trust to divide it equally amongst all "such children," to be payable and become vested interests at twenty-one; and in case there shall be only one "such child" who shall attain twenty-one, then to pay it unto such only child. There was a power of maintenance during minority, and also of advancement, not exceeding "such presumptive share," and a gift over, if the daughter should "have" no child who should arrive at twenty-one:—Held, that a daughter of A. who attained twenty-one and married, but died in the life of A., took no share. *Sheffield* v. *Kennett*, 27 Beav. 207; 4 De G. & J. 593.

By a marriage settlement a fund was settled, after the death of the survivor of the husband and wife, in trust for the children then living, to be paid at twenty-one, and in case the parents should die "without leaving any lawful issue," then as the husband should appoint; and in default, "in case there should be no child or children as aforesaid," over. Children attained twenty-one, but they all died in the life of their parents, leaving issue who survived the parents:—Held, that the gift over took effect. *Heath*, *In re*, 23 Beav. 193.

Bequest to A. for life, and after the death of A., then if A. shall leave issue, upon trust to transfer the share of A. to such issue equally if more than one, when and so often as they shall severally and respectively attain twenty-one, with a trust for maintenance in the meantime; and in case of the death of A. leaving no issue, or if A. should happen to leave issue, then upon the death of "such" issue under twenty-one, over:—Held, that the contingency of surviving A. was part of the gift to A.'s issue, and that therefore three children of A. who attained twenty-one, but died in her lifetime, took nothing; but that one child, who alone survived A., took the whole. *Watson*, *In re*, 39 L. J., Ch. 770; L. R. 10 Eq. 36; 18 W. R. 642.

A testator bequeathed to each of his five daughters 400*l.* per annum, to be payable half-yearly during the term of their natural lives; and after their respective decease, he gave the same to their children respectively, share and share alike, such children not to be entitled to more than their deceased parent's share; and in case any or either of these daughters should die without issue, he directed such annuity to cease, and to fall into the residue of his estate: —Held, upon the whole context of the will, that a daughter's children, who died in the lifetime of their mother, were not entitled to any share, and that, on the death of a daughter who had issue, but left none living at her death, the capital of the fund producing her annuity fell into the residue. *Hedges* v. *Harpur*, 3 De G. & J. 129; 27 L. J., Ch. 742; 4 Jur. (N.S.) 1209; 6 W. R. 842.

Gift of residue on trust to pay the dividends to the testatrix's son for life (except what was required for education of her son's children); and should her son die before all or any of his children should attain twenty-one, she wished each child to receive their share on attaining twenty-one; but should all his children die before himself, at his death, then over:—Held, that a child who died an infant, in the lifetime of the son, had not acquired a transmissible interest. *Chadwick* v. *Greenall*, 3 Giff. 221; 7 Jur. (N.S.) 950; 5 L. T. 232.

The rule in *Howgrave* v. *Cartier* (3 V. & B. 79) in favour of putting on a settlement or will

making a provision for a family such a construction as will give the children indefeasible interests on their attaining twenty-one, is only a rule of construction to be applied in construing ambiguous words, and not a positive rule which will modify the effect of plain words. *Hamlet, In re, Stephen* v. *Cunningham*, 58 L. J., Ch. 242; 39 Ch. D. 426; 59 L. T. 745; 37 W. R. 245—C. A.

A testator gave his property to his daughter for life, and then to her children, who being sons should attain twenty-one, or being daughters attain that age or marry. "And in case my said daughter shall happen to die without leaving any child or children her surviving, or leaving such, they shall all die without having obtained a vested interest in the said trust moneys, and without leaving any issue them, him or her surviving," then over to two cousins. The daughter had children, some of whom attained twenty-one, but all died in her lifetime:—Held, that the gift over took effect, its terms being unambiguous, and the event to which it referred having happened. *Ib.*

A testator bequeathed personal estate on trust after the death of W. K. B. for W. R. B., and in case W. R. B. died without leaving issue male, for J. B. W. R. B. died in the lifetime of W. K. B., having had only one son, who died an infant in his father's lifetime:—Held, that the words "die without leaving issue male" must be construed as "die without leaving issue male living at the death," and not as "die without having had issue male," and therefore that the gift over to J. B. took effect. *White* v. *Hight* (12 Ch. D. 751; 41 L. T. 17) overruled. *Ball, In re, Slattery* v. *Ball*, 58 L. J., Ch. 232; 40 Ch. D. 11; 59 L. T. 800; 37 W. R. 37—C. A.

Testator gave all his property to his daughter, and if she "should die before the age of twenty-one, and at any time without issue," over. The daughter attained twenty-one, married and had a child:—Held, that "without issue" meant "without leaving issue alive at the time of her death." *Clay* v. *Coles*, 57 L. T. 682.

The words "without leaving" may be read "without having had" where the result of so doing is to make the whole instrument consistent, and where the contrary construction would have the effect of divesting a previously vested gift in a manner inconsistent with the expressed intention of the testator; but they will not be so read for the purpose of altering the event upon which the divesting of a gift previously vested is to take place. *Armstrong* v. *Armstrong*, 21 L. R., Ir. 114—C. A.

Testator devised real estate to "my son G. A. . . . Should my son G. and his wife E. die leaving no family, his share to revert to my two daughters D. and S." G. A. had several children, all of whom died in his lifetime without issue. By his will he devised and bequeathed all the real and personal estate to which he should be entitled at his decease to E.:—Held, that, upon G. A.'s death, E. took a life estate only in the property, and D. and S. the reversion in fee. *White* v. *Hight* (12 Ch. D. 751; 41 L. T. 17) not followed. *Ib.*

—— **Where Subject Matter involves Personal Enjoyment—Annuity.**]—The principle of construction whereby, in the case of a gift over on death without "leaving" children, the word "leaving" is construed "having," so as not to take away an interest previously vested, will not readily be applied where the subject-matter of gift is an annuity, which ex vi termini involves the notion of personal enjoyment. *Hemingway, In re, James* v. *Dawson*, 60 L. J., Ch. 85; 45 Ch. D. 453; 63 L. T. 218; 39 W. R. 4.

A testator gave to his daughter L. an annuity during her life, payable out of the rents of leasehold property held for an unexpired term of about sixty years, and after the death of L. directed that the annuity should be payable half-yearly to and amongst such of her children as being sons should attain twenty-one, or being daughters should attain that age or marry, and if there should be but one such child, should be payable and paid to such only child, and in the event of the death of L. "without leaving" any such child, the testator gave the annuity which should fail by such death unto and among the survivors of the testator's children and grandchildren. The testator directed that the leaseholds should not be sold, but be retained by his trustees, and the rents applied in payment of this and other annuities. L. survived the testator, and had one child who attained twenty-one, but died in the lifetime of L.:—Held, that the word "leaving" must be read in its literal sense, and that therefore the representative of the deceased child was not entitled to the annuity, but the gift over took effect. *Ib.*

c. On Death before Legacy is Vested.

"Vested" construed "Vested in Interest."]—In a gift over on the death of A. before the estate became vested in him, the word "vested" means vested in interest and not vested in possession. *Arnold, In re*, 33 Beav. 163; 9 Jur. (N.S.) 1186; 9 L. T. 530; 12 W. R. 4.

The word "vested," used in a gift over, must be construed "vested in interest," and not "vested in possession," unless the rest of the will and the context require that it should receive the latter construction. *Ib.*

Where residuary real and personal estate was directed to be all converted into personalty, and to be applied in payment of debts, &c., and the residue to be divided among testator's children, J., M. and C., and grandchild R., the share of M. to be paid as soon after his decease as convenient, and the shares of C. and R. at the ages of twenty-two and twenty-one respectively; and in case any of his children should die before their shares became so vested as aforesaid, the shares to go to the survivors equally; and if but one, the whole to that one. J. and C. died in testator's lifetime, C. under twenty-two, and R. survived testator, but died under twenty-one:—Held, first, that "vested" must mean "payable," and that the original shares of the deceased children survived to the survivors; and, secondly, that "whole" meant the whole residue, and, therefore, that the accruing as well as original shares devolved to M. as sole survivor. *Sillick* v. *Booth*, 1 Y. & C. C. C. 121; 6 Jur. 142.

Devise before 1837 to the testator's daughter K. for life; remainder to the use of all and every the daughter and daughters of the body of M., as tenants in common; and in default of such issue, to A. in fee. By a codicil the testator recited that he had devised the reversion in fee in several estates expectant on the decease of his several daughters (including H.), to his son A.; and also that he had devised other estates to trustees, to the use of A., his heirs and assigns, until he attained twenty-five, and thereupon to

him, his heirs and assigns for ever; and declared, that in case A. should die without issue, "and before the several estates should become vested in him by virtue of the said several limitations," then over. A. died after the testator's death, and without issue, and subsequently H. also died unmarried:—Held, that the word "vested" must be construed "vested in interest," and not "vested in possession." *Richardson* v. *Power*, 19 C. B. (N.S.) 780; 35 L. J., C. P. 44; 11 Jur. (N.S.) 739; 13 W. R. 1104.

Testator gave the residue of his real and personal estate to trustees in trust for his three nephews, their heirs, &c., as tenants in common, with cross-remainders and benefit of survivorship in case any of them should die before their shares in the trust property should become vested in them, which he desired might not be shared until his youngest nephew should attain twenty-four; and he directed his trustees to maintain and educate them out of the income of the property during their minorities; the nephews were infants at the testator's death:—Held, nevertheless, that they took vested interests under the will. *Parkin* v. *Hodgkinson*, 15 Sim. 293.

—— **Construed "Vested in Possession."**]—A testator gave his residuary personal estate to trustees to pay the interest to his wife for life, and after her decease he gave four-sixths of the capital to each of his four brothers and sisters, and in case of the death of any or either of the legatees in his lifetime, the sixth part of him or her so dying to go to his or her children. He then gave the remaining two-sixths to the children of a deceased brother and sister: provided always, that in case of the death of any or either of his legatees before their respective shares should have become vested, the share or shares of him or her so dying were to sink into the residue, and go to the survivors as if the legatees so dying had not been named, or had never existed. One of the legatees survived the testator, but died in the lifetime of his widow, the tenant for life:—Held, the period of vesting was the death of the tenant for life, and that her representatives were not entitled to her share, but that it sank into the residue as if she had not existed. *Morris, In re*, 26 L. J., Ch. 688; 5 W. R. 423.

A testator gave all his real and personal estate to trustees to sell and divide the proceeds into four parts, and as to each of three of the fourths upon trust for one of the testator's children for life, with remainders to such of his or her children as being a son attained twenty-two, or died under age leaving issue, or being a daughter attained that age or married, equally, with benefit of survivorship. As to the other fourth, the son being dead, the life estate was omitted; and there was a direction, that if all those constituting a set or class of beneficiaries died without acquiring a vested interest in the capital, the share, extinguished or lapsed, should go equally amongst the surviving sets or classes. A son died intestate and without issue:—Held, that the gift over took effect. *Beardsley* v. *Beynon*, 12 L. T. 698; 13 W. R. 831.

A testator, by his will, directed a fund to be set apart to answer an annuity which he directed to be paid to his widow. After her death he directed the fund to form part of his residuary estate; and he bequeathed his residuary estate to all his children equally, to be divided between them; with a proviso that if any child should die, either in his lifetime or after his decease, and before the part or share bequeathed to such child should become a vested interest, without leaving issue, then such share should go to the survivors; but in case any child should die leaving issue, then such issue should take their parents' share:—Held, that the second branch of the proviso must be read in connection with the first, and that in both the death contemplated was a death before the share vested in possession. *King* v. *Cullen*, 2 De G. & Sm. 252.

A testatrix directed that her trustees should stand possessed of the residue of her estate as to one moiety and the dividends, to pay the same to her daughter A. for life, and then as to this moiety and the dividends and accumulations, until it should be distributable, to pay the same to the children of A. who should survive her, at twenty-one, with benefit of accruer and survivorship; and she gave the other moiety in similar terms to her daughter B.; and in case, at the decease of either of her daughters, there should be no children of such daughter who should have lived to attain a vested interest, then the moiety of such daughter so dying and the dividends and accumulations to be held for the other daughter for life, and her children afterwards. And if upon the death of the survivor of the two daughters there should be no child or children of either who should have lived to attain a vested interest in the two moieties, then the entirety of the two moieties and the dividends and accumulations to be held for the testatrix's six nephews and nieces on attaining twenty-one. A. died before the testatrix, and she then made a codicil, directing that her moiety should go to B. in the same manner as it would have gone to A. if she had lived; and she gave an annuity for the maintenance of the only daughter of A. until she should attain twenty-one. B. died, leaving six children infants:—Held, that the interest of the six grandchildren of the testatrix was not vested until they attained twenty-one, and the dividends must be accumulated, and that the nephews and nieces were not entitled under the gift over until default in the attainment of twenty-one by the grandchildren. *Bull* v. *Jones*, 31 L. J., Ch. 858; 10 W. R. 820. And see *Gaitskell, In re*, ante, col. 1054; *Young* v. *Robertson*, ante, col. 966.

d. On Death before Legacy Payable.

Immediate Gift.]—A testator declared that the trustees of his will should stand possessed of the residue of the money to arise from his real and personal estate upon trust, "for all and every my first cousins-german, to be divided equally amongst them, share and share alike. And in case any of my said cousins shall depart this life before their respective shares shall become due or payable, leaving any lawful issue, I direct that such issue shall have the same share or shares of the same residue as his, her or their parent or parents would have been entitled to if living." The testator had several first cousins-german living at the date of his will, two of whom died in his lifetime; the others survived him. One of those who died left seven children, the other left no issue:—Held, first, that the words "due or payable" referred to the time of the testator's death; secondly, that the issue of the deceased cousin were entitled to their parent's share; thirdly, that the share of the cousin who died without issue did not lapse. *Coort* v. *Winder*, 8 Jur. 770.

A. bequeathed pecuniary legacies to two

nephews and a niece by name, if they survived him and attained twenty-one, when the nephews' legacies were to be paid. In case of the death of either of the nephews, or of the niece, leaving issue, such issue to take the parents' legacy as the parents should by will appoint; but in case of the death of either of the nephews or the niece before his or her legacy became payable, the legacy to go to the survivors. During the minorities of the legatees the trustees were to apply the income of the legacies for their maintenance and education. The legacy of the niece, and any share she might acquire by the death of her brothers, or either of them, were to be settled for her separate use:—Held, that the word paid must be construed as vested, or payable, and that the executory gift to the issue would take effect in the event of the parent dying after attaining twenty-one. *Martineau* v. *Rogers*, 8 De G. M. & G. 328; 25 L. J., Ch. 398; 4 W. R. 502.

Future Gift after Life Interest.]—Real and personal estate were given upon trust, during the life of A., out of the income, to pay A. 200*l.* a year, and one-third of the residue to B.; and on the death of A., to sell and pay one-third to B., then a gift over, on the death of B., before his share should "become due and payable." B. died in the life of A.:—Held, that the gift over took effect. *Creswick* v. *Gaskell*, 16 Beav. 577.

A husband by his will gave his real and personal estate to trustees upon trust for his wife for life, and then to stand possessed of the same for all and every of his children, share and share alike, until his youngest child should attain the age of twenty-one, and upon his youngest child attaining such age, then upon trust for all his children, share and share alike. He then directed that if any of his children should die before his, her or their share or shares should become transferable and payable, without leaving issue, then the share or shares of the child or children so dying should go over to the survivors; but in case any of his children should die before his, her or their share or shares should become payable, leaving issue, then the trustees were directed to transfer and pay the share or shares of such deceased child or children unto his, her or their issue, share and share alike, when they should attain twenty-one:—Held, that the substitutionary gift to the issue of deceased children was sufficient to divest the share of a child who attained twenty-one, but died in the lifetime of the testator's widow, the tenant for life. *Chell* v. *Chell*, 23 W. R. 252.

Gift of residue in trust for wife during widowhood, remainder among five children or the survivor at such age as wife should appoint, in default at twenty-one; but share of child dying before it should become payable, to issue of child:—Held, that the issue of a child who attained twenty-one and died in the lifetime of the wife was entitled. *Hind* v. *Selby*, 22 Beav. 373.

The rule in *Emperor* v. *Rolfe* (1 Ves. Sen. 208) applies to the will of a person in loco parentis. The court will apply this rule in cases where the language of the testator does not necessarily imply an intention to benefit children dying before the tenant for life. *Jackson* v. *Dover*, 4 N. R. 136; 10 Jur. (N.S.) 631; 10 L. T. 489; 12 W. R. 855. And see *Crowder* v. *Stone*, ante, col. 958.

"Payable" under Appointment.]—A testator gave the interest of a fund to his widow for life, with a power of appointment amongst all his children, and in default of appointment amongst all such children, with a gift over to the widow, in case all the children should die before their shares should become payable. The widow appointed the fund to her two children, one of whom died in her lifetime:—Held, that the survivor took the whole fund. *Bielefield* v. *Record*, 2 Sim. 354.

Effect on Vesting of Interest—"Payable" construed "Vested."]—Where there is a gift for life, followed by a gift in remainder, which is to vest upon the attainment of a particular age, or any other event personal to the legatee in remainder, with a gift over in the event of the latter dying before the legacy is payable or receivable, or vested in possession, or the like, in any form of expression that signifies "paid" or "received," all such expressions are to be read as equivalent to "vested," and refer to the period at which the property is to vest. *West* v. *Miller*, 37 L. J., Ch. 423; L. R. 6 Eq. 59; 18 L. T. 429; 16 W. R. 602.

A testator bequeathed his personalty to trustees, to invest the same and pay the income to his wife, until his daughter should attain twenty-one, and as soon as she should attain that age then to call in all invested moneys, and divide the same between the daughter and his son; and in case of the death of either without issue before their respective estates or interests should be received, then to pay the estate or interest of him or her so dying to the survivor. But in case of the death of either previous to the time aforesaid leaving issue, then to such issue, with other remainders over. By a codicil, he directed the investments and payments to his wife to be continued during her life, though she might live beyond the daughter's attainment of the age of twenty-one; and, reciting that his son was dead, he gave the share and interest, which he would have taken, to the daughter, to be paid and applied along with her own. The daughter survived the testator and attained twenty-one, but died in the lifetime of his wife, leaving a child:—Held, that the daughter took an absolute vested interest in the fund on attaining twenty-one, which her death in the lifetime of the wife did not divest in favour of the child and the other persons entitled over. *Ib.*

A testator gave real and personal estate to trustees on trust, after the death of a tenant for life, to sell and convert into money, and "to pay and divide the moneys arising therefrom among" eleven persons named equally, as and when they should respectively attain twenty-one, with a gift over of the shares of any of them who should die "before such legacy, or share, or any part thereof, should become payable." All of them survived the testator, and attained twenty-one, but some of them died before the tenant for life:—Held, that "payable" was equivalent to "vested," and that the gift over did not take effect. *Haydon* v. *Rose*, 39 L. J., Ch. 688; L. R. 10 Eq. 224; 23 L. T. 334; 18 W. R. 1146.

Trust by will subject to an interest for life, to pay and transfer to the testator's nephew and nieces equally at twenty-one, with survivorship, in case any should die before his or their shares should become payable, and a limitation over in case all should die, &c. Vested interest at the age of twenty-one, before the death of the tenant for life. *Hallifax* v. *Wilson*, 16 Ves. 171; 10 R. R. 146.

Trust to pay the dividends of stock to the testatrix's niece for life, and after her death to divide the capital among the brothers and sisters of the testatrix, and in like manner to the survivors or survivor of them; the share of those who died in the life of the niece passed to their representatives. *Ib.*

Testator bequeathed 10,000*l.* in trust for his son, J. L. J., for life, remainder in trust for the children of J. L. J. when and as they should attain twenty-one, as tenants in common, and if any of them should die before their shares became payable, leaving issue; but if any of them should die before their shares became payable, leaving no issue, their shares to be paid to the survivors at the same time as the original shares should become payable; and if J. L. J. should have no child, or having such, they should all die under age and without issue, then the trust fund to sink into the residue, which the testator gave to two of his other children. J. L. J. had four children, all of whom attained twenty-one. One of them died in his lifetime without issue:—Held, that "payable" meant "attain twenty-one," and, consequently, that one-fourth of the fund vested in the deceased child. *Jones* v. *Jones*, 13 Sim. 561; 13 L. J., Ch. 16; 7 Jur. 786.

A testator devised his real estates to his widow for life, and after her death directed the executors to sell and divide the proceeds equally between his seven children; the shares of his three sons to be vested in them respectively when and as they should attain twenty-one, and the shares of his four daughters to be vested interests in them when and as they attained that age or were married. During the minorities of his children, their shares were directed to be invested and applied for their maintenance and advancement. In case any of the children should die leaving issue lawfully begotten "before the share of such child or children so dying as aforesaid shall become due and payable," the share was to be equally divided "amongst all the issue of such child or children as and when such issue shall attain the said age of twenty-one years"; the interest of such child's share so dying, leaving issue, to be applied for the advancement, &c., of such issue during minority. E., one of the testator's daughters, married and died in the lifetime of the testator's widow, leaving an infant child, and having assigned her share by way of mortgage:—Held, that the words due and payable did not postpone the vesting of the share until the death of the tenant for life, and that E.'s assignee was entitled, and not her infant daughter, under the gift over. *Mendham* v. *Williams*, L. R. 2 Eq. 396; 15 L. T. 130.

A testator, after giving all his real and personal estate to trustees, upon trust after payment of debts, funeral and testamentary expenses, to permit his wife to receive the rents of the realty and enjoy the personalty for her life, she maintaining his son E. during his minority, and after his decease to the use of the testator's sons T., J. and E., as tenants in common, subject to the payment of 200*l.* to each of his daughters H. and M. at the expiration of six calendar months after the decease of his wife, provided that if either or both of his said daughters should happen to die in the lifetime of his wife, or before their respective portions became payable, leaving lawful issue, such issue should have the portion of the parent so dying. H., one of the daughters, died in the lifetime of the testator's widow, unmarried; and upon the question whether the legacy of 200*l.* given to her was vested or not:—Held, that it was vested. *Wilkinson* v. *Chamberlain*, 3 W. R. 601.

A testator, by his will, bequeathed an annuity to his daughter, and directed that after her death the trustees should hold 2,000*l.*, part of the fund set apart to secure the annuity, upon trust to pay and divide the same unto and equally between the child and children of the daughter as and when they should respectively attain twenty-one, and in case any of the children should die before their shares should become "payable as aforesaid" without leaving issue, the share or shares of him, her or them so dying should be paid to the survivor or survivors of them, equally if more than one, and if but one, the whole to that one, with power for the trustees, during the respective minorities of the children, to apply the income of his, her or their expectant share or shares towards his, her or their maintenance and education. And if all such children should die under twenty-one, without leaving issue, the fund was given over:—Held, that the children's shares absolutely vested at twenty-one and were not divested by subsequent death without issue in the lifetime of their mother. *Partridge* v. *Baylis*, 17 Ch. D. 835; 44 L. T. 737; 29 W. R. 820.

Testator directed his executors to purchase out of his residuary estate a certain sum of stock, &c., to pay the dividends to his wife for her life, and after her death to divide the capital between such of his three daughters as should be then living. Provided, that if any one of them should be then dead, or should afterwards die before her share should become payable or divisible, leaving a child or children, that share should go to such child or children. The testator's wife died in his lifetime; one of the daughters died three months after the testator:—Held, nevertheless, that she had a vested interest in one of the shares. *Collins* v. *Macpherson*, 2 Sim. 87; 29 R. R. 65.

A testator gave his real and personal estate, after paying four annuities, to one for life, and after his death, he directed his personal and the produce of his real estate to be divided amongst the children of A. living at the testator's death, when the youngest attained twenty-one, if the annuitants should be then dead; but if not, then his trustees were either to invest it and pay and apply the residue of the income in the maintenance, &c., of the children, according to their discretion, or accumulate, such accumulations to be paid, after the death of the surviving annuitants, with the original shares. There was a gift over in the event of the death of any child who should become entitled to a distributive share before his share became payable. One of the children predeceased an annuitant:—Held, nevertheless, that the bequest was vested, and that the gift over did not take effect. *Butterworth* v. *Harvey*, 9 Beav. 130; 9 Jur. 999.

e. On Death before Legatee Entitled.

"Entitled" construed "Entitled to a Vested Interest."]—Construction of a gift over upon death before becoming entitled to payment. *Williams, In re*, 12 Beav. 317; 19 L. J., Ch. 46; 13 Jur. 1110.

Trust of a sum of consols for all and every the children of A. and B., the shares of sons to be paid, assigned or transferred to them at twenty-one, and the shares of daughters at twenty-one

or marriage, unless such respective times of payment should happen in the lifetime of A. and B., or the survivor, in which case the same should be paid, assigned and transferred immediately on the death of survivor of A. and B.; and in case any of the same children should happen to die before he or she should become entitled to the payment, assignment or transfer of his or her share, then the share of the party so dying should be paid, &c., to the survivors or survivor who should become entitled to have their, his or her shares or share paid, assigned or transferred to them, him or her, as aforesaid:—Held, that a child who attained twenty-one, but died in the lifetime of A. and B., was entitled to a share, and that the benefit of the trust was not confined to children living at the period of distribution. *Ib.*

A testator gave the residue of his estate upon trust, to pay the interest to his widow during her life for her separate use, and after her decease to pay the principal to C. for her own use, and to be at her own disposal, but if C. should happen to die leaving any child living at her decease, then to such child or children; and if she should happen to die without any child living at her decease, then to D. and E.; but if either of them should die before they should become entitled to receive the fund, then he gave the whole to the survivor, and if they should both die in the lifetime of his widow, then he gave the whole to his wife absolutely. C., having survived the widow, was entitled to the residue absolutely. *Da Costa* v. *Keir*, 3 Russ. 360; 5 L. J. (O.S.) Ch. 161; 27 R. R. 93.

Testator, having a power to appoint by deed or will, executed a will, and afterwards a deed, and then a codicil to his will. By his will he appointed four denominations of land to his four sons, giving one denomination to each and his heirs, "to go to them immediately after the death of his wife, and in case of the death of any or either of his said younger sons before he or they should be respectively entitled thereto, then the part or share of him or them, so dying, to go to and be divided amongst the survivors equally, share and share alike." By the deed he partly displaced the appointment contained in his will, and appointed to his third son and his heirs the denomination of land given by his will to his fourth son, leaving the latter without provision; then, by a codicil, he appointed to his fourth son and his heirs another denomination of land "instead of" that given by his will:—Held, that the words "and in case of the death of any or either of his said younger sons," &c., referred to the event of the death, not of the testator, but of his wife. Held, also, that although the appointment by the will would have been subject to the clause of survivorship, the appointment by the codicil was absolute to him and his heirs. *Charitable Donations Commissioners* v. *Cotter*, 2 Ir. Eq. R. 196; 2 Dr. & Wal. 615. And the decision was affirmed, *S. C.*, 1 Dr. & War. 498, where, however, it was held, that the period of vesting was the death of testator, not of tenant for life.

Bequest of personal estate to A. for life, and after her death to the testator's brothers and sisters; but if any of the brothers or sisters should die before they became entitled to their shares, the shares of them so dying to go to their children. The testator left five brothers and sisters, two of whom died in the lifetime of A.:—Held, that the word "entitled" had reference to the death of the testator, and not to the death of A., and that the shares had therefore vested absolutely in the brothers and sisters, and that the representatives of each of them who had died were entitled to a fifth of the fund. *Henderson* v. *Kennicot*, 2 De G. & Sm. 492; 18 L. J., Ch. 40; 12 Jur. 848.

A testator by his will, dated in 1851, devised all his real estate to trustees upon trust to receive the rents and accumulate them until sufficient to pay his debts, and also to provide for the legacies next given. The testator then gave to J. C. the sum of 200*l.*; to S. W. the sum of 150*l.*; and to J. R. the sum of 19*l.* 19*s.* All of the three last-mentioned legacies the testator directed should be paid by his trustees at the end of seven years next after his decease; and he directed that, in case of the death of J. C. and S. W. respectively before they became entitled to the legacies above mentioned, leaving lawful issue him or her surviving, the legacy of him or her so dying should go and be equally divided between and amongst his or her issue at the end of seven years next after the testator's decease in case such issue should then have attained the age of twenty-one years, but if they should not have attained the age of twenty-one years, then when and as they respectively attained that age. The testator died in September, 1861. J. C. died in February, 1864, within seven years after the testator's death. He left two children and a grandchild. The question arose between them and his executors whether, in the events that had happened, the gift over of his legacy had taken effect:—Held, that the words "become entitled" did not mean "become entitled in possession"; that, therefore, notwithstanding that J. C. died within seven years after the testator's decease, the gift over of his legacy did not take effect; but that he became entitled thereto indefeasibly on the testator's death. *Crosland, In re, Craig* v. *Midgley*, 54 L. T. 238.

A gift over, after a tenancy for life, on death "without becoming entitled to the receipt of the trust moneys," construed "without attaining a vested interest." *Hayward* v. *James*, 28 Beav. 523; 29 L. J., Ch. 822; 6 Jur. (N.S.) 689; 8 W. R. 676.

A testator gave to trustees shares in his residuary estate for the benefit of his daughters for life, and after their death for their children, to be equally divided, and to be "assigned and paid," the shares of sons at twenty-one, the shares of daughters at twenty-one or marriage; but if either should die before his or her share became "payable," and in case her daughters or either of them should die without issue, or leaving issue, all of them should die without becoming entitled "to the receipt of the trust moneys," then over:—Held, that the shares of children vested at twenty-one or on marriage, and that they took an interest in the fund absolutely, and that the gift over did not take effect. *Ib.*

Personalty was given to parents for life, with remainder to all their children equally, the shares to be paid at twenty-one or marriage, unless in the lifetime of the parents, in which case payment was to be made on the death of the survivor. There was a gift over on the death of a child before becoming entitled to payment. A child attained twenty-one, but died in the lifetime of her parents:—Held, that the gift over did not take effect. *Williams, In re*, 12 Beav. 317; 19 L. J., Ch. 46; 13 Jur. 1110.

"Entitled" construed "Entitled in Possession."] — Entitled construed as entitled in possession. *Turner* v. *Gosset*, 34 Beav. 593.

Subject to prior life and possible absolute interests, there was a bequest of a portion of the residue to A., with a gift over to his children or other issue, in case of his decease before he should become entitled:—Held, that this meant entitled in possession. *Ib.*

Devise in fee and bequest of personal estate to A., and in case of his death under twenty-one without leaving issue, to B., codicil affirming the will in all respects, except by directing that A. should not be entitled till twenty-five. A. dying between the ages of twenty-one and twenty-five without issue, B. has no title. *Scott* v. *Chamberlaine*, 3 Ves. 302.

By a testamentary appointment a testatrix gave three copyhold houses to E. for life, and after his death she directed the houses to be sold and the proceeds "to be equally divided amongst" her three nephews and niece, "but should either of my said nephews or niece die before they are entitled to the property leaving issue, I give the share of him or her so dying to his or her child or children." All the remaindermen survived the testatrix, but three of them predeceased E., leaving children living at his death:—Held, that "entitled" meant entitled "in possession," and that therefore the shares of the three deceased remaindermen did not pass to their legal personal representatives, but to their children. *Charitable Donations Commissioners* v. *Cotter* (1 Dr. & War. 498) distinguished. *Noyce, In re, Brown* v. *Rigg*, 55 L. J., Ch. 114; 31 Ch. D. 75; 53 L. T. 688; 34 W. R. 147.

"Entitled in Possession" construed "Entitled to a Vested Interest."]—The will of the testator in this matter contained a bequest of 25,000*l.* to trustees, upon trust to invest the same, and to pay the interest to his daughter for life, and from and after her decease to pay the principal unto and amongst all her children equally, share and share alike, if more than one, and their respective executors, administrators and assigns; and if but one, to that one, his or her executors, administrators and assigns, "on the respective attainments of such children to the age of twenty-one years being sons, or on their respective attainments to that age or days of marriage being daughters," the interest of their respective shares from time to time, until their respectively becoming entitled to the principal, to be applied in their respective maintenance; and in case any of the children of his said daughter should happen to die before being entitled in possession to his, her or their share or shares under the will, the share of the child so dying was to go to the survivors or survivor of them. The daughter had two children only who attained twenty-one, the rest having died under age, and unmarried. One of these two children survived the testator, but died in the lifetime of her mother:—Held, that the gift over did not take effect, but the personal representatives of the deceased child were entitled to her share. *Yates's Trusts, In re*, 21 L. J., Ch. 281; 16 Jur. 78.

f. On Death before Actual Receipt of Legacy or Distribution of Estate.

"Received" construed Strictly.]—Where a testator directed the trustees of his will to pay a sum of money, and a share of his residue, to a legatee, but in case the legatee should die before the property was "actually paid or payable," then to hold it for other parties:—Held, that on the death of the legatee three months after the testator without any actual payment having been made to him the gift over took effect. *Whitman* v. *Aitken*, L. R. 2 Eq. 414; 12 Jur. (N.S.) 350; 14 L. T. 248.

"Payment" construed Strictly.] — Testator gave the residue of the proceeds of the sale of his real and personal estate between all such of his first and second cousins as should be living at the time of the determination of two life interests given by the will. The testator by a codicil directed that if any or either of his first or second cousins should die before the payment of any sum or share thereby, or by his will, directed to be paid to him or her, such sum or share should be equally divided amongst certain persons:—Held, that the gift over was meant to take effect in the event of death before the time of payment, i.e. the determination of the life interests. *Wilks* v. *Bannister*, 54 L. J., Ch. 1139; 30 Ch. D. 512; 53 L. T. 247; 33 W. R. 922.

Where Direction to Sell and Devise.]—Devise to the testator's wife for life, and as soon after her decease or refusal to release dower as conveniently might be, upon trust to sell and divide the produce between five nephews, at such time as the sale should be completed, if then living; if any should die in her life, or before the sale should be completed, his share to his children, if none, to the survivors; the interests not vested till the sale. *Elwin* v. *Elwin*, 8 Ves. 547; 7 R. R. 117.

—— **To Pay Debts.**]—Devise upon trust, by mortgage, or out of the rents and profits, to pay debts, and afterwards to raise portions for the testator's daughters, "such portions to become due and be considered as vested at the expiration of two years next after my decease, if my debts shall then be paid." This is a condition precedent to the portions becoming vested; and one of the daughters having died while her portion remained unpaid, upon a question between her representative and the persons who would be entitled in the event of the portion not having become vested in her lifetime, an inquiry was directed as to the time when the debts were, or might have been paid. *Bernard* v. *Mountague*, 1 Mer. 422. *See* 11 Ves. 508.

"Received" construed "de jure Receivable."]—Legacy out of a fund in the Indies given over in case of death of legatee before he might have received it, vested from death of testator. *Hutcheon* v. *Mannington*, 1 Ves. 366; 2 R. R. 115.

Where there was a gift over in the event of a legatee dying "before receiving his legacy," and a legatee died after the period contemplated for payment had arrived, but without receiving the legacy, by reason of a suit having been instituted, and the money paid into court:—Held, that the gift over did not take effect. *Whiting* v. *Force*, 2 Beav. 571; 9 L. J., Ch. 345.

A testator bequeathed personal estate in trust to pay the proceeds to his widow for life, and after her death to divide the capital between his brothers A. and B. and his sisters C. and D. He declared, that in case any of them should

die in his lifetime, and before they should have received any benefit from the bequest, then the share of him or her so dying should be divided among his or her respective children. A. survived the testator, and died in the lifetime of the tenant for life, having bequeathed his share:—Held, that "and" could not be read "or," and that on the death of the testator the share of A. was absolutely vested in him, and transmissible by his will. *Kirkbride, In re*, L. R. 2 Eq. 400; 15 L. T. 51; 14 W. R. 728.

A residuary bequest upon the whole will vests only as the property is received:—Held, therefore, that the representatives of a deceased residuary legatee are entitled only to that part which was got in before his death. *Gaskell* v. *Harman*, 6 Ves. 159; 8 R. R. 224. From this decree, plaintiff appealed, when the Lord Chancellor reversed that part of it which declares that the residuary property vested only as it was converted into money, his lordship holding that such an intention, though, if clearly expressed, it must, notwithstanding its inconvenience, be executed, was not the true construction of the whole will, and it is not to be collected unless clearly expressed. *S. C.*, 11 Ves. 489; 8 R. R. 224. And see *Innes* v. *Mitchell*, 6 Ves. 461; 5 R. R. 360.

Testator gave personal estate, outstanding on securities, to his wife for life, remainder in a moiety to six of his children, provided that, if any one died before receiving his or her share without leaving lawful issue, it should go over. One of the children died after the wife's death, before the securities were realised and the produce divided:—Held, that the proviso contemplated the time when the children should be entitled to receive their shares, not the time of actual payment; and that the representatives of the deceased child took a share. *Dodgson's Trust, In re*, 1 Drew. 440.

Frederick Hobson the elder, by his will, gave to three trustees (one of whom was his eldest son William) all his real and personal property, which included the proprietorship of a newspaper, on trust, to carry on the newspaper during the life of his wife, and they were annually to set apart and invest one-fourth of the profit of the paper as a reserve fund to meet emergencies, and to divide the remaining three-fourth parts of the profits of the same, and the income from his real and personal estate, into six equal parts for his wife and five children (all specially named), and in case of the death of any such child during the life of the wife, to pay the share of that child to the lawful issue of that child, or if none such, equally among the survivors of his children, and, after the decease ("or during her life if she and the majority of my children, and my trustees, shall deem it proper and expedient so to do), at the sole discretion of my trustees," to sell the real and personal estate and the newspaper, and divide the proceeds among the wife and children, bringing in the amount of the reserve fund as part; the shares to be for their absolute use and benefit immediately after such division. He declared that, "in case, under the above clause, it shall be agreed, or my trustees shall decide, to sell" the paper, and if any of his sons should wish to carry on the same, such one should be entitled to purchase it at 500*l.* less than the market price. Till all the property was sold the trustees were to apply the income of the part unsold in the manner before expressed as to the income of the real and personal estate. The will also contained a provision that "in case any of my children shall survive my wife and die before he or she shall have received his or her share of my trust estate and without leaving lawful issue," then that such share should go over:—Held, that these words imposed on the trustees an absolute trust for sale, not merely a power of sale, and that the discretion given to them referred only to the time and manner of selling to the best advantage. *Minors* v. *Battison*, 46 L. J., Ch. 2; 1 App. Cas. 428; 35 L. T. 1; 25 W. R. 27—H. L. (E.)

Held, also, that the word "received" in the divesting clause must be taken to mean "became de jure receivable," and that the shares vested indefeasibly immediately on the death of the widow, and (there being but three children of the testator then surviving) that William Hobson took an absolute vested interest in an equal third part of the testator's real and personal estate, including the newspaper. *Ib.*

A testator gave to his wife the rents and interest of all property for her life, but still giving her liberty to sell and dispose of the whole or any part of the property if she should think proper so to do; and he directed that all his property remaining at her death should be divided into two equal parts, one moiety among six persons and the other moiety among three, but that if any of the nine legatees should die before receiving their share, having no child, such legatee's share should be equally divided between the other legatees:—Held, that the widow took only a life interest in the property. *Rose* v. *Rowe*, 21 L. T. 349; 17 W. R. 1077.

Held, also, that none of the legatees to whom one moiety of the property was bequeathed were entitled to share in the other moiety. *Ib.*

The testator gave all his real and personal estate to trustees, upon trust to sell and invest, and set apart a sufficient sum to produce an annuity to his widow for her life, and that the trustees during the life of his wife should stand possessed of the residue of the moiety arising from such sales, and after the decease of his wife of the whole of such moneys, upon trust to pay and divide the same unto and equally between and amongst all and every his children as and when they should respectively attain the age of twenty-one years, and to their several and respective executors, administrators and assigns; but in regard to such of his children as had already attained the age of twenty-one years, he directed that the share or shares of such children should be paid to them respectively at the expiration of twelve months after the decease of his wife; but in the event of the decease of any or either of his said children before he, she or they should have received or become possessed of their shares, leaving issue, that the share of the child so dying should go to the children of such child on their attaining twenty-one; and on failure of issue of any of his (the testator's) sons or daughters, then the share of such his sons or daughters should go to such of his (the testator's) children as should be then living:—Held, that the children of the testator who had attained twenty-one at the date of the will took vested interests in their shares, liable to be divested in the event of their dying before the widow, but that they were entitled to receive the interest of their shares in the meantime, and that the children who had attained twenty-one since the date of the will were entitled to an immediate transfer of their shares, except as to the fund appropriated to the widow's

annuity. *Rammell* v. *Gillow*, 15 L. J., Ch. 35; 9 Jur. 704.

—— **Whether Gift over Good.**]—A testator bequeathed to his executors the residue of his ready money, and money at interest that should be due and owing to him at his decease, upon trust, to receive and get in all his said moneys, and after paying certain legacies, to divide the remainder unto and between all his nephews and nieces who should be then living; and in case of the death of any of his nephews and nieces before receiving their respective shares, then the share of him or her so dying to go to the survivors. The testator, by a codicil which he directed should be annexed to and form part of his will, bequeathed to his wife all his real and personal estate and effects, of what nature or kind soever, which he should be possessed of at his decease, to hold and enjoy the same during her life:—Held, that the gift of the testator's nephews and nieces was a specific bequest, and no life interest in that fund was given to the widow; that the legacies vested in the nephews and nieces at the decease of the testator, subject to be divested upon the death of any of them before the expiration of twelve months, the usual period allowed for payment of legacies; and that the daughter of a niece who died within a year was not entitled to her mother's share. *Arrowsmith's Trusts, In re*, 29 L. J., Ch. 774; 6 Jur. (N.S.) 1231; 8 W. R. 555. And see *S. C.* on appeal, 2 De G. F. & J. 474; 30 L. J., Ch. 148; 7 Jur. (N.S.) 9; 9 W. R. 258.

A testator gave his real estate and the residue of his personal estate to trustees, upon trust with all convenient speed after his death to sell and convert the same, and to hold the proceeds on trust to pay his debts and funeral and testamentary expenses, and subject thereto, and to the payment of an annuity, to divide the residue of the trust moneys into six equal parts, among two nephews and four nieces of the testator named in the will. He directed that the shares of the nephews should be paid to them as soon after his death as possible. He directed that the trustees should invest the shares of the nieces and pay the income thereof to them for their separate use. He directed that, in case any of his nephews should die before him, or before the division of his estate as before directed, his share should go over; and there was a similar direction with regard to the share of any of the nieces who should die before him, or before the division of his estate as before directed:—Held, that the "division" of the testator's estate meant the expiration of twelve months from his death, and that the share of one of the nieces, who survived him but died within that period, went over. *Collison, In re, Collison* v. *Barber*, 48 L. J., Ch. 720; 12 Ch. D. 834; 28 W. R. 391.

Bequest of share of residue to K. and G., "but in case K. shall die before he shall actually have received the whole of his share and without leaving issue living at his decease, then and in such case, and whether the same shall have become due and payable or not, such part or parts as he shall not have actually received to be paid to G." K. died unmarried, without having received any share of the residue:—Held, that the gift over was not void for uncertainty, but took effect. *Johnson* v. *Crook*, 48 L. J., Ch. 777; 12 Ch. D. 639; 41 L. T. 400; 28 W. R. 12.

Where a legacy is absolutely vested it cannot be divested by a subsequent gift over in the event of the legatee dying before he has received the legacy. *Bubb* v. *Padwick*, 49 L. J., Ch. 178; 13 Ch. D. 517; 42 L. T. 116; 28 W. R. 382.

A testator gave his residuary estate in trust for all his children who should attain the age of twenty-one years as tenants in common, but so that they should not be entitled to receive their respective shares until the youngest child attained the age of twenty-one years, unless the trustees of the will should in their discretion consider it proper that the shares, or any of them, should be paid; and the testator directed that in case any child should die before the youngest attained the age of twenty-one years and without having actually received his share, then that share should go over to the other children:—Held, that each child on attaining the age of twenty-one years acquired an indefeasibly vested interest in his share. *Arrowsmith's Trusts, In re* (supra), observed upon, and *Johnson* v. *Crook* (supra) not followed. *Ib.*

Bequest of proceeds of real and personal estate (directed to be converted with power of postponement) on trust for the testator's three sons and daughter equally, the daughter's share to be retained for her separate use for life, and after her decease for her children, with a direction in the event of any child of the testator dying before the testator, or before the execution of all or any of the trusts of the will, leaving issue, to pay to the issue of such deceased child the share which their parent would have taken if living. The three sons having survived the testator, were held to be absolutely entitled, the gift over on death before execution of the trusts being void for uncertainty. *Johnson* v. *Crook* (supra) disapproved. *Roberts* v. *Youle*, 49 L. J., Ch. 744.

A testator gave each of four persons a fourth of the proceeds of his residue, and in case of the death of any legatee before the "final division" of his estate he gave that legatee's share over. One legatee died more than a year after the testator, but before the estate had been distributed:—Held, that his personal representatives were entitled to his fourth share. *Johnson* v. *Crook* (supra) approved. *Wilkins, In re, Spencer* v. *Duckworth*, 50 L. J., Ch. 774; 18 Ch. D. 634; 45 L. T. 244; 29 W. R. 911.

A gift over of a legacy, in case the legatee should die before the actual receipt of it, is bad in law, if the bequest is immediate. *Martin* v. *Martin*, 35 L. J., Ch. 281; L. R. 1 Eq. 369; 12 Jur. (N.S.) 889; 14 L. T. 129; 14 W. R. 421.

A testator gave a mixed fund, to be equally divided between his nephews and nieces; and he directed that the property which he left to his nephews and nieces should on their decease severally be divided equally between such of their children as might survive them, and if either or any of his nephews and nieces died before him, or before they should have actually received what was to go to them, their share should be divided equally between their children, and, in default of children, between his nephews and nieces:—Held, that the nephews and nieces who survived the testator took absolute interests. *S. C.*, 35 L. J., Ch. 679; L. R. 2 Eq. 404; 12 Jur. (N.S.) 889; 15 L. T. 99; 14 W. R. 986.

A testator, in case of the death of any of his children without leaving issue, before payment of any part of reversionary legacies, directed such parts to be divided among the others and other

of them, and in case of the death of a child leaving issue before such payment, he directed such parts to be divided among the children of such child :—Held, first, that "payment" referred to the time when the shares given over became payable, and the gift was not void for uncertainty; secondly, that "others" meant children other than those who had died without leaving issue; thirdly, that the gift over applied to accrued as well as original shares. *Arrowsmith's Trusts, In re* (supra), approved and followed. *Hutcheon* v. *Mannington* (1 Ves. Sen. 366) and *Martin* v. *Martin* (supra) distinguished. *Bubb* v. *Padwick* (supra) disapproved. *Johnson* v. *Crook* (supra) approved. *Chaston, In re, Chaston* v. *Seago*, 50 L. J., Ch. 716; 18 Ch. D. 218; 45 L. T. 20; 29 W. R. 778.

10. Acceleration of Interests.

Where Prior Interest revoked—Realty.]—The words "from and immediately after his decease," following a limitation for life, in general point out the order of limitation merely. *Lainson* v. *Lainson, Lainson* v. *Ede*, 3 Eq. R. 43; 5 De G. M. & G. 754; 24 L. J., Ch. 46; 1 Jur. (N.S.) 49; 3 W. R. 31. And see *Carrick* v. *Errington*, 2 P. Wms. 361.

Where, therefore, a testator revoked a limitation for life, which was followed by those words, introducing subsequent limitations :—Held, that the remainders were accelerated. *Ib.*

—— **Personalty.**]—The same rules as to acceleration which relate to real estate do not apply to personalty. However, under a gift by will of money out of which there was to be set apart as much as would produce an annuity of a certain amount to be paid to A. for life, with a gift over after A.'s death of the sum set apart, and a revocation by codicil of the annuity given to A. :—Held, that the interest of the persons entitled under the gift over was accelerated and took effect at once without waiting for the death of A. *Eavestaff* v. *Austin*, 19 Beav. 591.

Where Prior Devise void—Excess of Power.]—Lands were settled to the use of a man for life, remainder in fee to such one or more of his children as he should by deed or will appoint, and in default of appointment to the children equally. The father by his will devised the lands to his wife for her life, upon condition that she should thereout maintain and educate his children in such manner as his executors should think proper; and that, at the end of every year, whatever sum should be in her hands, after defraying all necessary expenses, should be accumulated in order to form a fund for payment of the legacies thereinafter given by him; and he gave to each of his younger children 500*l.*, and devised the lands to his eldest son in tail, with a direction that if at the death of his wife there should be accumulated a sufficient fund for the payment of the legacies, those lands, together with certain other lands not the subject of the power, should stand charged with the deficiency :—Held, that the devise to the eldest son was not invalidated by the previous devise to the wife, although the devise to the wife was void, as an excess of the power. *Crozier* v. *Crozier*, 5 Ir. Eq. R. 540; 3 Dr. & War. 353.

—— **Under Wills Act.**]—Gift to the testator's daughter of real and personal estate "during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age" :—Held, that, as regarded the real estate, the gift to the children was strictly a remainder, and that the construction as to the personalty followed the same rule as the realty; and, therefore, that, the gift to the daughter being void on account of her having attested the will, the gift to the children was accelerated, and took effect immediately. *Jull* v. *Jacobs*, 3 Ch. D. 703; 35 L. T. 153; 24 W. R. 947.

Held, also, that the remainder to the daughter's children created vested interests. *Ib.*

A testator devised and bequeathed all his real and personal estate to his wife for life, and after her death to be equally divided between such of his children as should be living at her death; and in case of any of the above-mentioned children dying before his wife leaving children, such children were to take their parent's share. And in the event of any of his daughters being married at his wife's decease, it was his will that such proportion as they might be entitled to should be left to them and their children exclusively, and should in no way be controlled by their husbands. At the death of the testator's widow one of his daughters was living who had several children. Her husband was an attesting witness to the will, and consequently the gift to her was void under s. 15 of the Wills Act :—Held, that the daughter's children were not to be disappointed by her disability, but took an immediate interest in her share as tenants in common. *Clark, In re, Clark* v. *Randall*, 55 L. J., Ch. 89; 31 Ch. D. 72; 53 L. T. 591; 34 W. R. 70.

Gift by will of real and personal estate upon trust to convert and pay the income of the proceeds to A. for life, and after A.'s death to pay the capital and income thereof unto the child or children of A. in equal shares, with gifts over in case A. should die without leaving issue living at his death. The will had been attested by A.'s wife, so that the gift of a life's interest to him was void under s. 15 of the Wills Act. There were no children of A.'s marriage. The personal estate was exhausted, and the trust funds represented real estate only :—Held, that until A. had a child the gifts upon the determination of A.'s life estate could not be accelerated, and that during the life of A. and so long as he had no children, the income of the trust funds was undisposed of, and belonged to the heir-at-law, and could not be accumulated for the benefit of the persons contingently entitled in remainder. *Jull* v. *Jacobs* (supra) distinguished. *Hodgson* v. *Beetive (Earl)* (post, col. 1767) and *Dumble, In re* (post, col. 1771) explained. *Townsend, In re, Townsend* v. *Townsend*, 56 L. J., Ch. 227; 34 Ch. D. 357; 55 L. T. 674; 35 W. R. 153.

By Forfeiture.]—A testator appointed, under a general power, real estate, and devised other real estate to his wife and her assigns during her life, and after her death to his son, with a proviso, that if his wife should "do, make or execute any deed, matter or thing whereby she should be deprived of the rents and profits, or the power or right to receive, or the control over the same, so that her receipt alone should be a sufficient discharge for the same, her life estate should cease and determine as fully and effectually as it would by her actual decease." By a codicil he gave his personal estate to his wife for life for her separate use, independently of any

future husband. The wife married again without making any settlement:—Held, that notwithstanding the limitation to her and "her assigns," and the allusion to a future husband in the codicil, the wife's life estate was forfeited by her second marriage; and that the remainder both in the appointed and devised estates was accelerated. *Craven* v. *Brady*, 38 L. J., Ch. 345; L. R. 4 Ch. 296; 16 W. R. 505.

—— **Under Condition.**]—A will directed a settlement to be made of the G. estate, which contained a shifting clause, providing, that if any person taking the G. estate should not re-settle the De Ligne estate (acquired through another title) to like uses, the G. estate should go to such uses as if the limitation in his favour had not been inserted. It also directed the insertion of a name and arms shifting clause in a very different form. A., a tenant for life with remainder to his children, refused to re-settle the De Ligne estate, and he had no issue:—Held, thereupon, the next remainderman was entitled to the rents of the G. estate until A. died or had issue. *D'Eyncourt* v. *Gregory*, 34 Beav. 36.

A devise expressly conditional upon particular contingencies in defeasance of a preceding absolute devise will not take effect by acceleration when the prior estate is avoided by an event which is in no way comprised within the conditions specified. *M'Carthy* v. *M'Carthy*, 1 L. R., Ir. 189.

By Implication.]—On construction of a will the enjoyment of bequests, given in terms indicating a future period, accelerated by implication. *Parrott* v. *Worsfold*, 1 J. & W. 594.

Executory Devise—Interim resulting Trust for Heir—Death of Devisee.]—Devise when the devisee attains twenty-one, a resulting trust for the heir until that period, and, by the previous death of the devisee, the remainder accelerated. *Chambers* v. *Brailsford*, 19 Ves. 652; 11 R. R. 214—C. A.

Right to Rent already accrued.]—There is no case in which the contingent estate of a remainderman has been accelerated for the purpose of giving him a right to rent accrued prior to the time when his estate took effect. *Sidney* v. *Wilmer*, 25 Beav. 260.

i. WHAT MAY BE DEVISED OR BEQUEATHED.

1. Contingent and Executory Interests.

Possibility.] — Contingent and executory estates, and possibilities accompanied with an interest, are devisable. *Moor* v. *Hawkins*, 2 Eden, 342.

A possibility is devisable. *Perry* v. *Phelips*, 1 Ves. 254, 255.

Executory Interest under Shifting Clause.]—A contingent estate in fee under a shifting clause may be devised both by the old and new law. *Ingilby* v. *Amcotts*, 21 Beav. 585; 25 L. J., Ch. 769; 2 Jur. (N.S.) 410, 556; 4 W. R. 433.

Devise of estate X. to A. in fee, with an executory shifting limitation to B. and her heirs, in the event of A. becoming entitled to another estate, Y. B. died first, and her estate descended on C., her heir, who by his will in 1851 made a general devise of his real estate. Some months after his death, the event took place on which the X. estate was to shift from A. to B.:—Held, that the estate X. passed by C.'s will, and did not descend either to the heir of B. or of C. *Ib.*

Contingent Interest in Personalty.]—A. devises a term for years to B. for life, remainder to C.; C. in the life of B., devises his remainder. This is good, and amounts to C.'s declaring by his will that his executor shall stand possessed of the term in trust for the devisee. *Wind* v. *Jekyl*, 1 P. Wms. 572.

—— **Where Prior Interest lapsed.**]—Bequest of a contingent interest in personalty void, where the preceding gift never vested, owing to a lapse. *Miller* v. *Faure*, 1 Ves. Sen. 85.

Contingent Interest of Testator's Widow under Partnership Deed.]—Under a proviso in a partnership deed that in the event of the death of one partner a certain proportion of the subsequent profits should be payable to his "widow or family," such profits were held to form part of his residuary estate, subject to the trusts of his will. *Tibbs, In re*, 17 W. R. 304.

A tradesman bequeathed his residuary estate, including his stock-in-trade, to trustees, with a direction to convert into money all such parts as should consist of leaseholds or money in the funds, and to invest the same and pay the annual income to Sarah his wife; and after her decease to Mary his wife's sister; and after the decease of the survivor of Sarah and Mary, he gave his residuary estate to another person absolutely. After the date of will Mary married, and her husband and the testator entered into partnership, under articles, which contained a proviso, that if the testator should die during the partnership, leaving a widow surviving, such widow might, if she should think fit, continue to carry on the partnership business with the surviving partner, and should be entitled to the testator's share in the profits and excess of capital; and if the testator should leave no widow, or his widow should not desire to enter into the business, or if the other partner should die during the partnership, the surviving partner to take upon himself the partnership business and property, accounting and paying for the same as therein directed. The testator died, leaving his widow, who under this provision claimed his interest in the partnership:—Held, that the provision in the articles took the testator's share of the business wholly out of the provisions of the will, and that the widow became entitled, under the partnership articles, to such share. *Page* v. *Cox*, 10 Hare, 163.

2. Equitable Interests.

Equitable Lien.]—Any equitable interest is devisable. *Perry* v. *Phelips*, 1 Ves. 254.

Testator cannot by any words devise lands, either under the statute or at common law, which he had not at the time of making the will. *Ib.*

An equitable lien is an equitable obligation to do according to conscience; and a devise of it good in equity. *Id.* 255.

Equity of Redemption—Devise by Tenant in Tail.]—A tenant in tail of an equity of redemption

may devise it for the payment of debts. *Turner* v. *Gwinn*, 1 Vern. 41.

Personalty subject to Covenant to Settle.]—A covenant to settle on particular persons all the covenantor's personal estate, subject, nevertheless, to any disposition or changes he might make by will:—Held, only to amount to a provision in case of intestacy, and not preventing the party from disposing of the property by will to other persons. *Stocken* v. *Stocken*, 4 Myl. & Cr. 95; 7 L. J., Ch. 305; 2 Jur. 693. And see *S. C.*, 2 Myl. & K. 489; 4 Sim. (N.S.) 152.

3. Rights of Action.

Right to Sue.]—A right to sue is a devisable interest. *Gresley* v. *Mousley*, 28 L. J., Ch. 620; 5 Jur. (N.S.) 583; 7 W. R. 427—L.JJ.

Property, which has been made the subject of a voidable conveyance, is capable of being devised, and the devisee is entitled to sue for the purpose of setting aside such conveyance. *Ib.*

A person, who has sold an estate under circumstances which entitle him in equity to have the sale set aside, has in the estate an interest of such a nature as to be devisable even by a will made before the passing of the 7 Will. 4 & 1 Vict. c. 26. *S. C.*, 4 De G. & J. 78; 5 Jur. (N.S.) 583.

Right to Set Aside Deed.]—A right to set aside a release may be devised. *Drew* v. *Merry*, 1 Eq. Abr. 175.

The right to set aside a conveyance improperly obtained by a solicitor from his client, is devisable. *Uppington* v. *Bullen*, 2 Dr. & War. 184; 1 Con. & L. 291.

4. Devise by Purchaser after Contract to Purchase.

Where Contract not Completed — General Devise.]—A. articles to purchase lands in trust for B., and before any conveyance made by B., by will directed all his freehold estate to be settled on C., and his first son, &c. The lands articled for will pass by the will. *Greenhill* v. *Greenhill*, 2 Vern. 679; Pre. Ch. 320; Gilb. Eq. R. 77.

Estate contracted for will pass by a subsequent devise of all lands, the devisor being equitable owner under the contract. *Capel* v. *Girdler*, 9 Ves. 510; 7 R. R. 289.

If A. articles to purchase lands, but before the conveyance devises all his land to be sold to pay debts and legacies, the lands will pass, though he was not seised at the making of his will, neither did he republish it. So, if A. devises all his lands for payment of his debts, and then purchases land, equity will decree a sale of that land, though there were no precedent articles. *Prideaux* v. *Gibbon*, 2 Ch. Cas. 144.

From the execution of the contract, the estate is in equity the property of the vendee, will descend, and is devisable as such. *Seton* v. *Slade*, 7 Ves. 274; 6 R. R. 124.

By general devise, an estate in which devisor has acquired an equitable title passes. *Broome* v. *Monck*, 10 Ves. 605; 8 R. R. 48.

Contract for purchase generally; by a devise of real estate before the purchase is complete, the money will pass. *Id.* 613.

Devisee claiming benefit of contract for purchase of estate, directed to go to uses of will, the title proving defective, has no claim upon personal estate, either to have purchase-money or another estate purchased, or the purchase completed notwithstanding defects. *Id.* 597.

Estate contracted for after general devise will pass by republication, and must be paid out of personal estate. *Id.* 605.

Testator contracts for a particular estate, but dies before the purchase is completed; afterwards, from the state of his affairs, the contract is dissolved, yet the purchase-money shall not be sunk into his personal estate, but shall be laid out in other lands to the same uses as he had devised the land contracted for. *Whitaker* v. *Whitaker*, 4 Bro. C. C. 31.

—— **General Words—"At A. or Elsewhere."**]—Lands agreed to be purchased pass by general words in a will, such as "or elsewhere." Republication by a codicil. *Potter* v. *Potter*, 1 Ves. Sen. 437; 3 Atk. 719; Ambl. 98, upon other points.

—— **"Of which I may be Possessed."**]—Bequest of "the whole of my property of whatever description, freehold, leasehold, &c., of which I may be possessed at death":—Held, to pass real estate, agreed to be purchased by testator. *Holmes* v. *Baker*, 2 Madd. 462.

—— **Devise of particular Estate Contracted for.**]—A vendor and a purchaser being in treaty for the sale and purchase of an estate, the vendor wrote to his solicitor, stating that the purchaser had agreed to purchase his estate for 60,000*l.*, and requested him to settle an agreement on that basis for him to sign, adding that he had given to the purchaser a copy of this letter, not signed, as a memorandum. The purchaser subsequently wrote to the vendor's solicitor, inquiring when he would forward to him the draft of the agreement relative to the purchase he had concluded with the vendor for his estate in that county. Prior to the execution of the conveyances the purchaser made his will, by which he devised the subject-matter of the treaty to trustees upon certain trusts:—Held, that, at the date of his will, the purchaser had a devisable interest in the estate. *Morgan* v. *Holford*, 1 Sm. & G. 101; 17 Jur. 225; 1 W. R. 101.

—— **Charge or Lien for unpaid Purchase-Money.**]—A building agreement provided that when the lessee of certain land had built and taken leases on a sufficient number of houses thereon to secure by the ground rents a total annual rent of a fixed amount, the lessor would either convey to the lessee in fee-simple the surplus land not included in any lease, or, at the option of the lessor, would purchase the ground rents to be created out of such surplus land at an agreed price. The lessee built and obtained leases of houses sufficient to secure the total annual rent, and subsequently built houses upon the surplus land. The lessor elected to purchase the ground rents of these latter houses, but died before the "completion" of the purchase, having specifically devised the land which was the subject of the agreement, but without having made any disposition of residuary real and personal estate. The executors completed the purchase and paid the money:—Held, that the purchase-money of the ground rents was a charge or lien upon the land in question within Locke King's Act. *Kidd, In re, Brooman* v. *Withall*, 63 L. J., Ch.

855 ; [1894] 3 Ch. 558 ; 13 R. 101 ; 71 L. T. 481 ; 43 W. R. 51.

—— **Copyholds.**]—If A. buys copyhold lands, and dies before admittance, having first devised all his copyholds to T. S., the copyhold lands contracted for will pass by the will ; or in any case, if there are articles for a purchase, and the purchaser makes his will and dies before conveyance, the lands shall pass in equity. *Davie* v. *Beardsham*, 1 Ch. Ca. 39.

Where Will Insufficient to pass Real Estate.]—A., having agreed to purchase a real estate, the purchase-money for which exceeded the amount of his personal estate, by his will, made a few days afterwards, attested by three witnesses, as to all the worldly goods that it had pleased God to bless him with, gave and bequeathed to his wife and two sons all his goods, cattle, chattels, personal estate, and effects whatsoever ; and in case they died without issue, &c., he gave the children's share of the personal estate and effects over ; testator dying before the purchase could be completed :—Held, that the agreement ought to be specifically performed, and that, the words of the will being insufficient to comprehend real estate, the estate ought to be conveyed to the eldest son and his heirs, &c. *Cane* v. *Cane*, 2 Eden, 139.

Where no Binding Contract.]—Decree, upon the answer admitting a contract and a letter offering to sell at a valuation, for a conveyance on payment of the purchase-money into the bank by the plaintiff on a certain day, in default of payment the bill to be dismissed with costs. No binding contract until payment : the estate, therefore, did not pass by a previous devise, but descended to the heir. *Gascarth* v. *Lowther*, 12 Ves. 107 ; 8 R. R. 310.

Where Contract made after Will.]—One articles to buy certain lands ; he thereby becomes seised thereof in equity. But where A. devised all his real and personal estate, and afterwards articled to purchase lands, and then died, the heir-at-law was held to be entitled to this estate, as not passing by the will : secus, had the articles for the purchase been before the will ; for then the estate would have passed. *Langford* v. *Pitt*, 2 P. Wms. 629.

Effect of subsequent Conveyance as Revocation.]—*See* sub REVOCATION, ante, col. 434.

5. DEVISE BY VENDOR AFTER CONTRACT TO SELL.

Estate Contracted Passing under Devise of Trust Estates.]—In 1874 the plaintiff entered into a contract for the purchase of real estate. After the title had been accepted, and before completion, the vendor died, having by his will (dated in 1873) given his personal estate to E., whom he appointed executor, and devised all his real estate to H. and M. upon trust for sale, and having also devised to H. alone all the real estate which at his death might be vested in him as trustee :—Held, that the real estate contracted to be purchased by the plaintiff passed to H. under the devise of trust estates. *Lysaght* v. *Edwards*, 45 L. J., Ch. 554 ; 2 Ch. D. 499 ; 34 L. T. 787 ; 24 W. R. 778.

And see TRUST AND TRUSTEE.

k. BEQUESTS AND DEVISES.

1. WORDS OF.

a. What Property will Pass by Particular Words and Descriptions.

i. *Particular Words.*

"All" with Qualifying Words.]—Bank notes pass as cash by bequest of "all that should be in his house at testator's death." *Popham* v. *Aylesbury (Lady)*, Ambl. 68.

A will in these words, "I give all in S. to R.," does not pass a bond which happened to be at testator's house in S. *Moore* v. *Moore*, 1 Bro. C. C. 127.

Bequest of "all my property in A., except" a particular chose in action, described in the will, other choses in action of testator found in A. do not pass, notwithstanding the exception. *Fleming* v. *Brook*, 1 Sch. & Lef. 318 ; 9 R. R. 35.

A testator, by his will, said : "I give to my wife all my household furniture, plate," &c., "and other effects of the like nature, and all wines," &c., "which shall, at my decease, be in or about my dwelling-house, then occupied by me" :—Held, that in construing the bequest the sentence ought to be divided into two, and that the qualification as to his dwelling-house applied only to the latter part, and therefore that it passed plate at the testator's bankers, family plate in the possession of the testator's father as tenant for life, and to which the testator was entitled absolutely in remainder, and also the produce of family plate wrongfully sold by the tenant for life, and furniture, &c., deposited for safe custody at a warehouse. *Domvile* or *Domville* v. *Taylor*, 32 Beav. 604 ; 2 N. R. 258 ; 8 L. T. 624 ; 11 W. R. 796.

Where the testatrix bequeathed to her niece all her pictures and coins (excepting those of the two last reigns), in and about her dwelling-house, and all the residue of her estate, real and personal (except as afterwards given), to grandchildren, and directed that, from and after the day of her interment, all the property over which she had any disposing power in and about her dwelling-house should belong to her niece (except what she had otherwise given) ; hoards of money, in guineas, sovereigns, notes of the Bank of England, promissory and country notes, and a mortgage security, were afterwards found in the house :—Held, that the niece was entitled to the money and bank notes, but not to the country bank promissory notes, or mortgage. *Brooke* v. *Turner*, 7 Sim. 671 ; 5 L. J., Ch. 175.

R. by will, after appointing executors and directing his debts and funeral expenses to be paid, gave his wife "all my property leasehold and freehold which I now possess" :—Held, that all the testator's real and personal estate passed under the gift to his widow, and not only his leaseholds and freeholds. *Roberts, In re, Kiff* v. *Roberts*, 55 L. T. 498 ; 35 W. R. 176—C. A. Affirming 55 L. J., Ch. 628. See *Portal and Lamb, In re*, post, col. 1524.

"And so Forth."]—S. bequeathed as follows : "Whereas I am seised of a life estate in K. house and demesne, which passes after my death to W. S., I will and bequeath to him the house, furniture, books, plate, and so forth, as left by my late aunt, C. S. ; also the sheep, milch cows, together with the hay and corn on the premises," reserving certain pictures :—Held, that the

bequest was confined to everything at K. of a permanent nature, such as furniture, books, and plate, whether left by C. S. or acquired by himself; and did not include articles necessarily liable to be parted with or consumed, or any property on the farm acquired by himself, except the sheep, &c., expressly mentioned. *Sealy* v. *Stawell*, Ir. R. 2 Eq. 326.

Appurtenances.]—By a devise of a house cum pertinentiis, only the garden and orchard will pass with it; but by a devise of a house with the land appertaining thereto, the land usually occupied therewith will pass. One devised that his cousin A. should continue to live at his house, and be at the charge of keeping the house and the servants, and coach-horses which the testator employed in ploughing the ground, and spend the corn arising therefrom in the house; here the land enjoyed with the house shall pass to the cousin A. *Blackborn* v. *Edgley*, 1 P. Wms. 603.

A testator devised and bequeathed his indigo factory in India, "with the zemindaries, villages, and lands therewith held and used, and the appurtenances," to A. for life, with remainder over. At his death, the "outstandings" of the factory business comprised loans secured by bonds of native landowners to obtain leases of lands for the cultivation of indigo, and advances made to sub-lessees to secure the supply of indigo to the factory. These loans and advances were always considered part of the concern, which, in fact, could not have been carried on but for such arrangements:—Held, that the outstandings did not pass under the specific devise of the factory, either as appurtenances or otherwise. *Finch* v. *Finch*, 35 L. T. 235.

The word "appurtenances" does not properly, either in a deed or a will, include land where the principal subject of gift is land or a messuage. But in a will, if the circumstances and context shew that land was meant to pass as appurtenant, the word is flexible enough to carry such land. In ascertaining such intent as between a cestui que trust under a devise in trust and the heir, it is material that the whole land, including that claimed as appurtenant, is comprised in the devise to the trustee. It is also material that the cestui que trust's interest is subjected by the will to charges of a particular amount. *Cuthbert* v. *Robinson*, 51 L. J., Ch. 238; 46 L. T. 57; 30 W. R. 366.

Devise since 7 Will. 4 & 1 Vict. c. 26, s. 24, of "all that messuage or dwelling-house wherein my son now resides, with the stables and appurtenances thereto belonging, and therewith occupied." The testator subsequently converted a piece of land into garden-ground, and attached it to the house, and the garden continued to be occupied with the house up to his death:—Held, that the garden passed under the devise. *Otley and Ilkley Ry., In re*, 34 Beav. 525; 6 N. R. 244; 34 L. J., Ch. 596; 11 Jur. (N.S.) 818; 12 L. T. 659; 13 W. R. 851.

A devise of lands situate, lying, and being within the parish of G., "with the appurtenances," does not pass lands, thirty-three and a half acres, in the parish of A., which had been allotted in respect of land in both parishes, and which had always been let and occupied together. *Lister* v. *Pickford*, 34 Beav. 576; 6 N. R. 243; 34 L. J., Ch. 582; 11 Jur. (N.S.) 649; 12 L. T. 587; 13 W. R. 827.

Land cannot be appurtenant to land, and a devise of "land at G., with its appurtenances," will not operate to pass land at B., although it has always been dealt with and leased as part of the land at G. *Ib.*

A testator, possessing a farm in the parish of G., and a small piece of land in the adjoining parish of A., which had always been occupied and let at an entire rent with the farm in G., devised all his lands and hereditaments, "situate, lying, and being within the parish of G., with the appurtenances," to G. for life, with remainder to the child or children of G. in tail, and he empowered P. and J., the trustees of his will, during the minority of a tenant in tail entitled in possession, to take possession of the property on behalf of the minor, and to grant leases; and he devised the residue of his real estate to P. and J. during the life of M., in trust for M., with remainders over. The testator died in 1842, and thereupon G. took possession of the lands in G. and A. In 1850, G. died, leaving an only daughter, an infant, and P. and J. took possession of the land in G. and A., and in 1861 they granted a lease of the whole farm in pursuance of the power. In 1863, the daughter of G. came of age and took possession of the whole farm. In 1864, M. filed a bill to establish his right to the land in A.:—Held, that the land in A. did not pass by the specific devise, but formed part of the residuary estate, and that M.'s right was not barred by the Statute of Limitations, inasmuch as the possession of P. and J. from 1850 to 1863 must be attributed to their character of devisees in trust of the residuary estate, and was therefore not adverse to that of M. *Ib.*

C. occupied a house at B., and stables in the neighbourhood held under a different title. He bequeathed the lease of the house at B., "with all buildings belonging to me, and what the buildings may contain":—Held, that the stables, and the carriages and horses therein, passed to the legatee. *Kennedy* v. *Keily*, 28 Beav. 223.

Under a devise of all the testator's freehold lands situate in the parish of C., with their appurtenances, land in two adjoining parishes, which had always been let with the lands in the parish of C., and occupied by the same tenant:—Held, not to pass. *Evans* v. *Angell*, 26 Beav. 202; 5 Jur. (N.S.) 134.

A devise of lands and tenements without more, or a devise of messuages and tenements to uses applicable only to the freehold property without more, will not pass the testator's leasehold property. But a devise of messuages or tenements, with the appurtenances, to uses applicable only to freehold property, will comprise leasehold property where a clear intention to that effect can be collected from the circumstance of the leasehold property having been blended in enjoyment with the freehold. *Hobson* v. *Blackburn*, 1 Myl. & K. 571; 2 L. J., Ch. 168.

Balance.] — Bequest of the balance in the hands of testator's agents at the time of his death:—Held, to include a sum which he had by letter directed them to invest in the funds, but which was not invested till after his death. *Hill* v. *Mason*, 2 J. & W. 248.

Gift of "any small balance remaining in the bank after payment of my funeral expenses." The testatrix had, at the date of the will, a balance of 480*l.* at her bankers', which had increased to the amount of 1,373*l.* 0*s.* 10*d.* at her death:—Held, that the whole balance passed.

Page v. *Young*, L. R. 19 Eq. 501; 23 W. R. 479.

Bank.]—*See* **Money in Bank,** and **Securities Held by Bank,** infra.

Property "Bequeathed."] — The word "bequeathed" (though not in itself a technical word) is primarily applicable only to property passing under a testamentary disposition. The testatrix, a married woman, had under her marriage settlement an absolute power of appointment over certain funds. By her will in 1867 she specifically appointed such funds, and then proceeded as follows: "I constitute and appoint E. M. my residuary legatee to any property which has been bequeathed to me, and which is not mentioned in this will." The father of the testatrix, by his will in 1873, bequeathed to her a certain sum of stock, but he subsequently determined to give it to her in his lifetime, and accordingly transferred it to the trustees of her marriage settlement:—Held, that this sum of stock did not pass to E. M. under the residuary gift obtained in the will of the testatrix. *Armstrong, In re, Marescaux* v. *Armstrong*, 49 L. J., Ch. 53; 42 L. T. 823.

Books.] — The manuscript notebook of a physician made during his attendance on a patient:—Held, to pass by his will under the general description of all his books in a particular residence where such notebook was found. *Willis* v. *Curtois*, 1 Beav. 189; 8 L. J., Ch. 105.

Dugdale's Monasticon, Domesday Book, and the *State Trials* will pass under a bequest of the testator's law library and books of antiquities. *Wallace* v. *Bayldon*, 4 L. J. (O.S.) Ch. 74.

Book Debts.]—A. bequeathed his stock-in-trade, &c., to his wife and son to be used by them in his trade and business, which he directed to be carried on by them, in partnership, during the widowhood of his wife; "and for that purpose they were to have the use of the book debts or capital which he at his death might have employed therein":—Held, that the widow and son were entitled to the book debts or capital absolutely. *Terry* v. *Terry*, 33 Beav. 232; 9 L. T. 469; 12 W. R. 66.

Book debt held to be balance due to a testator who was a trader, after deducting the amount to which the testator was indebted to his debtors for trade and private debts. *Chick* v. *Blackmore*, 2 Sm. & G. 274; 23 L. J., Ch. 622; 2 W. R. 488.

And see **Debts,** infra.

Bonds.]—Bequest of a "bond of a given amount, with interest at a given rate":—Held, to carry the arrears of interest due upon the bond at the death of the testator. *Kent* v. *Tapley*, 11 Jur. 940.

A gift of 300*l.*, upon a bond, does not carry the interest incurred in the testator's lifetime. *Roberts* v. *Kuffin*, 2 Atk. 112.

Bequest, after several pecuniary legacies, "of all my bonds, shares in the bank to A., by paying the above-mentioned sums." The testator was possessed of several bonds upon which judgment had been entered, and of some which were barred by the statute of limitations:—Held, that the moneys due on the judgments entered on the bonds passed by this bequest. *Mercer* v. *Mercer*, 10 Ir. Ch. R. 505.

Canal shares will not pass under a bequest of property vested in "bonds or securities." *Hudleston* v. *Gouldsbury*, 10 Beav. 547; 11 Jur. 464.

And see **Foreign Bonds,** infra.

Box.]—A. devised to her daughter E. "my strong box, and whatsoever is in it, and all my chests and cabinets, and whatsoever is in them." This strong box was fixed upon a frame containing several drawers, and in these drawers were found bank-notes and other things of value:—Held, that the frame and drawers did not pass by the devise of the strong box; but, on an appeal, this decree was reversed. *Paget* (*Lord*) v. *Bridgewater* (*Duke*), 3 Bro. P. C. 79.

Business.]—A testator devised and bequeathed his whole property to trustees upon trust to invest such part as they should think fit in his business, and carry on the same till his son should attain the age of twenty-one years, and out of the profits to pay his widow the yearly sum of 200*l.* so long as she should remain a widow; and he directed the trustees, when his son should attain twenty-one, to transfer the business to his son. He then gave certain legacies to his other children, and provided that all his personal estate not required for the business should be continued in its then state of investment or altered at the discretion of the trustees, and the proceeds applied for the same purposes as the capital employed in the business. The business was carried on in a freehold shop:—Held, that the direction to transfer the business did not pass the freehold shop, and that the residuary gift carried the surplus profits of the business during the minority of her son. *Henton, In re, Henton* v. *Henton*, 30 W. R. 702.

Business, "Capital Invested in."]—P., by will, after desiring that his executor and partner H. might be allowed a year for converting his (the testator's) "proportion of capital, invested in the business he was then carrying on with H." into cash, and that such cash might be paid over as realised (with the exception of special bequests thereinafter mentioned) to the charity commissioners to be invested, desired that all shares of which he might die possessed might be transferred into the names of the charity commissioners, without being sold; the interest to be paid by them to certain persons for life. W. then directed, that after the death of the persons named sufficient of the property so invested by the commissioners should be converted by them and paid over to a number of charities, naming the sum to be given to each; and he then requested his executors would pay, as soon as conveniently might be after his decease, "out of the capital employed in the business," to the persons mentioned, certain sums (naming twenty-two legatees, and sums amounting together to about 700*l.*). At the date of his will, W. was in partnership with H., but before his death the business failed, and a composition was paid, mainly by the testator, at whose death the partnership assets were outstanding, and his proportion of capital consisted of half of these assets, after deducting the debts, one of which was a large debt due to himself:—Held, that the words "capital invested in the business" comprised all that was coming to the testator from his partner's estate, inclusive of the debt. *Bevan* v. *Att.-Gen.*, 4 Giff. 361; 9 Jur. (N.S.) 1099; 9 L. T. 221.

Business and Goodwill.]—The testator directed his executors to assign and transfer to H. "my business and the goodwill thereof, with the premises in which the same shall be carried on": —Held, that the capital of the testator employed in the business at his death and the stock-in-trade did not pass to H. under this bequest, and that the debts due to the business formed part of the capital, but the sacks, horses, and drays did pass to H. *Delany* v. *Delany*, 15 L. R., Ir. 55

Choice.]—*See* **Power to Choose**, infra.

Clothes and Linen.]—Bequest of "all my clothes and linen whatsoever" passes body linen only. *Hunt* v. *Hort*, 3 Bro. C. C. 311.

"Contents" of Desk.]—Bequest of a desk "with the contents thereof." The desk had in it, besides money, various choses in action—namely, a cheque to the testator's order and unendorsed, a banker's deposit receipt, promissory notes, some payable to his order and unendorsed, and the key of a box containing securities: —Held, that the choses in action passed by the bequest, but not the key of the box nor its contents. *Robson, In re, Robson* v. *Hamilton*, 60 L. J., Ch. 851; [1891] 2 Ch. 559; 65 L. T. 173.

—— **Of House.**]—A testatrix bequeathed certain legacies to A. C., sixth earl of E., and as to all her household furniture, paintings, books, china, and the whole contents of her house, she bequeathed the same to her trustees and executors upon trust that they should in the first place select and set aside a collection of the best paintings, statuary, and china for the Earl of E., and his successors, to be held and settled as heirlooms and to go with the title, and she authorised them to give to the said earl or his successors any articles of furniture which they should think fit, and as to all the rest and residue of the contents of her house upon trust for her trustees to select presents for her friends, and directed them to present any portion of the residue of the contents of her house to her cousins if they should think fit, or to sell the same, and the moneys so received to form part of her residuary personal estate. The testatrix died possessed of considerable personal estate, which comprised amongst other things a number of articles of jewellery which were at her death in a box at her bankers', which jewellery had been bequeathed to her. It was proved that it had been the practice of the testatrix, and also of the former owner, to send such box for safe custody to the bankers when they respectively were away from London:—Held, that the box of jewellery passed to the trustees as part of the contents of the house, that being the locality to which the property ought to be ascribed, although jewellery is merely for personal use, and is not appropriate to a house. *Johnson, In re, Cockerell* v. *Essex (Earl)*, 53 L. J., Ch. 645; 26 Ch. D. 538; 52 L. T. 44; 32 W. R. 634.

Corn.]—One devised that his cousin A. should continue to live at his house, and be at the charge of keeping the house and the servants, and coach-horses which the testator employed in ploughing the ground, and spend the corn arising therefrom in the house; here the land enjoyed with the house shall pass to the cousin A. *Blackborn* v. *Edgley*, 1 P. Wms. 603.

Curiosities.]—Ornaments of the person do not pass by a bequest of a cabinet of curiosities, even though occasionally shewn with it. *Cavendish* v. *Cavendish*, 1 Bro. C. C. 467; 1 Cox, 77.

Debentures.]—Held, that the word "debentures" in a will was sufficient to include general policies of insurance. *Phillips* v. *Eastwood*, Ll. & G. t. Sugd. 270.

A policy of assurance on the life of a debtor is a security for a sum to be paid, and may pass in a will under the words "debentures or debts." *Id.* 291.

Debts Due.]—A testatrix being entitled to her son's residuary estate, the amount of which was unascertained at her death, bequeathed as follows: "If any debts due to me at my decease, I request my executors will collect and pay into the hands of my children":—Held, that the son's residue passed by the bequest. *Bainbridge* v. *Bainbridge*, 9 Sim. 16; 7 L. J., Ch. 4; 2 Jur. 63.

Under a bequest of "all debts due and owing to the testator at the time of his death," a bond conditioned for replacing a sum of stock sold by the testator, after the date of his will, and lent by him to the obligor, was held to pass; the day stipulated for the reinvestment being passed at the time of his death, therefore not comprehended in the residuary devise, enumerating (among other things) "his government stocks and funds." *Essington* v. *Vashon*, 3 Mer. 434.

Testator was entitled to a rent-charge or annuity (issuing out of an estate of a tenant for life) equivalent to the amount of the annual interest upon the purchase-money of the annuity, and the annual premiums payable upon policies of insurance effected upon the life of the tenant for life, to secure the repayment of the principal; and by a subsequent parole agreement the annuity was made determinable by either party: —Held, upon the entire transaction, that this annuity and the policies, being merely the securities for a debt, passed under a bequest of all the "outstanding debts owing" to the testator; held, also, that the word "debentures" in a will was sufficient to include general policies of insurance. *Phillips* v. *Eastwood*, supra.

Testator gives a debt due from "J. on bond, 300*l.* and upwards," to A., B. and C. The debt is 350*l.*, viz. 200*l.* by bond and 100*l.* by covenant, and 50*l.*:—Held, that the three sums pass to A., B. and C. *Williams* v. *Williams*, 2 Bro. C. C. 87.

A Scotch heritable bond, although it contain a personal obligation to pay the debt, does not lose its heritable quality, and will not pass by an English will, but descends to the heir-at-law. *Jerningham* v. *Herbert*, 4 Russ. 388; Tam. 103; 6 L. J. (o.s.) Ch. 134; 28 R. R. 136.

Money at a banker's held to pass under a bequest of all debts due to the testator at the time of his death. *Devaynes* v. *Noble*, 1 Mer. 541; 15 R. R. 151.

A testator gave to the plaintiff the debt which was due from her to him. The plaintiff was not indebted to the testator, but she owed a sum of money to the firm in which the testator was a partner:—Held, that the joint debt passed under the bequest, subject to the rights of the surviving partners; and it being admitted that the partnership assets could be so arranged that the whole of the joint debt might be included in the testator's share of the assets, the plaintiff was

declared entitled to the whole debt. *Mayberry* v. *Brooking*, 7 De G. M. & G. 673; 25 L. J., Ch. 87; 2 Jur. (N.S.) 76; 4 W. R. 155.

A father after reciting that his son was "now indebted" to him in various sums of money in respect of advances, and that he was desirous that his son should be released from the said several sums, and that the securities held in respect thereof should be given up to him, bequeathed to his son all the aforesaid several moneys, with the securities then in the testator's custody relating thereto, and also released him from all claims in respect of the aforesaid moneys, "and all other moneys due from him" to the testator. By a codicil the testator released the son from another specified debt for moneys misappropriated by the son:—Held, that the will must be construed as speaking from the death of the testator; and that the son was released from the repayment of money advanced to him by his father between the date of his codicil and of his death. *Everett* v. *Everett*, 47 L. J., Ch. 367; 7 Ch. D. 428; 38 L. T. 580; 26 W. R. 333—C. A.

A father directed his debts, including 300*l*. due to his daughter, to be paid immediately. He owed his daughter 150*l*. only:—Held, there was no legacy given by this direction. *Wilson* v. *Morley*, 46 L. J., Ch. 790; 5 Ch. D. 776; 36 L. T. 731; 25 W. R. 690.

Where arrears of debt are bequeathed, they are confined to those due at time of making will. *Att.-Gen.* v. *Bury*, 1 Eq. Abr. 201.

Bequest of debt which shall be owing on a particular day taken as it stood at that day, and not affected by consignments from the Indies on account since death of testator, which happened previous to day specified. *Innes* v. *Mitchell*, 6 Ves. 461.

And see **Money Due on Mortgage**, infra.

Dividends.]—Unreceived dividends held not to pass under a bequest of the dividends and interest of all the testator's money in the funds to a legatee for life. *Shore* v. *Weekly*, 3 De G. & Sm. 467; 18 L. J., Ch. 403; 13 Jur. 1021.

A testator bequeathed all the dividends or interest of all his money in the funds, and of all other his personal property, to A. for life. The testator was at his death entitled to some dividends on stock, which had accrued due during his life, but had not been received by him:—Held, that such dividends did not pass under the words "dividends of his money in the funds," but formed "part of his general personal estate." *Ib.* See also *Constable* v. *Bull*, 18 L. J., Ch. 302; 13 Jur. 619.

A testatrix directed her trustees to pay the dividends arising from her personal estate, invested at her decease in or upon any stocks, funds, or securities whatsoever, yielding interest, to certain persons named in her will. The testatrix, at her death, left a balance in the hands of her banker, who was in the habit of allowing his customers interest upon the amount standing to their credit on a particular day in the year:—Held, that this balance did not come within the terms used by the testatrix, but was undisposed of by the will. *Archibald* v. *Hartley*, 21 L. J., Ch. 399.

A testator bequeathed the dividends on his American bonds, "which should be due to him at the time of his decease," upon trust for payment of certain arrears of allowances to his daughters. In his lifetime the dividends on these bonds having fallen into arrear, part of the arrears was capitalised, and bonds issued for the amount, and delivered to the trustees of a separation deed executed by the testator, though it did not appear that he was himself aware of the capitalisation:—Held, that he must be taken to have been aware of the capitalisation, and therefore that the capitalised bonds did not pass as dividends due to him at the time of his death, but that only the uncapitalised dividends passed, and that the legacy was specific, and not demonstrative. *Ricketts* v. *Harling*, 23 L. T. 760.

Effects—Cash.]—A testator bequeathed to A. "my plate, house-linen, furniture, and all other effects in my house at the time of my death":—Held, that a horse, carriage, car, and some hay in the yard and outhouses passed to A., but not a sum of cash in the house. *Watson* v. *Arundel*, Ir. R. 10 Eq. 299.

Under a residuary gift of "all my household furniture, wines, carriages, horses, and other effects, except my jewellery":—Held, that 750*l*. in cash and a book debt of 220*l*. passed. *Parrott*, *In re*, 53 L. T. 12.

—— **Fixtures of Business.**]—A testator gave his real and leasehold estate, stock-in-trade, money at the bank, goodwill, book debts, and effects, belonging to his business to his son, and charged his real and leasehold estates with the payment of legacies. The estates were sold to pay the legacies, and bought in by the son:—Held, that the fixtures passed to the son under the bequest of "effects belonging to the business." *Pinder* v. *Pinder*, 18 W. R. 309.

—— **Wine.**]—A testator by his will, made on the 21st December, 1879, devised his property, known as Heathfield, with the offices, gardens, fields, and appurtenances belonging thereto, to the use of his wife, and then the will went on: "I bequeath all my furniture, pictures, plate, jewellery, horses, and carriages, and other household effects, to my said wife absolutely":—Held, that all the wine at Heathfield passed under the words "other household effects." *Bourne, In re*, *Bourne* v. *Brandreth*, 58 L. T. 537.

And see **Furniture and Effects**, infra.

"Equal Share."]—A testator devised his freeholds in trust to pay two-fifths of the rents to A. for life, with remainder to his children, and to pay three-tenths to B. for life, with remainder to his children, and to pay the remaining three-tenths to C. for life, with remainder to her children. By a codicil he left A. an equal share only of the property with B. and C., instead of the increased share:—Held, that the property was divisible into thirds, one of which belonged to each of the legatees for life, with remainder to his children. *Quentery* v. *Quentery*, 33 Beav. 369.

"Estates and Hereditaments subject to the Limitations of the Settlement"—Money liable to be invested in Land under the Settlement.]—A tenant for life of a certain manor and other estates in Cornwall under a settlement which contained a power of sale, and directed that the proceeds of sale should be invested in the purchase of land either in the county of Cornwall or elsewhere, made his will and thereby directed his son, who was tenant in tail in remainder

under the settlement, within six months of the testator's death or of the son attaining twenty-one to effectually disentail the manor and estates and "all other the estates and hereditaments then subject to the settlement," and re-settle the same, with a proviso that if he did so the testator's residuary real and personal estate should belong to him absolutely; but that if he refused or neglected within the time aforesaid to disentail and re-settle, the residuary estate should go over. At the date of the testator's will, and also at his death, there were considerable funds which under the trusts of the settlement were liable to be laid out in the purchase of land:—Held, that the funds were described by the words "all other estates or hereditaments subject to the trusts of the settlement"; and that, therefore, in order that the condition of the will should be complied with, such funds must be included in the disentailing assurance and re-settlement. Quære, whether "hereditament" should be construed strictly as a word of art. *Cleveland's (Duke) Settled Estates, In re* ([1893] 3 Ch. 244), discussed and applied. *Basset* v. *St. Levan*, 13 R. 235; 71 L T. 718; 43 W. R. 165.

"All my Estate and Interest in the Lands of C."—Beneficial Interest in Charges on the Estate Passing.]—A testatrix who was entitled to an estate for life in the lands of C., and also to the reversion in fee in the same lands subject to the determination of the intermediate life estate of M. P., and who was also entitled to a charge of 1,000*l.* on the lands absolutely, and to the reversion in two other charges of 2,000*l.* each on the lands, subject to the determination of the life estate of K. in these charges by her will devised all her estate and interest in the lands to G. P., to whom also she bequeathed all her plate, plated ware, furniture, and pictures. There was no other legatee mentioned in the will:—Held, that the beneficial interest in the charges passed under the devise of all the testatrix's estate and interest in the lands. *Kilkelly* v. *Powell*, [1897] 1 Ir. R. 457—C. A.

A testator being possessed of a fee-simple estate in the lands of A., and also being beneficially entitled to a sum of money secured thereon by mortgage, devised all his estate and interest in the lands of A. to his son, W., for life, with remainder to his first and other sons in tail male; and in default of issue of his son W., to his son G. for life, with remainder to his first and other sons in tail male, with remainder over; and devised and bequeathed the residue of his property to his son W.:—Held, that the beneficial interest in the mortgage money passed under the specific devise of the lands. *Mackesy* v. *Mackesy*, [1896] 1 Ir. R. 511.

Estate—Plant.]—Devise of freehold and copyhold estate; part consisted of a brewhouse and malthouse, which was in lease, together with the plant and utensils:—Held, that the plant passed. *Wood* v. *Gaynon*, Ambl. 395.

And see **Personal Estate, Real Estate,** infra.

Estate, Money arising from Sale of—Books and Stock.]—Testator devised his estate in Leicestershire to trustees upon trust to sell the same, and also his books and stock, either together or in parcels. He afterwards disposes of the moneys to arise from the sale of his Leicestershire estate. As the estate, books, and stock might have been sold in one lot, and the produce was to form one common fund:—Held, that the disposition of the moneys to arise from the Leicestershire estate extended to the books and stock. *Newburgh (Earl)* v. *Eyre*, 4 Russ. 454; 6 L. J. (O.S.) Ch. 153.

"Everything else."]—*See* **Things,** infra.

"Expense other than paying Rates."]—Held, that the words "any other expense than paying the rates and taxes" meant "any other expenses affecting the property," and not expenses merely incident to the use and enjoyment of it; but that the words immediately preceding those threw on the trustees not only the burden of keeping vineries and forcing-pits in repair, but also that of keeping up the gardens. *Lethbridge* v. *Lethbridge*, infra, col. 1160.

Farm.]—The word "farm" means primarily land which is not held by the owner, but granted out to and occupied by another person, and may relate to the interest either of the lessor or of the lessee. *Holmes* v. *Milward*, 47 L. J., Ch. 522; 38 L. T. 381; 26 W. R. 608.

A gift of farms with real estate, upon limitations which import the fee, carries the interest in the real estate only and does not carry with it the leasehold interest in a farm. *Ib.*

A bequest of "the field in the front of my dwelling-house" does not include the house and curtilage, though in fact locally situate in the field, and such house and curtilage pass by a bequest of "the residue of my said farm." *O'Connor* v. *O'Connor*, Ir. R. 4 Eq. 483; 19 W. R. 90.

Farming Stock.]—B., who was a tenant farmer, bequeathed his household goods and other things, together with all his live and dead farming stock, implements, and all other the household and farming effects, to his wife for life, or for so long as she should continue to be his widow; and he directed that after his decease an inventory should be made and taken of his personal estate, and that two copies should be made, one to be delivered to his wife, and the other to be signed by her and kept by his executors, but he gave no directions as to any valuation of his personal estate. The testator, in case his wife should marry again, bequeathed all his personal estate and effects in trust for certain legatees. After his death, an inventory of his personal estate generally was made for probate duty, but no inventory was made and signed as directed by the will. He died in 1853, and the widow married in 1857, whereupon the legatees in remainder claimed that the widow and her husband might be charged with the value of articles included in the inventory, viz. "growing turnips and roots, fallows, labour, seeds, and manure; layers; manure made, and not carried out on the farm; wheat, barley, beans and peas, and straw and haulm severed from the ground; oxen, sheep, pigs, and horses":—Held, as the testator had not directed a valuation, that the established rule of the court must prevail, viz. that articles quæ ipso usu consumuntur, and which were necessarily employed on the farm in order to maintain the course of husbandry, did not pass to the legatees in remainder. *Bryant* v. *Easterson*, 5 Jur. (N.S.) 166; 7 W. R. 298.

A farmer bequeathed "the whole of the consumable and other provisions, farming stock and

effects, farming implements, growing crops, and tenant right," in or upon his dwelling-house and farm at his death to trustees, to carry on the farm "until the 6th of April next subsequent to or following the time of his decease," and after that day, to transfer "the consumable and other provisions, farming stock, and effects" upon his house and farm, to his son. He declared that his trustees were not to sell the "farming stock and effects" except in the ordinary course of management of the farm, and that the money produced thereby should fall into his residue. He died about four o'clock on the 5th of April, at which time there was on the farm, besides the ordinary farming stock, a large quantity of corn and wool of the last year's produce, and an excess of fat sheep and stock, of the value of 3,314*l.*:—Held, that these passed to the son. *Harvey* v. *Harvey*, 32 Beav. 441.

A testator bequeathed "all his live and dead farming stock in and about the farm and farm buildings then occupied by him":—Held, as against residuary legatees, that everything upon the farm belonging to the testator at the time of his death, including the animals, the unsold produce, and the growing crops, passed under the bequest. *Burbidge* v. *Burbidge*, 37 L. J., Ch. 47; 17 L. T. 138; 16 W. R. 76.

A gift of "all farming stock" will not, as against the devisee, pass crops on the ground, unless there be a plain intention that the legatee of the farming stock is to take all the personal estate. *Vaisey* v. *Reynolds*, 5 Russ. 12; 6 L. J. (O.S.) Ch. 172; 29 R. R. 4.

A testatrix, after devising all her real estate to A., gave all the "farming stock, goods, chattels, and effects in and about" one of her farms forming part of her real estate to B.; and she gave the residue of her personal estate to other persons:—Held, that all crops growing on the farm at the testatrix's death passed to B. *Vaisey* v. *Reynolds* (supra) disapproved of. *Roose, In re, Evans* v. *Williamson*, 50 L. J., Ch. 197; 17 Ch. D. 696; 43 L. T. 719; 29 W. R. 230.

And see **Stock,** infra.

Fixtures and Fittings Up.] — Household furniture does not pass under the description of "fixtures and fittings up." *Simmons* v. *Simmons*, 6 Hare, 352; 12 Jur. 8.

Foreign Bonds.]—A bequest of "foreign bonds and other securities":—Held, to pass foreign securities only, notwithstanding that testator had a very large personal estate vested in the British funds. *Ferguson* v. *Ogilby*, 2 Dr. & War. 548; 1 Con. & L. 554.

Colonial bonds will not pass under the description "foreign bonds." *Hull* v. *Hill*, 4 Ch. D. 97; 25 W. R. 223.

Freehold Lands — Copyholds.] — A testator devised a farm by the description of "my freehold farm and lands situate at Edgware, and now in the occupation of James Bray." The will contained no residuary devise. The farm comprised about seventy-six acres, of which twenty-six were copyhold:—Held, that the copyhold parts of the farm passed under the devise. *Hall* v. *Fisher* (post, col. 1177) and *Stone* v. *Greening* (post, col. 1193) discussed and questioned. *Bright-Smith, In re, Bright-Smith* v. *Bright-Smith*, 55 L. J., Ch. 365; 31 Ch. D. 314; 54 L. T. 47; 34 W. R. 252.

"Full Salary"—Legacy Duty.]—A gift of six months' full salary is not a gift free from legacy duty. *Marcus, In re, Marcus* v. *Marcus*, 56 L. J., Ch. 830; 57 L. T. 399.

The Funds—Money in.]—A testatrix, by will, in 1837, bequeathed as follows: "To my dear brother I leave everything I may be possessed of at my decease for his life; and should he marry, and have children of his own, to those children after; but should he die a bachelor, at his death I leave the whole of my fortune now standing in the funds to E., my god-daughter." A portion of the personal estate of the testatrix, both at the date of the will and of her death, consisted of bank stock. Her brother died a bachelor:—Held, that the bank stock did not pass to E. by the bequest. *Slingsby* v. *Grainger*, 7 H. L. Cas. 273; 28 L. J., Ch. 616; 5 Jur. (N.S.) 1111. Affirming 4 W. R. 623; 8 De G. M. & G. 385.

Certificates of the Boston (U.S.) water scrip and bonds of the Pennsylvania Railway Company:—Held, not to pass under the words "stocks in the foreign funds." *Ellis* v. *Eden*, 23 Beav. 543; 26 L. J., Ch. 533; 3 Jur. (N.S.) 950.

The words "money or stock in the foreign funds":—Held, upon the terms of a will, to comprise all foreign securities, for which the faith of the government of the foreign country was pledged. *Ib.*

East India stock will not pass under a bequest of money in the "government or parliamentary stocks or funds, or foreign stocks or funds." *Brown* v. *Brown*, 6 W. R. 613.

Testator bequeathed to trustees, for the use of his wife and children, the interest of his property in the English and French funds, and he gave the capital to his surviving children, that is to say, to be equally divided at the period of his eldest surviving child attaining the age of thirty. By a codicil he bequeathed to his executors, for the use of his children, "whatever sum now stands in my name, or may hereafter, in the Dutch funds, or any other funds, including the interest arising therefrom":—Held, that the words "any other funds" included stock in the British funds. *Montresor* v. *Montresor*, 1 Coll. C. C. 693.

Under a bequest of "all my Irish funded property, standing in my name in the Bank of Ireland," government debentures, which were in the hands of the testator's bankers at the date of his will, do not pass. *Ridge* v. *Newton*, 2 Dr. & War. 239; 1 Con. & L. 381; 4 Ir. Eq. R. 389.

A bequest of "property in the English funds" will not pass India stock or Exchequer bills. Stock standing in the testator's name at the time of his death, and which his bankers had purchased with moneys received by them on his account, without any express authority for their so doing, will not pass by a bequest of the testator's stock. *Johnson* v. *Digby*, 8 L. J. (O.S.) Ch. 38.

Bequest of "all the funded property in my name":—Held, to pass Irish bank stock and Irish 3¼ per cents. belonging to the testator, and standing in his name jointly with three others. *Mangin* v. *Mangin*, 16 Beav. 300.

A testator directed his trustees to sell and convert into money all his property, except such portion as consisted of moneys in the public funds, and the proceeds thereof to be invested

in the public funds:—Held, that the exception included long annuities. *Howard* v. *Kay*, 27 L. J., Ch. 448; 6 W. R. 361.

And see **Stock in the Funds,** infra.

Furniture—Books and Wine.]—Books and were held to pass by a specific bequest of "all the testator's furniture, linen, plate, pictures, carriages, horses, and other live and dead stock in his use and possession." *Hutchinson* v. *Smith*, 1 N. R. 513; 8 L. T. 602; 11 W. R. 417.

—— **China.**]—China held to pass under a bequest of furniture. *Hele* v. *Gilbert*, 2 Ves. Sen. 430.

—— **Clock.**]—Testator gave all his household goods, plate, linen, china, furniture, &c., which belonged to him at the time of his death to his wife absolutely, except so many and such parts thereof as should be contained in and described as heirlooms, or otherwise excepted by him in an inventory to be left by him, which he gave to his wife for her life. One of the articles enumerated in the inventory was an astronomical clock, which had belonged to testator's father, and been placed by him with a chronometer-maker thirty years back—in the first instance to ascertain the cost of repairing the same, and subsequently with a direction that it should be sold if a fair price could be obtained. The clock had remained with the chronometer-maker ever since, and had never been in the testator's actual possession:—Held, that this clock did not form part of the testator's general personal estate, but passed to his widow under the specific bequest of his household furniture. *Pellew* v. *Horsford*, 25 L. J., Ch. 352; 2 Jur. (N.S.) 514; 4 W. R. 442.

—— **Plate.**]—Under a bequest of the use of a house with all the furniture and stock, of carriages and horses, and other live and dead stock for life, plate passed; wine and books did not. *Porter* v. *Tournay*, 3 Ves. 311.

—— **Stock-in-Trade.**]—A silversmith bequeathing all his furniture, books, goods, and chattels, his stock-in-trade would not pass, though the plate in his house, as household furniture, would. *Stuart* v. *Bute* (*Marquis*), 11 Ves. 657; 8 R. R. 266.

"Furniture and Articles of Household Use or Ornament."]—A testatrix, claiming to be absolutely entitled to an altar-stone and certain relics, by her will specifically bequeathed all her "furniture and articles of household use or ornament":—Held, that the terms of the bequest were not sufficient to include the articles in question. *Petre* v. *Ferrers*, 61 L. J., Ch. 426; 65 L. T. 568.

"Rest of Furniture and Effects"—Bank-notes and Securities—Jewellery.]—A testator, after giving pecuniary and other legacies, including the sum of 100*l.*, to D., and including certain books, wine, and plate, gave "all the rest of the furniture and effects" at the house in which he resided to D., and devised and bequeathed the rest, residue, and remainder of his estate and effects to T. A sum of 2,740*l.* in bank-notes, certain stock receipts, certificates of railway stock, and some jewellery, besides the usual furniture and appointments, were found in his house after his decease:—Held, that the bank-notes, securities, and jewellery did not pass to D. under the gift of the rest of the furniture and effects at his house, but were included in the residuary gift to T. *Miller, In re, Daniel* v. *Daniel*, 61 L. T. 365.

"Furniture, Goods, and Chattels."]—A testator, after bequeathing pecuniary legacies, directed them to "be paid from such part of my personal estate as shall consist of money at my bankers or in the 3 per cent. consols." And after directing that the whole of his income should be devoted to the comfort and maintenance of his wife, and that she should have the use of his residence, he desired "that the furniture, goods, and chattels be not sold during my wife's lifetime, but at her decease to be divided among the executors":—Held, applying the rule, ejusdem generis, that the gift of "furniture, goods, and chattels," passed only such furniture, &c., as, on the house being let furnished, would go with the occupation of the house, and not such articles as jewellery, guns, pistols, tricycles, and scientific instruments. *Manton* v. *Tabois*, 54 L. J., Ch. 1008; 30 Ch. D. 92; 53 L. T. 289; 33 W. R. 832.

Household Furniture.]—A testator died in the occupation of a furnished tavern, where he carried on the business of a hotel keeper and betting agent, sleeping there occasionally for the convenience of his business, but having his ordinary residence at another house:—Held, that such parts only of the tavern furniture as were for the testator's own domestic or personal use, passed under a bequest of "all my household furniture," contained in his will. *Manning* v. *Purcell*, 7 De G. M. & G. 55; 3 Eq. R. 387; 24 L. J., Ch. 522; 3 W. R. 273.

—— **Fixtures.**]—Under a bequest of household furniture fixtures belonging to the testator in a leasehold house occupied by him will pass. *Paton* v. *Sheppard*, 10 Sim. 186.

A testator, who resided in a leasehold house, which was held by him for a short term of years, bequeathed all his leasehold messuages to his executors, in trust to sell; and bequeathed all his household furniture to his sister for life, and after her death to certain other persons:—Held, that the grates in the testator's residence passed under the bequest of "household furniture." *Peto* v. *Grissell*, 5 L. J., Ch. 286.

A bequest of "household furniture" will not, as a general rule, pass the tenant's fixtures in a leasehold house occupied by the testator. *Finney* v. *Grice*, 48 L. J., Ch. 247; 10 Ch. D. 13; 27 W. R. 147.

—— **Pictures, Books, China, &c.**]—Under a bequest of household furniture, plate in the house at testator's death, whether in common use or not, if suitable to the rank of the testator, pictures hung up, linen, and china, both useful and ornamental in the house, will pass; books in the library will not pass. *Kelly* v. *Powlet*, Ambl. 605; Dick. 559. See *Cole* v. *Fitzgerald*, 1 Sim. & S. 189. Affirmed, 3 Russ. 301; 1 L. J. (O.S.) Ch. 91; 24 R. R. 169.

Household furniture comprises everything that contributes to the use or convenience of the householder, or ornament of the house. *Ib.*

Construction of a will as to what will pass

under the description of "furniture." A testator by his will bequeathed his leasehold dwelling-house, together with all his pictures, prints, drawings, or paintings in miniature or enamel, with all his gold and silver coins, medals, watches, and trinkets of every kind whatsoever; as also his coaches, carriages, harness, and furniture to the same belonging; and also all and singular the fixtures appurtenant to his said leasehold messuage, together with the household furniture, plate, linen, wines, liquors, and other his estate and effects whatsoever, in and about the same, and that should be in his possession at the time of his decease, or in and about his said dwelling-house, or the outhouses and offices appurtenant thereto, and by him held, used, occupied, and enjoyed therewith; by a codicil he made a different disposition of the house, "with all its furniture and appurtenances thereunto belonging":—Held, that pictures placed in the house as ornamental furniture, and the plate and linen, passed by the codicil; but that the codicil had no operation on the disposition made by the will of the books, the gold and silver coins, trinkets, and things of that nature. *Cremorne* v. *Antrobus*, 5 Russ. 312; 7 L. J. (O.S.) Ch. 88; 31 R. R. 117.

By the term "household furniture" neither books nor wines pass. *Bridgman* v. *Dove*, 3 Atk. 202.

Devise by an E. I. captain of all household furniture, linen, plate, and apparel whatsoever, includes only what is for domestic use, not what for trade or merchandise. It does not include books nor plate for trade. *Le Farrant* v. *Spencer*, 1 Ves. Sen. 97.

—— **Personal Ornaments.**]—Bequest of "household furniture, plate, linen, china, glass, books, pictures, plated articles, prints, and all and singular other my household furniture and effects which, at time of my decease, shall be in and about my mansion house":—Held, not to include articles exclusively of personal ornament, and not adapted for the use or ornament of the house. *Tempest* v. *Tempest*, 2 K. & J. 635.

—— **Telescopes.**]—Telescopes held to pass under the words "household furniture and implements of household." *Brooke* (*Lord*) v. *Warwick* (*Earl*), 2 De G. & Sm. 425; 12 Jur. 912.

Household Furniture and Effects.]—Under a bequest of "household furniture, plate, china," and "other household effects":—Held, that gold, silver, and china snuff boxes, used for the purposes of ornament about the mansion, passed to the legatee. *Field* v. *Peckett*, 29 Beav. 573; 30 L. J., Ch. 813; 7 Jur. (N.S.) 983; 4 L.T. 459; 9 W. R. 526.

Held, also, that cabinets for china, which had been ordered by the testator, but had not been delivered at his death, also passed under these words. *Ib.*

—— **Jewellery.**]—Testatrix bequeathed "all the household furniture and effects" in and about her residence to A. and her residue to B.:—Held, that jewellery did not pass under the specific bequest. *Northey* v. *Paxton*, 60 L. T. 30.

—— **Farming Stock and Horses.**]—A gift of household furniture, plate, linen, china, glass, books, fixtures, and other effects of a like nature, does not include cows, horses, carriages, and farming stock. *Stone* v. *Parker*, 29 L. J., Ch. 874; 8 W. R. 722.

—— **Reversionary Interest in Stock.**]—Where a testator directed that his household furniture and effects should be sold immediately after his decease, and the proceeds applied for the benefit of his three younger children, the court held that a reversionary interest in a sum of stock to which he was entitled at the time of his death, and the contingency of a failure of issue, was not included in the bequest, but that there was an intestacy. *Marshall* v. *Bentley*, 1 Jur. (N.S.) 786; 3 W R. 566.

A reversionary interest in two sums of stock held not to pass under a bequest of "household furniture and effects, plate, linen, china, glass, books, wearing apparel, &c." *Newman* v. *Newman*, 26 Beav. 218; 4 Jur. (N.S.) 1030; 7 W. R. 6.

Goods and Chattels—Horses.]—By devise of all testator's goods and chattels in and about his dwelling-house and outhouses at A., at his death:—Held, that running horses passed. *Gower* (*Countess*) v. *Gower* (*Earl*), 2 Eden, 201; Ambl. 612.

—— **Cash.**]—A. devises 1,200*l.* to his wife and gives her all the goods and chattels, plate, jewels, household stuff, and stock belonging to his house at N.; 400*l.* which the testator has in the house will not pass by these words. *Anon.*, Pre. Ch. 8. *S. C.*, nom. *Saunders* v. *Earl*, 2 Ch. Rep. 188.

Where testator devised all his goods, chattels, household furniture, stuffs, and other things which should be in his house at time of his death:—Held, a sum of money there did not pass. *Trafford* v. *Berrige*, 1 Eq. Abr. 201.

—— **Choses in Action.**]—Generally, choses in action do not pass by a bequest of "goods and chattels" in a particular locality. Bequest "of all the goods and chattels, plate, linen, money at the bankers, or stock in the Monte de Milano, horses, carriages, &c., I may die possessed of at M.":—Held, not to pass Polish certificates and Neapolitan bordereaux (being government obligations) there situate, entitling the bearers to receive the interest and capital at a future time:—Held, also, that such securities could not be considered as money or cash; and, thirdly, that not having their locality at M., they did not pass under the words, "&c., at M." *Hertford* (*Marquis*) v. *Lowther* (*Lord*) (*Countess Zichy's Case*), 7 Beav. 1; 13 L. J., Ch. 41; 7 Jur. 1167.

Neither choses in action nor securities for money pass under a bequest of "goods and chattels." *Chapman* v. *Hart*, 1 Ves. Sen. 271.

What passes by devise of all goods and chattels in a house, not a bond or chose in action. *Ib.* But see *Anon.*, 1 P. Wms. 267.

And see **Household Goods,** infra.

Ground Rent.]—Bequest of leasehold ground-rents passes not the reserved rent only, but the reversionary leasehold interest. *Kaye* v. *Lawn*, 1 Bro. C. C. 76.

Devise of copyhold estate by the description of copyhold ground-rent good. *Walker* v. *Shore*, 19 Ves. 387.

Heirlooms.]—A testatrix having two houses, and residing occasionally in each, and having a

life estate in them with limitations over in tail male, gave by two separate gifts, nearly in the same words, the household furniture, &c., "in and about the same," specifically, in one case inserting a few words not found in the other, and excepting in one an article not mentioned in the other, and as to one referring to the articles as "heirlooms," to be enjoyed by the persons entitled in remainder. Money, railway certificates, live stock, carriages, wines and spirits, and hay were found on the premises:—Held, that these did not pass, but that plate, books, jewellery, and a piano did pass, and whatever was not mentioned in one, but was mentioned in the other, did not pass as to that one, but did pass as to the other. *Hare* v. *Pryce*, 11 L. T. 101; 12 W. R. 1072.

House—Library.]—A library of books held to pass under a general intention that the testator's house should not be dismantled, but kept up for his family. *Ouseley* v. *Anstruther*, 10 Beav. 462.

—— **Stables.**]—A testator bequeathed to his wife his leasehold house, No. 32, Princes Gate. Together with this house he had at the time of his death occupied stables called No. 3, Princes Mews, which were originally held under a different lease from the house, though each lease was entered into on the same day, and they were for exactly similar terms, and between the same lessor and lessee. Upon the purchase of the house and stables by the testator from the original lessee, they were assigned to him by one deed, and afterwards the testator again assigned both house and stables by one deed by way of mortgage:—Held, that the stables passed with the house to the wife. *Mocatta, In re, Mocatta* v. *Mocatta*, 49 L. T. 629; 32 W. R. 477.

House and Premises.]—Testator took a conveyance of "all that messuage or tenement, garden, fold, yard, and premises, called the Upper House Farm, with the barns, stables, cider mill, and outbuildings, containing 1a. 3r. 1p.," together with other enumerated pieces of land amounting to forty-one acres, which estate was ordinarily called the Upper House. By his will testator devised "all that my freehold house and premises called Upper House" upon certain trusts, and gave all the rest, residue, and remainder of his "said real and personal estates" over:—Held, that the whole estate called Upper House, and not merely the house and garden, passed under the devise of "all that my freehold house and premises." *Ross* v. *Veal*, 1 Jur. (N.S.) 751; 3 W. R. 652.

Household Goods.]—What passes under words "all his household goods." The words added thereto, "and whatever else legatee should think fit to accept of," were rejected in the construction of the will. *Anon.*, 2 Eq. Abr. 322.

Devise of plate, jewels, linen, household goods, and coach and horses, will be confined to things of the same nature; and goldsmith's notes and bank-bills do not pass by those words. *Timewell* v. *Perkins*, 2 Atk. 102.

Articles in the nature of household goods will pass under that description in a bequest, although they may never have been used by the testator, nor even kept in his house. *Pellew* v. *Horsford*, 25 L. J., Ch. 352; 2 Jur. (N.S.) 514.

—— **Plate.**]—Plate passes under a bequest of "household goods." *Stapleton* v. *Conway*, 1 Ves. Sen. 427. S. P., *Nicholls* v. *Osborn*, 2 P. Wms. 421; *Masters* v. *Masters*, 1 P. Wms. 425; *Lillcott* v. *Compton*, 2 Vern. 638.

By devise of all rings and household goods, plate used in the house does not pass. *Jesson* v. *Essington*, Pre. Ch. 207.

—— **Clock.**]—One, by will, gives all his household goods and implements of household. The malt, hops, beer, ale, and other victuals in the house do not pass; but the clock, if not fixed to the house, shall pass, but not the guns or pistols, if used as arms in riding or shooting game. *Slanning* v. *Style*, 3 P. Wms. 334.

A curious and valuable astronomical clock, formerly the property of Napoleon Bonaparte, had been taken as a prize of war by the testator's father in 1815. It had been shortly afterwards sent to a chronometer-maker in London for the purpose, first, of repair, and then for sale, and so remained unsold down to the death of the testator in 1854:—Held, that it passed under the description "household goods" in the testator's will. *Pellew* v. *Horsford*, supra.

Insurance Premium.]—Testator bequeathed to A. B. the premium of insurance on his life in an insurance office for her immediate expenses. Shortly before the date of the will a bonus had been declared upon the testator's policy of assurance:—Held, that the bonus alone passed under this bequest, a verbal declaration by the testator to A. B. upon the execution of the will to shew that he intended her to have both the policy and the bonus being inadmissible in evidence. *Barrow* v. *Methold*, 3 W. R. 629.

"All my Interest"—Will made before 1 Vict. c. 26.]—A testator in a will made before the wills act gave and bequeathed "all the interest of my houses and cottages situated as follows." He then proceeded to dispose of this property, which was copyhold, and after giving life interests, concluded with a gift to T. S.:—Held, that the words "all my interest" at the commencement of the will ran through the whole will, and were not in the nature of a recital merely, and that T. S. took the fee. *De la Hunt and Pennington, In re*, 57 L. T. 874.

Jewellery.]—A testatrix directs all her jewels to be sold to pay her debts, except a particular ring set with diamonds, which she gave to a friend, and she then bequeaths the remainder of her rings, her necklaces of every description, pearls, garnets, carnelians, and watches to B.; by a subsequent testamentary disposition she gives all her trinkets of every denomination, her jewels excepted, to C., and, in another part of the same instrument, directs her jewels to be sold; afterwards, by a third testamentary instrument, she bequeaths to C. all her trinkets and pearls, with various specific articles, among which were some rings set with diamonds; the testatrix was possessed of a very valuable necklace and cross, and of a pearl necklace, besides other necklaces, and of various diamond rings, besides those which were specifically bequeathed:—Held, that the diamond necklace and rings, and the diamond rings not specifically mentioned, were to be sold, and did not pass to B.; that the pearl necklace passed to B., under the

gift of necklaces of every description, and did not pass to C., under the gift of pearls. *Att.-Gen.* v. *Harley*, 5 Russ. 173; 7 L. J. (O.S.) Ch. 31.

—— **Coins.**]—A bag of coins found by the executors in the testator's strong box:—Held, not to pass under a bequest of "jewellery." *Sudbury* v. *Brown*, 4 W. R. 736.

—— **Masonic Orders.**]—A bequest of family diamonds and "other jewels" includes masonic orders and silver filigree ornaments. *Brooke* (*Lord*) v. *Warwick* (*Earl*), 2 De G. & Sm 425; 12 Jur. 912.

"Lease of House"—Freehold.]—A testator gave the lease of the house in which he should be living at the time of his decease to his wife. At the date of the will he was living in a house he held for a short term at a rack-rent; he subsequently bought and went to reside at a freehold house, where he died:—Held, that the freehold house was not devised to the testator's widow. *Knight, In re, Knight* v. *Burgess*, 56 L. J., Ch. 770; 34 Ch. D. 518; 56 L. T. 630; 35 W. R. 536.

Manor.]—A devise of a manor with all courts, &c. (enumerating the incorporeal hereditaments appointed to a manor only), extends to the demesne lands of the manor, and evidence of surrounding circumstances cannot be admitted to shew that such was not the intention. *Hicks* v. *Sallit*, 3 De G. M. & G. 782; 23 L. J., Ch. 571; 18 Jur. 915; 2 Eq. R. 818; 2 W. R. 173.

In a settlement of a manor, all hereditaments, as well corporeal as incorporeal, appurtenant thereto were enumerated. In a will exercising a power of appointment reserved by the settlement, the incorporeal appurtenants alone were enumerated, and dispositions were made of parts of the demesne lands, from which it might be inferred that the testatrix did not suppose that the demesne lands passed under the word manor:—Held, that these circumstances were not sufficient to raise a necessary inference upon the face of the will that the word manor was not intended to include the demesne lands. *Ib.*

The manor of W. was, by settlement, vested in trustees, upon such trusts as E. B., a married woman, should by will appoint. Before any will was made, a piece of copyhold land was, under an inclosure act, allotted to the trustees of the settlement as lords of the manor, and in compensation of their interest in the soil of the manor. Under the same act, two copyhold allotments were made to two other persons in respect of copyhold interests. The trustees of the settlement, in exercise of a power vested in them for that purpose, bought the two last-mentioned allotments, and held them upon the same trusts as the manor. Afterwards, in 1807, E. B. made her will, devising the manor, with its appurtenances, to the father of the plaintiff for life, with remainder to his first son in tail, with remainder to his second son, the plaintiff, and devising the residue of her property to trustees on trust to sell. E. B. died in 1813, and the copyhold allotment made to the trustees of the settlement, and the two allotments purchased by them, were then treated by the trustees of the will as part of the residue, and in 1814 were sold to a person from whom the defendant subsequently purchased. The plaintiff, while an infant, became entitled, in 1831, by the deaths of his father and elder brother, to the manor under the devise. He attained twenty-one in 1849, and soon afterwards filed a bill claiming the three allotments as part of the manor:—Held, that, as to each allotment, there had been, under the circumstances, an extinguishment of the copyhold in the manor, and that they all passed to the plaintiff under the devise of the manor. *Ib.*

The demesne lands of a manor previously granted in fee do not become reunited to the manor, if purchased by the lord, as they would do if they had reverted to him by escheat. *Delacherois* v. *Delacherois*, 4 N. R. 501; 11 H. L. Cas. 62; 10 Jur. (N.S.) 886; 10 L. T. 884; 13 W. R. 24.

If the demesne lands of a manor are treated, in a conveyance of them in fee, as a distinct property, as, for instance, being conveyed by the lord in fee without being accompanied by a declaration of the feoffor's title as lord, or being described as lands held of the manor, but only as lands situate, lying, and being within the manor, they are severed from the manor, and cease to form part of it, although the rents and dues may remain. *Ib.*

On repurchase, by the lord, of the fee-simple, he will hold of the chief lord. *Ib.*

They will, on such repurchase, again form part of the manor, so as to pass under that description made in a will dated anterior to the purchase. *Ib.*

Medals—Current Coin.]—Where current coin is curious, and kept with medals, it will pass as such. *Bridgman* v. *Dove*, 3 Atk. 202.

Messuage and Premises—Furniture.]—A testator devised his freehold messuage, tenement, or dwelling-house, with the yard, stables, and appurtenances, in Cavendish Square, together with the household furniture and effects therein, unto his widow for life; and, after her decease, he devised the same messuage or tenement, and premises, with the appurtenances, unto his son, his heirs and assigns:—Held, that the household furniture passed to the son. *Sanford* v. *Irby*, 4 L. J. (O.S.) Ch. 23.

—— **Garden on Opposite Side of Street.**]—Devise of "a messuage and premises, situate No. 4, —— Terrace":—Held, to include a strip of garden-ground on the opposite side of the street from the house, but for some time let and occupied with the house. *Hibon* v. *Hibon*, 1 N. R. 532; 32 L. J., Ch. 374; 9 Jur. (N.S.) 511; 8 L. T. 195; 11 W. R. 455.

Money.]—In construing a will no absolute technical meaning should be given to such a word as "money," the meaning of which must depend upon the context, if any, and such surrounding circumstances as the court can take into consideration. A testatrix who was possessed of cash, securities, leaseholds, furniture, and effects, by her will, made in expectation of her death, which occurred two days after its date, gave "one-half of the money of which I am possessed to H., and the remainder equally between O. and S., and after them to their children":—Held, that the word "money" passed all the personal estate. *Cadogan, In re, Cadogan* v. *Palagi*, 53 L. J., Ch. 207; 25 Ch. D. 154; 49 L. T. 666; 32 W. R. 57.

L. by her will desired that all her debts

funeral and testamentary expenses should be paid, and if she should not leave enough money for that purpose, she desired that sufficient to pay her debts might be sold of the property she purchased from R. She gave the remainder of that property to W. specifically; and after making certain specific bequests of furniture and jewellery, gave her interest in certain real estate to A. and made him her residuary legatee. The property purchased from R. was leasehold, held for a very long term of years. The testatrix at her death possessed no actual cash. She had a small sum due to her for rents, and the half of a turnpike bond, besides furniture, the property purchased from R., one leasehold dwelling-house, and the real estate specifically devised to A.:—Held, that the word "money" must be taken to mean not the general personal estate, but the rents and money due on the bond, and those being exhausted, the residue of the debts must be paid out of the property purchased from R. in exoneration of the furniture and leaseholds. *Lloyd* v. *Lloyd*, 54 L. T. 841; 34 W. R. 608.

At the date of the will in August, 1881, the testatrix had over 600*l.* at her bankers'. In February, 1883, she invested 600*l.* in the purchase of 586*l.* consols. At the date of her death in May, 1884, she had the 586*l.* consols, 555*l.* at her bankers', and 8*l.* cash in her house:—Held, that the word "money" in the will ought not to be extended beyond its strict meaning. *Sutton, In re, Stone* v. *Att.-Gen.*, 28 Ch. D. 464; 33 W. R. 519.

A testatrix, by her will dated in 1874, appointed executors thereof, gave pecuniary legacies to servants, and directed her debts and expenses to be paid, and continued:—"I give in equal shares all my moneys to my brothers and sisters as shall be living at my decease." Then she went minutely through her furniture and similar articles, bequeathing them to different members of her family, but some articles of furniture, &c., were omitted from the bequest, and the will contained no mention or express disposition of any stocks or investments, nor any residuary clause. By a codicil, dated in 1883, the testatrix bequeathed her furniture, &c., which might be in the house in which she and her sister X. should be living together at the time of her decease, to X. for life, and, after her death, she directed that the same should belong to the persons to whom the same effects were bequeathed by her will, and in all other respects she confirmed her will. The testatrix died in September, 1883, possessed of New Three per Cents. standing in her name; bonds of a foreign government payable to bearer; consolidated and preference stock of a railway company, registered in her name in the company's books; sums due to her; cash in her house; and furniture, &c., some of which was not specifically mentioned in the will:—Held, that the intention of the testatrix appearing from her will and codicil was to dispose, first, of all her moneys; secondly, of all her furniture, &c.; and therefore that, though the gift of all her moneys could not be read as a residuary clause, it must be read as applying to all the property of which the testatrix died possessed other than furniture, &c., and that the furniture, &c., not specifically disposed of was, therefore, the only property as to which the testatrix had died intestate. *Lowe* v. *Thomas* (infra, col. 1145) distinguished. *Townley, In re, Townley* v. *Townley*, 53 L. J., Ch. 516; 50 L. T. 394; 32 W. R. 549.

The word "money" by itself, in a will, means money strictly, and nothing else; but when used in connection with other words, it may have a much more extended signification. *Glendening* v. *Glendening*, 9 Beav. 324.

—— **Banking Account.**]—Bequest of "all my moneys":—Held, to include two balances standing to the credit of the testator at his bankers': one upon an ordinary current account, the other secured by deposit notes bearing interest. *Manning* v. *Purcell*, 7 De G. M. & G. 55; 3 Eq. R. 387; 24 L. J., Ch. 522; 3 W. R. 273.

Secus as to a sum of money returned to the testator's personal representative by stakeholders with whom the testator had placed it to abide the result of a wager which remained undecided at his death. *Ib.*

A testator by his will bequeathed to his wife all his moneys, household furniture, plate, books, linen, wearing apparel, &c., and his residue to his wife for life, and after her death to his children. The testator had, as a house of business, a tavern and betting office, and a private residence, both containing furniture, and he lived at the latter, but sometimes slept at the former. At the time of his death he had at a bank 2,000*l.* on a common banking account, and 5,000*l.* on a deposit account, for which latter interest was allowed; he had placed 6,000*l.* with certain shareholders to abide the event of a bet, and after his death it was repaid to his administratrix, and he held moneys for wagers, some of which were decided in his lifetime, but others not, all of which the administratrix paid:—Held, that the 2,000*l.* and the 5,000*l.* deposit account passed to the widow under the word "moneys":—Held also, that the 6,000*l.* did not so pass. *Ib.*

J. B., at his death, had a balance due from his banker, and was also entitled to a share of the balance due to A. B. from his brother, A. B. having received moneys for him from time to time, and with his knowledge paid them to his own bankers as his own moneys; but J. B. had no concern with A. B.'s bankers, nor did they know that he was interested in the moneys paid by A. B. J. B. bequeaths all his money in the hands of any banker:—Held, that his balance at his own banker's, and also his share of A. B.'s balance, will pass; and that evidence is admissible to shew that he so intended. *Heming* v. *Whittam*, 2 Sim. 493; 1 L. J., Ch. 94.

Under a specific bequest of personalty a gift of money will not include money at a banker's. *Loring* v. *Thomas*, 5 L. T. 269; 9 W. R. 919.

—— **Copyhold Lands.**]—Copyholds held to pass by the words "money, property, and effects," aided by the context. *Streatfield* v. *Cooper*, 27 Beav. 338.

—— **Furniture or Farming Stock.**]—A testator, after directing payment of debts, gave to his wife for life the interest of all sums of money he might die possessed of; after her decease he gave all such "interest money" to his daughter for life; and after her decease he gave the principal and interest to be divided between his daughter's children. The testator, at his death, was possessed of 455*l.* cash, besides furniture, farming stock, and a farm at a yearly tenancy:—Held, that there was a specific bequest

of the money only, and an intestacy as to the rest of his property, and that the debts must be paid out of his general estate. *Larner* v. *Larner*, 26 L. J., Ch. 668 ; 5 W. R. 513.

—— **Fine.**]—A testator bequeathed to his wife all his household furniture, plate, horses, carriages, stock, and all the money he might have, subject, however, to the payment of his debts and funeral and testamentary expenses, and to the erection of a suitable monument over him. After the date of his will the testator agreed, in writing, to make a grant in perpetuity of certain lands of which he was seised, in consideration of a fine of 1,250*l.* At his death the agreement remained uncompleted, and the fine was unpaid by the intended grantee, who was, however, willing to pay on getting a proper discharge. The will contained no further residuary gift. The lands to which the agreement related had been devised, in events which happened, to the testator's wife, durante viduitate, with remainder in trust for charitable purposes :—Held, that the fine of 1,200*l.* did not pass to the wife under the above-mentioned gift of "money." *Dillon* v. *M'Donnell*, 7 L. R., Ir. 335.

—— **Money due on Securities.**]—The word "moneys" in a codicil :—Held, to comprise not only all moneys in hand, but also all moneys due to the testator, whether upon security or otherwise, notwithstanding express mention made in the will of "moneys and securities for money." *Langdale* v. *Whitfeld*, 4 K. & J. 426 ; 27 L. J., Ch. 795 ; 4 Jur. (N.S.) 706 ; 6 W. R. 862.

A bequest of a cabinet with whatever it contains, "except money," will not pass a promissory note payable to the testatrix of a date anterior to the will, and which, at her death, was found in the cabinet. *Read* v. *Stewart*, 4 Russ. 69.

—— **Stock.**]—Bequest of "all the testator's money in the Bank of England" :—Held, to pass stock in the funds, testator having never had any cash in the bank. *Gallini* v. *Noble*, 3 Mer. 691.

Stock in the funds held in trust for the wife for life, with remainder as the husband should appoint, and in default to his executors, administrators, or assigns :—Held, not to pass under the will of the husband by the words "money he might have in the books of the Governor and Company of the Bank of England." *Howell* v. *Gayler*, 5 Beav. 157 ; 11 L. J., Ch. 398.

A testator, by his will, appointed A. and B. to be his executors, to take and receive all moneys that might be in his possession, or due to him at the time of his death, to be by them placed in the funds or otherwise laid out on security, the interest thereof to be paid to his wife for her life, and directed them, after her death, to divide the moneys held in trust by them between his two nieces. The testator had at his death only a small balance at his bankers', and the sum of 1,200*l.* consols :—Held, that the consols were disposed of by the will under the terms of moneys. *Waite* v. *Combes*, 21 L. J., Ch. 814.

The word "moneys" in a will extended, upon the context, to sums of stock. *Barclay* v. *Maskelyne*, 5 Jur. (N.S.) 12.

A., possessed of stock, made her will, and bequeathed "all the money I may die possessed of." She died possessed of no money, but of some personal chattels :—Held, that her intention could only be applied to the stock, and that it passed by her will, and did not form part of the residue. *Chapman* v. *Reynolds*, 28 Beav. 321 ; 29 L. J., Ch. 594 ; 6 Jur. (N.S.) 440 ; 8 W. R. 403.

South Sea stock and 3*l.* 5*s.* per cents. held in the context to pass by the expression "surplus money." *Newman* v. *Newman*, 26 Beav. 218 ; 4 Jur. (N.S.) 1000 ; 7 W. R. 6.

A testatrix bequeathed specific sums of South Sea stock and 3*l.* 5*s.* per cents. to her sister for life. At her death she left this money in trust to her niece, "to pay certain legacies," which did not exhaust the whole. She authorised her sister and niece (who were her executrixes) to sell out the residue of "her money" in the 3*l.* 5*s.* per Cents. over the sum she had mentioned for payment of her debts, and proceeded : "Then if there is any surplus money I give it to my niece" :—Held, that the niece took the surplus of both the funds. *Ib.*

Shares in an assurance company inclosed in an envelope, and indorsed "to be considered as ready money, and given to" the testator's wife :—Held, to pass under a bequest of "all sum and sums of money that might be in the house." *Knight* v. *Knight*, 2 Giff. 616 ; 30 L. J., Ch. 644 ; 7 Jur. (N.S.) 893 ; 5 L. T. 72.

A testator bequeathed all and every his household furniture and other effects, "and also all and every sum or sums of money which may be found in my house or be about my person or due to me at the time of my decease, and also all my stocks, funds, and securities for money, money due on bonds, bills, notes, or other securities which I may die seised, possessed of, or entitled to, and of any kind and description whatever, my will and intention is that my executors do and shall pay the same to H." The will contained no residuary gift :—Held, that shares in joint stock companies which belonged to the testator passed under this bequest. *Herbert* v. *Harrison*, 20 L. T. 386 ; 17 W. R. 523.

A testatrix made a bequest of "any interest or moneys to which she might be entitled on behalf of her late husband." At the time of her death she was entitled to a reversionary interest in consols and to other property, outstanding in the names of trustees, but of which she might at any time have obtained possession. As to one-third of the whole of this property, she had become directly entitled through her husband, and as to the other two-thirds through her infant son, who had acquired the same as one of the next of kin of his father :—Held, that the whole of the property passed under the bequest. *Moysey* v. *Stuart*, 23 L. T. 644.

A testator bequeathed to his sister a legacy of 100*l.* of good and lawful money of Great Britain, to be paid to her free from all expense, and a legacy of 20*l.* to his nephew, and the rest of his money to be equally divided between his brother and his niece. At his decease, his property consisted of 600*l.* Three per Cent. consols, and 119*l.* in sovereigns :—Held, that the stock did not pass under the word "money" ; under the words "free from all expense," the legacy of 100*l.* was to be paid discharged of duty. *Gosden* v. *Dotteril*, 1 Myl. & K. 56 ; 2 L. J., Ch. 15.

Under the following bequest, "to my brother, the whole of my money for his life, at his death to be divided between my two nieces, Rebecca and Mary ; my clothes to be likewise divided between them ; my watch and trinkets for my niece, Mary. I likewise declare

the longest survivor of my nieces is to become possessor of the whole money." The testatrix died possessed of certain small sums of ready money or cash, but of considerable sums of stock:—Held, that stock did not pass. *Lowe* v. *Thomas*, 5 De G. M. & G. 315; 2 Eq. R. 742; 23 L. J., Ch. 616; 18 Jur. 563; 2 W. R. 499. Affirming Kay, 369.

Stock in the funds, in which a testator has a reversionary interest, will not pass by a bequest of "my goods and furniture, my plate and linen, all money and notes that may be due to me at my decease." *Cowling* v. *Cowling*, 26 Beav. 449.

Testator, after giving certain annuities, gave to H. all his books, plate, linen, china, wearing apparel, watches, jewels, and money (except his money at his bankers' or in the funds, or placed on security), and all other property not otherwise disposed of. He subsequently, after directing that if the rents, &c., should be insufficient to pay the annuities they were to be reduced pro ratâ, directed that upon the decease of the annuitants the whole personal estate was to be invested in government securities and transferred to certain societies:—Held, that money must be taken in its strict legal sense, and did not include foreign stock and stock in various railway companies, the object of the exception being to restrict, and not to enlarge; but that "all other property" was not confined to articles ejusdem generis with those preceding, but must have an extended signification as to the personalty:—Held, also, that there was an immediate gift to the societies, subject to the fund remaining in its existing state of investment to pay the annuities, the investment in government securities being postponed until the death of the last annuitant. *Ludlow* v. *Stevenson*, 2 W. R. 675; affirmed 5 W. R. 828—L.JJ.

A testator, after stating "as for his worldly goods and chattels, he bequeathed them as follows," gave certain pecuniary legacies to his sons and daughter, and then bequeathed to his daughter "all things in the house remaining" of whatever kind, and "all moneys both in the house and out of it." There was no other gift of his residuary estate. He had some moneys both in the house and out of it at his death. He had also consols standing in his name, and some shares in a benefit building society:—Held, that the bequest of "moneys" was specific, and that it did not carry the consols, the shares in the building society, or the residuary personal estate. *Collins* v. *Collins*, 40 L. J., Ch. 541; L. R. 12 Eq. 455; 24 L. T. 780; 19 W. R. 971.

—— **Vested and Contingent Interests.**]—A testatrix bequeathed "all my money, except the sum of 400*l.* invested in the Belgravian Dairy Co., to" A. and B. She gave "the interest of the money invested in the Belgravian Dairy Co." to C., D. and E., in equal sums for life, and "on their deaths I will that the whole sum invested as above be used for the purpose of erecting an east window in St. Martin's Church, Epsom." The testatrix's estate at the time of her death consisted of cash, 500 shares of 1*l.* each in the dairy company aforesaid (the value whereof was at that time about 30*s.* per share), stocks and shares in other companies, and also a one-fourth share in certain railway stock in reversion to which she was contingently entitled on the death of the tenant for life without children:—Held, (1) that the gift of "400*l.* invested in the Belgravian Dairy Co." was a gift of 400 shares in that company, and not a gift of 400*l.* sterling, and (2) that the words "all my money" included not only the residue of the personal property to which the testatrix was entitled in possession, but also the one-fourth share in the railway stock to which she was contingently entitled in reversion. *Buller, In re, Buller* v. *Giberne*, 74 L. T. 406.

Money and Securities for Money—Bank-notes.]—Bank-notes, being always regarded, by common usage, as cash, cannot be considered as a security for money. *Southcot* v. *Watson*, 3 Atk. 233.

—— **Bankers' Deposit Notes.**]—A testatrix, having money placed with her bankers on deposit notes, being receipts for the money to account for on demand, gave "all bonds, promissory notes, and other securities for money in my hands at the time of my decease, and all moneys due thereon," upon certain trusts:—Held, that the bankers' deposit notes were not included in this bequest, but passed under a residuary clause. *Hopkins* v. *Abbott*, 44 L. J., Ch. 316; L. R. 19 Eq. 222; 31 L. T. 820; 23 W. R. 227. S. P., *Archibald* v. *Hartley*, 21 L. J., Ch. 399.

—— **Bond.**]—A. and B. were both domiciled in England. A. lent B. money on an English bond payable to him and his executors. Afterwards B. gave A. a heritable bond, charging lands in Scotland, as an additional security, and made payable to him and his heirs at a different time, and with a different rate of interest. On the death of A.:—Held, that the English bond was the primary security, that it did not merge in the Scotch heritable bond as the jus nobilius, and that the debt passed under A.'s will executed according to the English, but not according to the Scotch, solemnities, under the general term "securities for money." *Crust* v. *Goring*, 18 Beav. 383; 24 L. J., Ch. 308; 18 Jur. 884; 2 W. R. 370.

—— **Consols, Debentures, and Promissory Notes.**]—A testator, who died in 1878, bequeathed all his "moneys due on mortgage, securities for money, and ready money," to trustees upon trust for his children. Part of the testator's property consisted of the following: (1) consols; (2) proportion of dividend on such consols to the date of the testator's death; (3) promissory notes; and (4) railway debenture stocks. The question was, whether such property passed under the specific gift:—Held, that the consols and promissory notes were "securities for money" within the meaning of the gift, and so also the railway debenture stocks, it being expressly provided by s. 23 of the Companies' Clauses Act, 1863, that debenture stock and interest thereon should be a charge upon the undertaking of the company; but held, that the proportion of dividend on the consols did not pass, as the Apportionment Act, 1870, applied, and the dividend must therefore be apportioned as at the date of the testator's death. *Beaven, In re, Beaven* v. *Beaven*, 53 L. T. 245.

—— **I O U.**]—Under a bequest of "money, and securities for money," an I O U held by the testator at the time of his death:—Held, not to

pass. *Barry* v. *Harding*, 1 Jo. & Lat. 475; 7 Ir. Eq. R. 313.

—— **Unpaid Legacy.**]—An unpaid legacy bequeathed to a testatrix does not pass under her will by the words "moneys, and securities for moneys." *Mason, In re*, 34 Beav. 494; 34 L. J., Ch. 603; 11 Jur. (N.S.) 835; 13 W. R. 799.

A., a married woman, died in 1858, having bequeathed her money and securities for moneys to one, and all her separate personal estate and effects not thereinbefore disposed of to another. In 1863, A.'s mother died, having bequeathed to her a legacy and half her residue, and which bequest was saved from lapse by 7 Will. 4 & 1 Vict. c. 26, s. 33:—Held, that this legacy was passed under the residuary, and not under the specific, bequest in A.'s will. *Ib.*

—— **Legal Estate of Mortgagee.**]—Devise of all testator's freehold estates and all his farming stock, ready money, bills, bonds, notes, and other securities for money, and all the residue of his personal estate to trustees, their heirs, executors, &c., in trust to sell his real estates, and to sell, get in, and convert into money all his personal estate, will pass a mortgage in fee. *Barber, Ex parte, Tyas, In re*, 5 Sim. 451.

A testator, after several devises and bequests, gave, devised, and bequeathed all his messuages, chattels real, ready money, securities for money, debts, and personal estate to A. and B., their heirs, executors, administrators, and assigns, upon certain trusts:—Held, that the legal estate in the premises mortgaged to the testator in fee passed to A. and B., the trusts declared not being repugnant to that construction. *Mather* v. *Thomas*, 6 Sim. 115. And see *S. C.* 10 Bing. 44; 3 Moore, 684; 2 L. J., C. P. 234.

A testator, being a mortgagee of lands in fee, gave all his moneys, "securities for money," and all his personal estate and effects, to his wife, her executors, administrators, and assigns absolutely, she paying thereout all his debts, and he appointed his wife executrix. The testator's heir-at-law was an infant. The mortgagor sold the estate. The mortgagor and the executrix of the mortgagee petitioned the court, asking that the mortgaged lands might be legally vested in the executrix, to enable her to convey in the place of the infant heir:— Held, that the legal estate passed to the executrix by the will, and the court declined to make the order asked. *King's Mortgage, In re*, 5 De G. & Sm. 644; 21 L. J., Ch. 673; 16 Jur. 1153.

—— **Where Charge of Debts.**]—On construction of devise:—Held, that although words of devise would, standing alone, have been sufficient to have carried the legal estate in the mortgaged premises which may be so devised, yet being qualified by the subjection to the payment of debts, a purpose to which the money secured was alone applicable, and not the premises, it must be taken not to have been the intention of the testator that the legal estate therein should pass; and that therefore the heir-at-law is a necessary party to reconveyance on paying off mortgage. *Silvester* v. *Jarman*, 10 Price, 78.

A residuary devise of all the testator's estate, personal and real, although made subject to the payment of his debts, passes the legal estate in premises of which the testator was mortgagee in fee, notwithstanding the case of *Silvester* v. *Jarman* (supra). *Field's Mortgage, In re*, 9 Hare, 414; 21 L. J., Ch. 175; 15 Jur. 1004.

A mortgagee in fee of lands of gavelkind tenure gave and devised all the residue of his personal estate and real property, moneys, and securities, and all other effects, which should remain after paying his just debts, funeral and testamentary expenses, to his wife, for her own use and benefit:—Held, that, in consequence of the devise by the will, no estate in the mortgage premises remained vested in the infant co-heirs in gavelkind of the mortgagee; and an order was therefore refused upon a petition presented under the Trustee Act, 1850, praying an order vesting the infant's estate in the petitioner. *Ib.*

A testator, by his will in 1832, gave all his money, securities for money, household furniture, &c., and all other the rest and residue of his personal estate and effects, subject to the payment of debts and legacies, to his wife, her executors, administrators, and assigns absolutely:—Held, that the legal estate of mortgaged hereditaments, which was vested in the testator at the date of his will, passed under the term "securities for money"; and that the concurrence of the testator's heir was not necessary to make an effectual conveyance of the mortgaged premises to a purchaser. *Knight* v. *Robinson*, 2 K. & J. 563.

The case of *Galliers* v. *Moss* (9 B. & C. 267; 4 M. & Ry. 268; 7 L. J. (O.S.) K. B. 109) must be treated as overruled by subsequent decisions. *Ib.*

A testator, a mortgagee in fee of real estate, gave and bequeathed to A. and B. all and singular his household furniture, goods, plate, linen, and utensils whatsoever, and all and every other his goods and chattels, stock-in-trade, moneys, debts, and securities for moneys, and all and every other his personal estate and effects whatsoever and wheresoever, upon trust to get in his debts, and to sell his personal estate, and hand the money arising therefrom upon trust therein mentioned:—Held, that under these words the legal estate in the mortgaged property passed to the trustees. *Walker's Estate, In re*, 21 L. J., Ch. 674.

—— **Sale Money.**]—Money of the testator, in the hands of his salesmaster, does not pass under a bequest of all his ready money and securities for money, there being no evidence that the salesmaster acted as the banker of the testator. *Smith* v. *Butler*, 3 Jo. & Lat. 565; 9 Ir. Eq. R. 398.

—— **Vendor's Lien for.**]—A bequest of "all securities for money" will include money due to a testator in respect of which he had a vendor's lien for unpaid purchase-money. *Gould* v. *Teague* (7 W. R. 84) doubted. *Callow* v. *Callow*, 58 L. J., Ch. 698; 42 Ch. D. 550; 38 W. R. 104.

—— **Shares in Companies.**]—The context of a will must be clear to afford an indication that a testator has used the words "securities for money," which of themselves would not carry shares in public companies, in an extended sense. *McDonnell* v. *Morrow*, 23 L. R., Ir. 591.

—— **Stock.**]—The words "securities for money," in a will, pass stock in public funds, unless force of expression is controlled by context. Quære, as to bank stock. *Bescoby* v. *Pack*, 1 Sim. & S. 500; 2 L. J. (O.S.) Ch. 17; 24 R. R. 217.

Stock included in a will under the word "securities," legacies being charged for which the securities properly so called were not sufficient. *Dicks* v. *Lambert*, 4 Ves. 725.

A testatrix bequeathed the residue of her property, of whatsoever nature and description, "not being ready money or securities for money," to three legatees:—Held, that stock in the 3½ per cents. was included in the exception, and, therefore, did not pass to the residuary legatees. *Buckman* v. *Ives*, 6 L. J., Ch. 197; 1 Jur. 234.

O. by her will gave all her "money and securities for money of every description":—Held, that these words did not carry Bank of England stock, shares in a canal company, or moneys invested on mortgage by and in the names of the trustees of the will of F., a prior testatrix to whose estate O. was entitled as residuary legatee, subject to an outstanding unpaid legacy; but that the same words carried, first, moneys which had been advanced on mortgage by F. herself, and allowed by her trustees for sixteen years after her death to remain invested on the same mortgage, and, secondly, moneys which had been advanced by F. on mortgage, and on the mortgage having been paid off after her death had been received by one of her trustees as agent for O. *Ogle* v. *Knipe*, 38 L. J., Ch. 692; L. R. 8 Eq. 434; 20 L. T. 867; 17 W. R. 1090.

Money on Security—Legal Estate of Mortgagee.]—The gift by the will of a mortgagee in fee of estates on trust for sale, and of money on securities, does not carry the legal estate in her mortgaged property. *Cantley, In re*, 22 L. J., Ch. 391; 17 Jur. 124; 1 W. R. 158.

The words "money in the funds and on securities" do not pass the legal estate in mortgaged premises. *Ib.*

A., who was mortgagee of real estate, gave by will all his real and personal estate to B., upon trust, after payment of his debts, to permit and suffer his wife to receive the rents of his real estate, and the interest of all sums of money that might be due to him on mortgage, bond, note, or other security, for her life, and at her death to get in all the debts owing to him on any security or on simple contract, and to pay the same as in his will mentioned. B. died intestate, leaving an eldest son, who was an infant, and of unsound mind, but he had not been found lunatic by inquisition. Upon a petition by the parties beneficially interested:—Held, that the legal estate in the premises mortgaged to the testator passed to B. *Arrowsmith, In re*, 27 L. J., Ch. 704; 4 Jur. (N.S.) 1123; 6 W. R. 642.

Will of mortgagee disposing of the money carries his interest in the land. *Silberschildt* v. *Schiott*, 3 V. & B. 45.

Gift of a mortgage security for money will pass the fee, if the estate be mortgaged in fee. *Renvoize* v. *Cooper*, 6 Madd. 371.

Money Due.]—Testator bequeathed to A. B. all his ships and money due to him at the time of his decease:—Held, that freight earned after his decease under a charter-party executed before that event, but after the will, did not pass either as "money due" or as incident to the ship. *Stephenson* v. *Dowson*, 3 Beav. 342; 10 L. J., Ch. 93; 4 Jur. 1152.

A testatrix, who was entitled to a distributive share of the assets of an intestate, to whom, at her death, no administration had been taken out, bequeaths "all such sums of money as should be owing to her, at the time of her decease, from G. B." These words will not pass her beneficial interest in a sum of money which was then due from G. B. to the estate of the intestate. *Collins* v. *Doyle*, 1 Russ. 135.

Bequest of "all sums of money due to me at the time of my decease." At the death of the testator, A. was under an unascertained liability to him for a breach of a covenant in a lease:—Held, that the damages recovered in an action brought by the executor against A. for the breach passed under the bequest, as the action merely ascertained the amount of what was due to the testator at his death. *Bide* v. *Harrison*, 43 L. J., Ch. 86; L. R. 17 Eq. 76; 29 L. T. 451.

A testatrix made a specific disposition of property, including "all sum and sums of money which shall be due and owing to me at the time of my decease," and gave the residue of her personal estate to other persons. At the time of her death in 1781, she was one of the two next of kin of her son, who had died intestate in 1778. The son was the residuary legatee of his father, who had died in 1776. In 1800 a decree was made for taking the accounts of a partnership in which the father had been engaged, and which had been dissolved by the death of the other partner a few months before the father's death. In 1820 the representatives of the surviving executor of the father paid into court a sum of money on account of what was due from the executor to the father's estate in respect of moneys coming from the partnership. Nothing was shewn as to the state of the partnership assets or of the estates of the father or son at the time of the death of the testatrix:—Held, that the moiety of the testatrix in the fund in question did not pass under the gift of "sums of money due and owing to me at the time of my decease," but under the residuary bequest, it not being shewn that the assets were at her death in such a state that her share could be treated as a sum of money then owing to her. *Martin* v. *Hobson*, 42 L. J., Ch. 342; L. R. 8 Ch. 401; 28 L. T. 427; 21 W. R. 376.

A testator, by a will made in India, gave "the whole of my personal property, together with my pay, arrears of pay, also all my goods and chattels, with any cash now in hand or money due to me or that may become due to me after my decease":—Held, that a reversionary interest in a fund in England, to which he was entitled under his parents' marriage settlement, passed. *Maberley, In re*, 24 L. T. 262; 19 W. R. 522.

Money due on Mortgage.]—A devisee of 200*l.* on a mortgage passes the principal only. *Roberts* v. *Kuffin*, 2 Atk. 112.

A term of 500 years was created in real estate, the trusts of the term being at the request of B. to raise and pay to him by demise, sale, or mortgage, or out of the rents, the sum of 1,500*l.*, and in the meantime, and until the whole of this sum should be raised upon trust, to pay to B. interest at 4*l.* per cent.:—Held, that the 1,500*l.* thus charged upon the land passed under a specific gift in B.'s will of "all the moneys whatsoever due to me on mortgage, and all debts owing to me on an account." *Brown* v. *Brown*, 6 W. R. 613.

A bequest of "all money which at the time of my death shall be due or owing to me on mortgage from any person or persons" does not include a sum charged upon the estate of which the testator was tenant for life, to which he had become entitled as the representative of his own

younger children who had died intestate and unmarried. *Poulett (Earl)* v. *Hood*, 35 Beav. 234; 35 L. J., Ch. 253; 12 Jur. (N.S.) 85; 13 L. T. 783; 14 W. R. 298.

A testator by a specific devise bequeathed to A. a mortgage debt on estates in Ireland amounting to 10,000*l.* due to him from S. At the time of his death there was not this sum due to him on the mortgage, but only 6,781*l.* He, however, held a judgment against S. for 771*l.*, registered and re-registered according to the Irish act 13 & 14 Vict. c. 29:—Held, that the judgment debt, being duly registered at the time of the testator's death, passed to A. under the devise of the 10,000*l.* mortgage debt. *Puxley* v. *Puxley*, 1 N. R. 509; 8 L. T. 570.

The testator recited in his will that he had contracted for the purchase of farms, and had paid off and taken a transfer of a mortgage thereon from J. He directed that the purchase and conveyance should be completed, and specifically devised these farms to B. as part of his estate at L.:—Held, that the devisee was not entitled to the interest on the mortgage debt between the death of testator and completion of the purchase. *Ib.*

Testatrix, mortgagee of an estate of which her brother was tenant for life, and having his bond for some arrears of interest, bequeathed to him the arrears of her mortgage on his estate, likewise a bond from him in her possession; half of the mortgage money was paid before the will: the principal mortgage money does not pass. *Hamilton* v. *Lloyd*, 2 Ves. 416.

Specific bequest of all moneys, stocks, funds, shares, and other securities, "except mortgages on real and leasehold security":—Held, that mortgages on turnpike road tolls and toll-houses were not mortgages on real security, and did not come within the exception in the bequest. *Cavendish* v. *Cavendish*, 55 L. J., Ch. 144; 30 Ch. D. 227; 49 L. T. 626—C. A.

Quære, whether a debt, secured by a deposit of gems, with a written memorandum empowering the creditor to sell if default were made in payment by a day fixed, passed under the will of the latter by the description of "debts secured by mortgage." *Townsend* v. *Martin*, 7 Hare, 471.

Bequest of the debts that shall be due at the death of the testator by mortgages, bonds, or open accounts from certain persons, extended from the explanation of a similar bequest, by another clause, to debts of every description, therefore including judgments. *Stenhouse* v. *Mitchell*, 11 Ves. 352.

"Ready Money in Bank."]—A gift of "ready money in bank" includes money on deposit receipt which can be withdrawn without previous notice to the bank; secus, if previous notice is necessary. *Mayne* v. *Mayne*, [1897] 1 Ir. R. 324.

Money in the Funds.]—*See* **Funds**, supra.

Money in Hand—Balance at Bank.]—Where a testator gives to one person "all his moneys in hand," and to another "all his moneys out on securities," the balance at his banker's will pass as money in hand. *Vaisey* v. *Reynolds*, 5 Russ. 12; 6 L. J. (O.S.) Ch. 172; 29 R. R. 4.

"Money I die Possessed of."]—A gift by a testatrix of "any money of which I may die possessed" includes cash in the house and money at the bankers', and any money of which, at the time of her death, she might have claimed immediate payment; but not the apportioned part of an annuity, or of interest payable to her which had accrued from the last stated days of payment to her death, nor a legacy due to her which had not been acknowledged as at her disposal. *Byrom* v. *Brandreth*, 42 L. J., Ch. 824; L. R. 16 Eq. 475; 21 W. R. 942.

Testatrix, after giving the residue of her moneys, securities for moneys, goods, and personal estate to M. by will, by a codicil gave all the residue of the moneys of or to which she might at the time of her death be possessed or entitled to N.:—Held, that "moneys" in the codicil included not only moneys actually in hand, but also moneys due to the testatrix on security or otherwise at the time of her death. *Langdale* v. *Whitfield*, 4 K. & J. 426; 27 L. J., Ch. 795; 4 Jur. (N.S.) 706; 6 W. R. 862.

F. was at the time of his death entitled to an estate in fee simple, subject to a mortgage debt, which was vested in trustees for his wife during her life, and after her death for him absolutely:—Held, that such reversionary interest passed under his will by a bequest of "sums of money upon real securities which he should die possessed of or in anywise entitled to," and did not fall into the residuary bequest. *Wilkes* v. *Collin*, L. R. 8 Eq. 338; 17 W. R. 878.

A testator gave to his wife "any money that he might die possessed of, or which might be due and owing to him at the time of his decease":—Held, that the money receivable under a policy of assurance on his own life, to which the testator was entitled, passed under the bequest. *Petty* v. *Willson*, L. R. 4 Ch. 574; 17 W. R. 778.

A testatrix, whose only property consisted of a small sum in consols, bequeathed, after the payment of her debts, "all the money she might die possessed of" to her brother and sister, and she gave her other property to her executor:—Held, that the stock passed to the brother and sister under the word "money." *Chapman* v. *Reynolds*, 28 Beav. 221; 29 L. J., Ch. 594; 6 Jur. (N.S.) 440; 8 W. R. 403.

Ready Money.]—A British subject domiciled in Russia made a will in the Russian language and in Russian form, commencing with the statement that he thereby disposed of all his property. He directed a sale of his landed estates in Russia, which he specified, and proceeded to make a disposition of "the money proceeds of all the above, as also the whole of my capital which shall remain with me, after my death, in ready money and in bank billets belonging to me." He closed his will with the statement that as all his property was entirely his own, and acquired by himself, nobody had a right to interfere with or contest his dispositions or those of his executors. It was proved that "bank billets" were a particular kind of Russian negotiable securities. At the time of his death, he had, besides his Russian property, a large sum in the English funds:—Held, that the words "in ready money and in bank billets" were not merely words of defective enumeration, but a description comprising the whole subject of the gift; that, the description of the gift being clear and unambiguous, the first and last clauses of the will were not sufficient to extend the meaning of that description, and that the property in the English funds was undisposed of.

Wylie v. *Enohin*, 1 De G. F. & J. 410; 29 L. J., Ch. 341; 6 Jur. (N.S.) 259; 8 W. R. 316. Affirmed, sub nom. *Enohin* v. *Wylie*, 8 H. L. Cas. 1; 31 L. J., Ch. 402; 8 Jur. (N.S.) 897; 6 L. T. 263; 10 W. R. 467.

A testator gave all his ready money to his widow. He had three half-years' dividends at the bank, for which he had not received the dividend warrants:—Held, that the unreceived dividends did not pass by the words "ready money." *May* v. *Grave*, 3 De G. & Sm. 462; 18 L. J., Ch. 401; 13 Jur. 1021.

—— **Banking Account.**]—A bequest of "ready money" comprehends money of the testator in the hands of his banker. *Parker* v. *Marchant*, 1 Y. & C. C. C. 290; 11 L. J., Ch. 223; 6 Jur. 292. Affirmed as to "ready money" comprehending money at bankers', 1 Ph. 356; 2 Y. & C. C. C. 279; 12 L. J., Ch. 314; 7 Jur. 457.

The testator directed his debts to be paid out of his ready money, and then gave his furniture, plate, &c., and the residue of his ready money, on certain trusts. The testator, at the date of his will, kept his money in his own house, and had no banker, but at his death he had 3,190*l.* at his bankers', and 100*l.* cash at home:—Held, that the money at the bankers' passed under the term "ready money." *Taylor* v. *Taylor*, 1 Jur. 401.

"I give to my wife all my ready money at my bankers', in my dwelling-house, or elsewhere; by which I mean money not invested in security or otherwise bearing interest, but what I may have in hand for current expenses at the time of my decease":—Held, that cash balances in the hands of the testator's bankers and of his agent, and dividends of stock due at the testator's death, passed by the bequest; but that the rent of a house, and the interest of a sum due on mortgage, did not pass. *Fryer* v. *Ranken*, 11 Sim. 55; 9 L. J., Ch. 337.

Cash of a testatrix at a savings bank, as to which she had given notice requiring payment, and which only awaited her receipt:—Held, to pass by a bequest of all her ready money. *Powell, In re*, Johns. 49; 5 Jur. (N.S.) 331; 7 W. R. 138.

But sums secured to her on notes of hand:—Held, not to pass by that bequest, although preceded by a direction for payment of her funeral and testamentary expenses. *Ib.*

A testator had at his death two sums of money at his bankers', one on a drawing account, the other on deposit, for which no notice of withdrawal was necessary; and he was also entitled to proportionate parts of two pensions, and of interest on mortgages, and of dividends on shares and stocks:—Held, that a gift of his "ready money" passed the two sums upon drawing and deposit account, but not the pensions, interest, or dividends. *Stein* v. *Ritherdon*, 37 L. J., Ch. 369; 16 W. R. 477.

—— **Cash in Hands of Agent.**]—A testator directed that his debts, and all charges and incumbrances affecting his estates, should be paid by the application in the first instance of all ready money and securities for money which he should die possessed of; and he charged his estates of C. exclusively with the payment of such, if any, which should remain after such application. He devised his real estate to trustees and their heirs, as to the residue thereof not before disposed of (which included C.), to the use of his wife for her life; and he bequeathed to her, in case she should survive him, all his personal property not before bequeathed. He then bequeathed a legacy, payable immediately after his decease, and gave, devised, and bequeathed, after the decease of his wife, two other legacies, and appointed his wife executrix:—Held, that money of the testator, which at his death was in the hands of a salesmaster in Smithfield, was not ready money within the meaning of the will. *Smith* v. *Butler*, 3 Jo. & Lat. 565; 9 Ir. Eq. R. 398.

R. L. P., in May, 1847, placed money in the hands of his agent, J. C., for investment on mortgage, and in April, 1848, bequeathed to his wife all his "ready money and securities for money, money in the funds, and money in the bank or banks (if any), due and owing to him at the time of his decease." J. C. died in October, 1847, without having invested the fund, but retained it in his hands; and R. L. P. died in July, 1848. In administering the estate of J. C., a claim by the executor of R. L. P. for the amount, subject to a deduction for money due by R. L. P. was allowed:—Held, that the sum due from J. C.'s estate to the estate of R. L. P. passed to the wife of the latter under the above bequest. *Cooke* v. *Wagster*, 2 Sm. & G. 296; 2 Eq. R. 789; 23 L. J., Ch. 496; 18 Jur. 849; 2 W. R. 434.

Held, that though the money did not pass under the words "ready money," yet following *Parker* v. *Marchant* (1 Ph. 356)—looking at the whole frame of the will, and the intention of the testator as indicated by the context—the money did pass, and was the legatee's money in the hands of the agent's executors. *Ib.*

Remainder of Money — Stock.]—The words "remainder of my money" pass all stocks and investments of money, but not the general residue other than such investments. *Hart* v. *Hernandez*, 52 L. T. 217.

A bequest of what might remain of testatrix's money after her lawful debts and legacies were paid, sufficient to pass stock. *Rogers* v. *Thomas*, 2 Keen, 8.

"Stock" held upon the context of a will not to pass by the word "money." A testatrix first directed her funeral expenses to be paid, and she gave the remainder of her moneys to B., and her wearing apparel and all other property whatsoever and wheresoever to C.:—Held, that money in the funds did not pass to B. *Willis* v. *Plaskett*, 4 Beav. 208; 5 Jur. 572.

A share in long annuities held, upon the context, to pass under the words "remaining sum or sums of money." *Grosvenor* v. *Durston*, 25 Beav. 97.

General residue of personal estate, including railway stock, held to pass under the words "residue of money," the will commencing with a general bequest of everything "in trust for the following purposes," and the gift of money being preceded by bequests of specific chattels. *Montagu* v. *Sandwich (Earl)*, 33 Beav. 324; 3 N. R. 186; 10 Jur. (N.S.) 61; 9 L. T. 632; 12 W. R. 236.

A sister bequeathed 80*l.* to her brothers, and to S. 170*l.*, "also my watch, my chain, my Bible, my rings, my workbox, and all it contains, my cameo brooch and my father's miniature, and also anything else whatsoever belonging to me that he may wish to get; and I also direct that whatever money is left after my burial be handed over to him, he seeing that I am interred respectably and decently." She had at her death only

a few pounds, chattels, and a sum of 500*l.* in the government funds:—Held, that the stock, after satisfying the pecuniary legacies, passed to S. *Boardman* v. *Stanley*, Ir. R. 7 Eq. 342; 21 W. R. 644.

A testatrix gave the interest of 2,777*l.* in the South Sea stock, and 2,650*l.* 3*l.* 5*s.* per Cents., to her sister for life, and at her death she left "this money" in trust to her niece, A., to pay the following legacies: to her niece, A., 1,777*l.* in the South Sea stock, and 650*l.* in the 3*l.* 5*s.* per cents.; to her niece, B., the interest of 1,000*l.* in the South Sea stock, and 900*l.* in the 3*l.* 5*s.* per cents., for her life; to her niece, C., 320*l.* in the 3*l.* 5*s.* per cents.; to her niece, D., 100*l.* in the 3*l.* 5*s.* per cents.; and she empowered her sister and her niece, A., to sell out any of the "residue of the money" in the 3*l.* 5*s.* per cents. for the payment of her debts and funeral expenses; and if there was any "surplus money," she gave it to her niece A. She appointed her niece, A., and her sister executrices:—Held, upon the general intent of the will, that there was no intestacy, and that the two sums of 1,000*l.* South Sea stock, and 900*l.* 3*l.* 5*s.* per cents., subject to the life interest therein of the testatrix's niece, B., passed to her niece, A. *Newman* v. *Newman*, 26 Beav. 218; 4 Jur. (N.S.) 1030; 7 W. R. 6.

Testator bequeathed to his wife the lease of his house and all the furniture, &c., therein for life, the interest of all money he should die possessed of, then half of the debts due to him at his death, one excepted, which he directed debtor to retain as long as he pleased, paying the interest to her, to be disposed of as she thought fit; in case the interest of the money he should die worth should not be sufficient for her maintenance, executors to allow part of principal out of the debts, except that before excepted, to make her life easy and comfortable; after her death, the interest of all money remaining to his sister; after her death, to her daughter all sums remaining for ever; if they die before his wife, one-half of all sums remaining to be disposed of as his wife should think fit, the other to A. Upon bill by testator's niece against executors of the wife, the niece held entitled to all beyond the debts, and a moiety of all debts but that excepted; the other moiety to wife's executors, who, being also executors of testator, were decreed to take out of wife's share a sum advanced under their power. *Collet* v. *Lawrence*, 1 Ves. 268.

Some effect must be given to every part of the will. *Ib.*

—— **Reversionary Interests.**]—A., an officer in the army under orders at Cape Town to return to England, after bequeathing small legacies to men of his regiment, and directing that certain articles should be sent home to his father and disposed of as he should think proper, devised "that the remainder of his money and effects might be expended in purchasing a suitable present for his godson, son of the paymaster of the regiment," a boy of about a year old. The testator died at Cape Town. After satisfying the debts and the bequests there remained in the hands of the paymaster a small balance of money. At the time of his death the testator was entitled to reversionary interests in stock, expectant on the death of his mother and father, both of whom were living at his death:—Held, that the reversionary interests in the stock did not pass under the bequest of "all the remainder of his money and effects to be expended in purchasing a suitable present for his godson." *Borton* v. *Dunbar*, 2 De G. F. & J. 338; 30 L. J., Ch. 8; 6 Jur. (N.S.) 1128; 3 L. T. 519; 9 W. R. 41. Affirming 2 Giff. 221.

A bequest of any "money" which may remain after payment of his debts:—Held, to pass a reversionary interest in a sum charged on real estate. *Stocks* v. *Barre*, Johns. 54; 5 Jur. (N.S.) 537; 7 W. R. 247.

—— **Insurance Policy.**]—A testator, after making certain specific gifts, gave to his widow "the remainder of all my moneys, wherever it may be, in bonds, or consols, or anything else," for her sole use as long as she should live, but not to give it away from his sons or daughters at her death; and the testator, after disposing of the remainder of all his moneys, made a further specific gift. The testator died possessed of furniture, a leasehold house, and a policy of insurance, not specifically bequeathed:—Held, that the gift of the remainder of his moneys by the testator did not include the furniture and leasehold house, but did include the policy. *Stooke* v. *Stooke*, 35 Beav. 396; 14 W. R. 564.

Held, also, that the wife was entitled to all the testator's residuary personal estate invested in any security. *Ib.*

Mortgages on Real Security.] — Specific bequest of all moneys, stocks, funds, shares, and other securities, "except mortgages on real and leasehold security":—Held, that mortgages of turnpike road tolls and toll-houses were not mortgages on real security, and did not come within the exception in the bequest. *Cavendish* v. *Cavendish*, 55 L. J., Ch. 144; 30 Ch. D. 227; 53 L. T. 652—C. A.

Occupancy of House.]—Under a bequest to a wife of furniture and effects, and the free occupancy of a house for life, after which the effects to revert back to the estate, the free occupancy of the house entitled the wife either to reside in it or to let it during her life. *Mannox* v. *Greener*, L. R. 14 Eq. 456; 27 L. T. 408.

Testator directed that his wife should have liberty to occupy his house for a year, provided she continues so long in L. Then by a distinct clause he directed his executors to pay her a guinea a week during her stay at L. Her residence there beyond the year does not entitle her to a continuance of the weekly payment. *Walker* v. *Watts*, 3 Ves. 132.

A testator directed his trustees to allow A. to occupy a mill, so long as he should think proper to do so, "he nevertheless keeping the premises in good and tenantable repair, and paying" a rent of 100*l.* A. accepted the gift, but the premises were afterwards totally destroyed by accidental fire:—Held, that A. was bound to reinstate them, and was liable for the rent in the meanwhile, and that he could not escape from the liability to rebuild by declining any longer to retain them. *Gregg* v. *Coates*, 23 Beav. 33; 2 Jur. (N.S.) 964; 4 W. R. 735.

See also *Blackborn* v. *Edgley*, supra, col. 1121; *and Cases under* **Residence and Use,** infra.

Partnership, "Share, Right and Interest in" —Debt due from.]—B. bequeathed all his "share, right, and interest" in the goodwill of a partnership business, and in the partnership real and personal estate, to his son, upon trusts for the

benefit of the testator's wife and children :—Held, that a debt due to B. from the partnership, and on which he was receiving interest, did not pass by the trust bequest, but formed part of the testator's residuary estate. *Beard, In re, Simpson* v. *Beard*, 57 L. J., Ch. 887 ; 58 L. T. 629 ; 36 W. R. 519.

"Permit and suffer" Beneficiary to receive Rents and Profits—Legal Estate.]—A testator devised an estate to trustees, in case he should leave only one child (an event which happened), "to permit and suffer" such child to receive the rents and profits for her natural life, and declared that immediately after his death the trustee should stand seised and possessed of the hereditaments unto and to the use of the heirs of the body of such child, and the hereditaments were to be legally conveyed and assured unto such heirs of his child in equal shares as they should severally and respectively attain the age of twenty-one years or be married, and to their several and respective heirs and assigns for ever, the rents and profits in the meantime to be paid and applied by the trustees for the maintenance and education of such heirs of the child in such manner as the trustees should direct :—Held, that, notwithstanding the use of the words "to permit and suffer," the legal estate remained throughout in the trustees ; that the rule in *Shelley's Case* applied ; and that the will created an estate tail in the testator's daughter. Decision in *Montgomery* v. *Montgomery* (3 Jo. & Lat. 60) criticised by Lord Macnaghten. *Van Grutten* v. *Foxwell*, 66 L. J., Q. B. 745 ; [1897] A. C. 658 ; 77 L. T. 170—H. L. (E.)

Personal Ornaments.]—A pocket book and a case of instruments usually carried about the person of testator :—Held, not to pass under the words "personal ornaments" ; but whether a gold pencil case, toothpick, lip-salve box, and eye glass similarly circumstanced would pass, quære. *Willis* v. *Curtois*, 1 Beav. 189 ; 8 L. J., Ch. 105.

Personal Estate.]—A. having debts due to him by bond, and being possessed of a term for years, gave one moiety of his personal estate to his wife, and several legacies to other persons, and the residue to S. The wife shall have one complete moiety, if the other is sufficient to pay the debts, and she shall have a moiety of the lease. *Lee* v. *Hale*, 1 Ch. Ca. 16 ; 2 Freem. 157. See also *Reynolds* v. *Hyde*, 2 Barnard. K. B. 422.

A testator devised his real estate (subject to charges) in strict settlement, and gave all his "railway, canal, and navigation shares . . . and personal estate" to his executor, to pay his debts and legacies, and his residuary personal estate and effects to M. He was possessed of two navigation shares, which by the act creating them were made of the nature of real estate. Before his death, the undertaking to which the shares belonged became vested in a railway company, by an act which provided for an extinguishment of the freehold rights in the shares, upon their conveyance to the railway company. The shares were never conveyed to the railway company :—Held, that by the railway company's act, or if not, by the will, they were converted into personal estate, and went to the residuary legatee under the gift of his personal estate and effects. *Cadman* v. *Cadman*, 41 L. J., Ch. 468 ; L. R. 13 Eq. 470 ; 20 W. R. 356.

A. tenant for life, in case she should so long live, and continue unmarried ; in case of her marriage, to her in fee ; in case of her decease, unmarried, to her sister, B., in fee. A. and B., and the husband of B., join in a sale by fine ; the purchase-money was laid out in funds in names of trustees, without any declaration of trust, or agreement as to the application ; nor was any notice of this fund taken in the wills of B. and her husband. B., being the survivor, made a general disposition of all her personal estate in favour of A. Although still unmarried, A. was held absolutely entitled to the stock. *Seawen* v. *Blunt*, 7 Ves. 171.

A bequest of a moiety of the interest of the residue of the testator's personal estate :—Held, upon the context of the will, to pass the interest of the proceeds of real estate, which were directed to be invested so as to form one mixed fund with the residue of the personalty. *Byam* v. *Munton*, 1 Russ. & M. 503 ; 8 L. J. (o.s.) Ch. 156.

Trustees holding moneys in trust for a married woman invested the amount in the purchase of land ; and, by the purchase deed, to which the vendor and they were the only parties, they declared themselves possessed of the estate, in trust to pay the income to the married woman for her separate use for life, and after her decease in trust for the benefit of all the children of the husband and wife equally between them ; and in default of children without issue, then in trust for the husband in fee ; and power was reserved to the trustees, at the request of the husband and wife, to sell the property ; and thereupon, with all convenient speed, to lay out the produce in the purchase of other freehold estates and so on toties quoties. At the end of fifteen years the estate was sold, and the purchase-money was invested as money, and the income was paid to the married woman for forty-four years until her death. Several years after the sale of the estate, the trustees, by a deed, which the husband and wife executed, declared that they held the fund upon the trusts of the first purchase deed. The husband died intestate, and the wife survived him for ten years. By her will she gave "all" her "personal estate and effects whatsoever and wheresoever, and of every kind soever, either in possession, remainder, reversion or expectancy," unto two of her children :—Held, that there was no evidence that the widow intended to change the character of the fund from being real estate ; that there being children entitled for their lives to the fund, it was not competent for her alone to change its character ; but that, as the property vested in her subject to her children's life interest, it was competent to her to have given such reversionary interest by will, but that the words she had used were not sufficient to include it. *Gillies* v. *Longlands*, 4 De G. & Sm. 372 ; 20 L. J., Ch. 441 ; 15 Jur. 570.

Real estate was settled by a marriage settlement, not comprising any personal estate. The tenant for life sold part of the land to a company under the powers of its act, and the proceeds were paid into court and invested. Afterwards, the tenant for life, under the power in the settlement, appointed by will to his son the whole of the settled estate, and the purchase-money of the part which had been sold. The son by will disposed of his residuary personal estate of which he might be possessed, or over which he might have any power of disposition at his death, including in such personal estate "all moneys to which I may be entitled under the

marriage settlement of my father and mother"; and he declared that he did not by his will intend to dispose of any real estate, but only of personal estate and chattels real. The widow of the tenant for life, who was entitled to a jointure, was still living:—Held, that the fund arising from the sale did not pass by the will. *Skeggs, In re*, 2 De G. J. & S. 533; 13 W. R. 567.

Personal Property.]—See *Montresor* v. *Montresor*, infra, col. 1169.

Plant and Goodwill.]—Under a gift of "the plant and goodwill of my business in Aldersgate Street":—Held, that stock in trade and furniture in the house of business did not pass; but it appeared that the house was held by the testator on a lease, of which a few years remained, at a rack rent, and exclusively for the purposes of business:—Held, that the testator's interest in the house passed under the bequest. *Blake* v. *Shaw*, Johns. 732; 8 W. R. 410.

Plantation.]—Semble, that by a devise of a W. I. plantation, the stock, implements, utensils, &c., upon it will pass. *Lushington* v. *Sewell*, 1 Sim. 435.

Plate.]—A bequest by a testator of all the furniture (except plate and pictures) which might be in a house mentioned at his decease:—Held, to be confined to articles of solid silver, and not to include a plated service in the said house. *Holden* v. *Ramsbottom*, 4 Giff. 205; 1 N. R. 307; 9 Jur. (N.S.) 350; 7 L. T. 735; 11 W. R. 302.

R. after giving a legacy and an annuity to H., bequeathed to her for life a leasehold house at Chelsea which he occupied, in case he should be residing therein at the time of his death; and also absolutely all the furniture (except plate and pictures) which might be in the house at his decease; but in case she did not have the benefit of these contingent bequests, the annuity was to be increased. The testator died in the house at Chelsea. At his decease there were in the house a service of plated silver, and some articles of solid silver:—Held, that the plated articles passed to the legatee, the term "plate" meaning solid plate only. *Ib.*

And see **Use of Plate,** infra.

Portrait.]—A testator bequeathed the portraits of himself, of his grandfather and grandmother, of his mother and of the Duke of Schomberg, to A. B. The testator had one portrait of himself, one of his grandfather and grandmother, and one of his mother, and a three-quarters portrait and a portrait in crayons of the Duke of Schomberg, and also a picture in which the duke was represented on horseback, with a battle in the distance:—Held, that that picture was a portrait of the duke, and that it passed, together with all the other portraits, by the bequest. *Leeds (Duke)* v. *Amherst (Lord)*, 13 Sim. 459; 14 L. J., Ch. 73; 9 Jur. 359.

House and Furniture to A.—Power to B. to choose everything he might desire from the Furniture.]—A testator, by his will, devised to A. a certain house and the furniture therein, except what he otherwise disposed of by will or codicil. By his codicil he empowered B. to choose everything he might desire from the furniture at the said house, except certain specified articles:—Held, that the testator intended B. to take all, or as much as he liked, of the furniture in question other than the excepted articles, and was not bound to leave a substantial portion thereof. *Sharland, In re, Kemp* v. *Rozey*, 74 L. T. 664—C. A.

Property in Possession.]—A husband transferred money in the funds in the joint names of himself and wife, for the purpose of making a provision for her; and by his will he bequeathed to his wife a life interest in "all his property that he was in possession of":—Held, that the stock did not pass. *Low* v. *Carter*, 1 Beav. 426.

Premises.]—The word "premises" where in a will it is not used in its primary meaning of "præmissa," is equivalent to appurtenances. *Read* v. *Read*, 15 W. R. 165.

Therefore, where a testator excepted from a general devise the yard and premises where he carried on his business, a house adjoining to and communicating with his business premises, and in which he resided when he carried on his business, was not included in the exception. *Ib.*

A testator, by will, after giving annuities, directed that the surplus of the rents, profits, and interest of his real and personal estate should be applied by his trustees in the reduction of mortgage and other charges upon his estates. Subject thereto, he delivered his S. estate to trustees for his sons for life, and empowered his trustees to permit the person entitled for life or any greater estate in the property, to occupy the mansion, gardens, and "premises" rent free. The home farm had no farm-house, and the farm buildings and farm were occupied by the testator at the time of his death:—Held, that the word "premises" must be taken to mean property in immediate connection with the mansion and without which the mansion could not be conveniently occupied, and that it did not include a farm occupied by the testator and near the mansion-house, but not otherwise necessary for its convenient occupation than as a means of supplying it with necessary farm produce. *Lethbridge* v. *Lethbridge*, 4 De G. F. & J. 35; 31 L. J., Ch. 737; 6 L. T. 727; 10 W. R. 449. See *S. C.*, 3 De G. F. & J. 253; 30 L. J., Ch. 388; 7 Jur. (N.S.) 296; 4 L. T. 127.

See also **House and Premises** *and* **Messuage and Premises,** infra.

Premium.]—*See* **Insurance,** supra.

Profits—Of Land.]—A gift of "the profits arising in my will" by a codicil to a will which disposed of the rents and profits of real estate:—Held, to be confined to the produce of the real estate. *Elgood* v. *Cole*, 21 L. T. 80; 17 W. R. 953.

One, possessed of a term for years, devises all the profits thereof to S.; only the profits accruing from the death of the testator shall pass. *Tissen* v. *Tissen*, 1 P. Wms. 503.

—— **Of Business.**]—A testator directs, that W. F. shall, with a capital taken out of his assets, continue his, the testator's, business; that he shall bind D. G. apprentice to himself; that he shall take D. G. into partnership at the end of his apprenticeship, or so soon after as he shall think him capable; and that D. G. shall have one-third of the profits of the business: D. G. is

not entitled to claim any share of the profits which are made before he is admitted into partnership. *Gordon* v. *Rutherford*, Turn. & R. 373; 2 L. J. (O.S.) Ch. 50; 26 R. R. 183.

Property.]—On a gift by a testator of all his freehold house and property situate in Wright's Road:—Held, that scaffolding and building materials situate in the ground near the house did not pass. *Conway* v. *Vernon*, 2 Giff. 277; 7 Jur. (N.S.) 958.

A testator gave his freehold estate "and property, whether real or personal," to A. for life; and after her decease, he gave "all his said freehold estate and property" to B. and wife for life; and after their decease, he gave "all his said freehold property" to their children, "for an estate of inheritance in fee-simple," and, in default, he gave "his freehold estate and property" to C., his heirs and assigns, in fee-simple. He charged his personal estate with some legacies, and he gave the residue of which he should die possessed, &c., to A.:—Held, that B. and his children took no interest in the personal estate, which belonged to A. *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; 21 L. J., Ch. 722.

Property at Interest.]—A testator gave his property at interest and in the funds to A. S., and he left to his executors any cash or bank-notes in his drawer in the study, or in his drawing-room; and by a codicil he left to the servants living with him at his death, one year's wages each, and stated that he left in his drawer in the study money to pay servants, and any surplus over he left to his executors:—Held, first, that deposit receipts passed to A. S. as property at interest. *Sealy* v. *Stawell*, Ir. R. 2 Eq. 326.

Held, secondly, that there being no cash in the study drawer or drawing-room, the bank post bills and cheques went to the executors for their own benefit, subject to the payment of the servants' wages. *Ib.*

"All my Personal Property"—Enumeration comprising Real Estate—After-acquired Freeholds.]—A testator, by his will, dated in 1875, gave and devised to the wife Rebecca "all my personal property, wherewith it has pleased God to bless me; that is, my freehold land, and my two cottages, Pennce Birr, situated at Clowstop . . . also my five leasehold houses . . . to have and to hold the same for her natural life." He then directed her to provide "out of the rents of the above property" for a granddaughter of hers, and concluded, "my wife Rebecca to be sole executor of the same." Subsequently to the date of his will the testator acquired other freehold property at Clowstop, of which, together with personal property, besides the leaseholds, he died possessed. The question was, what property passed by the will:—Held, that the words "personal property" were not used in their technical sense; that the testator meant to give all the property of every kind belonging to him personally; that this general description was not cut down by the words of enumeration which followed; and that the widow was entitled, for her life, to all the real and personal estate of the testator which he possessed at the date of his death. *Smalley, In re, Smalley* v. *Smalley*, 49 L. T. 662.

Property Whatsoever.]—A testator "devised and bequeathed his lands and property whatsoever in Australia," together with the arrears of rents, to A. and B., "their heirs and assigns," and he gave the residue of his estate and effects to C.:—Held, that his personalty in Australia passed under the first gift. *Robinson* v. *Webb*, 17 Beav. 260. See also *Roberts, In re, Kiff* v. *Roberts*, supra, col. 1120.

"Real Estate"—Leaseholds for Years.]—A testator by his will, dated in 1870, declared that his trustees should stand possessed of and interested in the annual income and proceeds of his real and personal estate in trust to pay an annuity to his wife, and after her decease he declared and directed that his trustees should stand possessed of and interested in his real and personal estate upon the trusts and for the intents and purposes following, that is to say, "as to my real estates wheresoever situate (the Victoria Park Cemetery in the parish of St. Matthew, Bethnal Green, excepted)" in trust to pay the annual rents and proceeds thereof to two children as therein mentioned, "and as to my freehold estate called the Victoria Park Cemetery, and my personal estate wheresoever situated, upon trust to pay the dividends, interest, and annual proceeds thereof," to his five daughters in equal proportions. The personal estate comprised certain leaseholds for years:—Held, that according to the true construction of the 26th section of the Wills Act (1 Vict. c. 26) the leaseholds for years did not pass under the gift of the real estates. *Wilson* v. *Eden* (16 Beav. 153) discussed; *Turner* v. *Turner* (21 L. J., Ch. 843) and *Gully* v. *Davis* (L. R. 10 Eq. 562) discussed and distinguished. *Butler* v. *Butler*, 54 L. J., Ch. 197; 28 Ch. D. 66; 52 L. T. 90; 33 W. R. 192.

B., by will, gave all his real estate in Kent to trustees upon trust for his sons, in strict settlement, and he gave all his real estate in the several counties of Durham and Middlesex, and elsewhere, and certain land at Stillington, in the county of Durham, held on lease from Merton College, Oxford, and all the residue of his personal estate, upon trust as to the personal estate for sale and conversion as therein mentioned, and as to the said real and leasehold estates in the counties of Durham and Middlesex, subject as to the said leasehold estate to the rents and covenants in the then present or any future lease thereof reserved or contained, upon the like trusts as were thereinbefore declared concerning the hereditaments in Kent. The testator at his death possessed in Kent a freehold mansion and estate; in Middlesex, a leasehold house only, and no real estate properly so called; in Durham, both freehold and leasehold lands in addition to the lands at Stillington mentioned in the will:—Held, that s. 26 of the wills act applied, and all the leaseholds passed under the gift of real estate in the counties of Durham and Middlesex. *Davison, In re, Greenwell* v. *Davison*, 58 L. T. 304.

Rents.]—*See* **Ground Rents**, supra.

Rents and Profits.]—Testator being seised in fee of freehold collieries, for which he received a rent, and also having shares in a leasehold colliery, directed that his legacies should be paid "out of the rents and profits of his collieries":—Held, that the freehold collieries only were charged. *Shipperdson* v. *Tower*, 4 Y. & C. C. C. 441; 6 Jur. 658.

And see **Profits**, supra.

Rent and Interest.]—Arrears of annuity held to pass under a bequest of "all arrears of rent and interest due." *Hele* v. *Gilbert*, 2 Ves. Sen. 430.

Residence Rent Free.]—A. by a codicil to his will stated that whereas he had made too small a provision for his wife, he thereby bequeathed to her a certain annuity for her life, and he also directed that his said wife might reside rent free in his then residence during her life. The widow inhabited the house for some years after the testator's death, but then let it and received the rents:—Held, that the widow, in so doing, was not residing in the house within the meaning of the codicil, and that she was not entitled to retain for her own use the rents received from the house, but must pay them over to the trustees of the will. *May* v. *May*, 44 L. T. 412.

Proviso that, until the sale of certain premises directed to be sold under trust for sale, the settlor and his wife, during their joint lives and the survivor after the death of either, should be permitted to reside in and enjoy all or any of the premises rent free:—Held, that where husband and wife did not both elect to reside on the settled premises, the proviso did not enable the husband to do so. *Rainy* v. *Ellis*, 27 L. T. 463.

A permission to reside in a house without paying rent gives no right to the rents and profits of the house. *Parker* v. *Parker*, 1 N. R. 508.

See also **Occupancy and Use**, supra.

Remainder—General Words followed by Particular.]—A testator by his will having made a bequest of a sum of money secured by a mortgage proceeded in the following terms:—I leave "the remainder of my personal property in funds, Royal Bank, and other deposit dockets to my wife absolutely." He left pecuniary legacies to two individuals:—Held, that the words "in funds, Royal Bank, and other deposit dockets," did not cut down the generality of the gift of "the remainder" of his personal estate, which passed to the testator's wife under the bequest. *Tighe* v. *Featherstonhaugh*, 13 L. R., Ir. 401.

And see **Money, Remainder of**, supra.

Residue—Direction that Share shall fall into.]—A testator bequeathed the residue of his personal estate to his wife for life, and after her death to his sister and three brothers in equal shares; but directed that in the event of his sister dying unmarried in his wife's lifetime (which happened), "her one-fourth should fall into the residue":—Held, that there was no intestacy as to the sister's one-fourth, but that the whole residue was, on the widow's death, divisible in thirds between the three other legatees. *Humble* v. *Shore*; and *Lightfoot* v. *Burstall* (post, col. 1205); and *Crawshaw* v. *Crawshaw* (post, col. 1209) considered. *Rhoades, In re, Lane* v. *Rhoades*, 54 L. J., Ch. 573; 29 Ch. D. 142; 53 L. T. 15; 33 W. R. 608.

Testator by his will bequeathed an absolute interest in his residuary estate amongst four persons, including M., in certain shares. By a codicil he altered the gift in the will as to M.'s share by restricting it to an interest for her life only, and directed that, upon M.'s death, "the same should fall into and form part" of his residuary estate; and in all other respects he confirmed his will:—Held, that there was no intestacy as to the remainder expectant on the death of M. in her one-fifth share of the residue, because, on the true construction of the will and codicil read together, such remainder had been effectually given to the other residuary legatees. *Humble* v. *Shore* (post, col. 1208) overruled. *Palmer, In re, Palmer* v. *Answorth*, 62 L. J., Ch. 988; [1893] 3 Ch. 369; 2 R. 619; 69 L. T. 477; 42 W. R. 151—C. A.

Securities.]—*See* **Money, Securities for**, supra.

Securities held by Bank—Shares—Inscribed Stock.]—M., by will, gave to a charity, "all the securities in my name now held, or which may hereafter be held for me by Lloyd's Bank, of 54, St. James's street, London, S.W." M. was living in India at the time of his death, and the bank then held, on his behalf, besides a number of bonds and debentures and certificates of debenture stock, the certificates for 200 ordinary shares of the Globe Telegraph Trust Company. The testator was also entitled to 3,000*l.* India three per cent. stock, and had given the bank a power of attorney to receive the dividends thereon, and to sell the stock. The bank did not hold any certificate or document of title relating to this stock:—Held, that the Globe shares were not securities, and that the India stock was not in any sense held by the bank, and therefore neither of these passed under the bequest. *Maitland, In re, Chitty* v. *Maitland*, 74 L. T. 274.

Security, Real.]—*See* **Mortgage**, supra.

Seised.]—R., being seised of freehold houses, died intestate in 1864, leaving A. his sole heiress-at-law. Upon R.'s death, his widow wrongfully entered into possession, and retained possession till her death in 1869, when her devisees entered. A. died in 1871, without ever having entered into possession of the property, having devised to L. all real estate (if any) of which she might die seised. An action having been brought by L. against the devisees of R.'s widow for recovery of the land:—Held, that "seised" being a purely technical word, and there being no qualifying context, it must be construed according to its technical meaning; and that as A. at the time of her death had no seisin at law or in fact, the property did not pass under her devise. *Leach* v. *Jay*, 47 L. J., Ch. 876; 9 Ch. D. 42; 39 L. T. 242; 27 W. R. 99—C. A.

"Settled Funds."]—By a marriage settlement, a husband covenanted that his representative should, after his death, pay a sum of money to the trustees of the settlement to be held by them upon the trusts thereof. The husband died, and the covenant was never called into operation by the wife, the only person who had any interest in its performance. By her will she made a bequest of "all her husband's settled funds":—Held, that his gift did not include the money covenanted to be paid under the settlement. *Moysey* v. *Stuart*, 23 L. T. 644.

Settlement, "Property not included in."]—By an ante-nuptial settlement a sum of 7,356*l.*, the property of the wife, was vested in trustees in trust, that if the husband should, within six months, secure payment to them of 4,000*l.* by mortgage of certain hereditaments belonging to him; they would pay him 4,365*l.*, part of the 7,356*l.* (of which 356*l.* was to be for his own

use); and the mortgage debt of 4,000*l.* was ultimately, in case of no children of the marriage, which happened, to be upon trust for the husband. After the marriage the mortgage was made, and by his will the husband gave to his wife "all our furniture, horses, and movables at Chester, as well as all her own fortune not included in our marriage settlement, for her sole use as a feme sole should she marry again":—Held, that the ultimate absolute interest of the testator in the 4,000*l.* mortgage debt passed to the wife under the bequest to her of all her own fortune not included in the marriage settlement. *O'Reilly* v. *Smyth*, 1 Ir. Ch. R. 349.

Personal property was put in settlement on the marriage of A. with B. The trusts were inter alia for A. (the intended husband) for life: afterwards for B. (the wife) for life; and ultimately, in events which happened, as to one moiety of the trust fund for A., his executors, administrators and assigns. By his will, after confirming his marriage settlement, A. bequeathed all his property "not included in the above marriage settlement" to his executors, in trust for four of his children:—Held, that the moiety of the trust fund reserved to A., his executors, administrators, and assigns, under the limitations of the settlement, passed under the devise. *Green, In re, Walsh* v. *Green*, 31 L. R., Ir. 338.

Shares in Railway.]—A testator bequeathed some railway shares, "and all his right, title, and interest therein":—Held, that moneys which he had paid in advance beyond the calls, passed to the legatee. *Tanner* v. *Tanner*, 11 Beav. 69; 17 L. J., Ch. 115; 12 Jur. 87.

A testator who had stock in the public funds, and also stock in a railway company and partly paid-up shares in the same company, made a bequest of "all such stocks in the public funds or shares in any railway" of which he might die possessed:—Held, that the railway stock passed under the bequest. *Morrice* v. *Aylmer*, 45 L. J., Ch. 614; L. R. 7 H. L. 717; 34 L. T. 218; 22 W. R. 107; 24 W. R. 587.

—— **In Mines.**]—Shares in a partnership formed for working a slate quarry, pass under a bequest in a codicil of "all shares, debentures, or securities in railways or mines of which the testator should die possessed," the testator having no other interest in quarries or mines at the date of his codicil, but having since bought, and dying possessed of, some transferable shares in a mining company. *Cleveland (Duchess)* v. *Meyrick*, 37 L. J., Ch. 125; 16 W. R. 104.

"Shares" in Company—Debentures.]—A testator bequeathed all his stock, shares, and debentures in the M. bank, shares in four other companies (including the A. gas company), and all other shares in banks or public companies, not otherwise disposed of. At the time of his death the testator possessed one hundred and thirty-five shares in the A. gas company, and also 2,000*l.* debentures in that company:—Held, that the debentures did not pass under the bequest. *Luard* v. *Lane* (post, col. 1265) questioned. *Dillon* v. *Arkins*, 17 L. R., Ir. 636—C. A.

A bequest of all a testator's "shares" in a public company will not pass debenture stock. Dictum of James, L.J., in *Attree* v. *Hawe* (9 Ch. D. 349) discussed and explained. *Bodman, In re. Bodman* v. *Bodman*, 61 L. J., Ch. 31; [1891] 3 Ch. 135; 65 L. T. 522; 40 W. R. 60.

A testatrix gave "my shares in" a railway company to W. The testatrix held debenture stock, but did not hold any shares in the company:—Held, that the testatrix, by the bequest, intended to pass something, which she had, to W.: and that, as she had no shares, the debenture stock passed. *Weeding, In re, Armstrong* v. *Wilkin*, 65 L. J., Ch. 743; [1896] 2 Ch. 364; 74 L. T. 651; 44 W. R. 556.

"Shares and Interest" in Assurance Company.]—A shareholder in an assurance company bequeathed all and every his "shares and interest" in the company, and "all the advantages to be derived therefrom." There was also a general residuary bequest. The rules of the company required each shareholder to effect, or procure to be effected, an assurance to a prescribed amount, and provided that one-third of every bonus on a policy should be added to the capital of the company:—Held, upon the whole context of the will and codicils, that neither the moneys made payable by a policy effected by the testator on his own life nor the proportion of a bonus payable in respect of the policy, passed under the above words to the specific legatees. *Harrington* v. *Moffatt*, 4 De G. M. & G. 1; 1 Eq. R. 35; 22 L. J., Ch. 775; 1 W. R. 294.

Stock—Live Stock.]—Testator gives "all his stock, cattle, horses, and carriages" to his wife absolutely, and gives his "farm and stock, and crop thereof," to his said wife during widowhood:—Held, live stock upon the farm given to the wife during widowhood, passed to her absolutely under the former clause. *Randall* v. *Russell*, 3 Mer. 190; 17 R. R. 56. And see *Hardman* v. *Johnson*, 3 Mer. 347; 17 R. R. 95.

—— **Growing Crops.**]—A tenant for life of a plantation in Jamaica bequeaths and devises to A., his heirs, executors, administrators, and assigns, all her negro, mulatto, and other slaves, men, women, and children, and all her cattle, mules, horses, asses, and other live and dead stock upon that plantation, and all other her real estate in Jamaica, and, after various specific and pecuniary legacies, she gives the residue of her goods, chattels, and personal estate and effects to B. A. is entitled to the growing crops, which were on the plantation at the death of the testatrix. *Blake* v. *Gibbs*, 5 Russ. 13; 29 R. R. 1.

—— **Malthouse Stock.**]—W. devised all his household goods, cattle, corn, hay, and implements of husbandry, and stock belonging to his house, messuage, farm, and premises held by him on lease, to his wife for life:—Held, that a malthouse being included in the lease, the stock of that as well as the stock in husbandry, will pass by the bequest. *Brooksbank* v. *Wentworth*, 3 Atk. 64.

And see **Farming Stock,** supra.

—— **Books and Wine.**]—A testator gave to his widow for her own absolute use and disposal "all his furniture, linen, plate, pictures, carriages, horses, and other live and dead stock which might be in his use and possession" at the time of his death:—Held, that the wine, which

was of the value of about 150*l.*, and the books, about 50*l.*, passed to her by the specific bequest. *Hutchinson* v. *Smith*, 1 N. R. 513; 8 L. T. 602; 11 W. R. 417.

—— **Plate and Linen.**]—"Stock" held not to include plate, furniture or linen. *Wilson* v. *Wilson*, 11 Jur. 793. And see *S. C.*, 1 De G. & Sm. 152.

Stock in Trade.]—A bequest "of my stock in trade and debts accruing therefrom" passes the stock in trade and trade debts existing at the testator's death. *Ferguson* v. *Ferguson*, Ir. R. 6 Eq. 199.

A testator, who was a barge builder, specifically bequeathed to his son his business, "together with all and singular his stock in trade as a barge builder." It is a custom in the testator's trade for a barge builder, when selling a new barge, to accept an old barge in part payment, and to repair such old barge and let the same out on hire. At the testator's decease there were five old barges belonging to him which had been thus acquired, and were thus let out on hire:—Held, that these barges formed part of the testator's stock in trade as a barge builder, and passed under the specific bequest. *Richardson. In re, Richardson* v. *Pilliner*, 50 L. J., Ch. 488; 44 L. T. 404.

Stock in the Funds.]—In a will containing a direction to convert all personal estate except cash and money invested in the parliamentary stocks, and the testatrix had a sum in long annuities:—Held, as between tenant for life and remainderman, that the long annuities must be converted. *Reynolds* v. *Brown*, 1 W. R. 50.

A. bequeathed all his "stock and money in the funds," and all the residue of his estate and effects whatsoever, both real and personal upon trust, after payment of debts, to convert into cash all his residuary estate and effects, except the freehold, copyhold, leasehold, and stocks:—Held, that certain long annuities were, as "stock and money in the funds," within the exception from the general direction to convert the residuary estate. *Grant* v. *Mussett*, 2 L. T. 133; 8 W. R. 330.

—— **Purchase-money of Real Estate Invested in.**]—Freeholds in which a lunatic was interested, were taken compulsorily by a company, and the purchase-moneys, which, under the act of parliament, were liable to be invested in land, were paid into court, and laid out in the government funds. The existence of the fund was overlooked, and it went on accumulating. A., who became tenant in tail in possession, with immediate remainder to her in fee, devised her real estate, and bequeathed "all such capital, stock, and moneys as she should be possessed of, or interested in, at her death, in the public, government, or parliamentary funds"; but she expressed no further intention as to conversion:—Held, that the principal fund passed as real estate, and the accumulations as personal estate. *Dixie* v. *Wright*, 32 Beav. 662.

—— **Money to be Laid Out In.**]—A testator having at the date of his will a mortgage to secure the re-purchase of a sum of three per cent. consols, of which he had lent the produce on a previous sale, it was held to pass by a bequest of so much stock. *Collison* v. *Curling*, 9 Cl. & F. 88; 6 Jur. 673. Affirming 4 Myl. & Cr. 63.

A gift by will of all the interest of the testatrix in certain stock, followed by a codicil, directing that a debt owing to her should at her death be laid out in the same stock, will not pass the amount of the debt to the legatee of the stock. *Havard* v. *Price*, 2 Hare, 98; 6 Jur. 1011.

—— **Bonus on.**]—Under a bequest of the interest, dividends, proceeds, and profits of a sum in stock to S. for life, and of the stock after death of S., to A., but if A. should die before twenty-one to S., a bonus on the stock given under statute 56 Geo. 3, c. 96, was held to belong to A. as the legatee of the stock. *Hooper* v. *Rossiter*, 13 Price, 774; M'Cle. 527.

Legacies of 1,000*l.* stock:—Held, not to pass additional capital, given as bonus by bank under 56 Geo. 3, c. 96, subsequent to will, and before testator's death. *Norris* v. *Harrison*, 2 Madd. 268. But see *Matthews* v. *Maude*, 1 Russ. & M. 397; 8 L. J. (o.s.) Ch. 106.

Stocks, Funds, and Securities — Railway Shares.]—A testator gave the residue of his moneys, railroad shares, and personal estate to trustees, in trust to invest; and after the death of his wife and failure of issue, he gave to trustees "his residuary personal estate and effects, in trust to invest and stand possessed of the investment," as well as "the stocks, funds and securities" which composed his personal estate, upon trusts over:—Held, that the railroad shares passed by the bequest over. *Surtees* v. *Hopkinson*, 18 L. J., Ch. 188; 13 Jur. 181.

"Stock Standing in my Name."]—Where a testator made a specific bequest of "all my stock standing in my name in various companies, together with all bonds, &c.":—Held, that sums in consols, and in new three per cent. annuities, a thirty years' annuity, also sums of New Zealand four per cent. stock; of Victoria, 1883, four per cent. stock; of New South Wales four per cent. stock; of Metropolitan board of works stock; of Nottingham corporation stock and dividends, passed under the bequest. *Parrott, In re, Parrott* v. *Parrott*, 53 L. T. 12.

And see **Funds, Money in The**, supra.

Things.]—Under a devise to A., of the testator's house, with the lands thereunto adjoining as then used and occupied by himself, and also all the household and other furniture, pictures, plate, books, and other things whatsoever usually therein, or considered as belonging thereto, except only cash, bank-notes, and securities for money,—neither carriages, carriage and riding horses, used by the testator for the accommodation of himself and his family, nor farming stock and utensils used by him in cultivating said lands, pass, although some were usually in the stables and on the lands, and were there at the time of the testator's decease. *Pennefather* v. *Bury*, 3 Jo. & Lat. 727; 9 Ir. Eq. R. 586.

Bequest of the use and enjoyment "of everything else at my house," means such things as are proper to go with the house as heirlooms, viz. fixtures and ornaments, not watches, &c. *Bown* v. *Cornforth*, 2 Ves. Sen. 277.

Timber.]—Devise of real estate to M. for life, and direction that "timber or wood which should be on his real estates, should from time to time

be used for repairing the houses thereupon, or otherwise, for the benefit or advantage of his estate, and that the same should be sold, and the money arising therefrom should be applied," &c.: —Held, devise to M. carried the underwood, and that trustees, leaving sufficient timber for repairs, might cut all fit timber, except ornamental. *Butler* v. *Borton*, 5 Madd. 40; 21 R. R. 272.

Use of House.]—Testator divided his will into several clauses or articles, which he numbered; and after appointing several trustees, and providing for their succession, he by the second article of his will bequeathed to his trustees in trust for the use of his wife and children as thereinafter detailed, viz. all his household furniture, plate, medals, china, linen, books, paintings, prints, wines, provisions, horses, carriages, cows, and sheep, and all other live and dead stock in and about his premises, with all his ready money in his house and at his agent's and banker's, with all moneys due to him at the time of his decease; also he gave and devised all and every his dwelling-house and mansion, buildings, gardens, and lands, with the appurtenances, and all his real estates, upon trust as aforesaid, and upon the uses thereafter stated, that is to say, all his real estate in and about Denne Hill, &c., until the youngest of his surviving children attained the age of twenty-five years; at that period he willed that his eldest surviving child should be put into possession of all his freehold and leasehold property, including all timber and underwood, and all personal property on the estates. By a subsequent article he appointed his eldest son, or next surviving child in seniority, his residuary legatee. There were other clauses in the will, and also a testamentary writing, from which it appeared to have been a principal object of the testator to give his children the advantage of having the same home for a period after his death as they had enjoyed in his lifetime:—Held, upon these clauses taken together, that the enjoyment and rents of the testator's real estates devised by the will belonged to the testator's wife and children generally (subject or not subject to a discretionary power of regulation in the trustees) until the attainment by the youngest surviving child of the age of twenty-five; held, also, that the property described as all the testator's ready money in his house, &c., did not belong to the residuary legatee, and did not fall within the description of all personal property on the estates, &c., but was to be applied for the benefit of the wife and children. *Montresor* v. *Montresor*, 1 Colly. 693.

See also **Occupancy and Residence,** supra.

—— **Right to Let.**] — A testator devised a house and premises to trustees, desiring that the use and enjoyment of the same should be offered rent free to his eldest child for the time being as long as he or she should please; and in case of refusal, or of his or her ceasing to occupy the same, then the house and premises were to be offered to his other children in succession:—Held, that a personal occupation was required, but that this was satisfied by keeping furniture and a servant in the house with occasional occupation; but the house and premises could not be let. *Maclaren* v. *Stainton*, 27 L. J., Ch. 442; 4 Jur. (N.S.) 199.

A testator desired that his two sons might have "the use and occupation" of certain lands, they paying a stated rent; and that in default of payment, or if they converted the arable land into tillage, they should no longer have "possession" thereof:—Held, that personal use and occupation was not enjoined, and that they might underlet. *Rabbeth* v. *Squire*, 19 Beav. 70; 1 Jur. (N.S.) 218. Affirmed 4 De G. & J. 406; 28 L. J., Ch. 565; 7 W. R. 657.

Use of Plate.]—"I bequeath to my wife all the household furniture and movable goods and chattels in and belonging to my dwelling-house, except my books; I bequeath to her the use of my plate, with power to dispose of such portion thereof as she shall think proper":—Held, that the wife took a life interest only in the plate, and that, as she had not disposed of it during her life, it fell into the residue. *Espinasse* v. *Luffingham*, 3 Jo. & Lat. 186; 9 Ir. Eq. R. 129.

—— **Of Wine and Consumable Stores.**]—Devise upon trust to permit M. to have the use and enjoyment of house and premises free of ground rent, and also of all household furniture, carriages, horses, goods, wines, linen, &c., in or about the house for life or widowhood:—Held, M. was not to be confined to the personal use and enjoyment of the house, furniture, and effects, and that she was entitled to the wines and other consumable articles absolutely. *Clive* v. *Clive*, 2 Eq. R. 913; Kay, 600; 23 L. J., Ch. 981.

And see **Wine,** infra.

—— **Of Book Debts or Capital in Business.**]—A. bequeathed his stock-in-trade, &c., to his wife and son to be used by them in his trade and business, which he directed to be carried on by them, in partnership, during the widowhood of his wife; "and for that purpose they were to have the use of the book debts or capital which he at his death might have employed therein":—Held, that the widow and son were entitled to the book debts or capital absolutely. *Terry* v. *Terry*, 33 Beav. 232; 9 L. T. 469; 12 W. R. 66.

Vertu, Objects of.]—A. by his will bequeathed unto his wife absolutely all his or her jewels, trinkets, gold and silver plate, ornamental and other china, and all objects of vertu and taste; and he directed that his said wife should be entitled, during her life, to his leasehold messuage, with the appurtenances, in Carlton House terrace, and the statuary, furniture, and other effects purchased by him therewith, or which might be therein at the time of his decease. After his death, the said leasehold premises, statuary, and effects were directed to be sold, and the produce was made part of his residuary estate. There were in the said house at the testator's death, but not purchased by him therewith, ten pictures valued at 15,000*l.*:—Held, that the words "objects of vertu and taste" were intended to include only things ejusdem generis with those enumerated, and did not include the pictures, but that these passed under the gift of the furniture, statuary, and effects in the said leasehold messuage. *Londesborough (Lord), In re, Bridgman* v. *Fitzgerald (Lord Otho)*, 50 L. J., Ch. 9; 44 L. T. 408.

Wine, "as much as She requires for Consumption."]—By his will the testator bequeathed to B. certain other legacies, "also all consumable stores in my house, except wines, with respect to

which she may have as much as she requires for consumption in the house, and with respect to the rest as to which I have hereafter given specific directions in dealing with my house." In a subsequent part of the will the testator gave to his trustees his house and all the furniture, plate, linen, china, wines, and other goods, chattels, and effects therein at the time of his decease, and certain other premises occupied by him, in trust to permit B. to use and occupy such house, furniture, plate, china, and other things, and to consume as much as she cared to do of his wines for and during her life, free of all rent or compensation of the same, and free of all obligation to repair or insure the premises or property (which he expressly directed his trustees to do), and free of all rates, taxes, tithes, and other outgoings (all of which he directed his trustees to discharge); and after the death of B. the house and property were to fall into and form part of his residuary estate:—Held, that B. was only entitled to the wines which she might require for consumption; that the rule with regard to gifts of all consumable articles could not be extended to a gift such as this; and that B. was not entitled to all the wines absolutely, though it might be that she and her friends would consume the whole during her occupation of the house. *Colyer, In re, Millikin* v. *Snelling*, 55 L. T. 344.

And see **Use of Wine**, supra.

ii. *Local Description of Real Estate.*

"Kingdom of England"—Whether Wales included.]—A testator devised "all my manors, messuages, lands, tenements, and hereditaments, whether freehold, leasehold, or copyhold, situate in the several parishes of M., C., L. and W., and also in the city of B., or elsewhere in the kingdom of England"; he had no lands in England, except in the places specified in the will, but he had a large estate in Wales, in the county of Carmarthen; quære, whether the devise passed the Carmarthen estate. *Okeden* v. *Clifden*, 2 Russ. 309.

County or Place.]—A will contained the following devise: "I give my mansion-house at Tedworth, in the county of Hants, and all my manors, farms, lands, tenements, and hereditaments in the county of Hants, devised to me by my late husband, subject to annuities charged thereon by his will, and subject to an annuity charged thereon by me, and all other hereditaments in the county of Hants to which I am or shall be entitled at my death, all which hereditaments in the county of Hants are hereafter described or referred to as my Tedworth estate." The Tedworth estate was partly in the county of Hants, and partly in the county of Wilts, and had long been enjoyed as one property. There was no boundary or division line, natural or artificial, between the two counties; and the mansion-house was largely disproportioned to the estate in Hants:—Held, that that portion only of the Tedworth estate which was in the county of Hants passed under this devise. *Webber* v. *Stanley*, 16 C. B. (N.S.) 698; 33 L. J., C. P. 217; 10 Jur. (N.S.) 657; 10 L. T. 417; 12 W. R. 833.

Devise of all the freehold and real and leasehold estates in the counties of Lincoln and Cambridge (except such as I have hereinbefore disposed of), "and all the leasehold lands" at S., in the "county of Dorset, and elsewhere, which I can dispose of by this my will":—Held, that it passed freeholds in Norfolk and elsewhere wherever situate. *Pinney* v. *Marriott*, 32 Beav. 643.

Under a devise of all the testator's freehold lands situate in the parish of C., with their appurtenances, land in two adjoining parishes, which had always been let with the lands in the parish of C., and occupied by the same tenant, held not to pass. *Evans* v. *Angell*, 26 Beav. 202; 5 Jur. (N.S.) 134.

A testator devised his estate, called "Arkley Hall Farm, in the parish of Ridge," upon certain trusts for A., and his will contained a residuary devise in favour of other persons. It was shewn that certain lands in other parishes had been purchased by the testator, and added to Arkley Hall Farm, and had been constantly let with it:—Held, nevertheless, that the land in other parishes did not pass under the devise of "Arkley Hall Farm," but went to the residuary devisees. *Pedley* v. *Dodds*, L. R. 2 Eq. 819; 12 Jur. (N.S.) 759; 14 L. T. 823; 14 W. R. 884.

A will contained a general devise of all the testatrix's messuages, hereditaments, &c., at Holton-le-Clay, and a subsequent devise of all her copyholds at X., Y. and elsewhere. The testatrix had no other copyholds, except those at X., Y. and at Holton-le-Clay. The Master of the Rolls was, under the circumstances, of opinion that the copyhold at Holton-le-Clay passed by the first devise, but directed a case to be sent for the opinion of the court of common pleas. *Borrell* v. *Haigh*, 7 L. J., Ch. 139; 2 Jur. 229.

Testator, having freehold, copyhold, and leasehold estates, some of which were within the liberties of the city of H., and others within the county of H., but out of the liberties of the city, devised all his freehold, copyhold, and leasehold tenements in the city of H. or the liberties thereof, in the county of H., and his two leasehold houses on Ludgate Hill, in the city of London, to trustees in trust to sell. In a codicil he spoke of the sale authorised by his will of his estates in the city and county of H.:—Held, that the estate in the county of H., but out of the liberties of the city, did not pass by the devise to the trustees. *Moser* v. *Platt*, 14 Sim. 95; 8 Jur. 389.

A testator, who died in 1818, after devising a freehold house to his wife and her heirs, devised a residue of his freehold estates, situate in four specified parishes, or elsewhere in the county of Cambridge, to two trustees and their heirs, upon the trusts thereinafter declared concerning the same, that is to say, upon trust that they should sell his several copyholds in the parishes aforesaid, and, after satisfying the costs of the sale out of the moneys thence arising, should pay the residue to his executor for the purpose of satisfying in the first place certain legacies; and he then devised all the residue of his real and personal estate to A. B. The testator, besides freeholds and copyholds situate in the four parishes, had freeholds not situate in the county of Cambridge, and copyholds not situate within the four parishes, and all the copyholds had been surrendered to the use of his will:—Held, that the beneficial interests in all the freeholds, whether situate in the county of Cambridge or elsewhere, passed to the residuary devisee; that the legacies were a charge only on the copyholds situate in the four parishes; that no estate

in those copyholds passed to the trustees, but only a power to sell; that any surplus of the moneys arising from the sale which might remain after satisfying the legacies, passed by the residuary clause; that the copyhold not situate within the four parishes passed to residuary devisees. *White* v. *Vitty*, 2 Russ. 484. *See this Case further*, 4 Russ. 584.

Situation or Street.]—A. bequeathed to his son all those his freehold brewhouse, buildings, and premises, situate in S. Street, whereon for many years, he had carried on the business of a brewer (except a site of a portion of the premises on which stood a room used as a counting-house); and also all that piece of land with the old malthouse standing thereon situate near S. Street. The testator had for forty-five years carried on business as a brewer on freehold premises, situate behind certain houses in S. Street. On a plot of land situate about 218 feet from S. Street, he had, upon a piece of building land bought by him some years before his death, built a malthouse and a carpenter's shop:—Held, that the malthouse did not pass to the son under the description of all the testator's freehold brewhouse, buildings, and premises in S. Street. *Lambert* v. *Overton*, 11 L. T. 503.

A person purchased a piece of land abutting on O. Street on the east and T. Street on the west. He built two houses, one in O. Street and the other in T. Street, and he divided the property into two portions. He devised "all that his freehold estate situate in T. Street":—Held, that the whole property passed. *Harman* v. *Gurner*, 35 Beav. 478.

A gift of "messuages and premises, situate No. 4," &c., held to pass garden ground occupied with the house, No. 4, but on the opposite side of the road. *Hibon* v. *Hibon*, 1 N. R. 532; 32 L. J., Ch. 374; 9 Jur. (N.S.) 511; 8 L. T. 195; 11 W. R. 455.

A testator resided in Camperdown House, and had eleven houses in Camperdown Place, and three in the rear, in Ship Row, all being leasehold. He bequeathed his leasehold estates situate Camperdown House, Camperdown Place, to his wife, for life. After her death, he bequeathed another leasehold to A., and the other leaseholds, viz. fourteen houses Camperdown, to B.:—Held, the fifteen houses passed to B. *Armstrong* v. *Buckland*, 18 Beav. 204.

A testator bought at one time certain houses in Bullen Court, in the Strand, and in Maiden Lane. The houses in the Strand were adjoining the houses in Bullen Court, which leads into that street. By his will he devised his freehold estates in Bullen Court, Strand, and Maiden Lane, in the county of Middlesex, to A. and B.:—Held, that the houses in the Strand passed under the devise. *Gauntlett* v. *Carter*, 17 Beav. 586; 23 L. J., Ch. 219; 17 Jur. 981; 1 W. R. 500.

A testatrix devised all her messuages in Denmark Court. She had five houses in the court, and another which fronted towards the Strand, and formed one side of a covered passage leading to the place where the five stood, and to the back of which was attached an out-building, abutting on ground within the court. The vice-chancellor having decided that the five houses only passed, the Lord Chancellor, on appeal, directed an ejectment to be brought by the heir-at-law against the devisee, and, on a verdict being found for the defendant, reversed the decision of the court below, and made a declaration that the house fronting towards the Strand passed with the other five. *Newton* v. *Lucas*, 1 Myl. & Cr. 391. Reversing 6 Sim. 54.

Name of Estate.]—It is the ordinary rule of a court of equity, in cases where an heir disputes the will, to grant an issue to try that question; but where he does not dispute it but acts under it, merely denying that certain portions of the land pass under the description used in it, a court of equity has full jurisdiction to determine the question thus raised without granting an issue, or may grant such issue at its discretion. In such a case parol evidence of what was considered in the lifetime of the testator to be the extent of the lands constituting the estate is receivable. A testator, who described himself as of "Ashford Hall in the county of Salop," devised "all my estates in Shropshire, called Ashford Hall," to trustees for sale:—Held, that this description was not confined to the mansion-house so called, and the lands immediately adjoining, but extended to such other lands in Shropshire as he possessed at the time of making his will. *Ricketts* v. *Turquand*, 1 H. L. Cas. 473.

A devise in 1844 of "all my Quendon Hall estates in Essex." The testatrix at the date of her will, and at her death, had a mansion called Quendon Hall, and land around it, and also other detached farms in Essex. There was no parish of Quendon Hall, nor was the term "Quendon Hall estates" a recognised appellation of any particular property:—Held, that extrinsic evidence was admissible to shew what estates the testatrix understood to be comprised in that description. For this purpose, old account books, in the handwriting of the testatrix, one containing "an account of timber cut down on the Quendon estate," and a paper headed, "1844, Quendon Hall Farms," written by the testatrix at about the date of her will, were received in evidence. Evidence was also admitted to prove that much of the property had been derived by the testatrix under the will of a relative who had appended to her gift a direction that her devisee should assume the name and arms of Cranmer, particularly as the testatrix in this cause had annexed a like condition to the above-mentioned devise. *Webb* v. *Byng*, 1 K. & J. 580; 1 Jur. (N.S.) 696.

Under a power in a settlement, H. devised lands called Claggetts and Sievelands, in the parish of Buxted, to W. There were lands described in the settlement as Claggetts and Sievelands, in the parish of Buxted, and there were also other lands in the parish of Buxted described in the settlement by other names. Evidence was adduced to shew that all these lands were, at the time of the will, and before and since, held by one tenant, and that the whole were known as Claggetts Farm:—Held, that all the lands known as Claggetts Farm passed by the devise. *Whitfield* v. *Langdale*, 45 L. J., Ch. 177; 1 Ch. D. 61; 33 L. T. 592; 24 W. R. 313.

Quantity.]—The testator had in 1833 taken a conveyance of a farm of forty-one acres by the description of "all that messuage called U., with the gardens, outbuildings, &c., containing one acre and three-quarters; and also all that piece," &c.; the conveyance then enumerating six or seven other parcels, the whole forming one farm, in one occupation. The testator then mortgaged the whole by the same description for 1,000*l.*

Afterwards, by will, he devised "all my freehold house and premises called U." to trustees to sell, and pay the said mortgage, and then pay 950*l.* legacies; and gave all the rest and residue of his estate over:—Held, as between the residuary legatees and heir-at-law, that the whole forty-one acres passed by the words "house and premises at U." *Ross* v. *Veal*, 1 Jur. (N.S.) 751; 3 W. R. 652.

Testator, who was possessed of three leasehold houses in K. Street, bequeathed "two houses in K. Street" in trust for P. for life, and then to form part of his residuary gift. The will contained no other references to the testator's houses in K. Street:—Held, that two of the houses passed under the gift, and that P. was entitled to elect which he would take. *Tapley* v. *Eagleton*, 12 Ch. D. 683; 28 W. R. 239.

A testator devised his mansion and estate, called Cleve Court, with the appurtenances, upon certain trusts, and gave the residue of his property of every description, other than those thereinbefore mentioned, upon other trusts. The testator had contracted, before the date of his will, to purchase an estate near and adjoining to the Cleve Court estate, which was conveyed to him subsequently. He also purchased, after the date of his will, several other small properties adjoining the Cleve Court estate:—Held, that evidence was admissible to shew what property the testator designated by the particular description up to the time of his death, and that all the property acquired after the date of the will and treated by the testator immediately before his death as additions to the Cleve Court estate, passed under the particular devise. *Castle* v. *Fox*, 40 L. J., Ch. 302; L. R. 11 Eq. 542; 24 L. T. 536; 19 W. R. 840.

A bequest of "the field in front of my dwelling-house" does not include the house and curtilage, though in fact locally situate in the field, and such house and curtilage pass by a bequest of "the residue of my said farm." *O'Connor* v. *O'Connor*, Ir. R. 4 Eq. 483; 19 W. R. 90.

—— **"Leasehold House and Premises"—Alteration of, between Execution of Will and Death of Testator.**]—A testator, who died on the 28th December, 1869, by his will dated the 3rd August, 1868, made the following bequest:—"I give my leasehold house and premises called the 'Anchor Inn,' where I now reside . . . unto my son." The testator made a codicil to his will dated the 25th December, 1869, which did not mention this legacy. At the date of the will the "Anchor Inn" was in course of reconstruction, with the view of separating two rooms from the inn to be let to a tenant who was to occupy them as a shop. The alterations were completed between the date of the will and the death of the testator, and at the latter date were occupied as a shop by a tenant of the testator. Prior to and during the alterations the premises were occupied solely by the testator, who continued up to the date of his death to reside in the inn, which had been separated from the shop:—Held, that as the shop was not leased by the testator until after the date of his will, it was concluded in the terms of the bequest, and so passed to the testator's son. *Edwards, In re, Rowland* v. *Edwards*, 63 L. T. 481.

"Thereto belonging"—Evidence of Testator's Intention.]—In this case the plaintiff claimed to be seised in fee-simple and entitled to the rent and profits of a certain garden called the "Malthouse Garden." J. S. by his will gave and bequeathed "the malting-office with the two adjoining cottages, and the garden and outoffices thereto belonging" to J. D. the plaintiff, and by a codicil of a subsequent date devised all his real and personal estate, not otherwise disposed of, to T. S., the defendant. The question raised was, whether the "Malthouse Garden" claimed, passed by the devise to the plaintiff:—Held, that the "Malthouse Garden" passed under the devise, and that the words "thereto belonging" referred to the whole subject of the first part of the devise, viz. the malthouse and the two cottages; and that evidence of the intention of the testator was not admissible, as there was no latent ambiguity in the language of the will. *Downe* v. *Sheffield*, 71 L. T. 292.

Description by Double Limitation.] — The testator devised freehold and other property to E. N. for life, and at her decease he gave the same, together with his copyhold and leasehold property "situate at C., in the parish of S. N.," to J. N. A.:—Held, that J. N. A. took no estate or interest in the copyhold or leasehold property till the death of E. N., but that it passed to the heir-at-law in the meantime; and that the bequest of the leaseholds did not include other leaseholds of the testator in the parish of S. N., but at some distance from C. *Attwater* v. *Attwater*, 18 Beav. 330; 23 L. J., Ch. 692; 18 Jur. 50; 2 W. R. 81.

A father devised his freehold property at M. in trust for his children, a son and daughter, equally. He had no freehold property at M., but he had two undivided fourth shares of some in R., which M. adjoined, and in which parish it was situate:—Held, that the property in R. descended to the heir-at-law. *Barber* v. *Wood*, 46 L. J., Ch. 728; 4 Ch. D. 885; 36 L. T. 373.

A devise of "two improved ground-rents in the Queen's Road, Dalston." The testator had no such ground-rents, but owned one ground-rent, issuing in respect of houses in the immediate neighbourhood of the Queen's Road, in the parish of H., and another issuing in respect of houses in the parish of S., not in the immediate neighbourhood of Queen's Road. The houses in H. and S. were about a quarter of a mile out of Dalston:—Held, that the ground-rents in H. and S. passed under the above description. *Tann* v. *Tann*, 2 N. R. 412.

—— **Place and Occupation.**]—A testator devised all his lands "situated at or within Dormstone, in the occupation of J." The testator was seised of two farms, both in the occupation of J. The greater part of each of the farms was within the parish of Dormstone, but three closes of one and one close of the other were respectively situate in an adjoining parish. In each case the portion which was not in the parish of Dormstone immediately adjoined the remainder of the farm, and was only separated from it by the parish boundary, which was, in the one case, a high road, and, in the other, a fence. In the latter case the parish church of Dormstone was only a few yards distant from the fence:—Held, that the devise comprised the four closes adjoining the parish of Dormstone. *Homer* v. *Homer*, 47 L. J., Ch. 635; 8 Ch. D. 758; 39 L. T. 3; 27 W. R. 101.

The testator also devised all his land "situate at G. in the occupation of S.":—Held, that this

devise did not include land situate at G., but in the occupation of J. *Ib.*

The greater part of a farm held by S. was situated in D. A devise by A. of his lands "at or within D. in the occupation of S." was held not to pass any part of the farm not within D. *Horner* v. *Horner*, 46 L. J., Ch. 617.

—— **Name and Occupation.**]—H. devised a messuage, barns, buildings, woods, wood-grounds, commonly called Tickeridge, in the parish of East Grinstead, in the occupation of W., to W. Evidence was adduced to shew that Tickeridge Farm, in the occupation of W., consisted of eighty-five acres in the parish of East Grinstead, and one hundred and sixteen acres in the parish of Westhoathly, and that the farmhouse and buildings were partly in one and partly in the other:—Held, that the whole of Tickeridge Farm, in the occupation of W., passed by the devise.

Some of the woodlands adjoined and formed part of Tickeridge Farm, but had been expressly excluded in the demise of this farm to W., and were retained by H. in her own occupation:—Held, that the woodlands did not pass by the devise.

H. devised a messuage, buildings, farm and land called Hookland, in the parish of Lindfield, by estimation eighty acres, more or less, in the occupation of C., to C. in fee. As to this, the description in the will was almost the same as that in the settlement. Evidence was adduced to shew that H. had a farm called Hookland, which at the date of her will was in the occupation of C., but that it consisted of one hundred and seventy-three acres, of which eighty-eight acres were freehold in the parish of Lindfield, sixty-six acres were copyhold in the same parish, and the remaining eighteen acres were copyhold in an adjoining parish:—Held, that the whole farm called Hookland, as well copyholds as freeholds, passed by the devise. *Whitfield* v. *Langdale*, supra.

—— **Tenure and Occupation.**]—Devise of "all that freehold farm called the Wick farm, containing two hundred acres or thereabouts, occupied by W. E. as tenant to me, with the appurtenances," to uses applicable to freehold property only. At the date of the will, and of the death of the testator, W. E. held under a lease from the testator two hundred and two acres of land, which were described in the lease as Wick Farm; of these twelve acres were leasehold:—Held, that the twelve acres did not pass by the devise. *Hall* v. *Fisher*, 1 Coll. C. C. 47; 8 Jur. 119.

One devises all his freehold houses in A., and hath none but leasehold houses there; the leasehold shall pass. Secus, in a grant. *Day* v. *Trig*, 1 P. Wms. 286.

—— **Falsa Demonstratio—Restrictive Words Rejected.**]—Where a testator uses a description of parcels consisting of two distinct and separable parts, of which the first is complete and correct, and the second incomplete and erroneous, the maxim falsa demonstratio non nocet applies, and the part which is false will not cut down that which is true. Secus, where the parts of a description are not distinct and separable. *White* v. *Birch*, 36 L. J., Ch. 174; 15 L. T. 605; 15 W. R. 305.

A testator devised "all his freehold estates at or near R. in the parish of H.," which was a complete and correct description of the property intended to pass. The context indicated an intention to pass the whole of such estate:—Held, that the gift was not narrowed by the erroneous addition of the words, "and now in my own occupation." *Ib.*

Where some subject-matter is devised as a whole, and then words of description are added which do not completely exhaust all the particulars included in the general devise, but seem to limit and restrict it, the entirety expressly and definitely given shall not be prejudiced by the imperfect enumeration of particulars; nor shall a clear enumeration of particulars be overlooked by an apparently general devise. *West* v. *Lawday*, 11 H. L. Cas. 375; 13 L. T. 171.

A person was possessed under one and the same lease for lives, renewable for ever, of lands denominated B., C., F. and G., all situate in the county of Kerry. He granted out the lands of G. for lives, with a covenant for perpetual renewal, reserving thereout a perpetual fee-farm rent. Some years after this grant he made his will, recited that he was possessed of a lease for lives, renewable for ever, of certain lands in the county of Kerry, which said lands are denominated B., C. and F., all situate in the parish of, &c., in the county of Kerry. He directed that "the aforesaid lands" should be sold, and after payment of his debts be equally divided between J. W. and S. L. After giving several legacies, he made J. W. "residuary legatee of all my real and personal estate and effects":—Held, that the estate of G. did not pass under the general devise, but went to the residuary legatee. *Ib.*

A testatrix devised "all that my share and interest in the messuages, lands, and premises, called or known by the name of the Dyffrydd and the Little Dyffrydd, situate in the parish of Kinnersley, in the county of Salop, now in the occupation of Mr. John Edwards." She was entitled to an undivided moiety of a compact estate containing 224 acres, all held under one title, part of which was called the Dyffrydd, and the rest Little Dyffrydd, the bulk of which answered the description contained in the will. There were, however, in the estate two small fields which, though in the occupation of John Edwards, were not in the parish of Kinnersley and county of Salop, but in the parish of Llandisilio and county of Montgomery; and the one field which, though in the parish of Kinnersley, was not, and never had been, in the occupation of John Edwards:—Held, that the leading words which defined the subject of the devise were "the lands known as the Dyffrydd and the Little Dyffrydd," and that they were not restricted by the words which followed, which were merely an erroneous description, and might be rejected. *Hardwick* v. *Hardwick*, 42 L. J., Ch. 636; L. R. 16 Eq. 168; 21 W. R. 719.

Where a testatrix "gave all those her freehold messuages or tenements, hereditaments and premises, called West Cliff, with the appurtenances thereto belonging, situate at West Cowes, and now used as lodging-houses"; and in a codicil referred to the same property as her estate, called West Cliff, at West Cowes:—Held, sufficient to pass, besides the lodging-houses, other houses, of which some were unfinished; and also certain plots of ground, together with the site of a private road and of a church, the building, and the advowson, all known as the West Cliff estate. *Cunningham* v. *Butler*, 3 Giff. 37; 7 Jur. (N.S.) 461; 4 L. T. 234.

A father gave all that part of Rigby's estate

purchased by him consisting of closes A., B., C., D., E. and F., with the timber and coal mines, to trustees in trust for his son O. for life, with remainder to the use of O.'s children as he should by deed or will appoint, and in default of appointment to the use of O.'s right heirs. O., by his will, after reciting the devise in his father's will (but without enumerating the closes), appointed all that part of the property devised by his father's will and therein described as that part of Rigby's estate purchased by his father consisting of A., B., C. and F., with the timber, but not including the mines, to his two sons T. and J.; and he appointed the mines under the land which he had appointed to T. and J. to his four other children. The two omitted closes, D. and E., lay between the other four:—Held, that the corpus of the estate devised by the father was sufficiently designated in the son's will; that the enumeration of the four closes instead of the six was a falsa demonstratio which might be rejected; and that the whole of the six closes passed under the appointment. *Travers* v. *Blundell*, 6 Ch. D. 436; 36 L. T. 341.

In construing a will of real estate, the court will look at the nature and circumstances of the property, and at the value of the subjects of the various devisees, and if the whole will, read by the light of such circumstances, discloses intention inconsistent with restrictive words in the description of the subject of a devise, those restrictive words may, as a matter of construction, be rejected as a falsa demonstratio.

Where a will contained a devise of hereditaments "in the county of Hants," described as "my Tedworth estate," and it was proved that the testatrix had an estate at Tedworth extending into the two counties of Hants and Wilts, but which had been dealt with without regard to the county division, and the will contained various indications derived from the limitations of the estate, and the value of the Hants and Wilts portions of it, tending to shew that the testatrix must have intended to deal with the whole estate:—Held, that although no one of these circumstances alone would have controlled the words of the devise, their cumulative force was sufficient to justify the rejection of the words "in the county of Hants" as a falsa demonstratio.

Evidence of the intention of a testator or of mistake in the preparation of his will, is not admissible, and an issue will not be directed on this ground to try whether particular restrictive words were or were not part of the will. *Stanley* v. *Stanley*, 2 J. & H. 491; 7 L. T. 136; 10 W. R. 857.

S. devised to his wife during widowhood "my residence called S. House, and premises thereto as the same are now occupied by me." Some years before making this devise he had let to two of his sons for the purposes of their business, an office standing in the yard of S. House and the stable and coach-house belonging to the house, except a room on the first floor of the coach-house to which the only access was through the house, and the sons were in occupation till his death:—Held, that the devise included the room over the coach-house, but did not include the rest of the stable and coach-house nor the office, for that the property which was in the testator's own occupation answered the whole of the description, and that being so, the court could not enter into the question of inconvenience, and reject the reference to occupation as falso demonstratio. *Travers* v. *Blundell* (supra) distinguished. *Stanley* v. *Stanley* (supra) observed upon. *Seal, In re, Seal* v. *Taylor*, 63 L. J., Ch. 275; [1894] 1 Ch. 316; 70 L. T. 329—C. A.

iii. *Local Description of Personalty.*

Country or Colony.]—Bequest of the testator's fortune in India, not extended under the general words, "temporal estate," in the introductory part of the will, to the property in England, part remitted from India between the will and the death, and some on its passage to England at his death. *Sadler* v. *Turner*, 8 Ves. 617.

A promissory note due to a testator domiciled in England, by a person resident at the Cape, passes by the words, "property I shall leave in the colony." *Scorey* v. *Harrison*, 16 Jur. 1130; 1 W. R. 99.

A testator gave the interest of all the property he should leave at the Cape of Good Hope to his wife for life, and after to his children, and a question arose whether a note for 500*l.*, found by the master to be payable in London, formed part of such bequest:—Held, that it did, the maker being resident in the colony. *Ib.*

A testator resident in England at the time of his death bequeathed to his son "all his estate and effects in Mauritius." At the time of his death the purchase-money of real estate in Mauritius sold by him to persons residing in that island was due to him. He was not domiciled in Mauritius:—Held, that this debt was included in the bequest of his property in Mauritius. *Guthrie* v. *Walrond*, 52 L. J., Ch. 165; 22 Ch. D. 573; 47 L. T. 614; 31 W. R. 285.

Bequest of "my property not in England and in the hands of my attorney abroad, W., consisting of Russian bonds, &c.":—Held, to pass all the testator's property abroad without limitations. *Drake* v. *Martin*, 23 Beav. 89; 26 L. J., Ch. 786.

A testator bequeathed "all his American stocks, funds, shares and securities, and all other his personal property in America, or the North American colonies of Great Britain, or otherwise, coming under the designation of property in America, or the North American colonies of Great Britain, including all such properties which might be secured, or the title evidenced by any specialty or other instrument being at his, testator's, death in this country or elsewhere," upon certain trusts. The testator was entitled amongst other stock, funds and securities to shares and bonds in the Pennsylvania Railroad Company, Tennessee and Ohio shares and bonds, and of various other companies, Brazilian bonds, old and new Mexican bonds, and other South American securities:—Held, that such shares, bonds and other South American securities passed under the designation of property in America. *Baring* v. *Ashburton* (*Lady*), 17 L. T. 557; 16 W. R. 452.

Residuary disposition of all the testator's real and personal estate in Jamaica, in trust, to be remitted to England, was held specific, and not to include a debt originally upon bond and judgment in Jamaica, and afterwards further secured by bond and judgment in England, under which it was received, and being considered undisposed of, was applied, in the first instance, to the debts, &c. *Nisbett* v. *Murray*, 5 Ves. 149; 5 R. R. 6.

County or Place.]—Held, as against a claim by pecuniary legatees to marshal, that where

there was a gift of all property, freehold, copyhold, and leasehold, at particular places and elsewhere in the county of Somerset, and all other real and personal estates whatsoever (testator not having, as it appeared, and the court observed, any real or leasehold property except in Somersetshire), the gift was specific, and not liable to be marshalled either as to leasehold or other property. *Symons* v. *James*, 2 Y. & C. C. C. 301.

A testator gave "all property belonging to him in the county of W." In that county he was entitled to collieries, in respect of which debts were due to him :—Held, that these debts passed under the gifts. *Tyrone* (*Earl*) v. *Waterford* (*Marquis*), 1 De G. F. & J. 613 ; 29 L. J., Ch. 486 ; 6 Jur. (N.S.) 567 ; 8 W. R. 454.

One devises to his wife all his personal estate at W. ; this is a specific legacy, and to be preferred to pecuniary legacies in case of deficiency of assets ; all the testator's personal estate that was at W. at his death shall pass, though not there at the making of the will. *Sayer* v. *Sayer*, 2 Vern. 688 ; Pre. Ch. 392 ; Gilb. Exch. R. 87.

—— **In the City of London.**]—A testatrix bequeathed her shares in a bank to the persons named in her will, and bequeathed the residue and remainder of her money, estate, and effects, whatsoever and wheresoever situate, to A., one of the legatees of the shares. By a codicil she devised and bequeathed her estate and interest in certain freehold houses in the city of London, and "all and every other my estate and effects in the city of London," to B. The shares were in a bank, the head office of which was in the city, and the testatrix also had a balance at a banker's in the city :—Held, that the shares passed under the will, and that the balance at the banker's being a debt, passed to the residuary legatee. *Rhodes* v. *Rhodes*, 22 W. R. 835.

"**At Bank.**"]—Bequest of "half my property at R.'s bank." At the time of his will and of his death the testator had at R.'s bank in Paris a cash balance and certificates of French shares, some inscribed and some transferable by delivery, which were deposited with the bankers, who received the dividends and carried them to his credit. He had nothing else at the bank :—Held, by the court of first instance, that only half of the cash balance passed by the bequest ; but held, on appeal, that a moiety of the shares also passed. *Prater, In re, Desinge* v. *Beare*, 57 L. J., Ch. 342 ; 37 Ch. D. 481 ; 58 L. T. 784 ; 36 W. R. 561—C. A.

"**Elsewhere.**"]—A testator by his will gave all his engravings in his dwelling-house at A. "or elsewhere" to his wife. He had sold certain engravings to T. by a voidable sale seven years before his will, and he died three years after making his will. The widow afterwards discovered that the sale was voidable and brought an action against T. to have it set aside, in which a decree was made that, as executrix, she was not bound by the sale and was entitled to the proceeds of the engravings :—Held, in an action against her as executrix by legatees that the engravings did not pass by the specific bequest to the widow. *Turner* v. *Turner*, 28 W. R. 859.

"**In and About**" **House.**]—Testator gave all the residue of his personal estate to his wife, except such parts as should be in and about his house, which parts he gave to his son, and directed the household furniture to go as heirlooms, and gave all arrears of rents which should be due to him at his death to his son : a bond to secure an old arrear of rent, and cash, both found in an iron chest, in which the steward kept the cash arising from the rents, belong to residuary legatee. *Jones* v. *Sefton* (*Lord*), 4 Ves. 166.

A testator directs that his household furniture, &c., and utensils in and about his mansion house at H., should go with the mansion house, and that for that purpose his trustees should make an inventory of the furniture, &c., and utensils which should be found in and about his mansion house and premises at the time of his decease. These words do not pass farming utensils on lands at H., occupied by the testator, along with the mansion house. *Fitzgerald* v. *Field*, 1 Russ. 427 ; 4 L. J. (O.S.) Ch. 170 ; 25 R. R. 97.

A bequest of "all my household furniture, plate, jewels, &c., and other effects of a like nature, and all wines, liquors, fuel, housekeeping provisions, and other consumable stores which shall at my death be in or about my dwelling-house" :—Held, to include plate not in the dwelling-house :—Held, also, to include plate to which the testator was entitled in reversion, and moneys recovered by his executors from the estate of the tenant for life, in respect of the value of plate sold by the latter without the testator's knowledge. *Domville* or *Domvile* v. *Taylor*, 2 N. R. 258 ; 32 Beav. 604 ; 8 L. T. 624 ; 11 W. R. 796.

Horses only used at a testator's town house, but regularly wintered at his country house, and happening to be in their winter quarters at the time of his death, will pass by a bequest of the town house, with the horses in, upon, or about the same, or the stables thereof. *Bruce* v. *Howe*, 19 W. R. 116.

A testator bequeathed his leasehold mill to trustees upon certain trusts, and all the corn and other articles which at his death should be in or about his dwelling-house, mill, or premises, he gave to his two sons absolutely :—Held, that a cargo of wheat consigned to the testator, and in course of transit on the day of his death, passed to the executors and not to the sons. *Lane* v. *Sewell*, 43 L. J., Ch. 378.

A testator, having three places of residence at A., B. and C., after having devised to his nephew his messuages at A., next bequeathed to him his house at B., which was leasehold, and the will then proceeded, "and I also give to my said nephew all my carriages, horses, implements, and my live and dead stock and chattels in or about the said house and premises, and also my household goods and furniture, pictures, plate, linen, china, liquors of all sorts, and brewing vessels, and likewise my watches and personal ornaments" :—Held, that the household goods, &c., in each of the three residences, passed by this bequest. Quære, whether a bust passed under the above words. *Willis* v. *Curtois*, 1 Beav. 189 ; 8 L. J., Ch. 105.

"**Therein.**"]—Bequest of "all my right and title to my property in the town of R., namely, my dwelling-house and household furniture, and all things now therein, in my possession, especially my car-horse and covered and side cars" :—Held, that banknotes, known by the testator to be in the house at the time the will

was made, passed to the legatee. *Mahony* v. *Donovan*, 14 Ir. Ch. R. 388—C. A.

Furniture in a Particular Place.]—Gift of furniture in a particular house means furniture permanently there. *Wilkins* v. *Jodrell*, 11 W. R. 588.

One devises to his son the furniture of his house at D., and orders goods to be carried from London to his house at D., and agrees with carriers for that purpose, but dies before the goods are removed to D. These goods shall not pass by the will as part of the furniture of the house at D. *Beaufort* v. *Dundonald*, 2 Vern. 739.

A bequest of furniture, prints, pictures, articles of vertu, and effects in, upon, or about a mansion at G., includes pictures sent from thence to be cleaned, books sent from thence to be bound, and furniture sent from thence to be repaired: but does not include pictures, statuary, and furniture purchased for the purpose of being placed in, but not actually placed in, the mansion at G. *Brooke* (*Lord*) v. *Warwick* (*Earl*), 2 De G. & Sm. 257; 12 Jur. 912.

A bequest of household furniture and other household effects, in a dwelling-house and premises, comprises all the property placed there, either for ornament, or for use, or consumption in it. *Cole* v. *Fitzgerald*, 3 Russ. 301; 1 Sim. & S. 189; 1 L. J. (O.S.) Ch. 91; 24 R. R. 169.

A. devises that the furniture and pictures of his three houses in B., C. and D., should go along with the houses: adjudged the plate then at his three houses passed by this devise. *Franklyn* v. *Burlington* (*Countess*), 2 Vern. 512; Pre. Ch. 251.

—— **Pictures in Boxes.**]—A. devises to B. all his goods and furniture in his house, except his pictures, which he gives to C.: pictures in boxes, as well as what were hung up in the house will pass to C.; and so will pictures bought after making the will. *Gayre* v. *Gayre*, 2 Vern. 538.

—— **Horses and Carriages.**]—C. occupied a house at B., and stables in the neighbourhood held under a different title. He bequeathed the lease of the house at B., "with all buildings belonging to me, furniture, and what the buildings may contain":—Held, that the stables, and the carriages and horses therein, passed to the legatee. *Kennedy* v. *Keily*, 28 Beav. 223.

Devise of a mansion house, with the parks, lands, and grounds thereunto belonging, "as now used and occupied by himself, and also all and every the household and other furniture, &c., and all other things usually therein, or considered as belonging thereto":—Held, not to pass horses or carriages in the stable, or stock, &c., on the land. *Pennefather* v. *Bury*, 3 Jo. & Lat. 727; 9 Ir. Eq. R. 586.

—— **Subsequent Removal—Gift good notwithstanding.**]—Testator bequeathed to his wife as follows: "all my interests in my house at Lavender Hill, the furniture, books, pictures, wines," &c., &c. After the date of his will the testator removed from Lavender Hill to Spencer Lodge, taking with him furniture, books, pictures, wines, and plate. He afterwards purchased more of these articles, and died at Spencer Lodge:—Held, that his wife was entitled to the furniture, books, pictures, wines, and plate which he had at the time of his death. *Norris* v. *Norris*, 2 C. C. C. 719; 15 L. J., Ch. 420; 10 Jur. 629.

A testator bequeathed the furniture, &c., which should be in Duddon Hall at his death to be held as heirlooms by the person entitled to Duddon Hall. At his death part of the original furniture of Duddon Hall had been removed and stored away along with new furniture and furniture from another house intended for, but never placed in, Duddon Hall:—Held, that all such furniture passed along with the furniture actually in Duddon Hall. *Rawlinson* v. *Rawlinson*, 34 L. T. 848; 24 W. R. 946.

A father bequeathed to his daughter "the trunks and boxes and anything contained therein which belonged to my late wife, and which were given to me at her death, and have not since been opened, but are sealed up in the dining-room of Carrig Park." After the death of his wife in 1847, two trunks containing her clothes—there being in one of them a dressing-case containing valuable jewellery—had been sent to Carrig Park, the testator's residence. A few years before his death and the date of his will, the testator, finding that the trunk in which the dressing-case was had been opened without his knowledge, caused the dressing-case with the jewellery to be removed out of the trunk and placed in an iron safe in another part of the house, of which he kept the key, where it was found after his death, locked, corded, and sealed. The trunks were found in the dining-room after his death, also locked, corded, and sealed:—Held, that the dressing-case and jewellery passed under the bequest to the daughter, and did not form part of the residuary estate. *Norreys* v. *Franks*, Ir. R. 9 Eq. 19.

J. devises all his household goods and furniture which should be in his house at R., at his death, to his wife, and afterwards going beyond sea, his steward gets the landlord of the house to accept a surrender of the house and removes the goods to another house, and writes an account of this to J., who approves of it. The goods will not pass by the will to the wife; otherwise if they had been removed by fraud to defeat the legacy, or by any fortuitous act without the privity of the testator. *Shaftesbury* v. *Shaftesbury*, 2 Vern. 747.

Bequest of goods on board a ship is good, though they may have been afterwards removed, and were not on board at the testator's death. *Chapman* v. *Hart*, 1 Ves. Sen. 271.

—— **Gift Adeemed by.**]—Testator gave all his plate and linen in his house in S. to his wife; he had but one set of plate and linen, which was usually removed with the family from house to house. The plate happened to be at B., the country house, at his death; yet it passed to the wife. *Land* v. *Devaynes*, 4 Bro. C. C. 537.

Goods removed for a necessary purpose, the legacy of them is not adeemed, as from fire or sent to be repaired, &c. *Ib.*

A testator, by his will describing himself as of a particular place, gave to his wife all his household furniture, plate, cutlery, linen, &c., which should be in, upon, or about his said dwelling-house at the time of his decease. The testator removed to another place, and the question was, whether that was an ademption of the bequest:—Held, that it was; the words "said dwelling-house" evidently referring to that particular place. *Houlding* v. *Cross*, 1 Jur. (N.S.) 250; 3 W. R. 334.

Bequest of furniture in one house which is afterwards removed to another house is adeemed. *Heseltine* v. *Heseltine*, 3 Madd. 276.

Testator gave to his wife his house in B., and the furniture in the said house. The lease of the house expired in the testator's lifetime, and he took another house and removed his furniture to it:—Held, that the legacy was adeemed. *Colleton* v. *Garth*, 6 Sim. 19; 2 L. J., Ch. 75.

A. bequeathed to B. his furniture, &c., which at the time of his death should be in the house he then occupied at X. The testator, at his death, had ceased to occupy that house, and had no furniture, &c., therein:— Held, that the bequest failed. *Spencer* v. *Spencer*, 21 Beav. 548.

A testator directed his furniture in Gloucester Square to be applied in payment of his debts, and in a subsequent part of his will, he bequeathed his furniture in England to his sisters. The testator removed the furniture in Gloucester Square to another residence:—Held, that it did not pass to his sisters. *Blagrove* v. *Coore*, 27 Beav. 138.

The testator by will gave to B. all his goods, &c., in his study, except his books and writings. He gave to C. all his books at his chambers in the Temple. He removed the books into the country before his death:—Held, that C.'s legacy was adeemed. *Green* v. *Symonds*, 1 Bro. C. C. 129, n.

iv. *Description by Title or Ownership.*

Realty.]—A testator, by a will made after the Wills Act came into operation, devised to trustees for five hundred years all his freehold and copyhold hereditaments in the county of D. which had or might thereafter come into his possession "by inheritance" from his father, whose heir he was. The testator's property in the county of D., when he made his will, consisted of one estate devised to him by his father before the Wills Act came into operation, and of another which had been conveyed to him by his father by a deed of gift, and into the possession of which he entered in his father's lifetime:—Held, that the latter estate was not subject to the trusts of the term, though without it they could not be fully performed as regarded the amounts directed to be raised under them. *Wilkinson* v. *Bewicke*, 3 De G. M. & G. 937; 1 Eq. R. 12; 22 L. J., Ch. 781.

A testator devised to his granddaughter a plot of freehold land by the description of "the portion of meadow land received by me in exchange from S., and other plots to the granddaughter, describing them by reference to the tenants in whose occupation they then were. Portions of the plot of land which the testator had acquired by exchange from S., and of certain of the plots which had been in the occupation of the several tenants named in the descriptions, were, at the date of the will, under contract for the sale to a railway company. The company had taken possession before the date of the will, but the conveyance was not completed until after the testator's death:—Held, that as there remained lands to answer the descriptions in the will at the time of its date, such lands alone passed under the devises, and that the purchase-money paid by the railway company to the trustee of the testator's will ought to have been paid to the plaintiff, the residuary devisee and legatee. *Jackson, In re, Wilson* v. *Donald*, 44 L. T. 467.

A testator, after reciting that he was possessed of property in D. for the residue of terms of years, bequeathed "his said D. property." He was entitled to freeholds as well as leaseholds in D.:—Held, that the leaseholds only passed under this gift. *Corballis* v. *Corballis*, 9 L. R., Ir. 309.

A lady was entitled under a will to a share of an estate, which, after the testator's death, was varied by allotments and exchanges under an inclosure act. She afterwards devised her share of the estate as "devised" to her "by the testator's will":—Held, that this passed the lady's share in the estate in its actual condition. *Cooch* v. *Walden*, 46 L. J., Ch. 639.

Realty and Personalty.]—A testator having a vested estate under the will of his grandfather, subject to a life estate in his grandfather's daughter, Mary, excepted from the operation of his will the real and personal estate which he might derive from his aunt Mary, or any of her family:—Held, a sufficient description of his vested interest under his grandfather's will. *James* v. *Wynford (Lord)*, 2 Sm. & G. 350; 23 L. J., Ch. 767; 18 Jur. 868; 2 W. R. 607.

Personalty.]—A testator bequeathed all the property to which he was or should be entitled under his uncle's will to trustees upon trust for the benefit of the defendant. After the date of his will he received a sum in cash from his uncle's estate, part of which sum he invested in the purchase of stock in a railway company:—Held, that the railway stock passed under the bequest. *Morgan* v. *Thomas*, 46 L. J., Ch. 775; 6 Ch. D. 176; 37 L. T. 689; 25 W. R. 750.

Bequest, after the death of certain annuitants of a sum set apart by the court for payment of them, or of such part of it as should not, by reason of their deaths, have been assigned or transferred:—Held, that a sum which had been ordered to be transferred on the death of an annuitant, but had not been actually transferred, did not pass. *Hooper* v. *Goodwin*, Jac. 375.

A bequest of "the property which the testatrix had received by the death of B.":—Held, to pass not only the property which the testatrix actually received in her lifetime from the source referred to, but also property to which the testatrix was then entitled in possession, but which was not actually paid until after her decease, and was then received by her representatives. *Girdlestone* v. *Creed*, 10 Hare, 487; 1 W. R. 228.

A reversionary interest in consols and other property to which a testatrix was absolutely entitled in possession, but in respect of which latter property she had received no income, and which was at the date of her will outstanding in the name of a trustee, passes under a bequest of "any interest or moneys to which I may hereafter be entitled on behalf of my late husband," although as to two third parts she had become entitled thereto as sole next of kin of her infant son, who had acquired the same as one of the next of kin of his father. *Moysen* v. *Stuart*, 18 W. R. 146.

Insurance Money.]—J. tenant for life, remainder to W. for life, remainder to J. in fee; during life of J., houses on estate were burnt down, and insurance money paid to J., the insurer, and placed in funds in his name; J., by will, devised estate to R. in fee, and his personal estate to W. W. applied part of insurance

money in repairing house on estate; insurance money unapplied remains in J.'s name; W., by will, stated the circumstances as to fund so standing in his brother's name, and bequeathed residue of his personal property:—Held, insurance money passed to R. as devisee of J. *Norris* v. *Harrison*, 2 Madd. 268.

—— **Bonuses.**]—A policy of insurance for 3,000*l.* on A.'s life was assigned to trustees, and, by a deed of even date, trusts were declared of it by the description of "the sum of 3,000*l.* for which A.'s life was insured," and power was given to B. to dispose of it by will. B., after reciting the settlement, bequeathed 1,000*l.*, part of the sum of 3,000*l.*, to A., and the remaining sum of 2,000*l.* to C. At A.'s death, 9,000*l.* was received under the policy:—Held, that the whole fruits of the policy were subject to the trusts of the settlement, and passed by the bequests to A. and C., in proportion to their legacies. *Courtney* v. *Ferrers*, 1 Sim. 137; 5 L. J. (o.s.) Ch. 107.

Where Misdescription.] — Devise of "my estates at S., which were devised to me or purchased from A.," the fact proving otherwise, construed not as an intended restriction, but as a misdescription. *Welby* v. *Welby*, 2 V. & B. 191; 13 R. R. 58.

A testator entitled in fee to some messuages and lands in A., and entitled for life to other messuages and lands in A., devised his messuages and lands in A. to his son, and charged his tenement in A., occupied by H., with certain legacies. The tenement occupied by H. was part of the property in A. to which the testator was only entitled for life:—Held, that it was not to be inferred from the description as his own of the tenement in A., occupied by H., that the testator intended to describe and devise as his own the other property in A. in which he had only an estate for life. *Parker* v. *Carter*, 4 Hare, 400.

A testatrix had power to dispose by will of property which she enjoyed under the residuary gift of her brother; a part of this property consisted of 7,000*l.* bank stock, which, after the brother's death, was increased by a bonus to 8,750*l.*; the testatrix in her will, made shortly after the bonus was declared, described the bank stock as consisting of 7,000*l.* The court decreed, that the 8,750*l.* passed by force of general expressions, which plainly manifested an intention to bequeath all that the testatrix derived from her brother. *Matthews* v. *Maude*, 1 Russ. & M. 397; 8 L. J. (o.s.) Ch. 106.

v. *General Devise of Real Estate.*

Before the Wills Act—Where Specific Gift Fails.]—If devise of land is revoked or does not take place, the land does not pass by the residuary clause. *Watson* v. *Lincoln*, Ambl. 328.

A testatrix, having the moiety of an estate, directed her executors to purchase the other moiety, and if the purchase should be completed within twelve months after her death, she gave the entirety on certain trusts; but in case her executors should not be able within that time to purchase it, she directed her moiety to be sold, and the produce, together with 1,100*l.*, to be held on other trusts. The will contained a gift of the residue of her estate of whatever kind, &c. The purchase was not completed within the time, although the executors were able, so that neither of the expressed events happened:—Held, first, that the trusts, both of the estate and 1,100*l.*, failed; and, secondly, that, as between the devisees and heir-at-law, the latter was entitled to the testatrix's moiety of the estate. *Upjohn* v. *Upjohn*, 7 Beav. 59.

—— **Intent Gathered from Will.**] — Where testatrix by will directed a sum of money to be laid out in land, and settled, after some previous limitations, on her own right heirs, and afterwards made a general residuary devise of all her real and personal estate:—Held, that upon the evident intent of the testatrix to exclude the residuary devisee, the heir-at-law was entitled to a remainder in fee in the lands to be purchased. *Robinson* v. *Knight*, 2 Eden, 155.

A. devised part of his real estates to his son W. in settlement, and other parts in fee, and the residue not specifically devised to W., whom, with E., he appointed executor and executrix. A., by codicil reciting the death of W. and the devises of the particular estates to him, devised the aforesaid estates, in case E. should die without issue in his wife's life, to his wife for life, with remainder to R., and appointed E. his sole executrix and residuary legatee. A. died seised of other estates than those specifically devised:—Held, that E. did not take the residuary realty. *Hillas* v. *Hillas*, 10 Ir. Eq. R. 134.

Under the Wills Act—Where Specific Gift void.]—The 25th section of the Wills Act is to be construed upon the principle of assimilating a residuary devise of real estate with a similar bequest of personalty. A devise which was, by construction, residuary:—Held, accordingly to pass lands which had been included in a devise void as contrary to law. *Carter* v. *Haswell*, 26 L. J., Ch. 576; 3 Jur. (N.S.) 788; 5 W. R. 388.

C., in 1854, gave to trustees, their heirs, executors, administrators, and assigns, all his real and personal property, of whatever nature or kind, in trust for his sister S. The testator directed that certain farms should be sold, and that the money obtained, together with moneys due to him, should be vested in the names of the treasurers of the Wesleyan Methodist Missionary Society on annuity such as the law directed, such annuity to be paid to his sister as she might direct. After the decease of a brother and another sister and C., the claim to the annuity was to cease:—Held, that the testator had given his property, of every description, upon trust for one particular person, and everything given to the Wesleyan Methodist Missionary Society was given by way of charge thereon, which having failed, there was an absolute trust in favour of S. *Ib.*

A married woman, having a power of appointment under her marriage settlement over estates A. and B., appointed by will in September, 1838, estate A. to her husband in fee, "and all other the hereditaments comprised in the settlement not hereinbefore disposed of to another person." By codicils to her will she revoked the appointment of estate A. to her husband, and gave him the same estate for life, with remainder to trustees to sell and pay certain legacies and pay the residue to charities:—Held, that the devise of "all other the hereditaments," &c., by the will was not residuary but specific; and that the void gifts to the charities did not pass by it, but lapsed as unappointed. *Brown's Will, In re*, 1 K. & J. 522; 3 W. R. 542.

A testator made a will (dated before the Wills Act), by which he directed his residuary real estate to be sold and the proceeds to be divided (in the events which happened) among twelve persons, of whom A. and B. were two. He made a first codicil (dated after the Wills Act), by which he directed certain real estate acquired subsequently to the date of the will to be sold, and the proceeds divided in the same way as the proceeds of his other real estate. This codicil was attested by A. and B. He then made another codicil, described as a codicil to his will of a certain date, but not referring to the prior codicil:—Held, that the second codicil did not operate as a re-publication of the first codicil; that the gifts to A. and B. of two twelfth shares of the proceeds of the property comprised in the first codicil failed; and that these shares fell into the residue, and were divisible between A. and B. and the other ten residuary legatees. *Burton* v. *Newbery*, 45 L. J., Ch. 202; 1 Ch. D. 234; 34 L. T. 15; 24 W. R. 388.

A lady who had executed a deed of gift (which was enrolled) of lands at H. to three trustees for founding a charity, died within a year of its execution, having devised the same lands, in case she should not in her lifetime have effectually disposed of them, to A., B. and C. (two of whom were trustees of the deed) as joint tenants, and she devised certain lands to the plaintiff by the following description: "The rest of my hereditaments at H., and all my hereditaments at S. and W." The plaintiff filed a bill impeaching the devise as being a secret trust for charitable purposes, and claiming to be entitled to the lands:—Held, that as the testatrix devised the lands in full reliance that the devisees would carry out her object, and that the trust was tacitly accepted by them, the devise was therefore void:—Held, also, that the words "the rest of my lands at H." were not a residuary devise within the Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 25, and that the lands in question were undisposed of. *Springett* v. *Jennings*, 40 L. J., Ch. 348; L. R. 6 Ch. 333; 24 L. T. 643; 19 W. R. 575—C. A.

—— **Where Specific Gift Lapses.**]—If a specific devise of lands fails, it will fall into and pass by a general devise of all real estates not before devised. *Green* v. *Dunn*, 20 Beav. 6; 24 L. J., Ch. 577; 3 W. R. 277.

Devise of lands in E. to A. in fee, with other specific devises, and a devise of "all my lands not herein before devised" to trustees upon trust for A. for life, with limitations over. A. dies in lifetime of testatrix, who makes a subsequent codicil varying the will in other parts, but leaving the devises to A. unaltered:—Held, that the lands in E. passed by the residuary devise since the 7 Will. 4 & 1 Vict. c. 26. *Ib.*

A testator, in 1847, devised specific real estate to his daughter M., and, after making several specific bequests, devised and bequeathed all other real and personal estate of which he might die possessed to M. and others of his children. M. died in his lifetime:—Held, that the devise expressed by the words "all other," &c., was a residuary devise within the 7 Will. 4 & 1 Vict. c. 26, s. 25, and included the real estate devised to M. *Cogswell* v. *Armstrong*, 2 K. & J. 227; 1 Jur. (N.S.) 1162.

—— **Where Will made under Mistake of Fact.**]—Testator by his will recited that he left nothing to his nephews and nieces, as they would be entitled to the property, held by testator under their grandfather's will on his (testator's) death without issue, and devised all his real estate and his residuary personal estate to trustees upon certain trusts. The remainder after his own life, supposed by the testator to belong to the nephews and nieces, had in fact descended to the testator himself:—Held, that under the circumstances it did not pass by the residuary gift, but was undisposed of. *Circuitt* v. *Perry*, 2 Jur. (N.S.) 1157; 5 W. R. 15.

N. devised an estate at R. to such of the children of J. as J. should by will appoint, and in default to them equally. By the death of four of J.'s children, J. took half the estate as heir of his deceased children. J., by his will, devised all his real estate to his children equally, and he directed that the estate at R., devised by the will of N., over which he might have any power of appointment by will, should not be included in or affected by his own will, but should go according to the limitation contained in N.'s will:—Held, that J.'s moiety in the R. estate passed under the residuary devise in his will, and did not descend to his heir. *Atherton* v. *Langford*, 25 Beav. 5.

The wife of A., being entitled in fee, devised to him the B. property. A., under a wrong impression that his wife had no power of testamentary disposition, made his will containing this clause: "And I am wishful here to observe that my son, as heir-at-law of his mother, will inherit the B. property, and is therefore further provided for." A. then devised his residuary estate to other persons:—Held, that he had died intestate as to the B. property, notwithstanding the residuary devise. *Hawks* v. *Longridge*, 29 L. T. 449.

Effect on Lease for Lives.]—A testator, seised of estates in fee, and holding certain lands and titles in the county of H., under church leases for lives, devised all his lands and hereditaments in the counties of H. & G. and all other his real estate to his daughter, and the heirs of her body, and, for default of such issue, to F. and his heirs. The daughter at the testator's death, and ever afterwards, was of unsound mind. Her husband, having taken out administration to the testator, with the will annexed, procured from time to time renewals of the leases. She survived him as well as all the cestuis que vient named in the testator's leases, and died without issue, and without having done any act to bar such interest as F. had under the devise:—Held, that the leaseholds for lives passed by the will, and that F. was entitled to the benefit of the subsisting leases, which had been obtained by way of renewal of the old leases. *Fitzroy* v. *Howard*, 3 Russ. 225; 7 L. J. (O.S.) Ch. 16; 27 R. R. 73.

Devise of all freehold lands would include leases for lives, though the limitations are inapplicable. *Watkins* v. *Lea*, 6 Ves. 642. And see *Mogg* v. *Mogg*, 1 Mer. 654; 15 R. R. 185.

A testator seised of an estate pur autre vie, and possessed of personal property to the amount of about 4,500*l.*, by his will bequeathed "the sum of 1,500*l.*, the other part of the 4,500*l.*, together with any further property," in trust for the use of his father, to be disposed of by him, share and share alike, as he by deed or will should appoint, among testator's brothers, H. and J., and the daughter or daughters of his sister E. The will contained a residuary clause in these

words: "As to the rest, residue, and remainder of my worldly estate and fortune, not heretofore and hereby disposed of, in trust to the use of my affectionate father, J. C., and his heirs, executors, and administrators for ever":—Held, that the estate pur autre vie passed under this residuary clause, and not under the words "any further property," upon the true construction of the entire will. *Acheson* v. *Fair*, 3 Dr. & War. 512; 2 Con. & L. 208.

A testator, seised of freeholds and copyholds in fee, and leaseholds for lives, devised "all his real estate whatsoever and wheresoever":—Held, that the copyholds and leaseholds for lives, as well as the freeholds in fee, passed, notwithstanding some parts of the will were inapplicable to them. *Weigall* v. *Brome*, 6 Sim. 99.

Testator devised all his manor, messuages, lands, tenements, tithes and hereditaments, and all his real estate whatsoever, "except what is hereinafter mentioned and devised," to the use of all his children successively, in strict settlement, and gave two of them annuities, which he charged upon a rectory held by him under a lease for lives, which he directed to be renewed if those two children or either should be living at his death, and that their lives or that of the survivor should be inserted in the new lease, and the fine paid out of his personal estate; he gave part of his personal estate specifically, and directed the residue to be laid out in land, to be settled to the same uses as his real estate; but afterwards, by a testamentary paper, unattested, he disposed of his personal estate otherwise: the heir contracted to sell the lease of the rectory, and upon a case directed to the court of king's bench on his bill for specific performance, the certificate was, that the lease did not pass by the will, but devolved on the heir as special occupant; but the Lord Chancellor considered that title too doubtful to be forced on a purchaser: an act of parliament was therefore obtained. *Sheffield* v. *Mulgrave (Lord)*, 2 Ves. 525.

—— **Lease for Years—Intention of Testator.**]—If upon the whole will it plainly appear that the testator meant to pass leasehold property under the description of real estate, the court will give effect to his intention. *Goodman* v. *Edwards*, 2 Myl. & K. 759.

—— **Where Testator has no Freeholds.**]—A devise, dated after 1837, of "all my real estate," without any words of locality or description, will pass leaseholds if the testator has no other landed property. *Gully* v. *Davis*, 39 L. J., Ch. 684; L. R. 10 Eq. 562.

A testator devised all his real estate whatsoever and wheresoever to trustees. The will contained a residuary bequest of personal estate. He was at the date of his will and of his death possessed of property which he believed to be freehold, but which proved to be leasehold. He had no other landed property:—Held, that the leasehold passed under the devise. *Ib.*

A testator gave and devised all his freehold and copyhold messuages, farms, lands, tenements, hereditaments, and real estate, situate at Market Rasen, to his wife for life, and then to his son, his heirs and assigns, for ever. The testator had no property at Market Rasen except a leasehold estate held for 1,000 years:—Held, that the leasehold estate passed under the above clause. *Nelson* v. *Hopkins*, 21 L. J., Ch. 410.

A. devised all his estates to B., and had only leaseholds:—Held, they shall pass. So where a man, having lands in fee, and for years, devised all his lands, the fee-simple only shall pass; but where he had a lease for years, and no fee-simple, the lease for years shall pass, for otherwise the lease would be void, and the court directed a trial at law upon the issue. Whether the testator had both freehold and leasehold, and in the same parish, quære. *Knotsford* v. *Gardiner*, 2 Atk. 451.

Absolute interest in leaseholds bequeathed to trustees in trust for two persons:—Held, to pass. *Bradshaw* v. *Bradshaw*, 5 Ir. Eq. R. 310.

—— **Where Testator has both Freeholds and Leaseholds.**]—One seised in fee, and possessed by lease for twenty-one years of lands in D., devises all his lands in D., whereof he is seised, possessed, or anyways interested in, to A. for life; remainder to B., in tail; remainder to C., with power to make a jointure; remainder to trustee to preserve contingent remainders, &c.:—Decreed, the leasehold should pass as well as the freehold. *Addis* v. *Clement*, 2 P. Wms. 456.

General devise of all manors, messuages, lands, tenements, and hereditaments, in the county of Y., or elsewhere, with long limitations in strict settlement, and a residuary disposition of the personal estate, also by very general words. The Lord Chancellor was clearly of opinion that two leasehold houses passed with the personal estate, and not under the devise of the land; but granted a case. *Thompson* v. *Lawley*, 5 Ves. 476.

Testator devised certain specified messuages and lands, and all other his messuages, lands, tenements, and hereditaments, which might not be in his will particularly described or mentioned, to trustees upon certain trusts. The court declined to decide whether a leasehold house passed under the general words without directing a case for the opinion of a court of law. *Parker* v. *Marchant*, 1 Y. & C. C. C. 290. The court of common pleas, to whom a case was sent:—Held, that the leaseholds did not pass, and their certificate was confirmed, &c. 2 Y. & C. C. C. 279; 12 L. J., Ch. 314; 7 Jur. 318. And see *S. C.* at law, 5 Man. & Gr. 496; 6 Scott (N.R.) 478; 12 L. J., C. P. 170.

Testator gave, devised, and bequeathed all his messuages, lands, tenements, and hereditaments whatsoever and wheresoever, and all moneys in the funds, to trustees, their heirs, executors, administrators, and assigns, according to the several and respective estates and interests therein, and declared the trust of the rents, issues, and profits, dividends, interest, and proceeds, subject to ground rents and other outgoings in respect of the said messuages, lands, &c.; the leasehold estates pass with the freehold upon the subsequent words. *Hartley* v. *Hurle*, 5 Ves. 540; 5 R. R. 113.

Devise of all testator's real estates wheresoever situated, lying, and being:—Held, not to include leaseholds as well as freeholds. *Whitaker* v. *Ambler*, 1 Eden, 151.

One, having freehold and leasehold estate in C., devises all his manors, lands, tenements, mines of coal and lead, to, &c.:—Held, the leasehold as well as freehold passed. *Lowther* v. *Cavendish*, Ambl. 366; 1 Eden, 99.

—— **Where Freeholds and Leaseholds intermixed.**]—A devise of lands and tenements with-

out more, or a devise of messuages and tenements to uses applicable only to the freehold property without more, will not pass the testator's leasehold property. But a devise of messuages or tenements, with the appurtenances, to uses applicable only to freehold property, will comprise leasehold property, where a clear intention to that effect can be collected from the circumstance of the leasehold property having been blended in enjoyment with the freehold. *Hobson* v. *Blackburn*, 1 Myl. & K. 571 ; 2 L. J., Ch. 168.

Testator devised to trustees all his messuages or tenements, farms, lands, hereditaments, and premises in C. and W., and all other his freehold lands and tenements whatsoever, to hold all such his real estate upon trust for his wife for life, remainder to other parties in tail. He also gave all his household goods, &c., and all other his personal estate, to his wife absolutely. The testator was seised in fee of freehold lands in C. and W., and also in S. ; but there was no messuage or building on any of the freehold lands, except a barn in S. He also had land in C. for a long term of years, on which there was a farm and buildings ; and at his death, and for six years before, he occupied the freeholds and leaseholds as one farm, but they were not contiguous :—Held, that the freeholds only passed by the devise to the trustees, but that the leaseholds did pass to the wife as personalty under the residuary bequest. *Arkell* v. *Fletcher*, 10 Sim. 299 ; 3 Jur. 1099.

A testator devised all his real estates to trustees ; as to his freehold messuages, farm lands, and hereditaments in the county of B., in trust for C. The testator had a farm in that county consisting of a messuage and 116 acres of land, of which the messuage and the greater part of the land were freehold, and the other parts leasehold for long terms of years at peppercorn rents : and they were interspersed with and undistinguishable from the freehold part, and had been demised therewith as one farm, at one entire rent, and the testator had always treated and dealt with them as freehold :—Held, nevertheless, that the leasehold parts were not comprised in the trust. *Stone* v. *Greening*, 13 Sim. 390.

A. gave all his real estate situate as described in his will to trustees to have and to hold to them, and the survivor of them, for ever or otherwise, according to the several and respective natures and tenures thereof, on certain trusts :—Held, that the leasehold as well as the freehold property of the testator at the place mentioned passed. *Swift* v. *Swift*, 1 De G. F. & J. 160 ; 29 L. J., Ch. 121 ; 1 L. T. 150 ; 8 W. R. 100.

A testator devised to A. and B., and their heirs, all his "freehold land, messuages or tenements, and hereditaments, respectively situate and being in, or forming the whole or part of," a set of buildings which he named, all in a particular parish. Of one part of the property thus described the testator at his death was seised in fee, subject to a lease ; of a second part he was possessed for a term of years ; and of (X.) a third part (now in question) he was possessed for a term of years, and he was also seised of the reversion of the same in fee, from the expiration of three years after the end of the term :—Held, that both the leasehold and the freehold interest of the testator in the portion (X.) passed under the bequest. *Matthews* v. *Matthews*, L. R. 4 Eq. 278 ; 15 W. R. 761.

A residuary devise of manors, messuages, lands, farms, tithes, tenements, hereditaments and real estate, as well copyhold as freehold, was held not to include long leaseholds which had been occupied in one farm with freeholds. *Holmes* v. *Milward*, 47 L. J., Ch. 522 ; 38 L. T. 381 ; 26 W. R. 608.

The dealing with land originally of leasehold tenure for a long period by persons in possession of it was held to afford a presumption, as between those claiming under such persons, that the reversion had been got in. *Ib.*

A testator, after certain devises and after charging his real estate with certain payments, gave and devised "all the rest and residue of my manors, messuages, farms, and real estate, whatsoever and wheresoever, in possession as in reversion, remainder as expectancy, and whether vested in me or any other person or persons in trust for me, or which I am entitled to at law or in equity," to the uses in his will mentioned. The will dealt separately with personal estate : —Held, that leaseholds had not passed under the residuary devise, notwithstanding the inconvenience of separating them from freeholds of the testator with which they were let to one tenant at and before the date of the will. *Ib.*

Effect of Insufficient Attestation before Wills Act.]—Devise of all lands and tenements in or near F., by a will attested by two witnesses only, where the testator had freehold, will not pass leasehold ; contra, if he had only had leasehold. *Chapman* v. *Hart*, 1 Ves. Sen. 271.

Leasehold Tithes Passing with Freehold.]—Testator, having tithes in fee, and likewise tithes by leases perpetually renewable, devised all his lands, tenements, and tithes to defendant ; the leasehold tithes pass as well as the freehold. *Turner* v. *Hustler*, 1 Bro. C. C. 78.

"Contrary Intention" under Wills Act.]—A testator having devised the residue of his personal estate, whatsoever and wheresoever, to A. B., devised all his manors, lands, &c., at W., in the county of Durham, and at B., in the county of York, and a parcel of land purchased of M. L., and all other his real estates in the counties of Durham and York and elsewhere, and all his estate and interest therein, to C. and D. and their heirs, to certain uses :—Held, under the 1 Vict. c. 26, s. 26, that his leaseholds in Durham passed to C. and D. with the real, and not to A. B. with the personal estate. *Wilson* v. *Eden*, 16 Beav. 153. Reversing 17 L. J., Ch. 459 ; 12 Jur. 488.

The Wills Act, s. 26, which provides that a general devise of the testator's lands shall include leaseholds, unless a contrary intention appear by the will, was intended to abolish a technical rule which generally defeated the intention, and not to substitute another technical rule in its place. If, therefore, on the fair construction of the will, there are indications of an intention that leaseholds should not pass by the devise of lands, they will be excluded. *Prescott* v. *Barker*, 43 L. J., Ch. 498 ; L. R. 9 Ch. 174 ; 30 L. T. 149 ; 22 W. R. 422—C. A.

A husband, after devising his mansion house to his wife for life, devised his mansion house and "lands" in strict settlement. There was a direction to trustees to receive and accumulate the rents during the minority of any tenant for life or tenant in tail by purchase, and to stand possessed of the accumulations, if such tenant for

life or in tail attained twenty-one, or died under that age leaving issue entitled or inheritable under the will, to pay or transfer the funds to such tenant for life or in tail, his executors or administrators, as personal estate; but if such tenant for life or in tail died under twenty-one without leaving such issue, then to lay out the fund in the purchase of freeholds in fee-simple to be settled to the same uses as the devised estates. There was a power of sale, and a direction to invest the moneys arising from sales in the purchase of freehold lands, to be settled to the same uses, or leaseholds convenient to be held therewith, with a direction to settle the purchased leaseholds on like trusts, but so that they should not vest absolutely in any tenant in tail by purchase who did not attain twenty-one; but on his death under that age should devolve as if they had been freeholds of inheritance, and been settled accordingly. There was also a bequest of heirlooms to be held on trusts corresponding with the uses of the mansion house, with a similar proviso against their vesting absolutely in any tenant in tail by purchase who did not attain twenty-one. The testator bequeathed his residuary personal estate to trustees upon trusts corresponding with the uses of the devised estates, with a proviso that it should not vest absolutely in any tenant in tail by purchase dying under twenty-one, but on his death under that age should devolve as if it had been freehold of inheritance included in the devise:—Held, that there was sufficient indication of an intention not to include leaseholds for years in the devise of lands, and that they passed under the residuary bequest. *Ib.*

A husband devised and bequeathed the residue of his real and personal estate upon trust to convert his residuary personal estate, "except leaseholds," and out of the income of the investments and the rents and profits of the real estate to pay annuities, and accumulate the residue of the income during his wife's life; and after her death upon trust as to all his real estate at, in, or near E., and in or near W., out of the rents and profits during the life of J. T. W. to repair and insure, and to pay an annuity, and subject thereto in trust for J. T. W. and his assigns for life; and after his decease for his first and other sons successively in tail male, with remainder to his daughters equally as tenants in common in tail, with limitations over in the nature of cross remainders. The testator had both freeholds and leaseholds for a term of 1,000 years at E.; at W. he had leaseholds only for a term of 900 years:—Held, that the leaseholds at E. and also at W. passed under the devise, the exception of leaseholds in the gift of residue not showing a contrary intention. *Moase* v. *White*, 3 Ch. D. 763; 24 W. R. 1038.

Effect on Reversion.]—A., seised in fee, and in possession of several real estates, and of the reversion in fee of the manor of S., subject to the estate tail of three persons who were living, devises all his estates generally to trustees in trust to be sold and to invest the money for benefit of younger children. This reversion falls in after the death of A.:—Held, that reversion passed by will, and was well vested in trustees for the benefit of the testator's younger children. *Atkyns* v. *Atkyns*, 3 Bro. P. C. 408; Cowp. 808.

Construction of devise, as applying to the body of the estate, or merely a reversion from the combination of it with other estates, and the general inaptitude of the expressions, &c. *Welby* v. *Welby*, 2 V. & B. 192; 13 R. R. 58.

J., having lands in A. and B., settles lands in A. to particular uses, remainder to his own right heirs; then devises all his lands in B., and elsewhere, not formerly settled; hereby the reversion of lands in A. passes. *Chester* v. *Chester*, Fitzg. 150; 3 P. Wms. 55; 2 Eq. Cas. Abr. 330. pl. 9.

A devise of lands, out of settlement, will pass as well those lands of which the testator was seised in fee at the time of making his will, as those which were comprised in a settlement made on his marriage, the particular uses of which were determined by his having no male issue. *Falkland (Viscount)* v. *Lytton*, 3 Bro. P. C. 24.

A., by virtue of several settlements, being tenant in tail after possibility of issue extinct, of some lands, remainder in fee, to trustees in trust for him and his heirs, and to some other lands being tenant for life, remainder to his first, &c., sons, remainder to trustees in fee, in trust for the right heirs of B., whose heir he was, and as to other lands, being tenant in tail, remainder to the right heirs of his father; and having no issue, by will devised to his nephew all his lands, tenements, and hereditaments, out of settlement:—Decreed, all the lands so settled to pass by this devise. *Strode* v. *Russel*, 2 Vern. 621; 3 Ch. Rep. 169.

Lands with a power of revocation will not pass by a devise of lands out of settlement. *Ib.*, 624.

Devise of lands not in settlement will pass the reversion of the settled lands. *Glover* v. *Spendlove*, 4 Bro. C. C. 337.

A devise "of all property which I am possessed of, which is not settled by either of my marriage settlements," will pass a reversion in fee, of an estate limited to the testator by his marriage settlement. *Jones* v. *Skinner*, 5 L. J., Ch. 87.

Testator was seised of one estate in fee-simple, and of another settled by marriage articles upon himself for life, remainder in tail to his first and other sons, &c., and, in default of such issue, to his own right heirs, provided that "in case he should die without issue, or intestate, the said lands" were to go to A. L., her heirs and assigns. By his will he devised all his "unsettled estate":—Held, that the reversion in fee in the settled estate passed. *Incorporated Society* v. *Richards*, 1 Dr. & War. 258; 1 Con. & L. 58; 4 Ir. Eq. R. 177.

A testator, entitled to a copyhold estate in remainder expectant upon the determination of the life estate of his wife in the same premises, by his will gave the income of all his property, wherever situate or of whatsoever kind, to his wife for life; and, at her decease, he gave all the property then left by him, and of which she was to have the income for her life, to his children; and, at his wife's death or second marriage, he directed his trustees to receive the rents and dividends arising from the estate and effects he should die possessed of, and to apply the same to the maintenance of his children until the youngest should attain twenty-one:—Held, that the interest of the testator in remainder in the copyhold estate passed by his will. The tendency of modern decisions is to read the different clauses of the same will referentially to each other, unless they are clearly independent. *Ford* v. *Ford*, 6 Hare, 486, 492.

A., at the time of making his will, was seised

in fee of the manor of G., and was tenant for life, under his father's will, of the mansion-house of C. and the manor of W., with an ultimate reversion in fee after the determination of life estates and estates tail. By his will he devised the mansion-house of C. and the manors of G. and W. to C. for life, with remainders over. The limitations of the will corresponded in a great measure to those of the father's will. The will gave to the tenants for life, several of whom were tenants for life under the father's will, powers of jointuring, to be capable of being exercised as they should come into possession of the estates by virtue of the limitations in the testator's will:—Held, that it was not the intention of the testator to dispose only of his reversion in the mansion-house of C. and manor of W., but to deal with the present interest in them; and that C., who had become absolutely entitled to those properties under the will of the testator's father, was put to his election.

Although the inaptitude of some of the limitations in a devise to a reversion will not prevent a reversion from passing, it may furnish a sufficient ground for holding that something more than a reversion was intended to pass.

Where a testator devises property in which he has a devisable, but only partial, interest, it is a question of construction whether he has shewn an intention to dispose of more than the devisable interest that he has, and an express declaration of such intention is not necessary in order to raise a case of election. *Wintour* v. *Clifton*, 26 L. J., Ch. 218; 3 Jur. (N.S.) 74; 5 W. R. 129.

—— **Where Reversion Created by the Will itself.**]—A. devised a farm to B. for life, and after some legacies devises all other his personal estate, lands, tenements and hereditaments, not before devised, to C. The reversion of the farm passed by the general devise to C. *Kingsman* v. *Kingsman*, 2 Vern. 560.

A., seized in fee, devised Black-acre to B. for life, and devised to C. all his lands not before devised, to be sold. By this devise of all his lands, &c., the reversion of Black-acre was well devised to C. *Rooke* v. *Rooke*, 2 Vern. 461; Pre. Ch. 602; 1 Freem. 219. And see *Taaffe* v. *Ferrall*, 10 Ir. Ch. R. 188.

Where a testator gives a real estate to A. for life, and then makes a residuary devise to A., B. and C. for their lives, there is no such inconsistency as to exclude the remainder in that real estate from the residuary devise. *Alliston* v. *Chapple*, 6 Jur. (N.S.) 288; 2 L. T. 110.

Lands, parcel of the duchy of Cornwall and governed by the custom of that duchy, the tenure of which was originally a holding or convention from seven years to seven years, which ultimately grew into a holding to the tenant and his heirs and assigns, subject to the payment of a fixed fine every seven years under penalty of forfeiture, no surrender to the uses of a will being required:—Held to pass by a general devise made previously to the 55 Geo. 3, c. 192; and the circumstances of such general devise being followed by a devise of all testator's duchy lands to one for life:—Held, not to prevent its passing the reversion. *Ustieke* v. *Peters*, 4 K. & J. 437; 4 Jur. (N.S.) 1271.

Effect on Contingent Interest in Real Estate.]—Where a testator devised (by will dated in 1827) all the hereditaments to which he should be entitled at his death to trustees for sale:—Held, that a contingent interest in an estate in fee both by virtue of a shifting use, and also of an ultimate limitation in default of issue of his brother, did not pass by such devise. *Honywood* v. *Honywood*, 2 Y. & C. C. C. 471.

A contingent interest in real estate transmissible to heirs may be disposed of by a residuary devise made in general words, though the testator could not become entitled to such real estate, except on events depending on his own death without issue. *Ingilby* v. *Amcotts*, 25 L. J., Ch. 769; 2 Jur. (N.S.) 556; 4 W. R. 433.

—— **On Legal Estate in Testator as Mortgagee.**]—A man, seised in fee of divers lands, and having also lands mortgaged to him, devises all his lands to A. and his heirs; the mortgaged lands did not pass. *Winn* v. *Littleton*, 1 Vern. 3; 2 Vent. 351; 2 Ch. Ca. 51.

Testator, having real estates in A. and B., and a mortgage in C., and a statute extended in D., devises all his credits and mortgages to his executors, and then devises all his real estates to whatsoever, in A., B., C. and D., to S. for life, and after his decease to his heirs and their heirs for ever:—Held, that mortgage in C., and extent in D., went to executors. *Davis* v. *Gibbs*, Fitzg. 116; 3 P. Wms. 26; Mos. 269.

Under a general devise of all the rest, residue, and remainder of and in all and singular the property, estate, and effects which the testator should be possessed of or entitled to, or over which he should have a disposing power at his decease, of whatsoever kind, &c., the same might be:—Held, that the legal estate in mortgaged premises did not pass, but descended to the testator's heir-at-law. *Horsfall, In re*, M'Cle. & Y. 292.

The legal estate in mortgaged premises did not pass by a general residuary devise by the mortgagee. *Leeds (Duke)* v. *Munday*, 3 Ves. 348.

A., in 1860, gave all the residue of his real and personal estate to all his nephews and nieces as tenants in common, after specifically devising certain lands, not including any lands vested in him as mortgagee or trustee, and bequeathing annuities and legacies:—Held, that the estates on trust and mortgage did not pass to the unascertained class, but to the heir-at-law as trustee; and the court directed the same to be vested in the executors upon the trusts of the will. *Finney's Estate, In re*, 3 Giff. 465; 8 Jur. (N.S.) 965; 6 L. T. 745.

A testator who was mortgagee in fee with a partial beneficial interest in the equity of redemption, devised to trustees all his real and personal estate upon trust, first, to pay his debts and funeral and testamentary expenses, and then, upon certain trusts, for his wife and children; and he gave to his trustees powers to sell or mortgage any part of his estate. The will contained no devise of trust or mortgaged estates:—Held, that the legal estate in the mortgaged property did not pass under the will. *Packman and Moss, In re*, 45 L. J., Ch. 54; 1 Ch. D. 214; 34 L. T. 110; 24 W. R. 170. But see *Brown, In re*, 3 Ch. D. 156.

A testatrix devised and bequeathed all the residue of her property, of whatever description, which she had power to dispose of by will, as follows:—One moiety to be equally divided between her two daughters, and the other moiety she gave to a trustee to be paid in equal shares to her two sons at twenty-five, the shares

of children dying under age to go to the survivors, and the trustee to have power to vary the securities and to apply part of the income for the maintenance and education of the children. The testatrix was mortgagee in fee of an estate which was subsequently sold under a power in the mortgage deed, and the purchaser required that the residuary devises should join in the conveyance :—Held, that the legal estate in the mortgaged property passed to the heir-at-law of the mortgagee. *Martin* v. *Laverton*, 39 L. J., Ch. 166 ; L. R. 9 Eq. 563 ; 22 L. T. 700 ; 18 W. R. 561.

—— **Where Trust for Sale.**]—A., being seised of the equity of redemption of lands in N., which he had mortgaged to his father, and also of the legal estate in them as heir to his father, the mortgage being still unsatisfied, devised all his lands in N. and elsewhere in trust to sell :—Held, that the legal estate did not pass by the will. *Marshall, Ex parte*, 9 Sim. 555 ; 8 L. J., Ch. 187 ; 3 Jur. 196.

A husband, who was mortgagee in fee of an estate to secure a sum of money of which he was trustee, devised and bequeathed his residuary real and personal estate unto and to the use of his wife, her heirs, executors, administrators and assigns, in trust, either to leave the same in existing investments, or sell and convert the same, and out of the proceeds to pay his debts, funeral and testamentary expenses, and certain legacies, and invest the residue and retain the income thereof for her life ; and, subject as aforesaid, such residue to remain in trust for C. There was no express devise of trust or mortgaged estate :—Held, that the legal estate in the mortgaged property did not pass under the will. *Smith, In re*, 4 Ch. D. 70 ; 35 L. T. 890 ; 25 W. R. 294.

A testatrix directed her just debts to be paid. She then gave pecuniary legacies, and gave all the rest, residue, and remainder of her real and personal estate and effects to T., for her own absolute use and benefit :—Held, that although by these dispositions the testatrix's own real estate was charged with debts and legacies, an estate of which she was mortgagee was not excepted from the residuary devise. *Stevens's Will, In re*, 41 L. J., Ch. 537 ; L. R. 6 Eq. 597.

Effect on Interest of Testator as Mortgagee in Possession.]—J. W., being seised and possessed of considerable freehold, copyhold, and leasehold estates in the county of H. ; and in possession, as mortgagee, of certain leasehold houses at K., in the county of M. ; but having no other property in the said county of M., and having other estates vested in him as mortgagee, besides those at K., makes his will, devising "all his freehold, copyhold, and leasehold messuages, &c., in the county of H., and in the town of K.," to A. W. for life, and after her death "all and singular other his freehold, copyhold, and leasehold messuages," &c., in the counties of H. and M. or elsewhere to E. W. and A. T. for their joint lives, and after their several deceases "all the said freehold, leasehold, and copyhold messuages," &c., unto and equally among their children ; and gives to A. W. "all the residue of his real estate, not before disposed of, and all other his estates and interests whatsoever, vested in him as mortgagee or trustee," &c., "and all the residue of his personal estate, ready money, and securities for money," &c., subject to the payment of debts and legacies :—Held, that the mortgaged premises at K. passed under the devise of all the freehold, copyhold, and leasehold messuages, &c., in the county of H., and in the town of K. *Woodhouse* v. *Meredith*, 1 Mer. 450 ; 15 R. R. 145.

S., in 1849, devised all his freehold and copyhold mansions, messuages, farms, and hereditaments, situate in the county of N., or elsewhere, to four persons, in trust. In 1843, S., being mortgagee of certain lands, with a power of sale, conveyed them to A., and he, in 1845, by deed, declared himself to be a trustee for S., who from that time held undisputed possession of them :—Held, that as between the parties beneficially interested under the will, the mortgaged lands passed under the above general devise. *Burdus* v. *Dixon*, 4 Jur. (N.S.) 967 ; 6 W. R. 427.

Lands originally held under old mortgages pass by general devise, though no release of equity of redemption appears. *Att.-Gen.* v. *Bowyer*, 3 Ves. 714 ; 4 R. R. 132. And see *S. C.*, further, 5 Ves. 300. S. P., *Att.-Gen.* v. *Vigor*, 8 Ves. 256.

—— **Where Foreclosure subsequent to Date of Will.**]—Devise of all lands does not pass land held in mortgage, as it continues personal estate, till final order of foreclosure ; and devise of lands held in mortgage at time of will does not pass that land, if testator obtains final order of foreclosure before death. *Thompson* v. *Grant*, 4 Madd. 438 ; 20 R. R. 318.

Mortgages in fee, though forfeited, will not pass by a general devise, of "all my lands, tenements, and hereditaments" ; nor will they pass by such a general devise, though the equity of redemption is afterwards foreclosed or released. *Strode* v. *Russel*, 2 Vern. 621 ; 3 Ch. Rep. 169.

If a testator, after devising all "his lands, tenements, and hereditaments," foreclose an equity of redemption of a mortgage in fee, such estate will not pass by these general words, because a foreclosure is considered as a new purchase of the land. *Casborne* v. *Scarfe*, 1 Atk. 605.

Effect on Equity of Redemption.]—By a devise of land mortgaged in fee, the equity of redemption alone passes ; if for years, the reversion and equity of redemption pass. *Forrester* v. *Leigh*, Ambl. 174.

Tenant in tail, with remainders in tail, the reversion in fee to tenant in tail, the land having been mortgaged for a term of years by donor, previous to those estates, and so every of them having an equity of redemption incident to it. Tenant in tail by will appoints the mortgage to be paid off, and then mortgaged term to be assigned to his mother, and by same will (being seised in fee of other lands) devises all lands to W. and his heirs, by which reversion of mortgaged premises passes, on the estate tail and remainder in tail being spent :—Held, that the equity of redemption, which was incident to the reversion in fee of tenant in tail, did not pass to the mother by the will, and was, therefore, not severed from the reversion. *Amhurst* v. *Litton*, Fitzg. 99. Affirmed, 5 Bro. P. C. 254.

Neither the words "I give and bequeath all my effects (after paying of every due demand)," though immediately preceded by directions touching the rents of a copyhold estate, nor the words "what title I have left to call my own," will include the equity of redemption of that

copyhold. *Henderson* v. *Farbridge*, 1 Russ. 479 ; 4 L. J. (o.s.) Ch. 209.

Proceeds of Part of Realty not passing by Devise.]—Upon a marriage, an undivided eighth share in remainder in fee belonging to the wife expectant on a life estate entirety was settled in trust for the wife for life, with remainder to the husband for life, with remainder to the children in tail, and remainder to the heirs of the wife ; and a power of sale and of exchange was given to the trustees, who were to invest the proceeds in the purchase of realty in possession, and hold it on the trusts declared respecting the reversionary interest thus settled. The entirety of a portion of this estate was sold, in concurrence with the trustees of the settlement, by the other parties interested in the estate. By the deed an eighth part of the purchase-money was apportioned according to the values of the life interest and the reversion in that share and the value of the reversionary interest and the reversion in that share, and the value of the reversionary interest was expressed to have been paid to the trustees of the settlement. In point of fact, however, the whole of the eighth part was invested in consols, the dividends of which were paid to the tenant for life for the entirety. This state of things continued after the death of the wife (who died without leaving issue) during the lives of her husband and heir-at-law successively, but there was no evidence of their intention as to the destination of the fund beyond what was to be inferred from the above course of dealing with it :—Held, that an election could not be inferred to take the property in its actual state, and that on the death of the heir-at-law his share of the fund was to be treated as part of his real estate. *Pedder's Settlement, In re*, 5 De G. M. & G. 890 ; 24 L. J., Ch. 313 ; 3 Eq. R. 157 ; 3 W. R. 136.

Held, also, that it did not pass by his will under a devise of all such shares as he might at his death possess in the estate, there being a part of it remaining unsold to answer the description. *Ib.*

A testator devised to his grand-daughter a plot of freehold land by the description of "the portion of meadow land received by me in exchange from S.," and other plots to the same grand-daughter, describing them by reference to the tenants in whose occupation they then were. Portions of the plot of land which the testator had acquired by exchange from S., and of certain of the plots which had been in the occupation of the several tenants named in the descriptions, were, at the date of the will, under contract for sale to a railway company. The company had taken possession before the date of the will, but the conveyance was not completed until after the testator's death : — Held, that, as there remained lands to answer the descriptions in the will at the time of its date, such lands alone passed under the devises, and that the purchase-money paid by the railway company to the trustee of the testator's will ought to have been paid to the plaintiff, the residuary devisee and legatee. *Jackson, In re, Wilson* v. *Donald*, 44 L. T. 467.

vi. *Gift of Residue.*

"Residue"—What is.]—A testator gave all his personal estate for the use of his wife, not doubting but that she would exercise due discretion and economy in expending the same, and directed that the whole of his personal property should be under the care of his wife and other executor, who were requested to pay debts, &c. ; and after the decease of his wife the testator gave the residue of his personal estate over :—Held, that residue meant residue after payment of debts, &c., and that the wife took a life interest only with a gift over. *Brooks, In re*, 2 Dr. & Sm. 362 ; 34 L. J., Ch. 616 ; 12 L. T. 172 ; 13 W. R. 573.

A testatrix gave several life annuities and directed funds to be invested producing an income sufficient to meet them. She bequeathed the residue of her estate, "including the funds set apart to answer the annuities when and so soon as such annuities shall respectively cease," to T. The estate was only sufficient to pay about 5*s.* in the pound on the legacies and values of the life annuities, and under an order of the court the sums apportioned to the values of the life annuities were invested, and the dividends paid to the annuitants. On the death of one of the annuitants, T. applied for payment to him of the fund of which that annuitant had been receiving the income :—Held, that he had only the ordinary rights of a residuary legatee, and could take nothing until the legacies and annuities had all been paid in full. *Tootal, In re, Hankin* v. *Kilburn*, 2 Ch. D. 628 ; 24 W. R. 1031.

"Residue" of personal estate means the personal estate which remains after payment of the testator's debts, funeral and testamentary expenses, and the costs of the administration of his estate, including the costs of an administration suit. *Trethewy* v. *Helyar*, 46 L. J., Ch. 125 ; 4 Ch. D. 53.

The share of one of several residuary legatees consists of what remains after all equities between him and the estate have been settled. *Willes* v. *Greenhill*, 29 Beav. 376.

Arrears of income of separate estate pass by a general gift in a will of "the residue of the said trust fund comprised in my marriage settlement." *Tatham* v. *Drummond*, 2 H. & M. 262.

—— **When Construed General Residue.**]—A testator, after bequeathing some pecuniary legacies and some specific articles, directed "the residue" to be given to A. :—Held, that A. was entitled to the general residue of the testator's estate, and not the residue of such articles only as were ejusdem generis. *Bainbridge* v. *Bainbridge*, 7 L. J., Ch. 4.

The following passage at the end of a will, "I guess there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire E. M. to do, and keep the residue for her own use and pleasure," was held, under the circumstances and upon the whole context of the will, to amount to a gift of the general residuary personal estate to E. M. *Boys* v. *Morgan*, 3 Myl. & C. 661 ; 9 Sim. 289 ; 7 L. J., Ch. 247 ; 2 Jur. 514 ; *Ib.*, 608.

The words "what remains" at the close of a bequest of a specific fund :—Held, a general residuary disposition, the full sense not being necessarily confined ; comprising, therefore, personal estate bequeathed upon a contingency too remote, not being to take place until thirty years after the testator's death. *Crooke* v. *De Vandes*, 11 Ves. 330.

A father, having bequeathed the residue of his estate to trustees, directed that they should

convert into money such parts as did not consist of money at his death, and should stand possessed of the proceeds upon trust to divide the "residue thereof" among his daughters:—Held, that the trusts applied to the whole of the residuary estate. *Wood* v. *Evans*, 22 W. R. 438.

Testatrix by her will disposes of certain long annuities, and of a sum in cash, and then uses the following words: "I believe there will be sufficient money left to pay my funeral expenses." By a codicil to her will the testatrix expresses herself thus: "If there is money left unemployed, I desire it may be given in charity":—Held, that the general residue of the testatrix's personal estate, including a sum of 2,500*l.* trust moneys, in which she had a vested reversionary interest at the time of her death, subject to be divested by the appointment of her mother, passed under the words "money left unemployed," and was well given to charity. *Legge* v. *Asgill*, cited in Turn. & R. 265; 24 R. R. 51. See note there.

A testatrix having two leaseholds, at X. and Y., bequeathed those at X. to one for life, and directed that after her decease they should "form the residue of her leasehold estates thereinafter bequeathed." She then bequeathed all the residue of her leaseholds "whatsoever and wheresoever" not thereinbefore otherwise disposed of:—Held, that the leasehold at Y. also passed under the residuary gift. *Markham* v. *Ivatt*, 20 Beav. 579.

Testatrix gave nine legacies of 1,000*l.* each, part of 14,500*l.* South Sea annuities, and as to the residue of the said fund and all other her personal estate, including such of said legacies as should lapse by death before they should be transferable, upon trust to convert into money such part of her residuary personal estate as shall not consist of South Sea annuities, and invest such money with any money belonging to her at her decease in said fund, South Sea annuities, and from time to time invest the dividends, &c., of all such South Sea annuities as shall constitute her residuary personal estate in the same fund till the youngest of the said legatees shall or would, if living, have attained twenty-one, and then to transfer the whole of such South Sea annuities to said nine legatees equally, with such survivorship as their original shares. The nine legacies of 1,000*l.* each only are specific; the remainder of the South Sea annuities is part of the general personal estate. *Richardson* v. *Brown*, 4 Ves. 177.

It is a question to be determined by the particular words of each will whether a gift of "surplus" or "residue" means surplus or residue properly so called, or a mere proportional share of a particular fund. Where, after the gift of a fund charged with certain payments, the words were, "and the overplus which the said, &c., do produce more than all these disbursements do amount to (which I do find and compute to be about 60*l.* per annum)," they were held to mean surplus, and not proportional share. *Southmolton Corporation* v. *Att.-Gen.*, 5 H. L. Cas. 1; 23 L. J., Ch. 567; 18 Jur. 435.

A feme coverte had power by will to appoint a trust fund, of which 2,000*l.* was payable immediately, and the remainder subject to her husband's life interest therein. She appointed the 2,000*l.*, and directed the trustees, after the decease of the husband, to stand possessed of the "residue" of the stock, after payment thereout of the 2,000*l.*, upon trust to pay 5,700*l.* as the husband should appoint, and to apply the residue in payment of a number of legacies. The husband appointed the 5,700*l.* to himself:—Held, notwithstanding there was a probability that the fund would prove insufficient for the payment of all the legacies, that he was entitled to immediate payment of the 5,700*l.* *Vivian* v. *Mortlock*, 21 Beav. 252.

The "residue" applicable to the payment of the legacies (other than the 5,700*l.*) being held to mean simply what remained after payment of the 5,700*l.*, and not a proportionate share of the fund. *Ib.*

—— **When Construed Residue of Particular Fund.**]—A testator, after disposing specifically of most of his property, enumerated funds out of which he directed that his debts, funeral and testamentary expenses should be paid, and added: "The remainder to be equally divided to my surviving children." The frame of the will left it doubtful whether these words were intended to apply generally or only to the residue of the particular funds:—Held, that, considering the general frame of the will, only what was left of the particular funds passed. *Jull* v. *Jacobs*, 3 Ch. D. 703; 35 L. T. 153; 24 W. R. 947.

A testator bequeathed to A. his household furniture and other like things, "and all other goods of whatever kind," and he appointed that certain specified moneys should be divided as follows after all his debts should be paid off. He then specified certain legacies, and proceeded, "three or four thousand pounds or whatever remaining sum or sums to A.":—Held, that A. did not take the general residue. *Wrench* v. *Jutting*, 3 Beav. 521; 5 Jur. 145.

Testator, after bequeathing to A. and B. legacies of stock unequal in amount, and giving several legacies to public charities, requests the said A. and B. to be his executors, and gives to them as such one hundred guineas each; he then orders his books, jewels, plate, and household furniture to be sold, and after desiring mourning to be provided for his servants, and five guineas each to be given to several persons named in the will, and to his executors for a ring as a token of remembrance, concludes his will in the following manner: "In case there is money remaining, I should wish it to be given in private charity":—Held, that the general residue of the testator's personal estate, consisting of a leasehold estate, money in the funds, and a balance in cash, was not comprehended in the residuary clause, which was confined to the residue of the produce of the articles which the testator directed to be sold. *Ommaney* v. *Butcher*, Turn. & R. 260; 24 R. R. 42.

A testator having stated in his will that he had four shares in the National Bank and an insurance policy, a bond and half an annuity, gave the bank shares to his sister S., as a trustee for his niece; and having disposed of the other property already mentioned, he bequeathed the "remainder of those effects (all my just debts being paid), if any remain," to his sister, adding, "and I beg she will apportion between the above-named [naming four of his legatees]; and as my nephew John Corbet has a less secure position in life than his brothers, to him such portion or portions as she shall seem fit. I would also wish that she should have power to give some small amounts for charity, especially to L.'s family," &c.:—Held, that the residuary bequest was

confined to the property specifically enumerated, and did not pass National Bank shares or other property acquired after the date of the will. *Corbet* v. *Corbet*, Ir. R. 7 Eq. 456.

Held, also, that his sister took the residue as a trustee for the persons named, and not beneficially. *Ib.*

In December, 1867, J. devised her moiety of the freehold lands of B. to her sister L. for life, to whom she also left certain personalty absolutely, and appointed her "residuary legatee." The testatrix then proceeded, subject to L.'s life estate, to declare a trust for the sale of the premises, and out of the proceeds gave two effectual legacies, and several charitable bequests which subsequently failed from her dying within three months of the date of her will. In July, 1868, L. devised the other moiety of the lands to trustees to sell, and out of the proceeds to pay certain pecuniary legacies, and she gave "whatever residue" there might be after such payment to certain charities. She then directed her railway shares to be sold, and after charging her debts and some more legacies on the produce, she gave the residue to W., to whom, with others, she subsequently bequeathed several specific chattels. L. having died in July, 1869:—Held, first, that, the words "residuary legatee" referring primâ facie to personalty, there was nothing in the context of J.'s will to enlarge their operation into a gift of real estate, and that consequently her heir-at-law took the realty or its proceeds, which became undisposed of from the failure of the charitable bequests charged thereon; but that, since the purpose for which a conversion had been directed had not wholly failed, he took such real estate as personalty. *Hamilton* v. *Foot*, Ir. R. 6 Eq. 572.

Held, secondly, that the gift of "the residue" did not constitute W. general residuary legatee, but only referred to the residue of the produce of the railway shares, and that this view was confirmed by such gift being followed by that of specific chattels to W., which a bequest of general residue would have included. *Ib.*

Gift of Residue in Proportion to Legacies—When all Legatees Entitled.]—Under residuary bequest to legatees in proportion to their legacies, all legatees, pecuniary and specific, even of things, &c., not expressly or by implication excluded, were held entitled; so annuitants, if they had not been excluded, on construction of whole will. *Nannock* v. *Horton*, 7 Ves. 391.

Testator, after giving some legacies, directs payment to be made to his devisees as under, and then mentions certain persons and the sums to be paid them, and gives residue to all his devisees above mentioned in proportion to their legacies. Every one of legatees is entitled to share of residue. *Coope* v. *Banning*, 1 Sim. & S. 534; 2 L. J. (O.S.) Ch. 11.

Testator distributes a sum of stock, except a small part, among certain legatees, as to one of whom, X. Y., he uses expressions of resentment, and says that the bequest is more than she deserves. By a codicil, he leaves the surplus stock to be appropriated, as his executors think proper, among the several legatees. The executors, in appropriating the stock, cannot omit X. Y. *Inglefield* v. *Coghlan*, 2 Coll. C. C. 247.

—— **Pecuniary Legatees only Entitled.**]—Gift of residue "to be divided among legatees in proportion to the legacies bequeathed by this my will"; restricted, upon construction of the whole will, to general pecuniary legatees, in exclusion of legacies payable out of a specific fund in futuro, and of legacies given by codicil. *Henwood* v. *Overend*, 1 Mer. 23.

Under devise of personal residue to relations in such proportions as testator had given other part of his fortune, pecuniary legatees only are entitled, and not a devisee of real estate. *Adair* v. *Maitland*, 7 Bro. P. C. 587; 3 Ves. 231.

P. bequeathed the residue of her personal estate unto all those of her legatees thereinbefore named whose legacies did not exceed 300*l.*:—Held, that a specific legatee to whom chattels valued at a less sum than 200*l.* were bequeathed was not entitled to a share.

An annuity of 20*l.*, valued at less than 200*l.*, was given by the will to P.:—Held, that she was entitled to a share of the residue.

The testatrix bequeathed sums of 200*l.*, and of less amounts, to certain charitable institutions:—Held, that they were not entitled to any portion of the residue. *Nicholson* v. *Patrickson*, 3 Giff. 208; 7 Jur. (N.S.) 987; 5 L. T. 202.

—— **Remaindermen Excluded.**]—Testator directed interest of sum of money to be paid to his sisters, during their lives, in equal proportions, and, at their death, gave to their children the inheritance their mother derived from his estate, and desired that his sisters should be residuary legatees in proportions already mentioned:—Held, that sisters were entitled absolutely to residue, and that their children took no interest. *Grassick* v. *Drummond*, 1 Sim. & S. 517.

—— **Where Additional Legacies given by Codicil.**]—Where testator, by his will, gave his residue among certain legatees in proportion to the amount of their legacies thereinbefore given, and afterwards by codicil gave other legacies to some of the same legatees, "in addition to what he had given them by his will":—Held, that the shares which the former took in the residue should be proportioned to their legacies under the will only. *Hall* v. *Severne*, 9 Sim. 515.

A testator by his will bequeathed a legacy of 70,000*l.* to trustees upon certain trusts in favour of one of his adopted daughters therein named, and a legacy of 80,000*l.* upon similar trusts in favour of another adopted daughter, also named; and, after declaring that the term "the said residuary legatees" thereinafter used should be considered to designate all persons thereinbefore named as pecuniary legatees, he bequeathed his residuary estate in trust for and to be divided among "the said residuary legatees" pro ratâ in proportion to the amounts of the legacies thereinbefore bequeathed to "the said residuary legatees" respectively. By a codicil the testator revoked the legacy of 70,000*l.* given by the will, and, "in substitution for, and not in addition to," the same, gave to his trustees the sum of 80,000*l.* upon the same trusts as those declared in the will concerning the revoked legacy of 70,000*l.*, and "in the same manner as if they were there repeated"; and in terms substantially identical the testator revoked the legacy of 80,000*l.* given by the will, and gave a legacy of 140,000*l.* "in substitution for, and not in addition to," the revoked legacy of 80,000*l.* A question arose as to whether, in the division of the residuary estate, any and what share of it should be allotted in respect of the two increased legacies, or in respect of the two for which they

were substituted :—Held, that, in the absence of authority, the fullest meaning must be given to the words "in substitution for, and not in addition to," and, reading the will and codicil together, the effect was as if the testator had directed that the increased legacies should be read as if they were inserted in the will for all purposes ; and that the residue must be divided among the legatees as if their original legacies had been the amounts mentioned in the codicil, and not in the will. *Cortauld, In re, Cortauld* v. *Cawston*, 47 L. T. 647.

—— **Where Prior Gift Cut down by Codicil.**]—M., by will, gave all his property, real and personal, to trustees, directing them to pay the income to his son and heir J. until J. should attain thirty, and then convey to J. the residue. By codicil, M. recalled the direction to pay the whole income to J., and directed the trustees to pay to J. thereout 300*l.* yearly until he attained thirty, and then to dispose of "the said residue" as directed by the will :—Held, that the surplus income beyond 300*l.*, which accrued during the minority of J., was not undisposed of, but passed to the trustees under the word "residue." *Sturgis* v. *Campbell*, 12 L. T. 836.

—— **Legatees under Codicil only not Entitled.**]—*Hall* v. *Severne* and *Nicholson* v. *Patrickson*, supra.

—— **Gift in "Equal Shares" to all Legatees.**]—Under a gift of the residue to all the testator's legatees, in equal shares (which were twenty-three in number), each legacy will have added to it one twenty-third part of the residue. *Taniere* v. *Perks*, 1 L. J. (o.s.) Ch. 79.

General Gift Qualified by Subsequent Words.]—The testator, after giving his whole property to his wife and daughter, qualified the bequest by the words "namely, to give to my wife 50*l.* a year for her life, and 500*l.* to my daughter at twenty-one" :—Held, that there was an intestacy as to the residue after payment of the 50*l.* per annum and the 500*l.* *Childs* v. *Wilson*, 2 Jur. 415.

Revocation of Share of Residue.]—A. by his will gives the residue of his estate to three of his children, share and share alike, as tenants in common, and not as joint tenants ; but by a codicil he revoked his daughter M. from being one of the residuary legatees, and in lieu thereof gave her a pecuniary legacy. This third shall go to the testator's next of kin, and does not belong to the two other residuary legatees as such. *Cheslyn* v. *Cresswell*, 3 Bro. P. C. 246. Affirming, 2 Eden, 123. And see *Ramsay* v. *Shelmerdine*, 11 Jur. (N.S.) 903 ; 13 L. T. 392 ; 14 W. R. 46.

A testator gave his residuary real and personal estate to trustees for his five sons as tenants in common, and by a codicil revoked and made void all the trusts in his will contained concerning his residuary estate, so far as the same trusts related to his son R., or his interest therein, and in lieu gave a pecuniary legacy upon trust for R., his wife and children, and if R. should have no children, he directed that the legacy should sink into the residuary estate, but so that R. or his representatives should not take any share or interest therein :—Held, that the testator died intestate as to the trusts of one-fifth share of his residuary estate, and that the legacy was payable out of the residuary estate, and not out of the share which was undisposed of. *Sykes* v. *Sykes*, 37 L. J., Ch. 367 ; L. R. 3 Ch. 301 ; 16 W. R. 545.

Gift by a testator of six-sevenths of his residuary estate unto and equally between six individuals ; but in a certain event, in order to secure to all an equal participation in the property, A. and B. (two of the six) were not to receive any share :—Held, that upon the happening of the event the six-sevenths became divisible among the four, and that there was no intestacy as to the share of A. and B. *Vaudrey* v. *Howard*, 2 W. R. 32.

Direction that Share of Residue shall fall into Residue.]—A gift by a will of one-sixth of the testatrix's residuary estate to S. W., revoked by a codicil, and the same sixth given to S. W. for life, with a direction, after her decease, to pay a legacy thereout, and that the remainder of such sixth should sink into the residue of her (the testatrix's) personal estate, and be disposed of accordingly :—Held, that the remainder of the sixth share of the residue was not thereby given to the other residuary legatees, but was undisposed of. *Humble* v. *Shore*, 7 Hare, 247 ; 1 H. & M. 550, n.

Where a testator gave one-third of the proceeds of the conversion of his real and personal estate to A. for life, with remainder to his children, and declared that on failure of A.'s issue the one-third should sink into his residuary estate, and be held and applied accordingly, and then gave the other two-thirds to other persons, and A. died without issue :—Held, that A.'s one-third was not given to the other residuary legatees, but was undisposed of. *Humble* v. *Shore* (supra) followed. *Lightfoot* v. *Burstall*, 3 N. R. 112 ; 1 H. & M. 546 ; 33 L. J., Ch. 188 ; 10 Jur. (N.S.) 308 ; 12 W. R. 148.

A testator gave the residue of his real and personal estate to trustees to convert, and as to two-fourths of the proceeds to pay the same to his sisters A. and M., and to stand possessed of the two remaining fourths upon trusts, as to one such fourth, in favour of his sister J. for life, and her children, and as to the other such fourth, in favour of his sister E. for life, and her children ; and declared that, in the event of either or both of his sisters J. and E. dying without issue, the share or shares of either or both so dying should sink into and form part of his residuary estate, and be paid and divided accordingly, but so that the husband of the one so dying should take no share therein as representing his wife. The testator died in 1863, M. in 1867, and J. in 1870 :—Held, that as to the share of J. there was an intestacy, and that the clause in the will relating to the share of J. or E. dying without issue was inoperative. *Bevis, In re*, 26 L. T. 239 ; 20 W. R. 359.

A testator bequeathed the residue of her personal estate, "and also all such and so much of her personal estate, the trusts, bequests, or dispositions whereof in the will contained should fail, or become incapable of being performed," in eleven equal parts, among different persons. The legacy of one eleventh part lapsed :—Held, that the lapsed legacy fell into the residue, which became divisible into ten parts, amongst the remaining residuary legatees. *Evans* v. *Field*, 8 L. J., Ch. 264. And see *Atkinson* v. *Jones*, Johns. 246 ; 5 Jur. (N.S.) 761.

A testatrix directed her residuary estate to be divided into three equal shares, and gave one share to the children of T. M., one share to the children of W. H. (subtracting from their share 2,000*l.* that W. H. owed the testatrix), and the remaining third part to the children of R. H. :—Held, that the 2,000*l.* was to be considered as part of the residue, that the residue was to be divided into the equal parts, and that the 2,000*l.* was to be taken as part of the share of the children of W. H. *Murray* v. *Samson*, 3 Sim. 536.

A testator, by his will dated in 1853, after appointing trustees and executors, gave to them his residuary real and personal estate in trust for sale, and to divide the proceeds "among all his children in equal shares" on their respectively attaining twenty-one, but to stand possessed of the share of his married daughter I. upon trusts for her during her life, and after her death for her children, and in default of children upon trust for such persons as she should appoint; and in default of appointment the testator directed that such share should "fall into and become part of his said residuary personal estate, and be paid and applied accordingly." By a codicil the testator varied the ultimate gift by directing that his daughter's power of appointment should be limited to a moiety of her share of the residue, and that the other moiety should "fall into and become part of his residuary personal estate, and be paid and applied according to the trusts of his will." The testator left seven children, including his daughter I., all of whom attained twenty-one. The daughter died without issue, but having appointed the first moiety of her one-seventh share of the residuary estate to her husband:—Held, that the second or unappointable moiety of her one-seventh was not undisposed of by the testator, but was divisible equally among his other six children as residuary legatees. *Crawshaw* v. *Crawshaw*, 49 L. J., Ch. 662; 14 Ch. D. 817; 43 L. T. 309; 29 W. R. 68.

A testator by his will directed that his trustees should stand possessed of the residue of his estate upon trust, as to one-seventh part thereof, to invest the same and pay the income to his daughter for life, and after her death to hold the same in trust for her child or children who should attain the age of twenty-one years; but if there should be no such child, then he directed his trustees "to apply the said share as part of his residuary estate." He afterwards declared trusts of the remaining six shares of his residuary estate. F. survived the testator, but left no child who attained the age of twenty-one years:—Held, that the share of F. was undisposed of by the will. *Humble* v. *Shore* (supra) and *Lightfoot* v. *Burstall* (supra) followed. *Crawshaw* v. *Crawshaw* (supra) distinguished. *Savage's Trusts, In re*, 50 L. J., Ch. 131.

A. B. by will gave real and personal estate to a trustee to sell and convert, and out of the moneys to pay debts, and to divide the residue equally between five persons named. By a codicil A. B. bequeathed to the issue of S. R., one of such persons, all the effects which by the will she had bequeathed to S. R., who was stated to be dead; but if there should be no issue living at A. B.'s decease, or being such if such effects should not be claimed by such issue within twelve months after her decease, then such effects shall fall into and be considered as part of the residue of the personal estate. S. R. never had any issue:—Held, that S. R.'s share of residue under the will was undisposed of. *Barker's Estate, In re, Hetherington* v. *Longrigg*, 15 Ch. D. 635; 29 W. R. 281.

Humble v. *Shore* (supra) and *Lightfoot* v. *Burstall* (supra) followed. *Ib.*

Crawshaw v. *Crawshaw* (supra) distinguished. *Ib.*

And see *Rhoades, In re*, and *Palmer, In re*, ante, col. 1163.

Fund set apart for Annuities falling into Residue.]—A. gives 800*l.* to his executors, on trust to pay annuities to B. and C. for their lives, exceeding the interest of the 800*l.*, and gives the surplus of his estate to D. and E. The annuitants being dead, the 800*l.* shall go to the residuary legatees, and not to the executors. *Cock* v. *Burrish*, 1 Vern. 425.

Gift of a particular fund for life, then to residuary legatees as such, then the residue given to them as tenants in common; the particular fund is part of the residue, and vests accordingly in them as tenants in common. *Pitt* v. *Benyon*, 1 Bro. C. C. 589.

A testator having bequeathed annuities issuing out of a leasehold estate to some annuitants for life, to some during the continuance of the fund, and to others indefinitely, with a general provision for an increase or diminution of the annuities, in proportion to the increased or diminished income of the estate; and a particular provision that, on the death of some of the annuitants for life, their portions should be paid to the survivors: the annuities given indefinitely are payable during the continuance of the fund; and the amount of annuities ceasing by the death of annuitants for life not named in the particular provision belongs not to the survivors but forms part of the residue. *Hack* v. *Tuck*, 3 Swan. 270. And see *Hedges* v. *Harpur*, 3 De G. & J. 129; 27 L. J., Ch. 742; 4 Jur. (N.S.) 1209; 6 W. R. 842.

The testator desired that A., B. and C. might each enjoy during life the interest of 800*l.* sterling, the principal to devolve eventually to his residuary legatees. He directed the residue of his property to be divided into three equal parts, one part to each of his brothers and his sister; and if his brothers and sister should not survive him or have legal issue living at the testator's death, then their shares to devolve in equal proportions to the survivors, as well as the shares that might have been devised to their issue. The testator's estate was not sufficient to pay the legacies in full:—Held, upon the death of one of the tenants for life, that an apportionment of the legacy of 800*l.*, set apart to answer her life interest, fell into the residue, and was not given over to the residuary legatees in their individual character; and that the surviving tenants for life were entitled to have the deficiencies in their annuities satisfied out of the released fund. *Arnold* v. *Arnold*, 2 Myl. & K. 365; 4 L. J., Ch. 79.

N. T. devised an annuity of 300*l.* per annum to his wife for life, then to accumulate, to make a portion for his first daughter who should marry, then in order to raise portions for other daughters, then to remain to his eldest son, and on his decease to the heirs male of his body, and in case of his having no issue remainder to the next eldest son and his heir male. The daughters married in the life of the wife; the eldest and two other sons of testator died, leaving the wife without issue. This is not personal estate vesting absolutely in the eldest

son (on the principle that it would be an estate tail in land), neither does it vest as an executory devise on the fourth son of testator, who survived; but it is an annuity, and being exhausted by the events, there being nobody to take it, as such, sinks into the residuary estate of the testator. *Turner* v. *Turner*, 1 Bro. C. C. 317; Ambl. 776.

A testator, after giving legacies, directed the conversion and investment of his real and personal estate, and the appropriation of a sufficient sum to produce an annuity to be paid to his wife for life, and then to a charity, and the testator gave the residue of the net produce of his real and personal estate to certain persons named. The gift to the charity failed by reason of there being no pure personalty:—Held, that the annuity fell into the residue. *Pearson* v. *Hullah*, 17 L. T. 113.

A testator by his will gave certain annuities, and directed that the sums set apart to secure them should, as the annuitants died, sink into the residue of the personal estate. By a codicil to his will he stated that in case his property would not provide an income equal to the annuities, they should be ratably reduced. His estate was deficient, and the annuities were ratably reduced. Upon the death of any annuitant, the sum set apart to secure the reduced annuity will belong to the residuary legatee, and is not to be applied to increase the reduced annuities to the amount given by the will. *Farmer* v. *Mills*, 4 Russ. 86; 28 R. R. 14.

A testator gave 400*l.* a year to his wife if she recovered her mental faculties, otherwise 200*l.* a year, and to be paid out of his government stock; and he directed, as soon as conveniently might be after her death, the investment of the stock out of which the annuity was payable in land to be conveyed in strict settlement. The wife did not recover:—Held, that the extra 200*l.* a year became part of the residue to be invested, and did not belong to the tenant for life. *Tucker* v. *Boswell*, 5 Beav. 607.

The testator, after directing that his property should be realised, and after payment of his debts and funeral expenses should be invested in the 3 per cent. consols, left the annual interest to his executor, to be paid to five persons by way of annuities, two of which were given simply in the words "30*l.* to A., 20*l.* to B." In a subsequent part of his will he gave all his household furniture, the whole of his personal property of every kind not specified above, to his wife:—Held, that the capital producing the two sums above mentioned, subject to the life interest of the annuitants, passed to the wife. *Clowes* v. *Clowes*, 9 Sim. 403.

A testator directed his trustees to set apart sufficient stock to produce 700*l.* a year, and pay, among others, an annuity of 200*l.* a year to his brother Thomas for life, and after his decease to continue it amongst his brother's children then living in equal shares during their lives, and at the decease of any of them the stock from which the 200*l.* a year arose was to be sold, and the produce divided equally amongst the children of him or her so dying as they should severally attain twenty-one, with interest in the meantime to be applied for their benefit; and he said, "I give them vested interests therein"; and if any of his brother's children should at his decease be dead and have left issue, such issue should be entitled amongst them to the money they would eventually have been entitled to had their parent outlived his brother. If any of the parties anticipated the payment or sold his interest before due, it was declared to be forfeited, and applied as if such parties had died before the legacy fell due. The testator then appointed his trustees executors and residuary legatees. 23,333*l.* 6*s.* 8*d.* was set aside, to answer the 700*l.* a year. The testator's brother Thomas died, leaving six children, of whom Richard was one living at the date of the will; and he, after the decease of his father until his death, received an annuity of 33*l.* 6*s.* 8*d.*, being one-sixth of the 200*l.* a year. Richard died, leaving three children surviving, one of whom was born in the lifetime of the original testator:—Held, that the children of Richard were not entitled to the money representing the annuity to which he was entitled, but that it fell into the testator's residuary estate. *Greenwood* v. *Roberts*, 21 L. J., Ch. 262.

Destination of Income of such Funds.]—*See* post, INTERMEDIATE RENTS AND PROFITS.

Gifts which Fail—Rule.]—A bequest of "all and singular other my property and estate" will include not only everything not before mentioned in the will, but everything the previous disposition of which fails, unless it appears from the will that the property comprised in the previous disposition was intended to be excepted for all purposes from the residuary bequest, and not merely for the purpose of giving it to the particular legatee. *Bernard* v. *Minshull*, 1 Johns. 276; 28 L. J., Ch. 649; 5 Jur. (N.S.) 931.

Contingent Legacy which Fails.]—Devise of lands to his executors to be sold, and thereout to pay 500*l.* to A. if he return from beyond sea, and the residue to B. A. died before testator. This 500*l.* legacy, being given on a contingency that never happened, is as no legacy, and falls into the residue; otherwise, if it had been an absolute legacy of 500*l.* *Sprigg* v. *Sprigg*, 2 Vern. 394.

The words "what remain" at the close of a bequest of a specific fund:—Held, a general residuary disposition, the full sense not being necessarily confined; comprising therefore personal estate bequeathed upon a contingency too remote; not being to take place until thirty years after the testator's death. *Crooke* v. *De Vandes*, 11 Ves. 330.

Construction of a residuary clause as comprehending a legacy given upon a contingency which did not happen. *Bird* v. *Le Fevre*, 15 Ves. 589.

Testator gave 1,000*l.* to his natural son, and if he died under twenty-one then that sum and the residue to go to the testator's family, and he gave the residue to his natural son, to be applied as above directed. The son died under twenty-one:—Held, that the 1,000*l.* was part of the residue, and did not pass to the testator's next of kin as a legacy. *Breashur* v. *Dor*, 4 Sim. 21.

Construction of a trust by deed, of money to accumulate, until the grantor's grandchildren, then living, or to be born, respectively attain twenty-one; and on attaining, &c., to pay to each as they should respectively attain such age, their respective shares to be ascertained by the number in being as they respectively attain twenty-one, without regard to such as might afterwards be born. No interest vested until payment. The measure of distribution is the number existing at each period. Those who had received have no further claim upon the fund, increased by shares falling in; therefore one dying under

twenty-one after all the others had either received their shares or died under twenty-one, that share is undisposed of by the deed, and passed by a bequest of "all effects whatsoever," following specific descriptions of property. *Campbell* v. *Prescott*, 15 Ves. 500.

Legacy Adeemed.]—A testator gives to A. B. the residue of his personal estate, except South Sea stock, which he gives to C. D. The stock is afterwards converted into money. It falls into the residue given to A. B. *Wingfield* v. *Newton*, 2 Coll. C. C. 520, n.

Life Interest forfeited by Residuary Legatee.]—Trust by will to permit testator's wife to receive interest and rents for life, for the maintenance of herself and childreu, and in case of her marriage that the interest, &c., shall not be paid to her any longer, but be applied by his executors and trustees (she being an executrix with them) for maintenance of the children, revoked on her marriage, and not restored by a general residuary disposition to her. *Duncan* v. *Duncan*, 19 Ves. 396; G. Cooper, 254.

Lapsed Legacies.]—Residuary bequest of personalty includes everything; as a void or lapsed legacy. *Durour* v. *Motteux*, 1 Ves. Sen. 320.

General residuary disposition of real and personal estate, not hereinbefore specifically disposed of:—Held, to comprehend specific legacies lapsed, the word "specifically" being construed "particularly." *Roberts* v. *Cook*, 16 Ves. 451.

General residuary clause passes all that is not sufficiently disposed of, as in case of lapse. *Brown* v. *Higgs*, 4 Ves. 708; 4 R. R. 323.

Testator, intending to dispose of all his personal estate, gives the residue in fifth shares, but appoints his brother "heir to whatever part of his estate should be unappropriated by his will." One of the five shares lapsed in testator's lifetime:—Held, that the above was an ultimate general residuary clause, and comprised this as including not merely what was not mentioned, but everything not effectually given. *Jackson* v. *Kelly*, 2 Ves. Sen. 285.

Testator bequeathed all his personal estate, except the money laid out in stock, mortgages, and bonds, to A.; and as to his money in stock and on mortgages and bonds, he gave the same to B. The gift to B. failed by an event analogous to a lapse:—Held, the property which was intended to be given to B. passed under the residuary bequest to A. *Evans* v. *Jones*, 2 Coll. C. C. 516.

A testatrix having a general power of appointment over a sum of stock under the will of T. S. appointed the stock to her sons Joseph and John, and her other children, equally; and she left any other sum of money or property to which she then was or might thereafter become entitled under the will of T. S. to be divided amongst such of her children as might be living at her death; and she constituted Joseph her residuary legatee. John died before her:—Held, that Joseph was entitled to the share of the stock intended for John. *Spooner's Trusts, In re*, 2 Sim. (N.S.) 129; 21 L. J., Ch. 151.

Residuary clause passes all personal property that is not disposed of, as by lapse, though it was contended upon the particular expressions to have been separated, and not intended to pass with the residue. *Cambridge* v. *Rous*, 8 Ves. 13.

A., having a power to appoint 1,000*l.* by will, and which in default of appointment was given over to B., duly appointed it to C., who died in the testator's life. He afterwards made a codicil, giving his residue, and the dividends due at his death on the 1,000*l.*, to his wife:—Held, that under the 7 Will. 4 & 1 Vict. c. 26, the 1,000*l.* passed to the wife under the residuary gift. *Bush* v. *Cowan*, 32 Beav. 228. And see *Harris* v. *Davis*, ante, col. 948–9.

Gift Void through Illegality.]—Testator, disposing "of the property of which he should be possessed at his death, after payment of debts and expenses," first made several bequests, specific and general, and then, after directing a certain purpose to be fulfilled out of the surplus property which should remain, gave the remainder in a certain way:—Held, that the latter gift was a gift only of the residue that should remain after deducting what would be required for the object proposed, and that, in the event of that object failing through illegality, the failure would not inure for the benefit of the residuary legatee. *Mitford* v. *Reynolds*, 1 Ph. 185; 12 L. J., Ch. 40.

A leasehold house, the bequest of which, being to a charity, fails, passes under a general disposition of the residue, and does not belong to the next of kin as undisposed of. *Shanley* v. *Baker*, 4 Ves. 732.

A testator, after sundry other legacies to B. and others, gave B. a sum of 1,000*l.* in trust to invest and accumulate, and pay the accumulated fund to any son he might have named John who should attain twenty-one years of age; and if the first son he should have, and call John, should die before twenty-two, then to the next, and so on; and if no son called John should attain twenty-two years, then B. was to retain the 1,000*l.* for his own use. The testator then declared that his residuary estate should be divided among his pecuniary and particular legatees, in proportion to the particular legacies:—Held, that B. was entitled to retain the sum of 1,000*l.* for his own use (the gift to the son John at twenty-one being void for remoteness), but that the same fell into the residue. *Joy* v. *Aspinwall*, 18 Jur. 284.

—— **Void for Uncertainty.**]—A testator, after giving a fund to his executors upon certain trusts, declared it to be his will that in the event of the failure of those trusts (an event which happened) his said trustees, and the survivors or survivor of them, his executors or administrators, should apply the fund for charitable or other purposes as they or he should think fit, without being accountable to any persons whomsoever for such their dispositions thereof:—Held, that these words created a trust, but a trust of so indefinite a nature that it could not be carried into effect: the bequest therefore failed, and the fund fell into the residue. *Ellis* v. *Selby*, 1 Myl. & Cr. 286; 5 L. J., Ch. 214. Affirming 7 Sim. 352.

Gift for Impossible Purpose.]—Testator in the eighth clause of his will directed his executors to purchase a piece of ground which he described, and to erect a monument upon it, for the interment of his own body and the bodies of his parents and sisters, and to pay the expense out of the surplus of his property after discharging his debts and legacies. By the ninth clause he gave the remainder of his property to a charity.

The owner of the piece of land refused to sell it:—Held, that the subject-matter of the ninth clause was not so implicated with the subject-matter of the eighth as that the eighth having failed the ninth must fail also; and that the eighth having failed the whole surplus of the testator's property passed by the ninth clause. *Mitford* v. *Reynolds*, 16 Sim. 105; 17 L. J., Ch. 238; 12 Jur. 197.

—— **Made under Mistake.**]—Certain real estates were settled, on an event which happened, to the use of the survivor of the intended husband and wife, in fee. The wife survived. The husband by his will devised all his real estates to his wife for life, and after her death to executors upon trust to sell, and subject to certain bequests, &c., gave one-fourth of the proceeds to such persons as his wife should appoint, and the remainder equally amongst his executors. All the executors died in the lifetime of the wife, and previously to the date of her will. The wife by her will (made since the passing of the Wills Act), acting upon the supposition that her husband had intended to include in his will the settled estates, which came to her by survivorship, devised them to the uses concerning the same declared by him in his will:—Held, that the settled estates were not well devised by the testatrix to the uses of her husband's will, but that they fell into and formed part of her residuary estate. *Culsha* v. *Cheese*, 7 Hare, 236; 18 L. J., Ch. 269; 13 Jur. 802.

Legacies bequeathed by the will of a husband, and subsequently of the widow, proving void, they fall into the residue of the estate, and are not to be distributed among the remaining legatees. *Lake* v. *Cook*, 2 Ken. Ch. 54.

Interests Undisposed of.] — A domiciled Englishman dies abroad, having by an instrument which was admitted to probate in England, appointed K. to make a will for him conformably to instructions given or to be given to him, and nominated him as his universal heir. Evidence being given that by the foreign law the universal heir would take all that was not otherwise disposed of by the testator's instructions, and the instructions referred to not being proved:—Held, that K. was entitled to the whole of the testator's property for his own use. *Reynolds* v. *Kortright*, 2 Eq. R. 784; 18 Beav. 417; 2 W. R. 445.

Testatrix directed all her estate to be turned into cash; if amounting to 20,000*l.* to go thus: if less, in similar proportions: then subject to some legacies, debts, &c., the residue of her estate in sixteenths; two to her mother for life, the others to different persons absolutely. She then made three residuary legatees. The shares given are only of the 20,000*l.* subject to charges: all beyond that goes to the residuary legatees. Legacy decreed to feme covert: settlement directed. *Green* v. *Scott*, 1 Ves. 282.

"I bequeath to my wife all the household furniture and movable goods and chattels in and belonging to my dwelling-house, except my books; I bequeath to her the use of my plate, with power to dispose of such portion thereof as she shall think proper":—Held, that the wife took a life interest only in the plate, and that as she had not disposed of it during her life it fell into the residue. *Espinasse* v. *Luffingham*, 3 Jo. & Lat. 186; 8 Ir. Eq. R. 129.

Testator, after devising his real estate to his natural son T. A., bequeathed as follows: "I give and bequeath unto my sister E., to be paid out of the rents and profits of the aforesaid lands, the sum of 250*l.* per annum, and to live free from rent in the house I now occupy in H., with the land and buildings I now occupy, containing about nine Lancashire acres, with the use of my household furniture, plate, linen, books, wines, spirits, carriages and horses, cows, hay, and farming utensils and stock, for her sole use during her natural life, or so long as she shall remain unmarried; in either event, then to go to T. A.; but should she marry, then my will and mind is that my executors shall pay her 100*l.* per annum for her own use during her natural life out of the rents and profits of my said estate." The sister married in the testator's lifetime:—Held, that the consumable articles did not go to T. A., but fell into the residue, and that the annuities of 250*l.* per annum and 100*l.* per annum were not cumulative. *Andrew* v. *Andrew*, 1 Coll. C. C. 690.

Testator gave 19,000*l.* consols to trustees in trust for E. B. for life, and after her death for her children; and in case she should die without leaving a child, he directed that the trust fund should be considered as part of his personal estate, and be disposed of in due course of administration; and he gave the residue of his effects to E. B., her executors and administrators, to and for her own use and benefit, she and they paying thereout all the debts due from him at his decease, together with the expenses of his funeral, the charges of proving and establishing his will, and other incidental expenses, and he appointed her his executrix. E. B. survived the testator, and died without leaving a child:—Held, that thereupon the trust fund did not become undisposed of, but formed part of the testator's residuary estate, and belonged as such to E. B.'s estate. *Scott* v. *Moore*, 14 Sim. 35; 13 L. J., Ch. 283; 8 Jur. 281.

A testator bequeathed an annuity to D., and to A., B. and C. his residue, to be equally divided, &c., except the Swansea Canal shares, which were not to be sold till after the death of D.:—Held, that the Swansea Canal shares passed by the residuary gift. *James* v. *Irving*, 10 Beav. 276.

Trustees of a settlement were to stand possessed of the trust fund (consisting of twelve-fifteenths of a larger fund), in trust, as to one share, for the settlor's daughter A. for her life, and then for her children, who were to take vested interests, if sons at twenty-one, and if daughters at twenty-one or marriage; and if A. should have no children who should live to attain a vested interest in the fund, then to stand possessed of the share so given to A. and her children, in trust as to one moiety for the settlor's daughter B. and her children, and as to the other moiety for his daughter C. and her children, under the same limitations and restrictions to which the gift to A. and her children had been subjected. Then followed similar dispositions of the remainder of the trust fund in favour of B. and her children and C. and her children, with limitations over of each share (in the event of either B. or C. dying without leaving children who should attain a vested interest) to the other two daughters and their children, in moieties as before. But in case there should not be any child or children of A., B. and C., who should live to gain a vested and transmissible interest in the said twelve-fifteenth parts, or any part

thereof, under and by virtue of the settlement, then the trustees were to pay, assign, and transfer the whole of the twelve fifteenth parts unto the next of kin of the settlor. The settlor died, having by his will made A., B. and C. his residuary legatees. After his death C. died without issue; then B. died without issue, leaving A. surviving her, who had two children, one of whom, a daughter, was married:—Held, that A., having a child who had lived to gain a vested and transmissible interest in the fund, was not entitled to any portion of it under the limitation to the "next of kin" of the settlor; consequently, that so much of the fund as did not pass under the limitations, other than that to the next of kin, resulted to the settlor, and passed under his will to his residuary legatees. *Westwood* v. *Slater*, 1 De G. & Sm. 1.

L. by his will gave all his freeholds and leaseholds to trustees upon trust to invest the surplus for four years, and to pay the interest from the proceeds of his plate and effects directed to be sold to his daughter for life for her separate use, without anticipation, with "remainder" to her children equally, remainder to the children of his brothers, and a like disposition of all his other property, and on the question whether the accumulations during the four years were undisposed of:—Held, that they were not; but a general gift of the residue passed everything. *Jearrad* v. *Tracey*, 1 W. R. 501.

—— **In Spite of Erroneous Recital.**]—A testator, by a codicil, erroneously recited that he had already disposed of part of one portion of his property by his will, and gave the residue of this portion to a legatee:—Held, that the whole of this portion passed to the legatee, and did not fall into the general residue. *Langan* v. *Bergin*, [1896] 1 Ir. R. 331.

Lapsed Legacies Excluded where Intention shewn.]—A., by will, declares his intention to dispose of his household goods by his codicil, &c., and devises the residue of his personal estate not disposed of nor reserved to be disposed of, by his codicil, to his wife. Afterwards the testator makes a codicil, and does not dispose of his household goods thereby; the household goods shall not go to the residuary legatee, but according to the statute of distributions. *Davers* v. *Dewes*, 3 P. Wms. 40.

Residue under particular circumstances will not take in lapsed legacies, the residue being given as a small remainder of about 100*l.*, and the lapsed legacies amounting to 20,000*l.* In general, the residue takes in lapsed legacies; as to real estates it is otherwise. But the legatee must be a general legatee. *Att-Gen.* v. *Johnstone*, Ambl. 577, 580.

A testator bequeathed to his executors and trustees all his personal estate (except such goods as were by his will especially bequeathed, and also except his leasehold estates, which he declared it to be his intention to exonerate from the payment of his debts and legacies), upon trust, in the first place, to pay his debts, funeral and testamentary expenses, and legacies; and in case there should be any residue of his personal estate (except as aforesaid) he gave the same to his son R. And after giving certain specific legacies, the testator gave all his freehold hereditaments to the same trustees, upon trust for his said son R. for life, with remainder to his grandson W. for life, with divers remainders over in tail. And the testator gave all his leasehold estates to the same trustees, in trust to permit the clear rents thereof to be received, taken, and enjoyed by the person for the time being entitled to the freeholds, until such person should by good assurance become seised of the freeholds in fee simple in possession; and then in trust to convey and assign the leaseholds to him:—Held, that the limitations of the leaseholds beyond the life estates of R. and W. were void for remoteness; and that the interest thus improperly attempted to be given did not belong absolutely to W. as the last tenant for life, nor did it pass by the residuary bequest to R., because the exception of the leaseholds out of the residuary gift was not simply for the purpose of making a separate bequest of them, but also to exonerate them from payment of the debts and legacies; and therefore held, that, beyond W.'s life estate, the leaseholds were undisposed of by the will, and belonged to the next of kin of the testator. *Wainman* v. *Field*, Kay, 507.

A general residuary gift carries with it every legacy which fails to take effect, unless the testator has shewn an intention that property which he has excepted from the residue is never to fall into it. *Blight, In re, Blight* v. *Hartnoll*, 52 L. J., Ch. 672; L. R. 23 Ch. D. 218; 48 L. T. 543; 31 W. R. 535—C. A.

E. B., by her will, bequeathed to C. H. all her personal property, with the exception of a certain wharf upon which she had charged certain annuities and had given directions for the payment off of certain mortgages upon it:—Held, that E. B. had treated the wharf as part of her own personal property, and had shewn no intention inconsistent with its falling into residue, and that after satisfaction of the annuities and mortgages it passed to C. H. under the residuary gift. *Ib.*

Davers v. *Dewes* (supra) doubted. *Wainman* v. *Field* (supra) distinguished. *Ib.*

A testator gave to each of his brothers and sisters named in his will, "or to their legal representatives," 500*l.*, to be paid them in two years after his death. He then gave legacies to several nephews and nieces by name. The whole amount of the legacies was 6,100*l.* He gave the residue to his wife "except 4,100*l.*, of which she is only to have the use during her life, and which I wish to be devised amongst my relatives to whom I have left legacies in the fore part of this instrument, in proportion to the legacies left above, which will just make their legacies double the first bequest." On inspecting the original will, which was a holograph, 4,100*l.* seemed to have been substituted for 5,100*l.*:—Held, that the 4,100*l.* was not so taken out of the residue as to prevent the shares of it which lapsed from going to the residuary legatee. *Thompson* v. *Whitelock*, 4 De G. & J. 490; 28 L. J., Ch. 473; 5 Jur. (N.S.) 991; 7 W. R. 625.

Testatrix bequeathed certain leaseholds to trustees upon trust for sale, and to apply the proceeds in or towards payment of her debts, funeral and testamentary expenses, and legacies as far as the same would go; and as to all the moneys and personal estate not thereinbefore by her disposed of, and not consisting of lands, tenements, or hereditaments, or the produce thereof, she bequeathed the same for charitable purposes. The produce of the leaseholds was more than sufficient for payment of her debts,

funeral expenses, and legacies, and she had not devised any other than leasehold lands to be sold:—Held, that the surplus produce of the leaseholds did not fall into the residue, but was undisposed of. *Russell* v. *Clowes*, 2 Coll. C. C. 648; 10 Jur. 732.

A testator gave all his real and personal estate to trustees, except as to money due to him from E., to convert by sale and invest in the funds, "and pay the interest thereof unto his wife" for life, with remainder over:—Held, that the widow was entitled to the interest arising from the debt from E. *Dobson* v. *Banks*, 32 Beav. 259. And see *Cambridge* v. *Rous*, supra, col. 1213; *Hawks* v. *Longridge*, ante, col. 1190: *Torrens* v. *Millington*, 26 W. R. 753.

General or Particular Residue—Lapsed Gift.]—A testator bequeathed particular chattels at his residence to A., and his chattels there "not thereinbefore otherwise disposed of" to B., and his general residue to C. The gift to A. lapsed by her death in the testator's lifetime:—Held, that the chattels bequeathed to A. passed to B., as part of a particular residue, and not to C. as part of the general residue. Distinction between a general and a particular residue. *De Trafford* v. *Tempest*, 21 Beav. 564.

A testatrix, after bequeathing divers annuities and legacies, and amongst others a sum of stock to M. M., to vest at twenty-one or marriage, devised and bequeathed a West India plantation, and all the residue of her money in the funds, after payment of the annuities and legacies thereinbefore bequeathed, and also her plate, books and certain portraits, to E. G. T. and M. T. for their lives equally, and after the death of either the whole to the survivor for life, and after the decease of the survivor then unto such children of M. T. as he should by deed or will appoint, and in default of appointment then the plantation and the residue of the money in the funds to be equally divided among the said children and their heirs; and if but one child the whole to such child and his or her heirs, the funded property to be an interest vested in them being sons at twenty-one, and being daughters at twenty-one or marriage; but in case M. T. should die without issue of her body lawfully begotten, the testatrix devised the plantation equally among all the children of A. W. and their heirs; and in case M. T. should die without issue as aforesaid, she then bequeathed her said residue of her money in the funds, and all her said plate, books, and portraits, unto M. T. for life, and after his decease to his eldest son for ever; but in case M. T. should die under age and without issue then the said residue of her money in the funds, plate, books, and portraits unto M. M. absolutely. All the rest and residue of her estate and effects the testatrix gave and bequeathed unto E. G. T. and M. T. absolutely, M. T. having survived E. G. T., and died without having been married:—Held, that the stock legacy to M. M., which had lapsed by her death under age and unmarried, passed under the residuary bequest of the funded property for the benefit of M. T., and did not sink into the general residue. *Malcolm* v. *Taylor*, 2 Russ. & M. 416.

Upon the construction of a will:—Held, that lapsed legacies fell into the general and not into a particular residue. *Master* v. *Laprimaudaye*, 2 Coll. C. C. 448.

—— **Gift which Fails.**]—Testator gave after his wife's death four pictures to the trustees of the National Gallery, and "all the rest, residue, and remainder of my pictures . . . and other articles and effects . . . not herein or by any codicil specially bequeathed," to his wife absolutely; and after certain other bequests he gave "all the residue and remainder of my moneys . . . goods, chattels, and personal estate and effects whatsoever not herein specifically bequeathed" to his trustees on certain trusts. The trustees of the National Gallery declined the bequest:—Held, that the bequest of the four pictures fell into the second residuary bequest. *Patching* v. *Barnett*, 49 L. J., Ch. 665; 43 L. T. 50; 28 W. R. 886.

Testatrix, after giving certain legacies, bequeathed "all her moneys, securities for money, moneys secured on mortgage, railway stocks and shares, moneys to be produced from sale of any property at S. or P., to which she was entitled, all moneys to which she was entitled under the will of her late grandfather, and also all her moneys secured upon any securities or in any way or manner howsoever," to trustees, upon trust, after payment of her legacies and debts, to invest and pay the income to A. for life, and after her decease to pay thereout a certain charitable legacy, and as to the residue thereof upon certain trusts in favour of the defendants. The will contained a residuary bequest in favour of A. The charitable legacy was partially invalid under the Statute of Mortmain:—Held, that the portion of such legacy which failed passed to the defendants under the particular gift of residue, and not to A. under the general residuary gift. *Champney* v. *Davy*, 48 L. J., Ch. 268; 11 Ch. D. 949; 40 L. T. 189; 27 W. R. 390.

—— **Gift recited but not made.**]—See *Langan* v. *Bergin*, supra, col. 1217.

Lapsed Share of Residue.]—Where a residue was to be divided in three portions, and one third was given to A., another third to B., and as to the other third "500*l.* part thereof to C., and the residue and remainder of such third to other parties," and C. died in the lifetime of testatrix:—Held, that the 500*l.* lapsed to the next of kin. *Lloyd* v. *Lloyd*, 4 Beav. 231; 10 L. J., Ch. 327; 5 Jur. 673.

A testator having by his will directed his executors to transfer 500*l.*, part of his residuary estate, to H. N., and made a specific disposition of the other parts, and having afterwards drawn a pen through the name of H. N., and by a codicil declared that he razed her name out of his will with his own hand, the 500*l.* belongs as undisposed of to his next of kin. The costs of ascertaining the right to that sum paid thereout in exemption of the general residue. *Skrymsher* v. *Northcote*, 1 Swan. 566; 1 Wils. Ch. 248; 18 R. R. 142.

Testator gave the whole of his personal property, after payment of his debts, to his wife during her widowhood, remainder to his son, his only child; and if his son should die under twenty-one, he expressed it to be his wish to give 500*l.* to each of his brothers and sister, Joseph, James, and Mary, "and any further surplus to be equally divided between these my said brothers and sister, or their legal heirs and successors." The testator's son survived him, and died under twenty-one. His brother Joseph died in his lifetime:—Held, that the gift of the further surplus was not a residuary gift, but was a gift of the surplus of the testator's property after the three sums of 500*l.* each should be subtracted from it, and that the legal heirs and

successors to the brothers and sister were not intended to take unless all of them died, so as not to take; and consequently that there was an intestacy as to the 500*l.* and the share of the further surplus given to Joseph. *Gibson* v. *Hale*, 17 Sim. 129; 14 Jur. 27.

Testator bequeathed Greenacre to Catherine S. for life, with remainder to her son John S. in fee; provided that if he should die in his mother's lifetime, then and in such case the testator gave Greenacre, together with the residue of his real and personal estate, to trustees, in trust for Isabella A. for life, remainder in trust as to one-fourth for such persons as she should appoint by will; and upon further trust, to divide, convey, assign, and transfer all the rest, residue, and remainder of the trust property unto and to the use of Maria C., Rose B., and John S. absolutely. John S. survived his mother, and Isabella A. died intestate:—Held, that the trustees took the residuary real estate on the testator's death; and that Maria C., Rose B., and John S. were not entitled to the one-fourth of the property which was subjected to Isabella A.'s appointment, but that it was undisposed of. *Simmons* v. *Rudall*, 1 Sim. (N.S.) 115; 15 Jur. 162.

The testator gave his real and personal estate to his executors upon trust, after conversion and payment thereout of his debts, funeral and testamentary expenses, and legacies, to stand possessed of the residue, and divide the same into ten equal parts or shares, which he bequeathed to ten persons named in his will, and he declared that if the net residue of his property, after payment of the debts, &c., should exceed 10,000*l.*, then 10,000*l.* only should be applicable to the said trust, 1,000*l.* in each share; and in that case the testator gave the residue of his said property beyond the 10,000*l.* to his nephews and nieces in equal shares. The net residue, after the payment of debts, &c., exceeded 10,000*l.* One of the tenth shares lapsed by the death, in the testator's lifetime, of one of the ten legatees:—Held, that the lapsed share of 1,000*l.* did not pass as residue to the nephews and nieces, but was undisposed of. *Green* v. *Pertwee*, 5 Hare, 249; 15 L. J., Ch. 372; 10 Jur. 538.

Residue divided between certain residuary legatees, one of whom dies in the lifetime of the testator. By codicil the testator confirms his will except as to any legacy lapsed:—Held, that the share of the deceased legatee was undisposed of. *Wood's Will, In re*, 29 Beav. 236.

Property Subject to Power of Appointment.]—Sect. 27 of the Wills Act refers exclusively to general powers of appointment, and does not apply to limited or special powers. Property comprised in a limited or special power of appointment exercised by will is not within s. 24 of the Wills Act, as being real or personal estate comprised in the will. Dictum in *Wells, In re, Hardisty* v. *Wells* (42 Ch. D. 646), approved; *Stillman* v. *Weedon* (16 Sim. 26) considered. *Doyle* v. *Coyle*, [1895] 1 Ir. R. 205.

And see POWERS.

b. What Words will pass Particular Property.

i. *Real Estate.*

"Bequeath."]—The word "bequeath" is large enough to carry real estate, if distinctly applied to it. *Whicker* v. *Hume*, 14 Beav. 518.

Though a testator has elsewhere in his will used the words "devise" and "bequest" correctly in their technical senses, the words "bequeathed" and "bequest" in the residuary clause may be construed to include real estate. *Jackson* v. *Hosie*, 27 L. R. Ir. 450—C. A.

"Business."] — A testator devised and bequeathed his whole property to trustees upon trust to invest such part as they should think fit in his business, and carry on the same till his son should attain the age of twenty-one years, and out of the profits to pay his widow the yearly sum of 200*l.* so long as she should remain a widow; and he directed the trustees, when his son should attain twenty-one, to transfer the business to his son. He then gave certain legacies to his other children, and provided that all his personal estate not required for the business should be continued in its then state of investment or altered at the discretion of the trustees, and the proceeds applied for the same purposes as the capital employed in the business. The business was carried on in a freehold shop:—Held, that the direction to transfer the business did not pass the freehold shop, and that the residuary gift carried the surplus profits of the business during the minority of her son. *Henton, In re, Henton* v. *Henton*, 30 W. R. 702.

Effects.]—A gift, in a will, of "moneys and effects":—Held, under particular circumstances, sufficient to pass real estates. *Titchfield* (*Marquis*) v. *Horncastle*, 7 L. J., Ch. 279; 2 Jur. 610.

The word "effects" in a will equivalent to "property" or "worldly substance." *Campbell* v. *Prescott*, 15 Ves. 507.

A testator, by a will prior to the 7 Will. 4 & 1 Vict. c. 26, gave all the rents of his lands to three persons, to be equally divided between them according to value, but without any words of inheritance; and then accurately enumerating his real estate, proceeded to give his "stock-in-trade," money, book debts, and effects not included in the above statement to two of such persons, also without words of inheritance:—Held, first, that the direction in the first part of the will, that the rents were to be divided "according to value," did not amount to a direction to sell, and that the three first donees only took for life; secondly, that the word "effects" carried the reversion in the lands to the second set of donees in fee, subject to the life estate of the three first donees. *Milsome* v. *Long*, 3 Jur. (N.S.) 1073.

A testator gave, devised, and bequeathed his household goods, &c., "and everything he should die possessed of," to A., for life, and after her death, he gave, devised, and bequeathed "the whole of his effects which might be then remaining, unto and to the use of P.":—Held, that the real estate passed. *Phillips* v. *Beal*, 25 Beav. 25.

Copyholds held to pass under a will by the words "moneys, property, or effects," aided by the context. *Streatfield* v. *Cooper*, 27 Beav. 338.

Effects held to be ejusdem generis, and not to apply to real estate. *Cross* v. *Wilkes*, 35 Beav. 562.

Testator gave, devised, and bequeathed to his wife all his "furniture, goods, chattels, and effects, whatsoever the same may be or wheresoever the same may be situate":—Held, on the

context, that the gift passed all the property of the testator, whether real or personal. *Hall* v. *Hall*, 61 L. J., Ch. 289; [1892] 1 Ch. 361; 66 L. T. 206; 40 W. R. 277—C. A.

And see **Estate and Effects**, infra.

Estate.]—The word estate, when used in a will, is genus generalissimum, and will, of its own proper force, without any proof aliunde of an intention to aid the construction, carry realty as well as personalty, and is not to be confined and restrained to personalty only unless there is a clear intent expressed in other parts of the will, to be gathered either from the whole will, or from the way in which the word is used in the particular part of the will where the contested use of it arises. *Hamilton Corporation* v. *Hodsdon*, 6 Moore, P. C. 76; 11 Jur. 193.

Testator, by his will, devised to J. (his heir-at-law) part of his estate in fee, and also a life-estate, in another portion of his estate, named P.; and also gave to F. (his wife) a life-estate in part of P., during her viduity, with remainder to his other son N. in tail, remainder to his (the testator's) daughters for life; and after giving certain specific chattels to F., the will proceeded as follows: "I give all the remainder of my estate that is now in my possession, or may hereafter be mine, excepting what I have particularly given away, unto my wife, F., and it is my will, that, whatever my estate may consist of, after debts and legacies are paid, it be kept together under the direction of my wife F." N. died without issue, and F., the widow, also died unmarried and intestate. The heirs-at-law of J. sold the estate P. to the appellants, subject to the life-estate of the daughters. In a suit by the appellants, against the daughters of the testator, the co-heiresses of F., for a partition:—Held, by the judicial committee, affirming the decree of the court in Bermuda, that the remainder in fee in the estate P. passed to F., under the residuary clause, there being nothing in the context of the will to confine the natural and legal meaning of the word "estate" to personalty only. *Ib.*

The word "estate" in will, unless qualified, passes both real and personal estate. *Barnes* v. *Patch*, 8 Ves. 604; 7 R. R. 127. S. P., *O'Toole* v. *Browne*, 2 W. R. 430.

Under general word "estate" in will, real estate passes unless restrained by apparent contrary intent. *Woollam* v. *Kenworthy*, 9 Ves. 137.

Word "estate," when used generally, includes not only the lands or thing, but also the estate or interest. So, if "in or at" such a place is added; but if it is further added "in the occupations of particular tenants," quære. *Goodwin* v. *Goodwin*, 1 Ves. 228.

A testator gave and bequeathed the "residue of his estate, after taking out 1,000*l.*," to his uncle:—Held, that the residuary real and personal estate passed, the testator having previously made pecuniary gifts out of "his freehold and personal estate." *Hawksworth* v. *Hawksworth*, 27 Beav. 1.

The word "estate" in a will, will primâ facie pass real estate, and the burden of proof lies on those who contend the contrary. *Patterson* v. *Huddart*, 17 Beav. 210; 1 W. R. 423.

—— **Coupled with other Words.**]—The word "estate" and other similar words which, when used in a will, are of themselves sufficient to pass real as well as personal estate, will not be cut down and confined to the latter merely because the accompanying expressions and the limitations and trusts of the will are applicable to personal estate only. *Stein* v. *Ritherdon*, 37 L. J., Ch. 369; 19 L. T. 184; 16 W. R. 477.

Therefore, where a testator in 1866, after specific bequests of pure personalty, bequeathed all the rest and residue of his estate and effects to trustees, their executors, administrators and assigns, upon trusts applicable to personalty only, with an ultimate limitation to the next-of-kin:—Held, that a freehold house which belonged to the testator passed under the residuary gift to the trustees. *Ib.*

"All my freehold lands in tenure of L., and the residue of my estate, consisting of ready money, plate, jewels, leases, judgments, mortgages, &c., or in any other thing whatsoever and wheresoever, I give to A. or her assigns for ever." The court will intend an intestacy in favour of the heir-at-law, unless there is a clear intention to pass the real estate. *Timewell* v. *Perkins*, 2 Atk. 102.

One devises all his goods, chattels, and estate whatsoever, on condition to pay his debts and legacies; these words pass his real estate, he having by will devised a considerable legacy to his eldest son, and other legacies and the surplus of his estate after his wife's death, to be equally divided between his four children. *Lumley* v. *May*, Pre. Ch. 37.

It has been held that where "estate" is mentioned generally, accompanied with personal things, it should be restrained to personal, but never where real estate is mentioned; for then the personal things mentioned shall be considered only as an enumeration of those specific things. *Bailis* v. *Gale*, 2 Ves. Sen. 51. And see *Ridout* v. *Pain*, 3 Atk. 485.

A testator, after giving a specific legacy and an annuity, gave all his property to trustees, upon trusts for his granddaughter and her issue, with provisions for their benefit, and for the religious education of the granddaughter, who was a minor. The legatee and annuitant died soon after the making of the will. After this the testator, by codicil, gave and bequeathed "the whole of my estate, and all my household goods and furniture, linen, china, watches, and all other my personal property and effects that I may be possessed of at the time of my death," to his servant R., free from legacy duty, such gift not to prejudice any claim R. might have for wages; and the testator in all other respects ratified and confirmed his will. The grandchild was still living, and a minor:—Held, by the vice-chancellor of Lancaster, that the testator's real estate was unaffected by the codicil. *Molyneux* v. *Rowe*, 25 L. J., Ch. 570; 2 Jur. (N.S.) 769; 4 W. R. 539.

The codicil revoked the disposition of the real estate made by the will, for that the words of description in the codicil, following the words "the whole of my estate," comprised the whole personal estate, and the above words must therefore apply to the real estate. Turner, L.J. *Ib.*

—— **Estate and Effects.**]—A testator, after devising a freehold to two others and the survivor, her heirs, executors, administrators, and assigns for ever, proceeded, "And I give all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, goods,

chattels, estate, and effects, of what nature or kind soever, and wheresoever the same shall be, at the time of my decease, unto R. and S., their executors, administrators, and assigns in trust." He afterwards specifically bequeathed his ready money and various chattels :—Held, by the court of exchequer, that the word "estate," thus circumstanced, did not pass real estate; but this court, not being satisfied, directed a case to the common pleas. *Sanderson* v. *Dobson*, 10 Beav. 478. And see *S. C.* at law, 1 Ex. 141.

F. possessing, as far as appeared, personalty only, by his will, inter alia, left all the rest, &c., of his estate and effects to trustees upon trust to invest in the public funds or upon government or real securities, with power to vary the same. After a suit had been instituted and reference ordered, it was discovered that two chapel shares were real estate, and upon the question whether the above words passed real estate :—Held, that they did, according to the present law, which varied from the earlier cases; and a sale directed. *Fullerton* v. *Martin*, 1 Drew. 238; 22 L. J., Ch. 893; 17 Jur. 778; 1 Eq. R. 224; 1 W. R. 379.

A testator, after specific gifts of freeholds, leaseholds, and chattels, gave "all the rest of his household furniture, books, linen, and china (except as thereinafter mentioned), goods, chattels, estate, and effects to R. and S., their executors, administrators, and assigns," on trust. The testator then disposed of his ready money, moneys to arise from a certain sale, securities for money and moneys owing, and made certain specific bequests :—Held, that the whole of the residuary estate, real and personal, passed to R. and S. by force of the word "estate." *Dobson* v. *Bowness*, 37 L. J., Ch. 309; L. R. 5 Eq. 404; 16 W. R. 640.

T. A. H. by will gave all the residue of his "estate and effects" to trustees upon trust to invest the same in 3 per cents., and with power to alter, or vary, or transpose, at their discretion, and to pay the interest and dividends to D. for life, and after to her children. The testator acquired real estate after the date of his will, but left no heir; and on the question, as between the residuary legatee and the crown, whether the real estate passed :—Held, that it did. *D'Almaine* v. *Moseley*, 1 Eq. R. 252; 1 Drew. 629; 22 L. J., Ch. 971; 17 Jur. 872; 1 W. R. 475.

The word "estate," in a will, will primâ facie pass real estate, and the burden of proof lies on those who contend the contrary. *Patterson* v. *Huddart*, 17 Beav. 210; 1 W. R. 423.

A testatrix, after giving certain legacies to charities, and directing that they should be paid out of her personal estate, bequeathed her pictures, furniture, books, &c., to her daughters: and as to all the rest and residue of her estate and effects whatsoever, and all her diamonds and other jewels, not thereinbefore disposed of, she gave the same to trustees, their executors and administrators, upon trust, to sell the same and hold the money upon certain trusts :—Held, that her real estate passed under the word "estate." *Ib.*

A testator gave "all his estate, effects, and property whatsoever and wheresoever," which he was or might be possessed of or entitled to, "to his three executors, their executors and administrators," upon trust to stand possessed thereof, and the proceeds thereof, upon certain trusts for children and grandchildren :—Held, that this, by itself, would pass real estate, but, upon the subsequent expressions and the general scope and object of the will, the contrary was held. The court principally relied on the absence of the words "[illegible]" "devise," and "rent," and the use of the expression "possession," "executors and administrators," "principal, the balance, the principal of the said legacies," the direction to claim a share from his personal representatives, and the power to appoint new trustees, applicable to "executors," and not to "heirs." *Coard* v. *Holderness*, 20 Beav. 147; 24 L. J., Ch. 388; 1 Jur. (N.S.) 316; 3 W. R. 311.

—— **Where Trusts applicable to Personalty.**] —Under a devise of all the residue of the testator's estate and effects whatsoever and wheresoever, of what nature or kind soever, to trustees upon trusts applicable only to personal property: —Held, that the real estate passed, with a resulting trust for the heir. *Dunnage* v. *White*, 1 J. & W. 583; 21 R. R. 239.

A will made after the Wills Act, 1 Vict. c. 26, whereby the testator gave, devised, and bequeathed all his estates and effects whatsoever and wheresoever, and of what nature or kind soever, to be paid, assigned, or transferred to A. on his attaining twenty-one :—Held, to pass real estate (copyhold of inheritance) subsequently acquired, notwithstanding a direction in the will that in the meantime the executors should apply the interest, dividends, and proceeds of such estate and effects, or so much thereof, or so much of the principal thereof, as they should think necessary in the maintenance, education, and putting forth of A. in the world, and should invest the said estates and effects on real or personal security at their discretion. The directions applicable only to personal estate may in such a case be construed as referring not to the whole subject-matter of the gifts, but to such portions of the estate as may consist of personalty to which such directions may be fitly applied. *Stokes* v. *Salomons*, 9 Hare, 75.

The word "estate," in a will, will primâ facie pass real estate, and the burden of proof lies on those who contend the contrary. *Patterson* v. *Huddart*, 17 Beav. 120; 1 W. R. 423.

A testatrix after giving pecuniary and specific legacies, and after directing her charity legacies to be paid out of her personal estate, "gave and bequeathed" all the rest "of her estate and effects whatsoever and wheresoever, and all her diamonds and other jewels," to trustees, their "executors and administrators," upon trust to sell and divide :—Held, that the real estate passed to them. *Ib.*

A gift of "all the residue of my estate and effects to A. B. and C., upon trust to collect, get in, and recover the same, and invest in stock, and pay the dividends, &c., to persons beneficially entitled"; A. and B. being also executors :—Held, to pass real estate. *D'Almaine* v. *Moseley*, 1 Drew. 629; 1 Eq. R. 252; 22 L. J., Ch. 971; 17 Jur. 872; 1 W. R. 474.

A testator devised and bequeathed all his estate and effects to trustees, their heirs, executors, and administrators, to convert his personal estate, not being money, and to stand possessed of the money to arise by such sale, and of the rest and residue of his estate and effects, to invest the same in government or real securities, and to stand possessed of such investments for benefit of his widow and children and his brothers and sisters :—Held, that the real estate

passed to the trustees, but that the beneficial interest therein was undisposed of by the ... and consequently resulted to the heir. ... v. *Longley*, 41 L. J., Ch. 168; L. R. ... Eq. 133; 25 L. T. 736; 20 W. R. 227. And see *Whicker* v. *Hume*, supra, col. 1221.

Estates.]—Under a devise to trustees during life of A. of all testator's estates and farms:—Held, word "estate" referred only to the thing, and not to the interest in it. *Sayer* v. *Masterman*, Ambl. 345.

—— **Coupled with Other Words.**]—Personal estate to be laid out in land, but lent on mortgage instead, considered as land, having been always out in trustees, and the uses never united with the possession, and passed by such general words in a will as would pass land, as "all my estates, &c., whatsoever and wheresoever." *Rashleigh* v. *Master*, 1 Ves. 201; 3 Bro. C. C. 99.

A bequest of "all my goods, chattels, estate, and estates whatsoever," will pass real as well as personal property. *Churchill* v. *Dibben*, 9 Sim. 447, n.

A testator gave to his wife all his money, goods, chattels, estates, and effects, of what nature or kind soever, and wheresoever the same might be found at the time of his decease, for her life; and at her decease all his property of goods, money, chattels, estate, or effects whatsoever, to be equally divided between all his children, &c.:—Held, that the testator's real estate passed. *Midland Counties Railway Co.* v. *Oswin*, 1 Coll. C. C. 74; 3 Railw. Cas. 497; 13 L. J., Ch. 209; 8 Jur. 138.

Testator gave to his executors "all his goods, estates, bonds, debts, to be sold," &c. The word "estates" will pass a copyhold which was surrendered to the use of the will. *Jongsma* v. *Jongsma*, 1 Cox, 362.

"Fortune"—Words of Complete Disposition—Foreign Real Property.]—A testatrix, of French birth, made her will, dated 1868, in the French language. The will was, however, in English form, and the testatrix's domicil was English. The testatrix gave legacies and annuities to various persons, including her only daughter, and a specific legacy of articles of vertu to her only son. The testatrix then declared that, after the deduction of all the above bequests, together with the necessary sums to secure the payment of the annuities, the residue of her fortune (le surplus de ma fortune) should belong to her grandson. The only real estate which the testatrix possessed was situate in France. Her personal property was not quite sufficient to pay all her debts and legacies. The question was, whether the testatrix's real estate in France, devolving to her French heirs, could be taken as intended by the testatrix to be comprised in her will, and to be subjected by her to the same obligation of contributing to the payment of debts and legacies, in which event the French heirs would be put to their election:—Held, that, according to the authorities, the universality of a gift of property contained in a will was not sufficient to demonstrate or create a ground of inference that the testator meant it to extend to property which was incapable, although his own, of being given by the particular instrument; and that, therefore, the testatrix could not be said to have intended to affect her French real estate, there being nothing in the will from which the court could infer any such intention so as to take the case out of the rule above stated. *Baring* v. *Ashburton*, 54 L. T. 463.

"Lands" Coupled with Words applicable only to Personalty.]—A. devises to her niece thus: "I make my niece G. executrix of all my goods, lands, and chattels," and dies, not having any leasehold interest, yet her lands of inheritance pass not by these words. *Piggot* v. *Penrice*, Pre. Ch. 471.

Legacy.]—The word "legacy" primâ facie has reference to personal estate only. *Windus* v. *Windus*, 6 De G. M. & G. 549; 21 Beav. 373; 26 L. J., Ch. 185; 2 Jur. (N.S.) 269, 1101.

Money.]—A husband directed the income arising from his principal money to be paid to his wife, while unmarried, for the support of herself and the education of his children, and at her death or marriage to be divided among them. The testator had but little money strictly so called, but he had large personal property, and some freehold property:—Held, that the whole of the personal property passed, including leaseholds, but not the freehold property. *Prichard* v. *Prichard*, 40 L. J., Ch. 92; L. R. 11 Eq. 232; 24 L. T. 259.

Personal Estate—Proceeds of Real Estate.]—*See cases* ante, col. 1157.

Personal Estate and Effects.]—A testator gave his personal estate to his executors, with a direction to collect the rents of his freeholds, leaseholds, and copyholds, and thereout pay annuities. He gave his residuary legatee all his personal estate and effects:—Held, that by reference to the former part of the will the residuary real estate passed. *Lines* v. *Lines*, 22 L. T. 400; 17 W. R. 1004.

A testator devised his real estate (subject to charges) in strict settlement, and gave all his "railway, canal, and navigation shares . . . and personal estate" to his executor, to pay his debts and legacies, and his residuary personal estate and effects to M. He was possessed of two navigation shares, which by the act creating them were made of the nature of real estate. Before his death, the undertaking to which the shares belong became vested in a railway company, by an act which provided for the extinguishment of the freehold rights in the shares, upon their conveyance to the railway company. The shares were never conveyed to the railway company:—Held, that by the railway company's act, or if not, by the will, they were converted into personal estate, and went to the residuary legatee under the gift of his personal estate and effects. *Cadman* v. *Cadman*, 41 L. J., Ch. 468; L. R. 13 Eq. 470; 20 W. R. 356.

Personal Estate and Property.]—Gift of "personal estate and property whatsoever and wheresoever" held not to pass real estate. *Buchanan* v. *Harrison*, 31 L. J., Ch. 74; 8 Jur. (N.S.) 965; 10 W. R. 118.

A bequest of "the whole of my personal property, estate, and effects, of every and whatsoever kind they may be," will not carry real estate. *Belaney* v. *Belaney*, 36 L. J., Ch. 265; L. R. 2 Ch. 138; 16 L. T. 269; 15 W. R. 369.

The assignee of a term of years afterwards purchased the reversion, which was conveyed to a trustee for him in fee. In the deed of conveyance was contained a recital of the purchaser's desire that the term should not merge. The purchaser afterwards made a will bequeathing all his personal estate:—Held, that the term passed by the bequest. *Ib.*

A testator gave to his wife all his household furniture, personal effects, and properties of every description that he might be possessed of at his death, and also all moneys which might then be in his possession or due to him:—Held, that the gift did not include his realty. *Yates, Ex parte*, 20 L. T. 940; 17 W. R. 872. See also *Smalley, In re, Smalley* v. *Smalley*, ante, col. 1161.

"What I possess or die possessed of."]—A feme covert having power to dispose by will of personal property, and of a real estate at N., by her will, after reciting the power, gave several pecuniary legacies, and then gave to her husband her fields and house at N., likewise the remainder of her personalty, and all she might die possessed of, after payment of her debts, legacies, and funeral and testamentary expenses:—Held, that the husband took a life estate only in the realty, notwithstanding the gift to him of all the testatrix might die possessed of. *Monk* v. *Mawdsley*, 1 Sim. 286; 5 L. J. (O.S.) Ch. 149.

A testator, possessed only of personalty, by the residuary clause of his will bequeathed the same to his wife for life, and after her decease to his children in certain proportions. Having subsequently acquired real estate, he made a codicil, by which he left certain shares to his wife, "on the same terms as I have everything else (everything I possess I leave her)":—Held, that the words shewed a present intention, and passed the real estate. *Warner* v. *Warner*, 20 L. J., Ch. 273; 15 Jur. 11.

Devise of all "estate and effects that I shall die possessed of" carries after-purchased lands. *Churchman* v. *Ireland*, 1 Russ. & M. 250.

By will testator nominated wife his executrix, "thereby bequeathing to her all the property of whatever description or sort that I may die possessed," &c.:—Held, she is entitled, though not as executrix, to all his property that such a will could pass. *Noel* v. *Hoy*, 5 Madd. 38; 21 R. R. 271.

A gift to A. and B., "whom I appoint my executors of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or matter it may be," will pass the fee-simple of real estate. *Thomas* v. *Phelps*, 4 Russ. 348; 6 L. J. (O.S.), Ch. 110; 28 R. R. 120.

A testator gave, devised, and bequeathed his household goods, &c., "and everything he should die possessed of," to A., for life, and after her death, he gave, devised, and bequeathed "the whole of his effects which might be then remaining, unto and to the use of" P.:—Held, that the real estate passed. *Phillips* v. *Beal*, 25 Beav. 25.

Testator being seised in fee of a house in the town of C., and of estates in the counties of H. and L., gave pecuniary legacies to his two sons (one of whom was his heir), and also to his two daughters, M. and C. He then gave to his wife for her life the possession of his house, together with the use of his plate, furniture, &c., and the interest of his stock in the funds during her life, "save and except the clauses in favour of my daughters as already mentioned; at her decease it is my will and pleasure that M. and C. shall divide equally between them as residuary legatees whatever I may die possessed of, except what is already mentioned in favour of others":—Held, that M. and C. took an estate in fee in remainder expectant on the death of the testator's widow, in the house in C., and an estate in fee commencing on the widow's decease, in the estates in H. and L., and that the widow did not take a life interest by implication in those estates, but that the heir took them by descent during her life, *Davenport* v. *Coltman*, 12 Sim. 588; 11 L. J., Ch. 262; 6 Jur. 381. And see *S. C.* at law, 9 M. & W. 481; 11 L. J., Ex. 114.

Profits.]—*See* **Rents and Profits**, infra.

Property.]—The word "property" has the most extensive meaning, when used in a will. *Jones* v. *Skinner*, 5 L. J., Ch. 87.

A testator, by his will, devised his "property," and referred to the income by the words "dividends" and "interest":—Held, that his real estate was included in the word "property," notwithstanding the use of the other words. *Morrison* v. *Hoppe*, 4 De G. & Sm. 234; 15 Jur. 737.

Under the word property, reversionary interest in realty does not pass. *Buchanan* v. *Harrison*, 31 L. J., Ch. 74; 8 Jur. (N.S.) 965; 10 W. R. 118.

A testator gave to his wife, for her use and benefit, "his leases, moneys, goods, furniture, plate, book-debts, securities for money, and all other property, of every description, that he might be possessed of":—Held, that the real estate passed. *Greenwich Hospital Improvement Act, In re*, 20 Beav. 458. And see *Coard* v. *Holderness*, supra, col. 1226.

—— **Where Trusts applicable to Personalty.**]—Testator having given to his eldest son a particular estate, without words of limitation, proceeded to settle the residue of his property upon certain trusts between such son and his two sisters and their families, using words in the course of such devise more properly applicable to personal estate, as that his son's share (which in another place was called a portion) was to be placed in the names of trustees, and that in certain cases some of the capital might be advanced; the son's interest, too, in the residue was only for life:—Held, nevertheless, that the reversion in fee of the particular estate passed by the residuary clause. *Saumarez* v. *Saumarez*, 4 Myl. & Cr. 331.

A specific devise of real estate was followed by a devise and bequest of all the testator's other property whatsoever and wheresoever to trustees upon trusts which were expressed in terms more appropriate to personalty than to realty. The testator was not, at the date of his will, entitled to any real estate other than that specifically devised, but he subsequently became entitled to real estate of great value:—Held, that such subsequently acquired real estate passed by the will. *Lloyd* v. *Lloyd*, 38 L. J., Ch. 458; L. R. 7 Eq. 458; 20 L. T. 898; 17 W. R. 702.

Rents and Profits.]—Devise of profits is a devise of land. *Johnson* v. *Arnold*, 1 Ves. Sen. 171.

Devise of profits will pass land. *Allan* v. *Backhouse*, 2 V. & B. 74; 13 R. R. 23. Affirmed, Jac. 631; 23 R. R. 167.

A testator resident in Jamaica devised the rents, issues, and profits of his estate called Islington and Cove's Pen in that island to A. B.:—Held, that the estate, and the slaves, mules, cattle, and machinery thereon passed under this devise. *Stewart* v. *Garnett*, 3 Sim. 398. See *Rucker, Ex parte*, 3 Deac. & C. 704.

Devise of "one moiety of the rents, issues, and profits of my estate, named T., in the parish of M., to be divided equally amongst my grandchildren; the other moiety of the rents, issues, and profits of my said estate I give to R. and his heirs":—Held, that the grandchildren take the fee as tenants in common in a moiety of the estate. *Ib.*, 3 Sim. 398.

A sale directed on the words "rents and profits" alone, though generally contrary to testator's intention, in aid of a creditor, on the ground of law, that in a will those words meant and passed the land itself. Another construction, however, as to legatees, upon the addition of the words "as the rents and profits, &c., should advance the money." *Baines* v. *Dixon*, 1 Ves. Sen. 41.

Residuary Legatee.]—The term "residuary legatee" is not of an invariable nature; it must be fashioned and moulded by the context of the will. *Singleton* v. *Tomlinson*, 3 App. Cas. 404; 38 L. T. 653; 26 W. R. 722.—H. L. (I.)

—— **Appointment of—When Realty passes by.**]—Testator gave all his real and personal estate to his brother James and his nephew Malcolm, their heirs, executors, &c., in trust, by or out of his personal estate, or by sale, mortgage, or other disposition of his real estate or any part thereof, to pay his sister 1,500*l.*, and after giving 1,000*l.* to his brother James, he left to his brother Donald 2,000*l.*, and added, "and also to be my residuary legatee"; after which he gave 200*l.* to another of his sisters:—Held, that Donald was the testator's residuary devisee as well as legatee. *Evans* v. *Crosbie*, 15 Sim. 600; 16 L. J., Ch. 494; 11 Jur. 510.

A testator, by his will, devised all his estates to three trustees, whom he also named his executors, and charged same with various annuities and pecuniary legacies, and concluded thus: "I give, devise, and bequeath unto my said trustees, to be equally divided between them, share and share alike, all the rest, residue, and remainder of my property not herein disposed of, to answer any contingency that may arise or happen with respect to the trusts of this my will, or in case of nonpayment of my rents, as also to answer the several legacies and bequests herein mentioned, and to pay the expense of agency." By codicil to this will the testator made some alterations in the bequests of the annuities given by the will, and proceeded thus: "I leave my brother-in-law, P. N. (one of the trustees named in the will), residuary legatee to all my property; and I hereby empower him to keep clerks, agents, &c., in any manner he thinks proper, and also to fee one of the first lawyers upon any question he may think fit to consult for advice, and to do all other acts he may think proper, with or without the consent of my other trustees or executors":—Held, that all the real estate of the testator, not previously disposed of, passed to P. N. and that he took beneficial interest therein. *Warren* v. *Newton*, Dr. 464.

E. by her will, after a specific devise of real estate to S., and pecuniary legacies of 50*l.* and 200*l.*, bequeathed three other pecuniary legacies of 100*l.* each, with the proviso that "if her estate would not produce these sums of 100*l.* each, after the previous legacies were paid," then these sums were to abate; and she appointed S. her "residuary legatee." E. left real estate not specifically devised:—Held, that the real estate not specifically devised passed to S., as residuary devisee as well as legatee. *Salter, In re, Farrant* v. *Carter*, 44 L. T. 603.

A testator commenced his will by saying "As to my estate which God has been pleased in His good providence to bestow upon me, I do make and ordain this my last will and testament, as follows." He then made separate dispositions of two specified farms, then gave several pecuniary legacies, then bequeathed his shares in a quarry, then gave some further pecuniary legacies, and concluded with "and I make M. P., R. H. and O. P. my residuary legatees":—Held, that the testator's freehold estate not specifically mentioned in the will passed to these residuary legatees. *Hughes* v. *Pritchard*, 46 L. J., Ch. 840; 6 Ch. D. 24; 37 L. T. 259; 25 W. R. 761. And see *Davenport* v. *Coltman*, supra, col. 1230.

—— **When Realty does not pass by.**]—In a will, the words "I constitute A. and B. my residuary legatees," will not pass real estate. *Windus* v. *Windus*, 21 Beav. 373. Affirmed, 6 De G. M. & G. 549; 26 L. J., Ch. 185; 2 Jur. (N.S.) 1101.

A will recited that the testator was possessed of particular items of property, personal and real, and specified the different items; the enumeration, though not exhaustive, was nearly complete at the date of the will. The testator left a number of legacies (inter alia one shilling to his presumptive heir), which did not exhaust the personal estate as enumerated. and devised his farms (some of which were freehold) in inaccurate language, using the word "bequeath" in disposing of realty; but he did not express an intention to deal with his entire property. The will concluded by appointing J. W. his "residuary legatee." After the date of the will the testator invested a large sum in the purchase of a fee-simple estate:—Held, that the purchased estate did not pass to J. W. under the residuary clause. In a will including realty and personalty real estate does not pass under the words "residuary legatee" proprio vigore, without an expressed intention to dispose of the testator's entire property. *Gethin* v. *Allen*, 23 L. R., Ir. 236.

A testator concluded his will in these words: "As to all my personal estate, &c., subject however to my debts and legacies hereinbefore bequeathed, I give the same to W. R. W., whom I appoint executor of this my will, and also in case of any residue I appoint him my residuary legatee":—Held, that the residuary clause was confined to personal estate, and that under it certain rents undisposed of during the life of W. R. W. did not pass to him for life. *Wills* v. *Wills*, 1 Dr. & War. 439; 4 Ir. Eq. R. 531.

A testatrix, by her will, dated in 1854, gave as follows: "I commit to paper my wishes respecting the disposal of my property. . . . Everything I am possessed of I leave to my sister for her life, after her decease I give and devise as here annexed." Then followed a number of legacies, and the will proceeded: "My two nephews, H. H. M. and F. P. M., I leave my executors, and the latter residuary legatee after the demise of my sister." She also executed a

codicil, but she had no real estate either at the date of the will or codicil. She afterwards purchased some freehold property, which she held at her death. F. P. M. contracted for the sale of part of the real estate as absolute owner, and an objection having been taken by the purchaser that he had not title :—Held, that there was not sufficient context in the will to enable the court to read the words "residuary legatee" as "residuary devisee," and that consequently the real estate did not pass to F. P. M. *Hughes* v. *Pritchard* (supra) distinguished. *Methuen and Blore, In re*, 50 L. J., Ch. 464 ; 16 Ch. D. 696 ; 44 L. T. 332 ; 29 W. R. 656. And see *Monk* v. *Mawdsley*, supra, col. 1229 ; *Hamilton* v. *Foot*, ante, col. 1205.

—— **When Copyholds pass by.**]—A testator, after having given legacies to his children, amongst whom were two of his younger sons, Ansley and Eric, gave all his freehold, leasehold and copyhold estates unto and to the use of his sons Thomas and Ansley equally, as tenants in common ; and he also gave all the rest, residue and remainder of his personal estate and effects, after payment of legacies, to his sons Thomas and Ansley equally, and he appointed them and a nephew executors of his will. Thomas died in the lifetime of the testator, and afterwards the testator made a codicil, by which, after noticing the death of Thomas, the testator, "in the place and stead of him," constituted and appointed his son Eric jointly with Ansley and his daughter as an executrix in the room of his nephew, and proceeded in these words : "I also revoke the legacies to my sons Ansley and Eric, and appoint them residuary legatees, share and share alike ":—Held, that Eric did not take any portion of the freehold or copyhold estates under this devise, but that the moiety given by the will to Thomas was undisposed of. *Windus* v. *Windus*, supra.

J. G., by his will, declared his daughter M. A. to be his sole residuary legatee. J. G. at his death was entitled to certain copyhold estates, which were not specifically mentioned in his will :—Held, that the copyholds did not pass under the will to M. A. *Lea* v. *Grundy*, 1 Jur. (N.S.) 951.

A testator by his will devised and bequeathed all his freehold and copyhold estates and his personal estate to trustees, upon trusts for sale and conversion into money, and directed them to pay certain legacies, but did not make any residuary bequest. The testator, by an unattested codicil, gave other legacies out of the mixed fund, and appointed A., B. and C. his residuary legatees :—Held, that A., B. and C. were entitled to the surplus produce of the copyhold estates. *Wildes* v. *Davies*, 1 Sm. & G. 475 ; 22 L. J., Ch. 495 ; 1 W. R. 253.

Estate held by copy of court roll, according to custom of manor, but in case of intestacy distributable as personal estate, and in other respects differing from copyhold :—Held, to pass under a residuary bequest of personal estate, and not with copyhold messuages, &c., with limitations in strict settlement, upon whole will and circumstances. *Watkins* v. *Lea*, 6 Ves. 633.

"**All the Rest.**"]—A testatrix, after a gift of her house and garden (which were leasehold, though not so described) and several pecuniary legacies, directed that "all the rest" should be divided between the persons in her will named :—Held, that the word included realty as well as personalty. *Attree* v. *Attree*, 40 L. J., Ch. 192 ; L. R. 11 Eq. 280 ; 24 L. T. 121 ; 19 W. R. 464.

Whether by words "all the rest of my estate and fortune" in a will, copyhold estate as well as freehold passed, quære. *Dod* v. *Dod*, Ambl. 275.

A testator gave two pecuniary legacies, and then continued : "And lastly, I give my sheep and the rest, residue, and all moneys, chattels, and all other my effects, to be equally divided among my brothers," whom he appointed his executors :—Held, that all the freehold as well as personal estate of the testator passed under these words. *Smyth* v. *Smyth*, 8 Ch. D. 561 ; 38 L. T. 633 ; 26 W. R. 736.

A testatrix proceeded thus : "And in respect of my real and personal estate," I direct the tenant to be continued, "and as to the rest, residue, and remainder of my estate, including moneys and securities for money," I direct that it shall be divided, &c. :—Held, that the real estate passed. *Meeds* v. *Wood*, 19 Beav. 215.

A., having settled all his estates of inheritance upon his wife for life as a jointure, by will says : "All the rest and residue of my estate, chattels, real and personal, I give to my wife, whom I make sole executrix ":—Held, that the reversion of the jointure lands did not pass by this devise, but the personal estate only. *Marchant* v. *Twisden*, Gilb. Eq. R. 30. Lord Keeper said, that this case differed from *Murray* v. *Wise*, 2 Vern. 564 ; and that no resolution was ever carried so far as to construe these words to pass a fee.

"**Temporal Effects.**"]—"Temporal effects" in a will were held to include real estate. *Sheridan, In re*, 17 L. R., Ir. 179.

"**Trust Moneys**"—**Where Trust for Sale of Realty.**]—A testator gave real estate and personal estate in trust to sell and invest in "stocks, funds and securities," and hold the residue thereof upon the trusts declared by any codicil. By a codicil he gave "the trust moneys, stocks, funds and securities," by the will bequeathed, to charitable purposes :—Held, that the residuary real estate passed. *Whicher* v. *Hume*, 14 Beav. 509. Affirmed, 1 De G. M. & G. 506 ; 21 L. J., Ch. 406 ; 16 Jur. 391.

"**Worldly Estates.**"]—The words "worldly estates" :—Held, to pass real and personal estate. *Muddle* v. *Fry*, 6 Madd. 270.

"**Worldly Goods.**"]—A testator made his will in part in the following words : "I give to (trustees) all my worldly goods of what nature and kind soever, and wheresoever they might be found, upon trust to perform the trusts and conditions under-mentioned ; my wife to have possession of all while she lives ; but if she marries, to quit possession ; all my debts and legacies to be paid out of my personal estate and Westwood Close. To my son J. W., his heirs and assigns for ever. 20*l.* and Honey Close ; to W. E. and T. my children, and to the child or children that my wife may be enceinte with at the time of my decease. the rest of my worldly goods ; all my debts to be paid at my decease " :—Held, that the words "all my worldly goods of what nature or kind soever and wheresoever they might be found" included the whole of the real

and personal estate of the testator; and the words "the rest of all my worldly goods" carried the residuary real and personal estate, which passed to the children named in the will, and R. W. born in due time after the testator's decease. *Wright* v. *Shelton*, 18 Jur. 445.

"All I am Worth."]—Devise of "all I am worth" will pass real estate. *Huxstep* v. *Brooman*, 1 Bro. C. C. 437.

ii. *Advowson and Next Presentation.*

Lands, Tenements and Hereditaments.] — Devise of lands, tenements and hereditaments, subject to a term of eleven years, in trust, to receive the rents, issues and profits of the premises that from time to time should accrue and become due, and dispose, &c. An advowson in gross passes, and a sale of the next presentation within the term by direction, and for the benefit of the cestui que trust, was established. *Albemarle (Earl)* v. *Rogers*, 2 Ves. 477.

Living.]—The word living is sufficient to pass an advowson, but it may be restricted to the next presentation. The context must determine its meaning. *Webb* v. *Byng*, 2 K. & J. 669; 4 W. R. 657.

Devise to a minor of "the livings of Q. and C., should he like the profession and be qualified for them":—Held, to shew an intention to confer on the devisee a personal benefit; therefore, that the devise was confined to a single presentation, and did not extend to the advowson. *Ib.*

Rents, Dividends, Interest and Annual Income.]—A testator, who was both patron and incumbent of a living, devised the advowson and all his other real estates, and also his personal estate, to trustees in trust to pay the rents, dividends, interest and annual income of his real estates, until they should be sold as thereinafter directed, and also of his personal estate, to his sister, until she should have a child; and immediately after her having a child, in trust to stand seised and possessed of his real estates, if not then sold, and of his personal estate, and the rents, dividends, interest and annual income thereof, in trust for her children or child who should attain twenty-one, their heirs, &c.; and if she should have no such child, then in trust, after her death, for the trustees, their heirs, &c. The testator then directed his trustees to sell the advowson after his death. At the testator's death, his sister (who was his heir) had three infant children; and his living having become vacant by his death, the question was whether the children, their mother, or the trustees were entitled to present to it:—Held, that as the presentation to a living does not produce rents, dividends, interest or annual income, the dispositions of the will were not applicable to that species of property; and, consequently, that the testator's sister was entitled, as his heiress-at-law, to present to the living on the existing vacancy. *Martin* v. *Martin*, 12 Sim. 579; 11 L. J., Ch. 291; 6 Jur. 360.

Rents, Issues and Profits.]—A testator, who was entitled to various rectories, devised his manors, advowsons, messuages and hereditaments to trustees to make certain payments out of the rents, issues and profits, and subject thereto to accumulate the "residuary or surplus rents, issues and profits" of the property for twenty-one years on specified trusts. A claim by the heir-at-law to the proceeds of sale of a next presentation to one of the rectories, on the ground that the next presentations were not disposed of under the trust of "rents, issues and profits," was disallowed. *Cust* v. *Middleton*, 34 L. J., Ch. 185; 10 Jur. (N.S.) 1227; 11 L. T. 552; 13 W. R. 249.

Semble, that the words "rents, issues and profits" were of themselves sufficient to include the proceeds of sale of the next presentation. *Ib.*

Rents and Profits.]—Devise of surplus rents and profits carries a right of presentation. *Sherrard* v. *Harborough (Lord)*, Ambl. 167.

Testator devised inter alia all his estate, &c., to trustees on trust, out of the rents and profits during the lives of A. and B., and the survivor, to pay debts, legacies and repairs, subject thereto to pay 2,000*l.* a year to A. who was his heir-at-law, and subject thereto to B. for life:—Held, that advowsons passed, that the next presentations belonged neither to A. nor to B. till the trusts for payment of debts, &c., were satisfied, and must be sold for those purposes. *Cooke* v. *Cholmondeley*, 3 Drew. 1; 3 W. R. 1.

Tenement.]—An advowson does not pass by the word "tenement." *Kensey* v. *Langham*, Cas. t. Talb. 145, n.

Tenements and Hereditaments.]—An advowson in gross will pass by the words "tenements" and "hereditaments," but not by the words "lands," and it is assets by descent to satisfy bond creditors. *Westfaling* v. *Westfaling*, 3 Atk. 460, 465.

Next Presentation passing by Devise of Advowson.]—If A., seised of an advowson, be also incumbent and devises it, the devisee, after his death, shall nominate; for where the ownership and property of an advowson be in the devisee, they, and not the heir, shall nominate in consequence of such ownership, nor will it make any difference whether the devisee has the advowson in him as a personalty or as a realty. *Hawkins* v. *Chappell*, 1 Atk. 622.

"Next" Construed Next in Disposition of Testator.]—A., by will, directed trustees, upon the death of the present incumbent, to present A. to the living of S., in case he should take orders; and if he should not, or, taking orders, should die in the lifetime of B., then to present B., in case he should take orders; and after their several deceases, or of such of them as should take orders and be presented, or in the event of neither taking orders, A. devised the advowson to C. in fee:—Held, that the gifts in favour of A. and B. were in succession and not alternative, and that on the death of A., B. was entitled to be presented. *Hatch* v. *Hatch*, 20 Beav. 105; 3 W. R. 354.

A testator having the power of disposing of an advowson (subject to the existing incumbency of A., and a contingent right of B. to be afterwards presented), devised "the next avoidance thereof" in favour of C.:—Held, that "the next" meant the next the testator had power to dispose of, viz. that following the incumbency of A. and B. *Ib.*

iii. *Tithes.*

Land.]—One has no lands in A., but has tithes there, and devises all his land in A.; the tithes as they are issuing out of the land, and part of the land, and part of the profits thereof, shall pass. *Ashton* v. *Ashton*, 3 P. Wms. 386; Cas. t. Talb. 152.

Real Estates.]—Testator devised certain tithes to his nephews D. and W. for their lives successively, and, after the expiration thereof, to the several provision and uses therein expressed and contained of and concerning his real estates; and he devised all his real estates, of what nature or kind soever, and wheresoever situate, subject to the payment of his debts, &c., in aid of his personal estate, to his niece and her sons in strict settlement, with remainders to his nephew W. and his sons, and to two other persons and their sons, in like manner, with remainder to another person in fee. The niece married, and had a son after the date of the will; and the testator, by a codicil, devised all his real estates, of what nature or kind soever, to that son for life, with limitations, by way of remainder, to his first and other sons in tail male; and on failure of such issue, he devised all his said real estates in the manner mentioned in his will, and declared that the devises thereinbefore made should take effect in precedence to the devises of his real estates contained in his will:—Held, that the words "my real estates," in the will did not include the tithes; but that those words in the codicil did include them, and, consequently, that the estates for life in the tithes, limited to the testator's nephews, D. and W. by the will, were postponed to the limitations in the codicil to the son of the testator's niece and his sons. *Evans* v. *Evans*, 17 Sim. 86; 14 Jur. 383.

iv. *Money to be Laid Out in Land.*

Estates.]—Personal estate to be laid out in land, but lent on mortgage instead, considered as land, having been always out in trustees, and the uses never united with the possession, and passed by such general words in a will as would pass land, as "all my estates, &c., whatsoever and wheresoever." *Rashleigh* v. *Master*, 1 Ves. 201; 3 Bro. C. C. 99.

Land.]—Money agreed to be laid out in land:—Held, to pass under a devise of all freehold, leasehold, and copyhold lands lying in I. and in E. or elsewhere. *Guidot* v. *Guidot*, 3 Atk. 254. And see *Harvey* v. *Aston*, 1 Atk. 361; *Green* v. *Stephens*, 12 Ves. 419; 17 Ves. 64; *Lingen* v. *Sowray*, 1 P. Wms. 172; Pre. Ch. 400; Gilb. Exch. R. 91; 10 Mod. 39.

Money under a direction to be laid out in land considered as real estate, under a general disposition by the will of a person entitled absolutely in either shape of the "money and land," in the absence of intention, the word "money" being answered by another fund of stock. *Biddulph* v. *Biddulph*, 12 Ves. 161.

Lands, Tenements, and Hereditaments.]—A remote reversion in real estates and lands to be purchased and settled, will pass by general words in a will, as "all and every other my lands, tenements, and hereditaments," though the uses are immediate. But the purchase being postponed to the death of the devisor, the reversion in the estates to be purchased and settled to the same uses subsequent to his death, not being an interest vested in him, did not pass; and though, upon the settlement, a power of appointment was implied, the will, particularly executing express powers, did not amount to an execution of that implied power. *Att.-Gen.* v. *Vigor*, 8 Ves. 256.

Manors, &c.]—Money was to be laid out in land to be settled to the husband for life, remainder to raise portions for younger children; the money was afterwards invested by direction of the husband in S. S. annuities; afterwards, by will, he devised generally all his manors, &c., to certain uses; the money in the funds must be laid out in land. *Hickman* v. *Bacon*, 4 Bro. C. C. 333.

v. *Residue and General Personal Estate.*

a. Particular Words.

All Property.]—By will testator nominated wife his executrix, "thereby bequeathing to her all the property of whatever description or sort that I may die possessed," &c.:—Held, she is entitled, though not as executrix, to all his property that such a will could pass. *Noel* v. *Hoy*, 5 Madd. 38; 21 R. R. 271.

A., a British subject, domiciled at St. Petersburg, made a will in the Russian form and Russian language, by which he expressed a desire "to dispose of all my movable and immovable property." After giving legacies, and directing his household property and estates in Russia to be sold, he went on, "the money proceeds of all the above, as also the whole of my capital which shall remain with me after my death, in ready money and in bank billets" (bank debentures peculiar to Russia), "belonging to me, shall be divided into ten equal parts," two of which he devoted to debts and funeral expenses; and said, "of the remaining eight parts, I intend afterwards making a detailed proposal;" but if he did not (and he never did), they were to go to charitable purposes. He then named executors, and concluded thus: "and as all my movable and immovable property is mine own, honestly acquired by myself, nobody has a right to interfere with my dispositions, and contest the same, and no one has a right to interfere with or contest the dispositions and proceedings of my executors." The testator had large funds in English consols:—Held, that the executors did not take these consols under the general bequest in the will. *Enohin* v. *Wylie*, 8 H. L. Cas. 1; 31 L. J., Ch. 402; 8 Jur. (N.S.) 897; 6 L. T. 263; 10 W. R. 467. Affirming 1 De G. F. & J. 410.

Held, also, that as to these consols there was an intestacy. *Ib.*

Blank.]—A will, after gifts of legacies and direction for payment of funeral expenses, contained the words: "I leave —— to my sister":—Held, that there was a gift of residue. *Perkins* or *Parkins* v. *Fladgate, Bassett, In re*, 41 L. J., Ch. 681; L. R. 14 Eq. 54; 20 W. R. 589.

Debts.]—An unascertained residue held to pass under the will of the residuary legatee, by the words "debts due to me at my decease."

Bainbridge v. *Bainbridge*, 9 Sim. 16; 7 L. J., Ch. 4; 2 Jur. 63.

A. bequeathed "her household furniture, goods, ready money, and all debts and securities":—Held, that the residuary personal estate of A. passed thereunder. *Avison* v. *Simpson*, Johns. 43; 5 Jur. (N.S.) 594; 7 W. R. 277.

Effects.]—A testator gave various specific portions of personal estate to his wife, for and during her natural life, if she should so long continue his widow; but at her death, or in case she should marry again, then he gave all the things before given, adding the words "and effects, and also all my household furniture, which I hereby give to her for her sole use and benefit for and during the term of her natural life, if she shall so long continue my widow," to be equally divided among the children that he then had or might thereafter have by his said wife; but in case his wife should not marry again after his decease, he gave her "all and every his personal estate and effects whatsoever" for her life, and the same to be equally divided to and amongst such of his children as should be living at her decease, share and share alike. The testator died within three weeks after making his will:—Held, first, that the first gift was not merely specific, but passed the whole of his personal estate; secondly, that the two clauses were not repugnant, but the first was intended to apply to the case of the widow marrying again, and the second to the case of her not marrying again; and the latter event being that which happened, the children living at the death of the widow were alone entitled, to the exclusion of representatives of deceased children. *Wiggins* v. *Wiggins*, 2 Sim. (N.S.) 226; 21 L. J., Ch. 742.

"Else."]—A bequest of "my furniture, plate, books, and live stock, or what else I may be possessed of at the time of my decease," will pass the general residuary estate, though followed by specific bequests and devises to the same person, and by gifts of pecuniary legacies to various other persons. *Fleming* v. *Burrows*, 1 Russ. 276; 4 L. J. (O.S.) Ch. 115; 25 R. R. 48.

"Elsewhere."]—*See* **"Or Elsewhere,"** infra.

Goods.]—If a man gives a legacy and then says, "I give all my goods," it will pass the residue, though the word "goods" in common parlance means "goods only," and not the whole personal estate. *Crichton* v. *Symes*, 3 Atk. 61.

Goods and Chattels.]—A testator may make a residuary gift at the commencement of his will, if there be no other gift of that nature; and the words "goods and chattels" in such a clause may pass general personalty; but where there is a subsequent and clearly residuary clause, "goods and chattels" must be taken in the ordinary sense. *Mullins* v. *Smith*, 1 Dr. & Sm. 204; 8 W. R. 739.

"Left."]—A testatrix made the following indorsement on one of her testamentary papers: "I think there will be something left after my funeral expenses, &c., are paid, to give to W. B., now at school, towards equipping him to any profession." By another testamentary paper she bequeathed a sum of 500*l.* to W. B.:—Held, that under the first-mentioned paper W. B. was her residuary legatee. *Leighton* v. *Bailie*, 3 Myl. & K. 267; 3 L. J., Ch. 133.

Testator, reciting his intention to dispose of all his property, and that his daughter was likely to die (of a violent distemper), left his wife, if she died, the revenue and dividends of such property; but if his daughter lived, directed that his wife should only have her dower, giving the residue and dividends to that daughter; if she died without children, testator gave his brother "all that should be left": the daughter survived the testator, but died of the same illness without issue:—Held, that the mother was still entitled for life, and that the words "what should be left" constituted a good residuary bequest to the brother. *Duhamel* v. *Ardovin*, 2 Ves. Sen. 162.

Money.]—A mere gift of money may pass whatever is the representative of money. The expression "money" may represent the entire personal estate. *Stratton* v. *Hillas*, 2 Dr. & War. 51.

Sums of money in a will:—Held, to comprise personal estate generally. *Whateley* v. *Spooner*, 3 K. & J. 542.

"All the moneys which may hereafter revert to me":—Held, to be confined to money in its ordinary sense, and not to pass the general residue. *Eaton* v. *Att.-Gen.*, 13 W. R. 424.

A testator made his will in the following words: "I give to my wife, during her natural life, the interest of all sums of money I may die possessed of, subject to such agreements, if any, which I may enter into in my lifetime; and after her decease, I give all such interest money unto my daughter Mary during her natural life, and after her decease then I give the principal and interest unto my daughter's child or children, equally between them, share and share alike; and I direct my executors to advance and allow any reasonable sum or sums of money, from time to time, for the promotion in life of all or any of the children of my daughter, by way of apprenticeship or otherwise. And in case my daughter should die without issue of her body, unmarried or under age, then I give the said money and interest equally between my brothers and sisters; and in case of their deaths, to their respective child or children, equally between them." There was no residuary gift. At his death he left 450*l.* cash, furniture, and leasehold farm, cattle and farming stock:—Held, that the language relating to "moneys" meant "money" strictly, and that there was intestacy as to the residuary property. *Larner* v. *Larner*, 3 Drew. 704; 5 W. R. 513.

A testatrix, two days before her death, made a holograph will in these words: "I leave one-half of the money of which I am possessed to my sister, H. F. C., and the remainder to be equally divided between my sisters O. G. P. and S. A. C., and after them to their children":—Held, a complete disposition of all her personal estate. *Cadogan, In re, Cadogan* v. *Palagi*, 49 L. T. 666; 32 W. R. 57.

A testator, after expressing his intention to make a settlement of his affairs, appointed A. B. and C. D., his executors, to take and receive all moneys that might be in his possession, or due to him at the time of his decease, and to prosecute, if necessary, for the recovery thereof, to be by them placed in the British funds, or otherwise laid out upon such security as they should deem sufficient. On a question whether a sum of stock was disposed of by will:—Held, that the will operated as a complete disposition of all the personal estate, even if the word "moneys" were to receive only the strict construction, but

that on the context of this will the word "moneys" must be taken to include stock in the funds. *Waite* v. *Combes*, 5 De G. & Sm. 676; 21 L. J., Ch. 814; 17 Jur. 155.

A testator sold lands and left 900*l.*, the purchase-money, in the hands of his agent, a land surveyor, to be invested on security; the agent died, and was supposed insolvent, without having invested the money. The testator then, by his will, gave to his wife all his ready money and securities for money, money in the funds, and money in the bank or banks, if any, due or owing to him at the time of his decease:—Held, that the 900*l.* passed, and the rather because there was no gift of any residue, so that on the whole will there appeared an intention that all his property should pass, and that the words he had used should include everything, there being no other assets. *Cooke* v. *Wagster*, 2 Sm. & G. 296; 2 Eq. R. 789; 23 L. J., Ch. 496; 18 Jur. 849; 2 W. R. 434.

Principal Money.]—In a will the testator gave the income of his "principal money" to his wife, for the support of herself and the education of his children, and at her death, or on her marriage, to be divided between them, and made no other disposition of his property. He died entitled to some real estate, and of personal property worth 40,000*l.*, consisting chiefly of the value of his shares in two businesses, but including certain leaseholds:—Held, that the words "principal money" included his whole personal estate, including the leaseholds, but not the pure realty. *Prichard* v. *Prichard*, 40 L. J., Ch. 92; L. R. 11 Eq. 232; 24 L. T. 259; 19 W. R. 226.

Money remaining.] — A gift to A. of the remainder of money, goods, and debts due to the testator after payment of debts, constitutes A. residuary legatee. *Bloomfield, In goods of*, 31 L. J., P. 119.

A testatrix, having given directions respecting her funeral, after payment of her funeral expenses and just debts gives certain legacies and annuities, and after all the legacies are paid leaves whatever money remains or whatever money she may be entitled to, or have left her, to M. G. and F. G., and in case of the death of either of two annuitants an annuity of 60*l.* to go to the survivor, and then over to M. G. and F. G., with other provisions. The testatrix then left whatever money remained to O. and his four sisters, with specific gifts to her two sisters; and if they did not survive her to M. G. and F. G.; and if she had omitted naming anything she left it to her two sisters C. B. and J. V. The testatrix left funded property, some of which was set apart to answer the annuities; three annuitants, one being a legatee, survived the testatrix. M. G. died under age and unmarried, and one of the trustees was also dead. Upon bill filed to determine the meaning of the words "whatever money remains," and whether that clause or the clause where she referred to having "omitted naming anything" was residuary:—Held, that the latter was not, but that the former was residuary and included everything not before given. *Barrett* v. *White*, 24 L. J., Ch. 724; 1 Jur. (N.S.) 652; 3 W. R. 578.

A testator, after giving specific and pecuniary legacies, willed that A. and B. should divide equally any moneys which might remain to his account after payment of his debts and pecuniary legacies. The testator, at the date of his will and at his death, had money account subsisting between him and his bankers, and other persons:—Held, that the bequest did not pass his residuary estate, but only the balances due on those accounts, subject to the debts and legacies. *Hastings* v. *Hane*, 6 Sim. 67.

A testatrix gave "everything of which she died possessed" to her executors for certain specified purposes. She made several specific bequests of jewellery, and, if any money remained after paying these bequests, she left "the residue of money (if any)" to A.; she then made a specific bequest to B., and some small pecuniary legacies:—Held, that her general residuary personal estate (including railway stock) passed under the gift of "the residue of money." *Montagu* v. *Sandwich (Earl)*, 3 N. R. 186; 33 Beav. 324; 10 Jur. (N.S.) 61; 9 L. T. 632; 12 W. R. 236.

The word "money" standing by itself is confined to the proper meaning of that word; yet, if money is given after a direction to pay debts, legacies, and funeral and testamentary expenses, or with any other words which denote an intention on the part of the testator to dispose of the whole of his estate, it will be construed as synonymous with property. *Nevinson* v. *Lennard (Lady)*, 34 Beav. 487.

A testatrix, whose property consisted chiefly of stock in the public funds, after giving various legacies of sums of money, gave and bequeathed to the inhabitants of Tawleaven Row all which might remain of her money after her lawful debts and legacies were paid:—Held, that the persons found to be inhabitants of Tawleaven Row were entitled to the residue of the testatrix's general personal estate. *Rogers* v. *Thomas*, 2 Keen, 8.

A testatrix, whose personal property consisted chiefly of stock, after bequeathing a number of pecuniary and specific legacies, and giving certain directions as to her funeral, gave 200*l.* to each of her executors for their trouble, and bequeathed whatever remained of money to the five children of E. D.:—Held, that by the words "whatever remains of money" the testatrix referred to her general residuary personal estate. *Dowson* v. *Gaskoin*, 2 Keen, 14; 6 L. J., Ch. 295; 1 Jur. 669.

A bequest "of money which may remain after payment of the testator's debts," in the absence of any other gift of the residue, includes the general residue of the testator's personal estate not specifically bequeathed. *Stocks* v. *Barré*, Johns. 54; 5 Jur. (N.S.) 537; 7 W. R. 247.

A testatrix, by her will, after giving a pecuniary legacy and bequeathing furniture, leaseholds, and dock shares, gave "all the rest of her money, however invested," to her nephew R. J. F., "under deduction of 50*l.* to be paid to each of her executors." She then gave a number of specified articles, such as ornaments, plate, pictures, and house linen, to various other nephews and nieces, and appointed executors:—Held, that the gift to R. J. F. was a general residuary gift, and included the furniture, leaseholds, and dock shares, the bequest of which had lapsed. *Pringle, In re, Walker* v. *Stewart*, 50 L. J., Ch. 689; 17 Ch. D. 819; 45 L. T. 11; 30 W. R. 44.

Money in Bonds—Remainder of.]—A testatrix, after disposing of various portions of her property (other than Spanish bonds), bequeathed

"the remainder of her money in the Spanish bonds" to her nephews and nieces, and stated her intention to be to divide her property equally between her two sisters' children. The bulk of the residue consisted of Spanish bonds:—Held, that the general residue passed under the bequest; the words "in the Spanish bonds" being, under the circumstances, descriptive only of the nature of the investment of the bulk of the property comprised in the bequest. *Patrick* v. *Yeatherd*, 3 N. R. 367; 33 L. J., Ch. 286; 10 L. T. 92; 12 W. R. 304.

Other Effects or Property.]—Words of will were, "All my other effects I will to J., &c., to be sold for his benefit":—Held, all residue of testator's property, including money, passed thereby to J. *Hearne* v. *Wigginton*, 6 Madd. 119.

A will contained the following words: "I give, devise, and bequeath unto my dearly beloved wife, Mary Jupp, all my furniture, jewellery, pictures, wearing apparel, and other effects belonging to me at the time of my decease." The will went on to make certain specific bequests to the wife, and concluded by directing her to pay the testator's debts, and leaving it to her discretion whether or not she would provide for his sons and daughters by a previous marriage and for his nephews:—Held, that the words "other effects" constituted the wife a residuary legatee. *Jupp, In goods of*, 60 L. J., P. 92; [1891] P. 300; 65 L. T. 166; 40 W. R. 176; 55 J. P. 456.

D., by his will, gave all his property to his executor upon trust for the purposes of his will, and after gifts of 300*l.* to a daughter, and five shillings a week to his son, J. D., bequeathed the remainder of his property "and any other property of which I may die possessed, and I nominate and appoint my son, R. D." sole executor; but the testator omitted to say to whom he bequeathed the remainder:—Held, that he had failed to express his intention, and that there was an intestacy as to the residuary real and personal estate. *Driver* v. *Driver*, 43 L. J., Ch. 279.

"Or Elsewhere."]—The only disposition of property in the will of A. was as follows: "All the property that I have now, or may have at the time of my decease, in my apartments at 13, Plaistow Grove, or elsewhere, I give to my three nieces":—Held, that the words "or elsewhere" must be so construed as to pass the residuary estate of A. *Scarborough, In goods of*, 9 W. R. 149.

Overplus.]—It is a question, to be determined by the particular words of each will, whether a gift of "surplus" or "residue" means surplus or residue properly so called, or a mere proportional share of a particular fund. Where, after the gift of a fund charged with certain payments, the words were "and the overplus which the said, &c., do produce more than all these disbursements do amount to (which I do find and compute to be about 60*l.* per annum)" they were held to mean surplus, and not proportional share. *Southmolton Corporation* v. *Att.-Gen.*, 5 H. L. Cas. 1; 23 L. J., Ch. 567; 18 Jur. 435.

Remain.]—A testator, after bequeathing several legacies to his relations, and for charitable purposes, says, "to meet these I have 200*l.* in the Bank of Ireland; the little matters of furniture will be sold. If anything shall remain after all being paid, the Rev. Mr. G. will divide it amongst the poor." At the time of his death the testator had no such sum as 200*l.* in the Bank of Ireland, but his property consisted of 12,462*l.* 2*s.* 8*d.* of 3½ per cent. stock and 52*l.* in cash:—Held, that the general residue of the testator's estate passed under the residuary clause. *Gaffney* v. *Hevey*, 1 Dr. & Wal. 12.

A testatrix, after directing her debts and funeral expenses to be paid, and giving certain legacies and annuities, gave to N. whatever money remained. She afterwards made some specific bequests, and concluded, "if I have omitted naming anything, I leave it to my two sisters":—Held, that there was a general residuary bequest to N., and that the corpus required for payment of the annuities passed by that bequest after the annuities were satisfied. *Barrett* v. *White*, 24 L. J., Ch. 724; 1 Jur. (N.S.) 652; 3 W. R. 578.

The words "what remains" at the close of a bequest of a specific fund:—Held, a general residuary disposition, the full sense not being necessarily confined; comprising, therefore, personal estate bequeathed upon a contingency too remote, not being to take place until thirty years after the testator's death. *Crooke* v. *De Vandes*, 11 Ves. 330.

Rest and Residue.]—A testator, after making various dispositions of parts of his estate, appointed S., his executor, to "execute the disposal of all his personal property and effects by sale at auction, the proceeds of which he gave to his two youngest nieces in London or elsewhere"; and the residuary clause was, "the rest of my property in consols, after all my just debts and funeral expenses are paid, and what is found on my person and in the house, I give and bequeath" to five charities (naming them) "free of legacy duty":—Held, that the bequest to the nieces was residuary. *Foxen* v. *Foxen*, 5 N. R. 1; 10 Jur. (N.S.) 1061; 11 L. T. 292; 13 W. R. 33—L. C.

In a will made before 1838 a gift of "400*l.*" stock was obliterated, and the words "residue of my property" substituted, whereby the words admitted to probate were "residue of my property stock":—Held, that the will, by these words, passed to the legatee all the funded property belonging to the testatrix at the time of her death, although much of it was acquired after the date of the will and after 1838. *Banks* v. *Thornton*, 11 Hare, 176.

"Residue" is not a "legacy" in the ordinary sense of the term, though the person taking it is a residuary legatee. *Ward* v. *Grey*, 26 Beav. 485.

Testator says, as to the rest and residue of his lands, &c., his will is, that the annual profits should be equally divided between A. and C., and said nothing about the personal estate. By all the rules of grammar as well as law the words "rest and residue" must relate to something that went before; and, where testator calls it by the name of real estate, can never be said to affect his personal. *Beauclerk* v. *Mead*, 2 Atk. 168.

Residuary Legatee.]—A testator having in the commencement of his will appointed his daughter to act in concert with his son to be guardian and executrix, added, "I also appoint and desire in this my last will and testament,

that my son to be my executor and residuary legatee, do jointly with my daughter, my executrix, who is to act independent of her husband, and be guardian to the children":—Held, that the son alone was entitled to the residue. *Langley* v. *Thomas*, 6 De G. M. & G. 645; 3 Jur. (N.S.) 345; 5 W. R. 219.

Rights and Credits.]—A testator, having by his will bequeathed certain legacies, proceeded as follows:—"To my son I give, devise, and bequeath all my lands, tenements, rights, and credits, *subject to the legacies aforesaid, and my debts, the remainder of my property* to be disposed of by him to and amongst his children in such shares and proportions as he shall think proper." The words in italics were interlined. By the last clause in the will, the interlineations, as well as the original text, were declared to be in the handwriting of the testator. In 1839 he added a codicil to his will, by which he merely made a declaration with reference to one of the legacies given by the will. Semble, the general personal estate of the testator would have passed under the words "rights and credits" alone, even if the interlineations had not been made. *Hutchinson* v. *Hutchinson*, 13 Ir. Eq. R. 382.

Surplus.]—Bequest of personal property held a general residuary disposition, although accompanied with expressions favouring a more limited construction, and pointing only to a surplus beyond the property specifically mentioned. *Bland* v. *Lamb*, 2 J. & W. 399. Affirming 5 Madd. 412.

Unappropriated.]—Testator, intending to dispose of all his personal estate, gives the residue in fifth shares, but appoints his brother "heir to whatever part of his estate should be unappropriated by his will"; one of the five shares lapsed in testator's lifetime:—Held, that the above was an ultimate general residuary clause, and comprised this as including not merely what was not mentioned, but everything not effectually given. *Jackson* v. *Kelly*, 2 Ves. Sen. 285.

Whatsoever and Wheresoever.]—A bequest of "all my household furniture, implements of trade, cattle, sheep, and all the rest and residue of my moneys, securities for money, and personal estate whatsoever and wheresoever, not hereinbefore disposed of," is a residuary bequest. *Taylor* v. *Taylor*, 6 Sim. 246.

A testatrix, after several small bequests, bequeathed "all my household goods, furniture, clothes, moneys, securities for money, whatsoever" to her sister:—Held, that these words constituted a residuary bequest, and the court granted administration with the will annexed to the sister. *Garrett, In goods of*, 26 L. T. 984.

b. Construction of Words "Ejusdem Generis."

Wide Words followed by Enumeration of Particulars.]—The word "effects" in a will restrained to articles ejusdem generis with those specified, though the consequence was a residue undisposed of. *Rawlings* v. *Jennings*, 13 Ves. 39; 9 R. R. 137.

As to the residue "of his estate and effects, whatsoever and wheresoever, canal shares, plate, linen, china, and furniture," the testator devised and bequeathed the same to his wife:—Held, that the residuary personal estate passed, and that the general words were not limited to things ejusdem generis with canal shares, &c. *Fisher* v. *Hepburn*, 14 Beav. 626.

A testator bequeathed to his mother "all and everything he died possessed of, namely, money, plate, books," and other enumerated articles, for her sole use; "and, lest there be any dispute, he declared again that he left her everything he died possessed of for her sole use, as stated above":—Held, that the whole residue passed, and that the bequest was not restricted to the enumerated articles and others ejusdem generis. *Kendall's Trust, In re*, 14 Beav. 608; 21 L. J., Ch. 278.

A sergeant in the East India service bequeathed as follows: "To my wife I bequeath my pay, clothing, balance of clothing money, and moneys that may be now due or may become due to me at my decease; also, the whole of my property and effects, that is to say, my box, clothes, bedding, &c., I bequeath to my wife":—Held, that the whole residue passed, including a reversionary interest in the produce of the sale and conversion of a residuary real and personal estate of another testator. *Gover* v. *Davis*, 29 Beav. 222; 30 L. J., Ch. 505; 7 Jur. (N.S.) 399; 9 W. R. 87.

A bequest in general words will not be restricted by the enumeration of articles forming part of a previous gift. *Ib.*

Testator gave his bank stock to trustees, in trust for T. B., for life, and his funded property to the same trustees, in trust for W. R. E., for life, and after his death in trust for his issue; and he directed the trustees, after the decease of T. B., to pay the dividends of his bank stock to W. R. E., for life, and after his decease to apply the dividends and capital for the benefit of the children or child of W. R. E., in such manner as he had directed respecting his funded property; and should W. R. E. die without issue, male or female, of his body lawfully begotten, then he directed the trustees to apply his funded property and bank stock for such charitable or other purposes as they should think fit, without being accountable to any person; and he gave the residue of his personal estate and effects, wines, pictures, plate, books, and furniture to W. R. E.:—Held, that the ultimate trust of the funded property and bank stock was not too remote, but was void for uncertainty, and that the residuary clause was general. *Ellis* v. *Selby*, 7 Sim. 352. Affirmed, 1 Myl. & Cr. 286; 5 L. J., Ch. 214.

A testatrix says, "I give to B., &c., all my goods, wearing apparel, of what nature and kind soever, except my gold watch":—Held, that all her wearing apparel and ornaments of her person passed to the legatee, and any other household goods and furniture, but no other part of her estate. The words "all my goods, wearing apparel" shall not be confined to wearing apparel only, but shall be construed "goods and wearing apparel." *Crichton* v. *Symes*, 3 Atk. 61.

When a testator gives his property generally by words such as "all my property," or "all that I have power over," and then proceeds to enumerate particulars, the subsequent enumeration of particulars does not cut down the effect of the general words, even when the particulars enumerated constitute only an insignificant portion, and not the principal part of the testator's property. *King* v. *George*, 46 L. J., Ch. 670; 5 Ch. D. 627; 36 L. T. 759; 25 W. R. 638—C. A.

Therefore, where a testatrix made a holograph will in these words: "I do bequeath to A. all that I have power over, namely, plate, linen, china, pictures, jewellery, lace, the half of all valued to be given to H. The servants in the house who have been a year with me to receive 10*l*., and the clothes divided between them. Also all kitchen utensils," and the articles enumerated formed an insignificant part of her property:—Held, that the bequest was not restricted to the articles specifically enumerated, but that it passed the whole of the real and personal estate of the testatrix. *Ib.*

A markswoman made a will, shortly before her death, in which the only bequest was a gift of her "personal property, consisting of money and clothes." She was possessed at her death of property, besides cash in hand and clothes, consisting of money out on mortgage, money secured on a promissory note, and a reversionary interest in a sum of cash:—Held, that the words "consisting of money and clothes" did not cut down the generality of the gift of personal property, being only an imperfect enumeration of the particulars of which the personal estate consisted; and that the whole of her personal estate passed by her will. *Dean* v. *Gibson*, 36 L. J., Ch. 657; L. R. 3 Eq. 713; 15 W. R. 809.

N. K. by his will, after bequeathing legacies and directing his debts to be paid, ordered all his effects to be sold by auction, and such money or valuables as he should die possessed of to be handed over to D., to be applied to the use of M. K. to a certain amount during her life, and, if after her demise any residue remained, such residue to be expended in masses for his son's sake; and directed a security in the hands of J. O. N. to be applied as above directed. "My Royal Canal stock is to be sold; also, my Grand Canal debentures, as necessity may require, at the discretion of my executors":—Held, that the whole of the residue, including the stock and debentures, was disposed of under the residuary clause, and passed to the executor on the death of M. K.:—Held, also, that the bequest for masses for the testator's son was valid, and not void as a superstitious use. *Read* v. *Hodgens*, 7 Ir. Eq. R. 17.

Bequest of "all my right and title to my property in the town of R., namely, my dwelling-house and household furniture, and all things now therein, in my possession, especially my car-horse and covered and side cars":—Held, that banknotes, known by the testator to be in the house at the time the will was made, passed to the legatee. *Mahony* v. *Donovan*, 14 Ir. Ch. R. 388—C. A.

A testatrix, having executed a will and three codicils, made a fourth codicil as follows: "I do hereby bequeath to J. B. (to whom I have willed my landed property) also all my personalty, such as cash, furniture, &c., to be applied as I have requested him to do." The wishes of the testatrix as communicated to J. B. appeared fully from his affidavit in the action, and in part from a memorandum drawn up by him (but not signed by the testatrix) immediately before the execution of the codicil, and it also appeared thereby that the testatrix did not intend to alter her previous dispositions, except for the purpose of giving effect to her wishes as stated to J. B.:—Held, that her words "cash, furniture, &c.," were not sufficient to cut down the general expression "all my personalty"; and that, therefore, the fourth codicil extended to and comprised the whole personal estate of the testatrix. *Fleetwood, In re, Sidgreaves* v. *Brewer*, 49 L. J., Ch. 514; 15 Ch. D. 594; 29 W. R. 45.

Wide Words followed by Et cætera.]—Whether stock will, or will not, pass under the word "moneys," or under the word "stock," or under the word "chattels," depends upon the whole context of the will. The word "goods," and equally the word "chattels," used simply and without qualification, will pass the whole personal estate, including stock. A bequest of all moneys, goods, chattels, clothing, &c., the testator's property, which may remain after paying his funeral charges and debts, will pass the testator's interest in stock and money. *Kendall* v. *Kendall*, 4 Russ. 360; 6 L. J. (o.s.) Ch. 111; 28 R. R. 125.

Bequest of "all my household furniture and effects, plate, glass, books, wearing apparel, &c.":—Held, to pass the articles enumerated, and others, ejusdem generis, but not the general residue. *Newman* v. *Newman*, 26 Beav. 220.

The expression "&c." following the mention of specific chattels, is confined to things ejusdem generis, and does not include the residue of a testator's personal estate. *Barnaby* v. *Tassell*, L. R. 11 Eq. 363; 24 L. T. 221; 19 W. R. 323.

A husband directed that his freehold estate should be sold, and his debts paid by his widow and sole executrix, to whom he bequeathed "all my money, cattle, farming implements, &c., she paying my brother, J. C., the sum of ":—Held, that the widow was entitled to the general residue. *Chapman* v. *Chapman*, 46 L. J., Ch. 104; 4 Ch. D. 800.

A testator, after directing his debts, &c., to be paid, bequeathed to his wife his moneys, plate, &c. (enumerating several particular descriptions of personal property) and all the residue of his personal estate after payment of his debts, &c., and he directed his wife to give to his executors a bond for securing to them the payment of half the value of the said wines, plate, &c., enumerating several of the above-mentioned descriptions of personal property, but not mentioning the residue of his personal estate. The value was to be ascertained within three months from his death, and the plate was to be valued at a fixed price. The money payable on the bond was for the benefit of his nephews and nieces:—Held, that the bond was to be given for half the value of the property only which was specifically enumerated, and not for half the value of the general residuary estate. *Martin* v. *Welstead*, 18 L. J., Ch. 1.

Devise of the house in Camden Place and "all therein" to M. for life; "at her death I give and bequeath the house, &c. &c. to my nephew T., and his heirs." After the death of M., T. is entitled to all the chattels which were in the house at the testator's death, except the consumable articles. *Twining* v. *Powell*, 2 Coll. C. C. 262.

Generally, choses in action do not pass by a bequest of "goods and chattels" in a particular locality. Bequest "of all the goods and chattels, plate, linen, money at the bankers', or stock in the Monte de Milano, horses, carriages, &c., I may die possessed of at M.":—Held, also, that such Polish certificates and Neapolitan bordereaux (being government obligations) there situate, entitling the bearers to receive the interest and capital at a future time; held, also, that such securities could not be considered as money or cash; and thirdly, that not having their locality

at M., they did not pass under the words et cætera at M. *Hertford (Marquis)* v. *Lowther (Lord)* (*Countess Zichy's Case*), 7 Beav. 1; 13 L. J., Ch. 41; 7 Jur. 1167.

Enumeration of particulars followed by a gift in the following terms: "and also the whole of my property and effects, that is to say, my box, clothing, bedding, &c." :—Held, that the whole residue passed. *Gover* v. *Davis*, 29 Beav. 222; 30 L. J., Ch. 505; 7 Jur. (N.S.) 399; 9 W. R. 87.

Bequest of "the remaining part of my whole property, both in stock, household furniture, cash, &c., &c." :—Held, that the chattels real (with which alone the suit was conversant) passed by the will. *Mullally* v. *Walsh*, 3 L. R., Ir. 244.

Enumeration of Particulars followed by more General Words.]—Semble, that the general word "things" in a will following particulars enumerated is confined to things ejusdem generis. *Stuart* v. *Bute* (*Marquis*), 1 Dow, 73; 14 R. R. 14.

"Goods and chattels" will pass all personal estate, but, after furniture, &c., are restrained to articles ejusdem generis. *S. C.*, 11 Ves. 666; 8 R. R. 266.

Construction of a very inaccurate will, and the words "and all I am possessed of," were confined to a specific bequest of stock immediately preceding, meaning all interest in that fund, and did not comprise the general residue, which was by a subsequent clause expressly disposed of in a different manner. *Wilde* v. *Holtzmeyer*, 5 Ves. 811.

Testator, after giving at the commencement of his will various pecuniary legacies, and bequeathing all the rest and residue of his ready money, securities for money, and moneys in the funds to trustees upon certain trusts, concluded his will as follows: "And I do further give and bequeath to my said wife all my jewels, plate, linen, china, carriages, wines, and other goods, chattels, and effects whatsoever, as her own goods and chattels for ever; and I do hereby constitute and appoint her (my said wife) sole executrix of this my will" :—Held, that this clause carried the residue of the testator's property to the wife. *Parker* v. *Marchant*, 1 Y. & C., C. C. 290; 11 L. J., Ch. 223; 6 Jur. 292. And see *S. C.* on appeal, 1 Ph. 356; 2 Y. & C., C. C. 279; 12 L. J., Ch. 314; 7 Jur. 457.

Although the words "goods, chattels, and effects" may frequently be considered as having been used by a testator in a restrictive sense, yet primâ facie their import is general, and there are good grounds for considering them as used in a general sense either where they are not placed in connection with words or locality, or where they follow the enumeration of specific articles, or where there are no expressions in the will shewing a doubt in the testator's mind as to their comprehensiveness, or where the bequest in which they are contained is followed up by the appointment of an executor. *Ib.*

A bequest of "my wines and property in England" :—Held, to pass the testator's property in England of every description, including money in the funds and at his bankers', debts, and arrears of a pension due to him, and not confined to property ejusdem generis with wines. *Arnold* v. *Arnold*, 2 Myl. & K. 365; 4 L. J., Ch. 123.

General disposition by will not restrained by a defective specification. *Chalmers* v. *Storil*, 2 V. & B. 222.

A will restrained in point of extent to a partial disposition by a particular enumeration, and a reference to other instruments, notwithstanding the general words "personal estate"; specific disposition by will subsequent to annuities and legacies held auxiliary only, the general personal estate to be applied in the first instance. *Holford* v. *Wood*, 4 Ves. 76.

A testator bequeathed as follows: "As regards my worldly goods, I give and bequeath all my furniture, plate, books, and other personalty" to my wife :—Held, that the general words were not to be confined to things ejusdem generis, but that they included a share of the produce of real and personal estate to which the testator was entitled under the will of his father. *Nugee* v. *Chapman*, 29 Beav. 190.

A testator by his will gave the residue of his personal estate to A., B. and C., to be equally divided between them. By a codicil he gave A. the arrears of rent due to him for his real estate, and the amount of any salary due to him, and also bequeathed to A. all his clothes and any other property, goods, and articles belonging to him at the time of his death. By another codicil he revoked the bequest made to B. by his will :—Held, that the gift to A. by the first codicil was a general one, and that the words "property, goods, and articles" were not to be confined to articles ejusdem generis with clothes, and that consequently A. was entitled to two-thirds, and C. to one-third, of the residue. *Everall* v. *Browne*, 1 Sm. & G. 368; 22 L. J., Ch. 376; 1 W. R. 210, 226.

Bequest of household furniture, stock-in-trade, goods, chattels, and effects of every sort and kind, and also all moneys due on bond or simple contract :—Held, that the words "goods, chattels, and effects" ought not to be taken as ejusdem generis; but that the clause contained at once a general residuary bequest and a specific bequest of the furniture, stock-in-trade, and moneys. *Harris* v. *James*, 12 W. R. 509.

Diamonds and pearls made up for wear will not pass by a devise of a cabinet or collection of curiosities, consisting of coins, medals, gems, and Oriental stones, and other valuable things; valuable things must mean things ejusdem generis. *Cavendish* v. *Cavendish*, 1 Cox, 77.

A testator (tenant for life under a settlement of the B. H. estate and other lands, with remainder to his first and other sons in tail male with several limitations over) by his will gave certain specific things to be enjoyed by the person or the persons who for the time being should be entitled to the freehold or inheritance of the family estate at Stapleton, as and in the nature of heirlooms. He gave his furniture, plate, &c., to his brother A. He directed a sum of 1,000*l.* secured to him on the B. H. estate and other estates to sink into the freehold and inheritance of the said estates, that the same might merge them, and the rents and arrears of rent, with timber fallen, and other annual profits due to him at the time of his decease from the B. H. estate unto the person or persons who should be entitled to the freehold and inheritance of the same estate in possession on his decease. He gave his residue to his two brothers B. and C.; and he appointed his brother A. his sole executor. B. died in the testator's lifetime :—Held, that certain prepared brick earth, dug out of the estate by the tenant for life, and lying upon it at his death, and certain tiles so made and remaining on the estate, were comprised in and

passed by the words "other annual profits"; and that certain apportionable parts of the rents which, under the apportionment act, went to the testator's executor as part of his assets, passed under the words "due to him at the time of his decease." *Stapleton* v. *Stapleton*, 2 Sim. (N.S.) 212; 21 L. J., Ch. 434.

A devise in express words is not extended by subsequent general ones. *Roberts* v. *Kuffin*, 2 Atk. 112.

Money will not pass by a devise of all goods and things of every kind when the devisee has a money legacy at the outset of the will. *Ib.*

Testator gave to his son all his plate, jewels, trinkets, and all his furniture and other articles of domestic use and ornament. By a codicil, he gave to his wife all his provisions, wines, carriages, horses, and all his musical instruments, and the use of all his books, and all his money in his dwelling-house and in his banker's and land-steward's hands, for her own sole use and benefit:—Held, that the books were given to the son absolutely, subject to a life interest in the wife. *Cornewall* v. *Cornewall*, 12 Sim. 303; 10 L. J., Ch. 364; 5 Jur. 744.

A bequest of "foreign bonds and other securities":—Held, to pass foreign securities only, notwithstanding that testator had a very large personal estate vested in the British funds. *Ferguson* v. *Ogilby*, 2 Dr. & War. 548; 1 Con. & L. 554.

Bequest of "household furniture, goods, ready money, debts, and securities":—Held, to comprise the whole residuary personal estate and effects of the testatrix. *Avison* v. *Simpson*, Johns. 43; 5 Jur. (N.S.) 594; 7 W. R. 277.

Testator gave all his freehold and leasehold messuages, lands, and hereditaments, ready money, securities for money, stock in the public funds, goods, chattels, and effects, and all other his real and personal estate and effects, to trustees, in trust to pay the rents of his freehold and leasehold estates, and the dividends, interest, and proceeds of his money in the funds, and other his said personal estate, to his daughter for life, and, after her death, to stand possessed of his said freehold and leasehold estates, money in the funds, and all other his real and personal estate for the children of his daughter; and in default of such children, in trust to pay the rents of his said freehold and leasehold estates, and the dividends, interest, and proceeds of his said stock in the funds, and other his said personal estate, to his nephews for their lives, and after their deaths in trust to stand possessed of his said freehold and leasehold estates, money in the funds, and other his said personal estate for their children; and in default of such children, he gave his freehold and leasehold estates, stock in the public funds, and all other his said real and personal estate, to the corporation of S. in trust, as soon as conveniently might be after they should come into possession thereof, to sell the said freehold and leasehold estates, and also to sell, call in, and convert into money his said stocks in the public funds, and all other his said personal estate, and to lend the same to certain persons upon the terms therein mentioned. The testator at the date of his will, and at his death, was possessed of leasehold estates, turnpike securities, bank stock, and other personal estate:—Held, that the bequest to the trustees was a general residuary bequest, and that the leasehold and bank stock ought to be sold, and the proceeds invested in the three per cents.; and an inquiry was directed whether the turnpike securities were real and permanent securities. *Mills* v *Mills*, 7 Sim. 501; 4 L. J., Ch. 266.

On construction of will:—Held, word "effects" coupled with context operated as a bequest of the whole personal estate. *Michell* v. *Michell*, 5 Madd. 69; 21 R. R. 280.

Bequest of all other unbequeathed goods and chattels is residuary, notwithstanding a subsequent bequest to the same person of debts due to testator. *Bennet* v. *Batchelor*, 1 Ves. 63; 3 Bro. C. C. 28.

A testator gave certain specific property, the lease of premises occupied by him in his trade, and effects, to his wife for life, to be accepted by her subject to payment of debts, &c., and gave certain real estate to his executors, on trust to sell, the proceeds to form part of his residuary estate; and as to all the rest and residue of his estate, of whatever nature, &c., to his next heirs therein equally. Upon the question whether the word "effects" included the residue:—Held, that it did not; that the word "lease" took in all comprised in the lease, and that the charge was a general one. *Howse* v. *Seagoe*, 2 W. R. 597.

Construction of the word "other" contained in a residuary bequest of "all other the rest and residue" of the testator s personal estate. *Martin* v. *Glover*, 1 Coll. C. C. 269; 8 Jur. 640.

The husband by his will bequeathed as follows: "And unto my wife (whom I make full and wholly executrix) I give my house, with all my household furniture, as also all my plate, china, books, linen, and every other article belonging to me, both in and out of my house, and which may not be herein mentioned, she being subject to the payment of all my just debts, funeral and testamentary expenses":—Held, that the beneficial interest in the settled stock, which formed part of his general estate, did not pass to the wife. *Collier* v. *Squire*, 3 Russ. 467; 5 L. J. (O.S.) Ch. 186; 27 R. R. 112.

One being on shipboard, and entitled to part of a considerable leasehold estate by the death of his father, which he did not know he had a right to, makes his will at sea, and devises to his mother (if living) his rings, and makes A. his executor, and devises to A. his red box, and all things not before bequeathed. This shall not pass the leasehold interest, or what the testator did not know he was entitled to, but shall be restrained to things ejusdem generis. *Cook* v. *Oakley*, 1 P. Wms. 302.

A bequest in general words will not be restricted by the enumeration of articles forming part of a previous gift. *Gover* v. *Davis*, 29 Beav. 222; 30 L. J., Ch. 505; 7 Jur. (N.S.) 399; 9 W. R. 87.

A husband, after bequeathing a legacy of 1,060*l.* to his wife, gave her his writing-desk and "all the small coins, curiosities, and other articles" therein contained. At the time of his death the desk contained, besides the curiosities, a sum of gold, several bank-notes, and silver and copper, amounting in all to 32*l.*:—Held, that the gift did not include the 32*l.* *Dutton* v. *Hockenhull*, 22 W. R. 701.

Under a bequest "of all household furniture, stock, crop, movables, and other chattels," the legatee is entitled to scrip for shares, bank deposit receipts, and railway dividend warrants in the testator's house at the time of his death,

although those securities bore a date subsequently to that of the will. *M'Cormick* v. *Patten*, Ir. R. 5 Eq. 295.

A testator bequeathed to his wife absolutely 100*l*., his household furniture, &c., and then bequeathed to her the interest of moneys invested by him in certain loan societies, and all his other property, during her life. He afterwards bequeathed all moneys belonging to him in a friendly society and in all other societies to his wife absolutely:—Held, that the expression "all other societies" meant societies ejusdem generis. *Marks* v. *Solomons*, 2 Hall & Tw. 323; 19 L. J., Ch. 555.

A., living in India, and possessed of a share of 10,000*l*. charged on lands in Ireland, made his will in India, and thereby, after making several bequests in the company's rupees, proceeded as follows: "I desire that my plate, clothes, horses, and books, with the exception of those which my wife shall select, together with all my other personal property, with the following exceptions, be sold to the best advantage, and the proceeds appropriated to the liquidation of my debts: the balance, if any, to be handed over to my wife, to assist in defraying her expenses to England." He then bequeathed his watch and chain, and mathematical instruments of every description, and his professional books, to his brother-in-law, and appointed executors for India and executors at home:—Held, that the share in the Irish charge passed as part of the testator's other personal property. *Armstrong* v. *Armstrong*, 9 Ir. Ch. R. 487.

After sundry specific and pecuniary gifts, a testatrix "directed her executor to sell by public auction all her household furniture and other effects, and apply the same in discharge of the debts, &c., and the surplus to sink into the residue of her property thereinbefore mentioned, subject to the legacies and payments in the will mentioned; and as concerning such residue, she gave the same" to the residuary legatees:—Held, a good residuary bequest of all the personal estate, and therefore sufficient to comprise and pass many particulars of considerable value, of the existence of which the testatrix was probably ignorant. *Lloyd, In re, Baker* v. *Lloyd*, 2 Jur. (N.S.) 539.

Under a bequest of lands, "stock, crop, farming implements, household furniture and effects, whatsoever and wheresoever," money in a bank, and debts due to the testator, will pass. *Lowry* v. *Patterson*, Ir. R. 8 Eq. 372.

A gift by will of "my household furniture and effects of all kinds" followed by a gift for another purpose of "all my other real and personal estate":—Held, to include only effects ejusdem generis. *Hutchinson* v. *Rough*, 40 L. T. 289.

The mere fact that words of general import in a gift are preceded by an enumeration of particulars is not sufficient ground for restricting the signification of the general words. *Hodgson* v. *Jex*, 45 L. J., Ch. 388; 2 Ch. D. 122; 24 W. R. 575.

A will contained a gift of all the testatrix's furniture, plate, linen, and other effects that might be in her possession at her death. There was no other residuary bequest. She died possessed of a considerable amount of money in savings banks, promissory notes, cash, and jewellery:—Held, that the general residue passed under the words "other effects." *Ib.*

See also *Campbell* v. *Prescott*, ante, col. 1212–13. *Wiggins* v. *Wiggins*, ante, col. 1239.

—— **Where Chattels in or about Particular Place.**]—Where testator devised all his goods, chattels, household furniture, stuffs, and other things which should be in his house at time of his death:—Held, a sum of money there did not pass. *Trafford* v. *Berrige*, 1 Eq. Abr. 201.

General words in a bequest following a specific enumeration of articles in a particular locality will be confined to articles ejusdem generis. *Gibbs* v. *Lawrence*, 30 L. J., Ch. 170; 7 Jur. (N.S.) 137; 3 L. T. 367; 9 W. R. 93.

Therefore a bequest of "all and singular my household furniture, plate, linen, china, pictures, and other the goods, chattels, and effects which shall be in, or upon, or about my dwelling-house and premises at the time of my decease":—Held, not to include money found in the house. *Ib.*

A testator bequeathed to A. "my plate, house linen, furniture, and all other effects in my house at the time of my death":—Held, that a horse, carriage, car, and some hay in yard and out-offices passed to A., but not a sum of cash in the house. *Watson* v. *Arundel*, Ir. R. 10 Eq. 299.

Testator gave all his waggon ways, rails, staiths, and all implements, utensils, and things at his death used or employed together with or in or for the working, management, or employment of his collieries, and which may be deemed as of the nature of personal estate, in trust to be held or enjoyed with the collieries. Decree by Lord Rosslyn (3 Ves. 212) that, under this bequest, and upon the circumstances, money due from the fitters and others and in the Tyne Bank, coals at the pits and staiths, corn, hay, horses, timber, oil, candles, fire-engines, and other articles of stock-in-trade, passed. The decree, affirmed upon a rehearing by Lord Eldon (11 Ves. 657; 8 R. R. 266), but with considerable doubt, was reversed by the house of lords. *Stuart* v. *Bute* (*Marquis*), 11 Ves. 666; 8 R. R. 266; 3 Dow, 73; 14 R. R. 14.

Where there is a bequest particularised by one word, followed by general words, the latter will not be restricted to things ejusdem generis. *Swinfen* v. *Swinfen*, 29 Beav. 207; 7 Jur. (N.S.) 89; 4 L. T. 194; 9 W. R. 175.

A testator devised to S. "all his estate at Swinfen, or thereto adjoining, also all furniture and other movable goods here":—Held, that the live stock and implements of husbandry which were in or about the lands and premises adjoining the mansion at Swinfen (at which the testator resided) passed by this bequest. *Ib.*

Held, also, that money in the house, at the testator's death, also passed to the legatee. *Ib.*

A testator devised his mansion-house and real estate to trustees for his son for life, with remainder to his first and other sons in tail male, with remainders over; and he gave to his son his horses, carriages, household furniture, and other effects (except securities for money) which should be at the time of his decease in or about the mansion-house absolutely, with a gift over, if his son died under twenty-one, to his daughters, with power to let the mansion or appropriate the same or any part for the benefit of a minor child, and to preserve the effects as the trustees thought proper. Part of the effects was sold, and accounted for to the son, and the remainder handed over to him:—Held, that the farming stock did not pass under the limitations over, but only such things as were convenient to be

held with the mansion, such as carriages and horses. *Bradish* v. *Ellames*, 11 L. T. 470 ; 13 W. R. 128.

A bequest as follows :—"I give to my wife all my household furniture, plate, jewels, plated articles, linen, china, glass, books, pictures, musical instruments, and other effects of like nature, and all wines, liquors, fuel, housekeeping provisions, and other consumable stores which shall at my decease be in or about any dwelling-house then occupied by me," passes, first, all the plate and furniture which the testator had in possession, including plate at his banker's and in his father's house at the testator's death, and furniture at a warehouse : and, secondly, settled plate to which he was entitled in remainder, and the proceeds of a portion which his father wrongfully sold. *Domville* v. *Taylor*, 32 Beav. 604 ; 8 L. T. 624 ; 11 W. R. 796.

A. by his will bequeathed unto his wife absolutely all his or her jewels, trinkets, gold and silver plate, ornamental and other china, and all objects of vertu and taste ; and he directed that his said wife should be entitled during her life to his leasehold messuage with the appurtenances in Carlton House Terrace and the statuary, furniture, and other effects purchased by him therewith or which might be therein at the time of his decease. After his death the said leasehold premises, statuary, and effects were directed to be sold, and the produce was made part of his residuary estate. There were in the said house at the testator's death, but not purchased by him therewith, ten pictures valued at 15,000*l.* :—Held, that the words "objects of vertu and taste" were intended to include only things ejusdem generis with those enumerated, and did not include the pictures, but that these passed under the gift of the furniture, statuary, and effects in the said leasehold messuage. *Londesborough* (*Lord*), *In re*, *Bridgman* v. *Fitzgerald* (*Lord Otho*), 50 L. J., Ch. 9 ; 43 L. T. 408.

Where Contrary Intention Expressed or Inferred.]—Devise of "all my household goods and other goods, plate, &c., to A. ; the residue of my personal estate to B." The ready money and bonds do not pass by the word "goods," for then the bequest of the residue would be void. *Woolcomb* v. *Woolcomb*, 3 P. Wms. 112.

A gift of "household furniture, plate, house linen, and all other chattel property" is not a general bequest of the entire personal estate, but merely personal estate ejusdem generis. *Lamphier* v. *Despard*, 1 Con. & L. 200 ; 2 Dr. & War. 59 ; 4 Ir. Eq. R. 334.

A testator, after expressing an intention to dispose of his whole estate, and giving legacies of 100*l.* to each of five persons, desires all his goods and movable effects to be equally divided between them, and then bequeaths 20*l.* to a person whom he appoints executor ; afterwards, by a codicil, he directs the money to be paid to those five persons in twelve months, and his utensils and goods to be given to them in one month after his decease :—Held, that the words "goods and movable effects" are to be limited to utensils and articles ejusdem generis, and that the testator died intestate with respect to the beneficial interest in the general residue of the property. *Sutton* v. *Sharp*, 1 Russ. 146 ; 25 R. R. 19.

A testator bequeathed to A. his household furniture and other like things, "and all other goods of whatever kind," and he appointed that certain specified moneys should be divided as follows after all his debts should be paid off. He then specified certain legacies, and proceeded : "three or four thousand pounds or whatever remaining sum or sums to A." :—Held, that A. did not take the general residue. *Wrench* v. *Jutting*, 3 Beav. 521 ; 5 Jur. 145.

A residuary bequest in general terms. Revocation by a codicil as to "plate, linen, household goods, and other effects" (money excepted). The exception prevents the restrained construction in general of the words "other effects," viz. ejusdem generis. Stock, therefore, which does not pass under the word "money" was included with leasehold and all personal property, except money and bank-notes. *Hotham* v. *Sutton*, 15 Ves. 320 ; 10 R. R. 83.

A testator gave all his household furniture, money, goods, chattels, and effects to his wife absolutely. By a subsequent bequest in the same will he gave the residue of his personal estate to her for life, and on her death to two persons, in equal shares, absolutely :—Held, having regard to the use of terms applying to locality in the first bequest, that this bequest was limited in favour of the second bequest. *Smith* v. *Davis*, 35 L. J., Ch. 874 ; 14 W. R. 942.

A testator gave to his son all his furniture, plate, &c., and all other his goods and chattels whatsoever, not being money or securities for money, whereof he might be possessed at the time of his death, and in a subsequent part of the will he bequeathed to his trustees "all my property, as well as real and personal or mixed, not hereinbefore disposed of" :—Held, that although the words goods and chattels might, if unrestrained by the subsequent part of the will, have constituted a residuary bequest, yet that a residuary bequest being formed in the subsequent part of the will, the gift to the son was specific, and not residuary. *Mullins* v. *Smith*, 1 Dr. & Sm. 204 ; 8 W. R. 739.

Where there is a gift to one for life, with a direction not to sell the interest so given for a specific time, if the tenant for life dies within the time, the term expires by death. *Ib.*

A testator bequeathed all his estate and interest in his dwelling-house, together with all his household furniture, plate, linen, and all other effects therein, to M., and the residue of his property to two other persons :—Held, that a sum of money found in the house at the testator's death did not pass under the bequest to M. *Campbell* v. *M'Grain*, Ir. R. 9 Eq. 397.

An officer in the army, by his will, made on his way to England on sick-leave, after bequeathing two small legacies to a non-commissioned officer and private in his regiment, and directing his portmanteau, carpet-bag, and sea-chest to be sent to his father's residence in England, begged that, after those sums and other necessary expenses had been provided for, the remainder of his money and effects might be expended in purchasing a suitable present for his godson (then a child of a year old), son of the paymaster of the regiment :—Held, that the residue of the personal estate, consisting of reversionary interests in stock, did not pass to his godson. *Borton* v. *Dunbar*, 2 De G. F. & J. 338 ; 30 L. J., Ch. 8 ; 6 Jur. (N.S.) 1128 ; 3 L. T. 519 ; 9 W. R. 41. Affirming 2 Giff. 221. See also *Hodgkinson* v. *Barrow*, 2 Ph. 578 ; 17 L. J., Ch. 131.

c. Time of Operation and After-acquired Property.

i. *Time of Operation in General.*

In General.]—Wills in general construed from the making, unless circumstances, or the tenor of it, show it should be from death of testator, but the intermediate time not regarded. *Lomax* v. *Holmden*, 1 Ves. Sen. 295.

Paper writing proved as a testamentary schedule, and held to have effect from the date to pass what was in the hands of M. at the time of the date, not what was at the death of testator. The general rule as to testaments is, that the time of the testament, and not the testator's death, is regarded. *Downing* v. *Townsend*, Ambl. 280.

The statute 1 Vict. c. 26 extends generally to wills made previously to the passing of the act, where alterations have been made affecting such wills subsequently to the 1st January 1838. *Croker* v. *Hertford* (*Marquis*), 4 Moore, P. C. 339.

The provision in the 7 Will. 4 & 1 Vict. c. 26. s. 24, that a will is to be construed as if made immediately before the testator's death, relates only to the property comprised in the will. *Bullock* v. *Bennett*, 3 Eq. R. 799; 7 De G. M. & G. 283; 1 Jur. (N.S.) 567; 3 W. R. 545.

A testator had a daughter who, at the date of his will, was a widow, having been twice married. By his will, dated after the 7 Will. 4 & 1 Vict. c. 24, came into operation, he gave stock upon trust to pay the income to her for her life or until her marriage, and after her marriage or decease, which should first happen, upon trust for her children by both her husbands. After the date of the will the daughter married a third time, with the knowledge and approbation of the testator, who, however, died without republishing his will:—Held, that the daughter took no interest under it, and that the will spoke with relation to the state of circumstances at the date of the will, and not from the death of the testator, and therefore that the gift over had taken effect. *Ib.*

A. bequeathed to his sister an annuity, with a clause of revocation in case she should do any act or take any proceedings to alter, frustrate, or dispute the devises and bequests in the will of their deceased father. She, in pursuance of a power in the father's will, did take proceedings for altering the devises and bequests therein, and A. afterwards joined in an agreement, which was expressed to be for the purpose of preventing and terminating all doubts and controversies, to refer such devises and bequests to a valuer. The valuer awarded a sum of money to her for equality of partition, and all the parties interested under the father's will, including A., executed a deed of mutual confirmation and discharge, which recited that they were satisfied with the valuation, and was expressed to be made in order to carry into effect what they believed to be the wishes of the father. A. afterwards by codicil confirmed his will. Quære, whether the steps taken by his sister were within the proviso in the testator's will. But, held, that if so, he had by his subsequent acts dispensed with the prohibition. *Violett* v. *Brookman*, 26 L. J., Ch. 308; 5 W. R. 342.

As to Income Accruing.]—The apportionment act held to apply to a devise contained in a will dated before the act to which a codicil was made after the act. *Hasluck* v. *Pedley*, 44 L. J., Ch. 143; L. R. 19 Eq. 271; 23 W. R. 155.

Under a direction to pay to a legatee so much of the "income as would not, although the same were payable to him, be by his act or default or by operation or process of law so disposed of as to prevent his personal enjoyment thereof," followed by a gift over, each instalment of income vests in the legatee at the moment when it accrues due, or is in the hands of the trustees ready for application. If at that moment the legatee has not been deprived of the enjoyment of it he is entitled to receive it, so that it can be attached by a garnishee order, and the gift over does not take effect. *Sampson, In re, Sampson* v. *Sampson*, 65 L. J., Ch. 406; [1896] 1 Ch. 630; 74 L. T. 246; 44 W. R. 557.

ii. *Where After-acquired Property.*

Before the Wills Act—Principles.]—The rule, that after-purchased lands do not pass by a devise, does not arise from the word "having" in the statute of wills, but from the difference between the Roman testament or wills of personal estate, and a devise by the law of England, which is an appointment of the person to take the specific estate in nature of a conveyance, though fluctuating till death. *Brydges* v. *Chandos* (*Duke*), 2 Ves. 427.

Words primâ facie equivalent to pass future interests in personal estate, to have that effect unless controlled by the context. *James* v. *Dean*, 11 Ves. 389. Affirmed, 15 Ves. 236; 8 R. R. 178.

The words "all I am possessed of," in a will, in a legal construction, relate to the time of the death, not of the execution of the will unless explained. *Wilde* v. *Holtzmeyer*, 5 Ves. 811.

Reasons for the rules on which a residuary bequest of personal estate is extended to that which testator subsequently acquires. *Bland* v. *Lamb*, 2 J. & W. 405.

Very special words are required to confine a residuary bequest to property belonging to testator at date of his will. *Ib.*

Every gift of land, even a general residuary devise, is specific, and that only to which the party is entitled at the time can pass; in the case of personal property, what he has at his death will pass, and, if the description is specific, it may operate as a direction to purchase. *Nunnock* v. *Horton*, 7 Ves. 399.

Realty.]—A devise and bequest of "all my estate and effects, both real and personal, which I shall die possessed of," extends to lands purchased by the testator after the date of his will, and therefore the heir, taking benefits under the will, must elect. *Churchman* v. *Ireland*, 1 Russ. & M. 250.

A devise before 1838 of all my freehold hereditaments, and all my goods, chattels, "and generally all other my real and personal estates and effects whatsoever, whereof, I, or any person or persons in trust for me, am, is, or are, or shall or may be seised or posssessed":—Held, to put the heir to his election as to after-acquired lands. *Hance* v. *Trawhitt*, 2 J. & H. 216; 8 Jur. (N.S.) 430; 6 L. T. 19; 10 W. R. 191.

B. devised to his wife in these words:—"I do hereby give, devise, and bequeath unto my well-beloved wife Frances, all such sum and sums of money as now is or hereafter shall grow due to me from their majesties, for my own and servants'

service, either by sea or land; as also, all such sum and sums of money, lands, tenements, goods, chattels, and estate, whatever, wherewith, at the time of my decease, I shall be possessed, or invested, or which shall then, or of right doth, appertain unto me. And I do hereby nominate and appoint her, the said Frances, to be the whole and sole executrix of this my last will and testament." The testator had no real estate at the time of making this will; but having about nine years afterwards received part of his wife's fortune, he therewith purchased lands of about 200*l.* per annum. There having been no republication of the will after this purchase:—Held, that the lands did not pass, but descended to the testator's brother as heir-at-law. *Bunker* v. *Cook*, 3 Bro P. C. 19.

One articles to buy certain lands; he thereby becomes seised thereof in equity; but where A. devised all his real and personal estate, and afterwards articled to purchase lands and then died, the heir-at-law was held to be entitled to this estate, as not passing by the will: secus, had the articles for the purchase been before the will; for then the estate would have passed. *Langford* v. *Pitt*, 2 P. Wms. 629.

A testator, by will, gives his moiety of an estate called H. to his sister and her children, and subsequently, by a codicil which purports to give them the whole of that estate if she shall possess it at her death, charges it with a sum of money to legatees: at the date of the will and codicil he was owner of only one moiety of H., but before his death he acquired the other: although the devise fails as to the after-purchased moiety, the charge is good for the whole sum, and equity will make no appointment. *Lushington* v. *Sewell*, 1 Russ. & M. 169.

There is no distinction between a residuary and a specific devise of real estate; every devise of land being in effect specific, inasmuch as a residuary devise will only pass such real estate as the testator had at the time of making his will, and will not pass a real estate subsequently acquired. *Spong* v. *Spong*, 1 Y. & J. 360. Reversed 3 Bligh (N.S.) 84; 1 Dow (N.S.) 165.

—— **Mines Subsequently Opened.**]—Devise (before the Statute of Wills, 7 Will. 4 & 1 Vict. c. 26), of lands to certain persons, and of pits and veins of clay under the same lands to other persons; the latter devise passed only the pits and veins of clay open at the date of the will, semble. *Brown* v. *Whiteway*, 8 Hare, 150.

Whether since the statute such a devise would pass pits or veins open at the death of the testator, quære. *Ib.*

—— **Personalty—Money and Securities.**]—Quære, whether a bequest of "all the rest and residue of my ready money, securities for money, and moneys in the funds" will comprehend property of that description acquired after the date of the will. *Parker* v. *Marchant*, 1 Y. & C. C. C. 290; 11 L. J., Ch. 223; 6 Jur. 292.

A. B. bequeathed dividends of property in funds to C. D. for life, and directed, that after C. D.'s decease principal should be divided amongst his children, in manner after mentioned; she then gave children certain sums of money, which would have exhausted whole of funded property at date of will; between that time and A. B.'s death, that property greatly increased:—Held, executors entitled to surplus as undisposed of. *Haynes* v. *Littlefear*, 1 Sim. & S. 496; 2 L. J. (O.S.) Ch. 13.

The testator gave to wife ready money, &c., which he should have in house at time of death; he gave specifically to others his exchequer bills, stock, &c. Becoming insane, 3,000*l.* paid into his house was laid out in stock and exchequer bills: specific legatees of exchequer bills, &c., entitled. *Browne* v. *Groombridge*, 4 Madd. 498; 20 R. R. 326.

In a will made before 1838, a gift of "400*l.*" stock was obliterated, and the words "residue of my property" substituted, whereby the words admitted to probate were, "residue of my property stock":—Held, that the will, by these words, passed to the legatee all the funded property belonging to the testatrix at the time of her death, although much of it was acquired after the date of the will and after 1838. *Banks* v. *Thornton*, 11 Hare, 176.

—— **Proceeds of Sale.**]—T., in 1815, by will, after directing his debts to be paid, gave his personal estate, and money at his bankers' at the time of his decease, and his real estate, to trustees, to convert the personalty, and thereout to pay debts and certain legacies to his son and his daughter, M., "and equally to divide the remainder of the proceeds of sale" between his daugnters E. and O. The real estate was directed to be sold, and after payment of expenses the proceeds were ordered to be divided between his daughters E. and O. In 1857, the testator was found by inquisition to be of unsound mind, and the master in lunacy made a report, and a committee was appointed, who, between the date of the report and the death of T. sold the personalty, and paid sums into court, which were invested. T. died, in 1858, leaving his son and three daughters his next of kin. The chief clerk certified that of the property converted during a testator's lifetime, a large sum was cash at his bankers. There were moneys received in respect of debts due, and of the proceeds of sale of personalty:—Held, first, that the will must be read as from the date. *Wheeler* v. *Thomas*, 7 Jur. (N.S.) 599; 4 L. T. 137.

Held, secondly, that the testator intended that all his property, together with the ready money, should form one common fund, out of which were to be paid the debts and legacies. *Ib.*

Held, thirdly, that the whole of the general fund remaining in the hands of the executor, and which was applicable for the payment of debts and legacies, belonged to E. and O. as residuary legatees. *Ib.*

—— **Debts.**]—Bequest of debt which shall be owing on a particular day, taken as it stood at that day, and not affected by consignments from Indies, on account since death of testator, which happened previous to day specified. *Innes* v. *Mitchell*, 6 Ves. 464; 5 R. R. 360.

Where arrears of debt are bequeathed, they are confined to those due at time of making will. *Att.-Gen.* v. *Bury*, 1 Eq. Abr. 201.

—— **Interest in Partnership.**]—One partner by will gives one-ninth of one-twelfth of the profits reserved to him, to his partners. He afterwards, on the expiration of the partnership, renews it with the same partners, giving them a greater interest than they had under the former articles:—Held, they were entitled to one-ninth of the testator's interest in the partnership at his death, and that the renewal of the articles was not an ademption or revocation of the devise. *Backwell* v. *Child*, Ambl. 260.

—— **Household Chattels.**]—Bequest of household goods extends to all household goods purchased afterwards, and that are in the house at the testator's death. *Masters* v. *Masters*, 1 P. Wms. 424.

A. devises to B. all his goods and furniture in his house, except his pictures, which he gives to C.: pictures in boxes, as well as what were hung up in the house, will pass to C.; and so will pictures bought after making the will. *Gayre* v. *Gayre*, 2 Vern. 538.

Bequest of all testator's pictures, &c., they being a good collection; after-purchased pictures shall pass. A bequest of any species of personal estate is considered as fluctuating till the death of testator, and the whole of that species he has at his death passes. *Christchurch* (*Dean*) v. *Barrow*, Ambl. 641.

A. devises his library of books, now in the custody of B., to a college, and afterwards buys more books, which he places in the same library, and gives 4,000*l.* more to increase their library; after-bought books shall pass. *All Souls College* v. *Coddrington*, 1 P. Wms. 597.

Under the Wills Act — General Devise.]—A will made after the Wills Act, 1 Vict. c. 26, whereby the testator gave, devised and bequeathed all his estate and effects whatsoever and wheresoever, and of what nature or kind soever, to A., to be paid, assigned or transferred to him, on his attaining twenty-one:—Held, to pass real estate (copyhold of inheritance) subsequently acquired, notwithstanding a direction in the will, that in the meantime, the executors should apply the interest, dividends and proceeds of such estate and effects, or so much thereof, or so much of the principal thereof, as they should think necessary, in the maintenance, education and putting forth of A. in the world, and should invest the said estate and effects on real or personal security at their discretion. *Stokes* v. *Salomons*, 9 Hare, 75; 20 L. J., Ch. 343; 15 Jur. 483.

The directions applicable only to personal estate may, in such a case, be construed as referring, not to the whole subject-matter of the gift, but to such portions of the estate as may consist of personalty, to which such directions may be fitly applied. *Ib.*

In 1840 a testator devised as follows: "I give and devise to my wife, all my part, share, estate, or interest of and in the dwelling-house or tenement, and likewise the several closes or parcels of land hereinafter mentioned (describing them). And I also give and bequeath all my goods and chattels, dwelling-house or tenement heretofore mentioned to my wife for her use and interest during the term of her natural life; and after her decease I give and devise all my property, real and personal, unto my heir or heirs, to be equally divided among them, and as joint heirs of this my above-mentioned property." Several years afterwards the testator became possessed of two other closes and two cottages, and died in 1850:—Held, that the after-acquired property passed under the will, and the wife took a life interest in it. *Jepson* v. *Key*, 2 H. & C. 873; 10 Jur. (N.S.) 392; 10 L. T. 68; 12 W. R. 621.

A testator, having no real estate, gives to trustees all his leaseholds and other his estate and effects, upon trust to sell and divide amongst parties named. After the date of the will the testator acquires a freehold house, and then by a codicil revokes the appointment of one of his executors, and confirms his will. Upon a suit to administer his estate and inquiries in chambers, no heir-at-law can be discovered; and on the questions whether the freehold house passed by the general devise in the will, under the 20th and 24th sections of the 7 Will. 4 & 1 Vict. c. 26, or, if not, whether it went to the crown, there being no heir-at-law:—Held, that it went to the crown, as it was evidently the intention of the testator not to give it; and that not even the legal interest passed to the trustees, although the wording per se was sufficient to pass it. *Pierce* v. *Att.-Gen.*, 3 W. R. 612.

—— **Specific Devise.**]—A testator by will, dated in 1835, devised all his freehold lands and hereditaments as follows: "Of or to which I, or any other person or persons in trust for me, am or is or are seised or entitled in fee-simple, in possession, reversion, or remainder, or which, by virtue of any special power, I am enabled to appoint or dispose of by this my will," upon certain trusts; and by a codicil, dated in 1845, he gave and devised all the lands and hereditaments comprised in and devised by his will, subject to the charges in the will mentioned, and also to certain limitations therein mentioned, to the uses mentioned in the codicil; and he thereby expressly ratified the will, except so far as it was altered or revoked by the codicil. After the date of the codicil, he purchased one estate in fee-simple, and acquired another estate by descent, as the heir-at-law of his sister:—Held, following the decision in *Doe* d. *York* v. *Walker* (12 M. & W. 591; 13 L. J., Ex. 153), that the after-acquired estates were subject to the trusts and limitations of the will and codicil. *Langdale* (*Lady*) v. *Briggs*, 3 Sm. & G. 246. Affirmed, 8 De G. M. & G. 391; 26 L. J., Ch. 27; 2 Jur. (N.S.) 982; 4 W. R. 783.

The true construction of the enactment in s. 24 of the 7 Will. 4 & 1 Vict. c. 26, "that every will shall be construed, with reference to the real and the personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will," is, that so far as regards the extent of the dispositions of real and personal estate contained in the will, it is to be construed as if executed immediately before the death; and a bequest of "all my leaseholds" will therefore include after-acquired leaseholds. Per Turner, L.J. *Ib.*

Real estate is left by T. M. to J. D., a married woman, her heirs and assigns, for ever, independent of H. D., for her separate use and benefit, with power by any deed or instrument in writing, or by her last will and testament, to give, devise, and dispose of the same to any person or persons she may think proper, either absolutely, conditionally, or otherwise, and in default of her making any such gift or disposition, then from and after her decease the said property or such part thereof as she shall not have disposed of shall go to her heirs for ever. There is likewise a gift to J. D. of personalty for her sole and separate use, independent of the said H. D. her husband, and not to be subject to his debts, control, or interference, and her receipt alone to be a sufficient discharge for the same. J. D. makes a will and leaves all her residue to D. M. and T. M. T. M. predeceases her, having made his will and

left to her as above. On the question whether the clause for separate use extended beyond the coverture with H. D. :—Held, that it did not. On the question whether the property left to J. D. by T. M. passed by her will—dictum, that it did; and that a second husband surviving was entitled to dividends. *Moore* v. *Morris*, 3 Jur. (N.S.) 552; 5 W. R. 383.

A testator devised his mansion and estate, called Cleve Court, with the appurtenances, upon certain trusts, and gave the residue of his property of every description, other than those thereinbefore mentioned, upon other trusts. The testator had contracted, before the date of his will, to purchase an estate near and adjoining to the Cleve Court estate, which was conveyed to him subsequently. He also purchased, after the date of his will, several other small properties adjoining the Cleve Court estate :—Held, that evidence was admissible to show what property the testator designated by the particular description up to the time of his death, and that all the property acquired after the date of the will, and treated by the testator immediately before his death as additions to the Cleve Court estate, passed under the particular devise. *Castle* v. *Fox*, 40 L. J., Ch. 302; L. R. 11 Eq. 542; 24 L. T. 536; 19 W. R. 840.

K. being seised in fee simple of a several portion of the lands of C. devised them specifically to S. and his heirs. Subsequently to the date of her will, she purchased the other several portion of C., in fee. It appeared that both portions had originally formed one entire denomination, and, having come into the possession of tenants in common, had been apportioned between them in severalty; but both portions continued to be known as the lands of C., although commonly called, in addition thereto, for the sake of distinction, by the names of their respective owners at the time of partition. B. was the residuary devisee of K. :—Held, that under the 7 Will. 4 & 1 Vict. c. 26, ss. 3 & 24, the lands subsequently purchased passed to S., the specific devisee of C., and not to the residuary devisee. *Strevens* v. *Bayley*, 8 Ir. C. L. R. 410.

Estates acquired by the testatrix after the date of her will, although she had contracted to purchase some of them before that time, and although they were chiefly small additions to what were clearly comprised in the devise, were held not to pass thereby. *Webb* v. *Byng*, 1 K. & J. 580; 1 Jur. (N.S.) 696.

—— **Manor.**]—Where a lord of a manor made his will before the 7 Will. 4 & 1 Vict. c. 26, and devised a manor, and subsequently purchased freehold lands held of the manor :—Held, that the freeholds did not pass by the will. *Delacherois* v. *Delacherois*, 4 N. R. 501; 10 H. L. Cas. 62; 10 Jur. (N.S.) 886; 10 L. T. 884; 13 W. R. 24.

—— **Leaseholds.**]—A testator, by will, gave to his son leasehold premises, and his share and interest of and in the partnership stock in trade carried on at the premises. After the date of his will the testator obtained a lease of other premises, at which a portion of the partnership business was subsequently carried on, the rent, outgoings, &c., being paid out of the partnership assets :—Held, that the shares and interest of the testator, both in the houses and stock in trade belonging to him at the date of his will, and those obtained subsequently, passed to his son. *Robson, In re*, 4 L. T. 49; 9 W. R. 191. And see *Langdale (Lady)* v. *Briggs*, supra, col. 1262.

—— **Specific Bequest—Stock.**]—The 24th section of the Wills Act (7 Will. 4 & 1 Vict. c. 26), that every will shall be construed with reference to the personal estate comprised in it, to speak and to take effect as if it had been executed immediately before the death of the testator, "unless a contrary intention shall appear by the will," illustrated: "If I refer to a particular thing, e.g. a ring or a horse, and bequeath it as 'my ring' or 'my horse,' semble the 'contrary intention,' to which s. 24 refers, appears by the will, and the will speaks from the date of its execution; but when a bequest is of that which is generic, of that which may be increased or diminished, the act requires something more on the face of the will, for the purpose of indicating such 'contrary intention,' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.'" *Goodlad* v. *Burnett*, 1 K. & J. 341.

Testatrix in 1850 bequeathed thus: "I give my new three-and-a-quarter per cent. annuities":—Held, that the bequest comprised all the new three-and-a-quarter per cents. which she had at her death. *Ib.*

Testatrix gave to trustees 1,500*l.* and certain Danish bonds, which she described thus: "My four Danish bonds, one of them for the sum of 485*l.*, and another of them for the sum of 1,004*l.*, another of them for the sum of 1,315*l.*, and the other of them for the sum of 716*l.*, making the whole, together with the said sum of 1,500*l.*, the sum of 5,020*l.*" She had not any Spanish bonds for the specified amounts, but she had a mass of Danish bonds which, before making her will, she had received in exchange for other Danish bonds bequeathed to her by her husband, comprising four lots purchased by him at four several periods for sums corresponding with those specified in the bequest :—Held, it appearing that none of such bonds had been sold by the testatrix, that the bequest was a specific bequest of so much of her Danish bonds as was received by her in exchange for the bonds purchased by her husband with the specified sums. *Ib.*

The 24th section of the 1 Vict. c. 26, which provides that a will shall speak and take effect as if executed immediately before the death of the testator, unless a contrary intention appears by the will, will probably give an extended effect to what would have been a a specific bequest of a class of personal property before the statute. *Douglas* v. *Douglas*, Kay, 400; 23 L. J., Ch. 732.

For instance, a bequest, since the act, of "all the stock," would probably pass all the stock of the testator at the time of his death; but a gift of "all my stock which I have purchased" must be confined to stock actually purchased at the date of the will. *Ib.*

A testator specifically bequeathed railway stock which he afterwards sold. At his death he was entitled to similar stock which the description in the will was probably sufficient to comprise:—Held, that as there had been a specific thing existing at the date of his will to which the description applied, this circumstance was sufficient to exclude the application of the general rule contained in 7 Will. 4 & 1 Vict. c. 26, s. 24, that a will shall be construed to speak from the time of the testator's decease. *Gibson, In re*,

Matthews v. *Foulsham*, 35 L. J., Ch. 596 ; L. R. 2 Eq. 669 ; 14 W. R. 818.

A gift of "all my shares and stock" in a will made since the wills act, 7 Will. 4 & 1 Vict. c. 26, is a specific gift. Such a gift in a will made before the act would have been a specific gift of all the shares and stock possessed by the testator at the date of his will, and the effect of the act is to import into the gift all the stock and shares acquired by the testator before his death. *Bothamley* v. *Sherson*, 44 L. J., Ch. 589 ; L. R. 20 Eq. 304 ; 33 L. T. 150 ; 23 W. R. 848.

A testator having certain debentures at the date of his will, thereby gave "all my debentures" upon certain trusts. After the date of the will the testator exercised an option given him by the company who had issued the debentures, and converted them into debenture stock of the same company :—Held, that the debenture stock did not pass by the will. *Lane, In re, Luard* v. *Lane*, 49 L. J., Ch. 768 ; 14 Ch. D. 856 ; 43 L. T. 87 ; 28 W. R. 764.

A. bequeathed specifically all the money in the public funds "which he might be possessed of or entitled to at the time of his decease." He subsequently directed his country brokers to invest 5,000*l.* in consols. They debited his account with the amount, and sent instructions to their broker to make the purchase, but no contract was entered into by the broker until five hours after the testator's death :—Held, that the additional stock did not pass by the specific bequest, but fell into the residue. *Thomas* v. *Thomas*, 27 Beav. 537 ; 29 L. J., Ch. 281 ; 5 Jur. (N.S.) 1237 ; 8 W. R. 71.

—— **Debts.**]—Semble, that a will must be construed, as to the property comprised in it, as if made immediately before the death of the testator, unless a contrary intention appears on the face of the instrument. *Everett* v. *Everett*, 47 L. J., Ch. 367 ; 7 Ch. D. 428 ; 38 L. T. 47, 580 ; 26 W. R. 333.

By his will, after reciting that certain debts were due to him from his son, a testator released those debts, and "all other moneys due from him to me." He subsequently made further advances to his son, and expressly released them by a codicil. After the date of the codicil he made still further advances to his son, but did not release them by a further codicil :—Held, that there was nothing to shew a contrary intention, and that the will therefore spoke from the death of the testator, and released the sums advanced after the date of the codicil. *Ib.*

—— **Interest in Partnership.**]—The testator, William Russell, by a will dated in 1857, after reciting that he was carrying on business as an iron manufacturer in partnership with his two brothers, bequeathed all his share and interest of and in the partnership business, and of and in the real and personal estate employed or invested therein, and of and in the partnership debts, securities, and moneys to which he might be entitled at his decease, to trustees, upon trust to continue the business during his wife's life, and to pay to her a sum equal to half the amount drawn out by the two other partners. The wife had a discretion to discontinue the business, and in case the business should be discontinued testator directed the trustees to get in the share then appertaining to his estate in "the said co-partnership trade or business," and, after making good to the wife "one full third share of the profits," invest the same, and pay the income to his wife for life. After the death of the wife, he directed the trustees, out of the profits of the said share and interest in the business, if continued, and out of the trust fund, if the business should have been discontinued, to pay certain pecuniary legacies, and subject thereto to hold the fund in trust for A. B. Testator died in 1881. After the date of the will he acquired the shares of his two brothers in the partnership, and carried on the business, still under the firm of "Russell Brothers," as sole owner, until his death. A. B. died in the testator's lifetime. The widow had not discontinued the business :—Held, that the will operated upon the whole of the testator's interest in the business at his death, and that the widow took the whole of the income for her life. *Russell, In re, Russell* v. *Chell*, 51 L. J., Ch. 401 ; 19 Ch. D. 432 ; 46 L. T. 236 ; 30 W. R. 454.

—— **Where Present Tense Used.**]—Testator, by his will subsequent to the act, exonerated A. "from all payments and claims in respect of money laid out by me in repairs of the estates in Scotland, of which I am in possession as heir of entail, and which money has, according to the laws of Scotland, been charged thereon" :—Held, that this exoneration applied to those moneys only which had been actually laid out and made chargeable at the date of the will, to the exclusion of money expended after the date of the will, and also of money expended at the date of the will, but of which the charge pursuant to the Scotch act had not been completed until after the will. Observations as to the effect of s. 24 of the wills act, how far controlled by intention. *Douglas* v. *Douglas*, Kay, 400 ; 23 L. J., Ch. 732.

—— **Where Word "Now" Used.**]—A testator, by his will, dated after the wills act had come into operation, expressed himself thus : "and as to all and singular the residue and remainder of my messuages, lands, and hereditaments, whatsoever and wheresoever, and of what tenure or nature soever, and generally all the freehold, copyhold, and leasehold estates, whereof I am now seised or possessed" ; and in a subsequent part of his will he used these words : "I give to my nephew all such manors, farms, &c., as well freehold as copyhold and leasehold, as are now vested in me, or as to the said leaschold premises as shall be vested in me at the time of my death, as a trustee, to hold unto and to the use of my said nephew, his heirs, executors, &c., upon the like trusts as the same are now or shall be vested in me." The testator purchased a freehold estate after the date of his will :—Held, that the testator had himself put a construction upon the word "now," and that the will could not be construed to speak and take effect, with reference to the estates to which the testator died beneficially entitled, as if it had been executed immediately before his death. *Cole* v. *Scott*, 16 Sim. 259. Affirmed, 1 Mac. & G. 518 ; 1 Hall & Tw. 477 ; 19 L. J., Ch. 63 ; 14 Jur. 25.

The fourth section of the act 7 Will. 4 & 1 Vict. c. 26 having laid down the rule that a will shall be construed to speak and take effect from the death of the testator, "unless a contrary intention shall appear by the will" :—Held, that it is not necessary that such contrary intention should be expressed in so many words, or in some way quite free from doubt, but that it is to be

gathered by adopting, in reference to the expressions used by the testator, the ordinary rules of construction applicable to wills. *Ib.*

A testator devised a messuage or a dwelling-house, wherein C. "now resides, with the stables or appurtenances thereto belonging and therewith occupied." Between the date of his will and his death the testator purchased a garden, which he attached to the messuage, and the garden continued to be occupied with the house up to his death :—Held, notwithstanding *Cole* v. *Scott* (supra), that the garden passed under the devise. *Otley and Ilkley Ry., In re*, 34 Beav. 525; 6 N. R. 244; 34 L. J., Ch. 596; 11 Jur. (N.S.) 818; 12 L. T. 659; 13 W. R. 851.

H., in 1846, while encamped at P. and forming part of the army of the Sutlej, bequeathed as follows: "To my brother, G., all the shares which I now possess in the Union Bank in C., and also all the interest . . . and the money lodged there in deposit. . . . I leave and bequeath to W. S. all the money I possess in the company's funds, with whatever may be due thereon up to the day of my death, which is lodged with and under the management of the government agents and Major S. . . . I leave and bequeath the shares I am possessed of in the Agra Bank" to parties named, "and out of the money now in the Agra Bank in deposit." The testator died in 1851. After the date of the will, and before his death, his property in the company's funds was largely increased. On a bill filed by the next of kin :—Held, that the language of the 7 Will. 4 & 1 Vict. c. 26, s. 24, had not been controlled by any manifestation by the testator of a contrary intention, and consequently that the whole of the property passed under the will. *Hepburn* v. *Skirving*, 4 Jur. (N.S.) 651.

Under a gift of "all my ready money, bank and other shares, freehold property, . . . and any other property that I may now possess," personal estate acquired subsequently to the date of the will passes. *Wagstaffe* v. *Wagstaffe*, 38 L. J., Ch. 528; L. R. 8 Eq. 229.

A testator devised a freehold cottage and land "now in my own occupation"; he afterwards bought two fields adjoining and occupied them with the cottage; he subsequently by a codicil confirmed his will as to this devise :—Held, that the two fields together with the cottage and land passed by the devise. *Champion, In re, Dudley* v. *Champion*, 62 L. J., Ch. 372; [1893] 1 Ch. 101; 2 R. 162; 67 L. T. 694—C. A.

—— **Where Time of Death referred to.**]—A retroactive effect will not be given to an order for the purchase of stock, so as to include stock purchased after a testator's death, in a bequest of all stock "I may be possessed of or entitled to at the time of my decease." *Thomas* v. *Thomas*, 27 Beav. 537; 29 L. J., Ch. 281; 5 Jur. (N.S.) 1237; 8 W. R. 71.

A., in 1841, devised all the freehold property "of or to which I am seised or entitled in fee simple" in strict settlement. He afterwards devised all the copyholds "I am or at the time of my death shall be possessed of" upon trusts corresponding with those of his freeholds. He died in 1861 :—Held, that freeholds acquired after the date of the will passed by the devise. *Lilford (Lord)* v. *Keck*, 30 Beav. 300; 10 W. R. 240.

O. gave all his freehold, leasehold, and personal estate of which he should be seised or possessed at the time of his decease upon trust for his wife during her life and widowhood, provided that if his son should attain twenty-one before he should become entitled in possession to the testator's estate at C. he should be paid, as his share of the income, 40*l.* annually from the period of his majority to the death or second marriage of the testator's wife, and after that event in trust to assign all the testator's leaseholds at C. unto his son, his executors, administrators, and assigns. The testator gave all his real and leasehold estates, except his leasehold property bequeathed to his said son, upon trust for all his other children. After the date of the will, the testator contracted to purchase other leaseholds at C., adjacent to those belonging to him at the date of his will, and paid a deposit. The balance of purchase-money was paid and assignment taken by his executors :—Held, that the subsequently acquired leaseholds passed under the specific bequest free from any burden in respect of the balance paid by the executors. *Ord, In re, Dickinson* v. *Dickinson*, 26 W. R. 880. Affirmed, 12 Ch. D. 22; 41 L. T. 13—C. A.

Held, also, that the annuity of 40*l.* was payable, after the death of the son, to his personal representative, until the death or marriage of the testator's widow. *Ib.*

—— **Where Express Exception.**]—A testatrix devised and bequeathed all the residue of her property "except such real and personal estate as might remain subject to the trusts of her marriage settlement, by reason of no specific disposition thereof having been made by her under the power therein contained." In 1854 M. purchased real estate out of the savings of her separate property, and it was conveyed to the same uses and trusts as those declared by the settlement of 1838, omitting only the uses in favour of children :—Held, that the exception in the will referred only to the property subject to the trusts of the marriage settlement at the date of the will, and that the real estate subsequently purchased by M. passed under her will. *Hughes* v. *Jones*, 1 H. & M. 765; 2 N. R. 427; 32 L. J., Ch. 487; 9 L. T. 143; 11 W. R. 898.

—— **Bequest of Lease—Subsequent Renewal.**]—One seised of a lease for lives devises it, and afterwards renews; the renewal is a revocation of the will. *Marwood* v. *Turner*, 3 P. Wms. 166.

One devises a lease to his daughter, and afterwards renews the lease, and afterwards adds a codicil to his will. Whether the renewal of the lease is a revocation, and whether the adding a codicil to his will is a republication, quære. *Alford* v. *Earle*, 2 Vern. 209; Nel. 162.

A. devised all his estates to widow for life, remainder to nephew, he paying 2,000*l.* to appointee of widow, and made her executrix and residuary legatee. The estates were held under church leases, which testator renewed after will; quære, if a revocation. The widow, by will, in "pursuance of power," appointed plaintiffs, and devised estates "so given by her said husband's will, and all her interest, &c., therein," to trustees for nephew on his paying the said 2,000*l.*, "according to the true intent, &c., of husband's will, but not before or otherwise." Supposing the renewal of leases a revocation, the widow shall be presumed to have designedly given effect to the real intent of husband. *Penrice* v. *Garnons*, 3 Anstr. 821.

A devise of a lease, and of the right of renewal

carries both the lease and the right. *Abney* v. *Miller*, 2 Atk. 598.

Where testator says, "I give all my estate, right, and interest I shall have to come in a college lease at the time of my death," though renewed after the will, it passes notwithstanding. *Id.* 599.

B., after making his will, surrendered the college leases he had devised thereby, and accepted two new leases, for which he paid a larger fine; but the last lease was not sealed by the college till after the testator's death:—Held, that the first lease was a revocation; but the latter, which was not sealed, was not. *S. C.*, 2 Atk. 593; 2 Ves. Sen. 418.

If testator, after devising an estate for lives, surrender it and take a new lease, it is a revocation. *Id.* 527.

Upon a bill filed to have an assignment of rents and profits of a leasehold estate vested in defendant, in trust for plaintiff, the court, under the circumstances:—Held, that a will in 1735 was sufficient to pass the trust of a lease then in being, and the subsequent renewals in 1739. *Carte* v. *Carte*, Ridgw. 210; 3 Atk. 174; Ambl. 28.

The word "advantages" is sufficient to take in all the benefits belonging to the trust of an estate for years, not the profits only, but the renewals, which are consequential. *S. C.*, 3 Atk. 178.

Renewal of a lease for life, revocation of will as to those leases, but not as to lease for years. *Digby* v. *Lingard*, Dick. 500.

Bequest of a leasehold, without any words to pass the right of renewal, is revoked by taking new leases after the will. *Att.-Gen.* v. *Downing*, Ambl. 571.

Renewal of a prebendal lease is an ademption of a bequest of it, but a codicil to the will, though to pass after purchased property, is a republication of the will, and the lease shall pass by republication. *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291.

Devise of a leasehold estate held under a college: after the will made, the lease is renewed; this new lease does not pass by the will. *Hone* v. *Medcraft*, 1 Bro. C. C. 266.

After a devise of tithes, together with a real estate, a surrender of the lease under which they were held, and acceptance of a new lease:—Held, to amount to a revocation, so that a republication was necessary. *Rudstone* v. *Anderson*, 2 Ves. Sen. 418.

A. held a church lease, of which nine months had remained unexpired. He made his will in sickness, and devised all his interest in such lease to B. A., recovering, renewed his lease, and republished his will. Resolved, the renewed lease passed by the republication. *Anon.*, 2 Free. C. C. 116.

A testator, being under-lessee for a long term of years of two houses in Gower Street, numbered 63 and 64, and being possessed of two other houses in that street, numbered 67 and 76, for the residue of certain terms of years, bequeathed them to trustees in trust for D. C. for her life, remainder in trust, as to 63, 64, and 67, for his half-brothers and half-sisters (whom he named), and the survivors and survivor of them, for their, his, or her lives or life, remainder in trust to sell and divide the proceeds amongst their children living at the death of the survivor of them; and as to number 76, in trust, after the decease of D. C., for his niece S. C. for life, remainder in trust for her children who should survive her; and in default of such children, upon the same trusts as he had declared of the other houses after the death of D. C.; and he gave the residue of his effects to D. C., and appointed her his executrix. The testator, some years after the date of his will, took an assignment of the original lease, which comprised numbers 62 and 65, as well as 63 and 64; and a few months afterwards made a codicil, by which he confirmed his will. He subsequently made another codicil, which was in part as follows: "I also give, subject to her life estate, one moiety of the residue of my estate unto and amongst my nephews and nieces living at my decease, payable in like manner as by my will is directed concerning their shares and interests in the reversion of my houses in Gower Street, except that their shares and interests in the said moiety is to depend solely on the decease of my executrix." D. C. and all the testator's half-brothers and half-sisters died before the suit was commenced:—Held, that though the bequest in the will of numbers 63 and 64 was adeemed by the testator taking an assignment of the original lease, the effect of the last-mentioned codicil was to entitle the children of the testator's half-brothers and half-sisters who were living at the decease of the survivor of them to the testator's interest in numbers 63 and 64 as it existed at his death. *Porter* v. *Smith*, 16 Sim. 251; 12 Jur. 931.

Bequest of leaseholds for years determinable upon lives for life, with remainder over, for all the residue of the testator's term and interest to come therein at his decease: the term expired in the life of the testator, who continued to hold, and paid half a year's rent before his death as tenant by the year: upon the general words unrestrained, comprising the interest from year to year, and the intention upon the whole will, a subsequent lease obtained by the executrix, the widow and tenant for life under the will, was held subject to the uses of the will, as the residue of the term at his death, if any, however short, would have been. *James* v. *Dean*, 15 Ves. 236; 8 R. R. 178—C. A.

A renewed lease does not pass by a previous will bequeathing the lease or the premises held on lease. *S. C.*, 11 Ves. 387; 8 R. R. 178.

Bequest of leasehold premises, and all testator's estate, term, and interest therein; the interest acquired under a subsequent renewal of the lease does not pass. *Slatter* v. *Noton*, 16 Ves. 197.

Whether a renewal of lease is an ademption of a previous bequest of lease depends on the intention apparent in will; generally it is. *Colegrave* v. *Manby*, 6 Madd. 72; 22 R. R. 245.

A., being possessed of a lease of manor lands and hereditaments for twenty-one years, granted by the warden of an hospital, assigned, by his marriage settlement, the premises and all the interest, benefit, and advantage of a renewal therein, &c., to trustees upon trust, out of the rents and profits, to pay the rents, perform the covenants, raise a competent sum for renewing the lease from time to time as should be customary, and renew the lease accordingly, and subject thereto to pay the rents to A. during his life, and after his death to stand possessed of the leasehold premises, on certain trusts, for the sons of the marriage, and on failure of those trusts for A. absolutely. A., by his will, devised his manor, hospital lands, and hereditaments, situate in, &c., held by lease from, &c., to the same

persons who were trustees of his marriage settlement, with directions to perform the covenants in the new lease, or any leases hereafter to be procured, to collect out of the rents a competent sum for renewing the lease, and to renew the same from time to time. After the date of his will, A. surrendered the existing lease, and obtained a renewed lease:—Held, that this renewed lease passed by, and was subject to, the trusts of this will. *S. C.*, 2 Russ. 238; 22 R. R. 245. Affirming 6 Madd. 84.

Testator bequeathed to his wife the interest and dividends of such stock as should be standing in his name at his decease during her life, and he directed that at her decease one moiety of such stock, "subject to and after deducting such premium or sum of money as should be necessary for the renewal of the crown lease of the leasehold messuages which he purchased of Sir H. T., in case he should not have renewed such lease in his lifetime," should go to his five children. In a subsequent part of the will he gave to his son G. all his leasehold houses which he purchased of Sir H. T., to hold to his said son and his executors, &c., for the then existing term or terms therein, and all benefit of renewal "aforesaid," for his and their own use and benefit. At the time of the widow's death the lease was subsisting unrenewed:—Held, that by the "renewal" of the lease was intended a grant at the widow's death of a reversionary lease, to commence at the expiration of the former lease, for the same term, at the same rent, and under the same covenants as were mentioned and comprised in the former lease, or as near thereto as the law by which the crown leases are regulated would allow. *Rickards* v. *Rickards*, 2 Y. & C. C. C. 419; 7 Jur. 715. Affirmed, 13 L. J., Ch. 344.

A renewal of a lease containing a covenant for perpetual renewal executed to the lessee after the date of her will, devising her interest in the lease, though it was (previous to the passing of the 1 Vict. c. 26) a revocation of the will at law, was held not to have such effect in equity. *Poole* v. *Coates*, 2 Dr. & War. 493; 1 Con. & L. 531; 4 Ir. Eq. R. 497.

—— **Bequest of Lease—Subsequent Purchase of Reversion.**]—Where a testator has given certain leaseholds for all the residue of the terms for which the same should be held by him at his death, and afterwards acquires the fee, such fee passes under the 24th section of the 1 Vict. c. 26. Where there is a revocation of a specific gift of a house charged with an annuity, and another house is given in substitution, a certain reason being assigned for such revocation, though that reason does not arise, the revocation of the gift and the annuity is complete, and the substituted house is taken free from the annuity. An annuity of like amount, subsequently given, is in substitution for the annuity charged on the revoked gift. *Struthers* v. *Struthers*, 5 W. R. 809.

A testator devised all his freehold estate at B., which he purchased of C., by a will dated before, and republished by a codicil dated after the wills act; but a small piece of land purchased with the estate by the testator of A., and always held and mixed with it, was leasehold. After making the codicil, the testator purchased the fee of that small piece of land, and the leasehold interest was merged:—Held, notwithstanding the 24th section of the wills act, that the codicil did not pass the after-acquired fee. *Emuss* v. *Smith*, 2 De G. & Sm. 722.

A testator gave all his "personal property, estate, and effects" to his widow, and died intestate as to real estate. Being possessed of a term in real property, he subsequently purchased the reversion, and had it conveyed to a trustee, to prevent the term from merging:—Held, that the reversion did not pass by the will, but that the term did so. *Belaney* v. *Belaney*, L. R. 2 Eq. 210; 12 Jur. (N.S.) 445.

A testator being entitled to a house, as to part in fee, and as to the residue for a term of years, gave the same, by the description of "all that my messuage, partly freehold and partly leasehold, No. 3, C. Street," together with other estates, to trustees, their heirs, executors, administrators, and assigns, upon certain trusts for his wife for her life, and then for his son H. and his issue, in strict settlement. The testator, after directing that the estates, hereditaments, and premises should not be sold, gave the residue of his estate and effects upon trust for sale and division among his wife and children. After the date of the will the testator purchased the reversion in fee of the leasehold portion of No. 3, C. Street, and took a conveyance thereof, whereby the term became merged:—Held, that the whole of the testator's interest in the house passed under the specific devise, the description being sufficient, and the will affording evidence that the testator did not intend that the freehold and leasehold portions of the house should be divided. *Miles* v. *Miles*, 35 Beav. 191; 35 L. J., Ch. 315; L. R. 1 Eq. 462; 12 Jur. (N.S.) 116; 13 L. T. 697; 14 W. R. 272.

A testator, by will, dated in 1865, bequeathed to trustees house property held by him on lease, and part of which he described as leasehold, for the benefit of his wife for life, and, after her death, as she should appoint generally. He also made a residuary devise and bequest of realty and personalty. After the date of the will he purchased the reversion of the above leaseholds, and took a conveyance of the same to himself in fee:—Held, that the freehold interest in the property passed to the trustees in trust for the wife. *Cox* v. *Bennett*, L. R. 6 Eq. 422.

A testator gave to his wife all his term and interest in the leasehold house at B., at which he then resided, for her absolute use and benefit, subject to the payment of the ground rent and performance of the covenants affecting the same. After the date of his will the testator purchased the freehold of the house at B., which was conveyed to him in fee simple:—Held, that the house passed to the testator's widow, under the specific devise contained in the will, for an estate in fee simple. *Saxton* v. *Saxton*, 49 L. J., Ch. 128; 13 Ch. D. 359; 41 L. T. 649; 28 W. R. 294.

2. What Interest passes.

a. Estates for Life, in Fee Simple, or in Tail.

i. *What Words pass the Fee Simple.*

In General—Words of Limitation Necessary.]—In a devise of real estate words of limitation are required to give more than an estate for life, as are words of qualification to restrain the extent and duration of the interest in personal property. *Adamson* v. *Armitage*, 19 Ves. 418.

If lands are devised to one generally, he takes but an estate for life, unless it appear plainly the

testator intended him a greater, or that he is likely to be a loser, or his person chargeable. *Fairfax* v. *Heron*, Pre. Ch. 67.

Testator gives freehold and leasehold estates to his heir-at-law for life, remainder to R. for life, and to his first and other sons, remainder to S. and W. for their joint lives, and to the survivor of them; the survivor is only to take an estate for life in the freehold, though he takes the whole interest in the leaseholds. *Awse* v. *Melhuish*, 1 Bro. C. C. 519.

Devise in these terms: I give to A. my farm and my lands at R., to him, his heirs and assigns for ever; and I also give to A. my farm and manor of E. An estate for life only in the latter. *Paice* v. *Canterbury* (*Archbishop*), 14 Ves. 364.

A testator seised of property in fee devised it (by description), with all outbuildings, &c., "according to the tenor of the testator's deeds," without any superadded words of inheritance. The statute of wills being inapplicable:—Held, that the devisees took life estates only. There were two devises of the same property to children in two different events:—Held, that the terms of the second devise could not, by construction, be introduced into the first, so as to extend the estate thereby given. *Sturgis* v. *Dunn*, 19 Beav. 135.

A testator devised freeholds in terms which gave life estates to his children equally, and unto the children of such children as might be dead, who were to take their parents' share only:—Held, that the life estates of the children were not enlarged by the substituted gift. *Ib.*

The fee does not pass under a devise to two brothers, share and share alike, because one of them is the heir. *Bowen* v. *Scowcroft*, 2 Y. & C. C. C. 640; 7 L. J., Ex. Eq. 25.

Devise to A. for life, the reversion to B. and C., to be equally divided betwixt them. B. and C. are tenants in common for life only. *Peiton* v. *Banks*, 1 Vern. 65.

A testator gave and bequeathed to his son R. (who was his heir-at-law) his freehold land in D., and directed that the residue of the property which he might leave at his death should be divided between that son and his two sisters in equal proportions, with a direction that whatever portion might devolve to him should be placed in the names of trustees, and the interest paid to him during his life, and that after his death his share should be divided between his children and placed in the names of trustees, with a discretionary power to employ a portion of the capital for their advancement; and on the children respectively attaining twenty-five, their shares to be transferred to them. Should his son die without issue, the whole of his portion was to devolve to his two sisters during their lives in equal proportions, and after their deaths to their children:—Held, that under the terms of this devise the son took only a life estate in the freeehold land in D. *Saumarez* v. *Saumarez*, 4 Myl. & Cr. 331.

Where no Words of Limitation—Intention of Testator.]—A devise of all my lands, tenements, and hereditaments to A. will carry the fee, if that appears to be the general intent of the testator. *Denn* v. *Moor*, 3 Anstr. 781.

Whether the word "hereditament" alone will carry a fee, quære. *Ib.*

A legal fee will pass without the word "heirs" where a trust of land can be satisfied no other way. *Villiers* v. *Villiers*, 2 Atk. 72.

Devise to daughters to augment portions construed a devise of fee-simple. *Carpenter* v. *Chapman*, 9 Mod. 92.

Direction that all testator's children shall share equally in all his property, gives them the real estate in fee. *Patton* v. *Randall*, 1 J. & W. 189.

Bequest of land, and of five per cent. stock, and three per cent. stock, to trustees, to apply a sufficient part to the support and education of R., the stock to remain in the testator's name, and the surplus of the dividends and rents to accumulate; and when R. attained twenty-one, to transfer to her the lands, stock, and accumulations; but if R. died under twenty-one (as happened to be the case) testator gave his lands to E., without any words of limitation, and his five per cent. stock to M., provided they were living at the decease of R., not else. The plaintiffs were the residuary legatees. R. died under twenty-one:—Held, that E. took the lands in fee; that M. took the capital of the five per cent. stock; that the plaintiffs were entitled to the accumulations of the rents and dividends. *Powles* v. *Jopling*, 9 L. J. (O.S.) Ch. 224.

Devise to the testator's three daughters of his property in dwelling-houses, land, &c., in T., to be equally divided between them, share and share alike; and the testator thereby further willed the several shares to his three daughters as before mentioned, to have the interest for their use during their natural life, and afterwards divided equally amongst their children; and, for want of child or children, to go to their husband if living:—Held, that the daughters took estates for life, and in default of children the husbands of the daughters took estates in fee-simple. *Bentley* v. *Oldfield*, 19 Beav. 225.

Gift to trustees in fee, and then to A. B. without any limitation, held to confer beneficial interest in fee on A. B. *Smith* v. *Smith*, 11 C. B. (N.S.) 121; 8 Jur. (N.S.) 459; 5 L. T. 447; 10 W. R. 18.

—— **Where Executory Devise over after Gift in Fee.**]—Under a devise in fee with an executory devise over, indefinite in terms, the devisee over takes a life estate only in the event of the executory devise taking effect. In such circumstances effect is not given to any presumed intention on the part of the testator that the devisee over should take the same estate as the prior devisee would have taken. *Doe* d. *Brodhelt* v. *Thomson*, 12 Moore, P. C. 116; 2 L. T. 65.

A testator devised a house at Spanish Town, Jamaica, to M., in fee. By a codicil made shortly afterwards he revoked this devise in the following terms: "I hereby revoke the devise of my house in Spanish Town from M. and leave it to L., also with the furniture of the said house." The supreme court of Jamaica held that the words of the codicil which revoked the demise to M. substituted L. in the place of M.; and though there were no words of limitation in the devise to L., the court was of opinion that the intention of the testator was to give the same estate to L. as he had by will given to M., and that the re-devise in the codicil carried the fee to L. But upon appeal:—Held (reversing such judgment), that L. took a life estate in the house only; for though it was probable that the testator meant to give to L. the same estate and interest that M. would have taken under will if

the devise to him had not been revoked, yet, looking at the language of the codicil, which was all the court could do, there was no express declaration to be collected of an intention to give L. more than a life estate. *Ib.*

Indefinite Gift enlarged to Fee Simple by nature of Gift over.]—A. by his will, dated in 1819, devised his freehold estate as follows: "To my daughter Henrietta I bequeath the house I live in, being No. 11," &c.; "to my daughter Martha I bequeath my house No. 10," &c.; "but it is my will that the same be placed in trust, and that they shall only receive the rent during their life." "In case of Henrietta's death without leaving behind her more than one child, then the house No. 11 shall revert to my son David, son John, and daughter Martha in equal shares; but if she leaves more than one (be it one, two, or more), they shall all share alike the said property left to their mother; but suppose that none of them live to twenty-one, the property shall revert to David, John, and Martha, as before mentioned." Henrietta survived the testator, and died, leaving two children, of whom one lived to attain the age of twenty-one, and the other died under that age: —Held, that the two children of Henrietta took an estate in fee-simple in possession in the house No. 11. *Burke* v. *Annis*, 11 Hare, 232.

A testator, by a will made in 1806, devised all his real estate to his two brothers during their joint lives and the life of the survivor; and after the death of the survivor, unto and equally amongst all the children of his brothers who should be then living: and in case of the death of any of the children in the lifetime of his brothers or the survivor of them, leaving lawful issue, then he devised the part or share of such deceased parent or parents unto and equally amongst all his, her, or their children who should be then living; and he devised the residue of his real and personal estate to his widow, her heirs, executors, administrators, and assigns:—Held, that the children and grandchildren of the testator's brothers took estates in fee-simple in their respective shares. *Harrison, In re*, 39 L. J., Ch. 501; L. R. 5 Ch. 408; 23 L. T. 654; 18 W. R. 795.

In construing a will made before the wills act, the rule that an indefinite devise may be enlarged into a fee-simple by a gift over in a particular event is not confined to a devise of a vested interest, but is equally applicable to a contingent devise. *Ib.*

A testator, by a will dated in 1832, devised lands to T. during his natural life, and from and after his decease unto his eldest son, if he should have arrived at the age of twenty-one, and in default of his having a son then over. The legal estate in the lands was outstanding. T. died, leaving an eldest son, a minor:—Held, that on the death of T. the eldest son took an estate in fee, liable to be divested on his death under the age of twenty-one, with an executory devise over in that event to T. in tail. *Andrew* v. *Andrew*, 45 L. J., Ch. 232; 1 Ch. D. 410; 34 L. T. 82; 24 W. R. 349.

Devise to the testator's son A.; in case of A. dying before his brother B. and leaving no issue, then to B.; should both testator's children die without lawful issue, then over:—Held, that A. took an estate in fee, liable to be divested: (1) in the event of his dying in the lifetime of B. without leaving children living at his death; and (2) in the event of both A. and B. dying without leaving any children. *Bate, Ex parte, Mid-Kent Ry., In re*, 11 W. R. 417.

The testator gave all his lands, tenements, and hereditaments, and the residue of his personal estates, to trustees, &c., to the use of his grandson H. T. for life, and after his decease in trust for the child and children of H. T. at his or their ages of twenty-one as tenants in common; but in case H. T. should happen to die without leaving any lawful issue of his body living at the time of his decease, then over. H. T. had two children, a son who died in his infancy, and a daughter who attained twenty-one, but died intestate in the lifetime of H. T., leaving children: —Held, that in the events which happened the personal estate belonged to the personal representative of the daughter of H. T., and that the real estate vested in the heir-at-law. *Hutchinson* v. *Stephens*, 1 Keen, 240.

A testator had devised and bequeathed his real and personal estates to his wife during widowhood, and at her decease or marriage to his sons and daughters therein named in equal shares; and the will then proceeded as follows: "but if any of my children should die during my lifetime, or otherwise, leaving issue, such child or children, as the case may be, to have their father's or mother's share, to be equally divided between them absolutely." The testator's widow died in 1884, leaving all the sons and daughters named in the will her surviving, and all of them had attained twenty-one years. Such sons and daughters were the vendors of the property sold: —Held, that the children were entitled to their respective shares for an indefeasible estate in fee-simple, and that they could therefore make a good title. *Thompson* to *Curzon, In re*, 52 L. T. 498. See also *Pollard, In re*, post, col. 1429; *and Cases* sub DEATH WITHOUT ISSUE, ante, cols. 1012, et seq.

—— **By charging Lands with Debts or Legacies.**]—Whether a devise of lands to A., "after payment of my just debts and funeral expenses," will carry the fee, quære. *Denn* v. *Moor*, 3 Anstr. 781.

A., being seised of lands of 10*l.* per annum in possession, and 34*l.* per annum in reversion, gave certain legacies to be paid at certain different times, and then devised all his lands to his youngest son R., who did not pay the legacies within the time:—Held, that a fee passed to R., because it appeared that the sums to be paid were more than the profit of the lands in possession would amount to in that time. *Reake* v. *Lea*, 1 Free. C. C. 479.

A testator seised of lands under a lease for lives renewable for ever, gave his wife his dwelling-house for life, and certain benefits out of the farm, and gave his son John four acres of land, and his son Andrew the remainder of the farm, and directed his son Andrew to make good the benefits to his wife, and both Andrew and John to do all the labour belonging thereto:—Held, that John took the absolute interest in the four acres. *Morrough* v. *Dufferin (Lord)*, 2 Jones, 719.

Devise of land to A., paying out of the rents or out of the land a certain sum, is no fee-simple, otherwise if the devise was paying a certain sum generally, without saying "out of the land." *Hawker* v. *Buckland*, 2 Vern. 106.

A. devises to his brother B. all his lands and hereditaments, and all his personal estate,

desiring him to pay his debts and legacies. A fee passes. *Ackland* v. *Ackland*, 2 Vern. 687.

A. begins his will with disposing of all his worldly estate, and then wills that all his debts be first paid, and gives his wife a moiety of what is left after his debts paid. The real estate is charged with the debts, and a fee in a moiety of the surplus of the estate passes to the wife. *Beacheroft* v. *Beacheroft*, 2 Vern. 690.

Devise to testator's wife, she paying his debts, and 15*l.* to A. B., if so much can be spared, and the rest of the estate to go to A. B. after her death, gives her the fee and a power of sale. *Dolton* v. *Hewen*, 6 Madd. 9.

A devise of lands to A. "for paying his son 50*l.* when of the age of twenty-one years" gives A. the fee beneficially charged with the payment of 50*l.* *Abrams* v. *Winshup*, 3 Russ. 350.

A. gave B. all his lands, tenements, and messuages whatsoever, after debts and legacies and funeral expenses paid. The debts being charged only contingently on the real, if the personal estate should be deficient:—Held, that plaintiff took only a life estate. *Merson* v. *Blackmore*, 2 Atk. 341.

Testator, after expressing an intention to dispose of all his property, directed his just debts and funeral expenses to be paid by his executor thereinafter named, and then, after giving several pecuniary legacies, devised all copyholds, which were his only real estates, to his son J. without words of inheritance, and left all the rest and residue of his estate and effects to his said son, whom he appointed sole executor and residuary legatee, such son being also his heir:—Held, that the will was sufficient to pass the fee in the copyholds, and that it charged them with the debts. *Dover* v. *Gregory*, 10 Sim. 393; 9 L. J., Ch. 81.

Under a devise to R. and his heirs, and if he dies without issue then to W., he paying his two sisters 500*l.* apiece, and if R. and W. die without lawful issue then to testator's three daughters and their surviving issue:—Held, that R. took an estate in fee, which was not cut down to an estate in tail. *Fisher* v. *Barry*, 2 Hog. 153.

W. by will, dated before 1838, gave three parcels of land, A., B. and C., to his son J. in one gift, without any words of inheritance, and afterwards declared that J. should out of A. pay another son, D., an annuity of 10*l.* per annum during D.'s life:—Held, that this enlarged the previous indefinite devise to J. to an estate in fee-simple in the parcel of land A., but that he only took a life estate in the other parcels B. and C. *Matthews* v. *Windross*, 2 K. & J. 406; 2 Jur. (N.S.) 926.

A devise in 1822 of real estate to S., upon condition that she pay 50*l.* to B. by instalments of 10*l.* a year; but in case S. dies without issue the land to go to S. or his heirs, "in consideration that he pays to J. or his heirs the sum of 250*l.* twelve months after the death of S.":—Held, that the gift conferred upon S. a fee-simple by reason of the charge of 50*l.*; and that the gift over was to take effect upon her death without issue then living, from the direction that the executory devise over was to pay the 250*l.* twelve months after the death of S. *Blinston* v. *Warburton*, 2 K. & J. 400; 25 L. J., Ch. 468; 2 Jur. (N.S.) 858.

An indefinite devise of real estate by a will made before 1838 is enlarged into a fee-simple by annexing a direction that the devisee should pay a sum of money to another person, or by a declaration that the devise is "subject to his making" such payment, or by any other expression in the will, shewing that the payment is to be made by the devisee out of the interest devised to him, because if such interest were for life only it might determine before it enabled him to make such payment. *Burton* v. *Powers*, 3 K. & J. 170; 26 L. J., Ch. 330; 5 W. R. 242.

But an indefinite devise before 1838 of real estate to A., "after" or subject to the payment out of the premises "of a sum of money to another person," has not this effect, because the sum is then charged upon the whole fee-simple, and nothing is given to A. until that charge is satisfied; and consequently no implication can be derived from the charge of an intention to enlarge A.'s estate. *Ib.*

A testator by his will, made in 1822, devised a farm and premises to A. for life, and after her decease to J. W., subject to the payment out of the aforesaid premises of the sum of 50*l.*, and ordered that the rents and interest that were behind, due, and unpaid, should go and be paid to that person he had left the estates and property respectively to. The devise to J. W. contained no words of limitation, and the will contained a residuary devise:—Held, that J. W. took a life estate only. *Ib.*

A testator devised to his wife his lands. By a separate clause he gave her certain chattels, and then added, fourthly, "I order my wife to pay the following legacies," which he enumerated. He made her and another executors:—Held, the legacies were charged on the lands, and the wife took the fee. *Johnson* v. *Brady*, 11 Ir. Eq. R. 386.

Neither the word "thereout," nor "paying," is required to make the repayment of a legacy a condition, so as to give the devisee the fee in lands charged with it. *Ib.*

A testator, by will made in 1809, after giving all his "lands, tenements, chattels, and premises whatsoever" to his wife during her life, bequeathed at her death certain messuages "to his son W., he paying to certain legatees the sum of 50*l.* each, out of the aforesaid premises." By another devise he "gave to his son J. other messuages at the decease of his wife." The residuary clause was as follows: "All the rest and residue of my estate, of whatever nature, kind, and quality soever the same may be, and not herein disposed of, after payment of my debts, &c., first, I give to my grandson 5*l.*; lastly, I give and bequeath unto my four daughters equal share and share alike of the said residue and remainder, and to be paid to them one year after the death of my wife":—Held, that the devise to J. was not enlarged to a devise in fee by implication from the prior devise to W. (which was accompanied with a charge), and that J. took an estate for life only. *Morris* v. *Lloyd*, 33 L. J., Ex. 202; 10 L. T. 508.

Held, also, that the reversion in fee passed by the residuary devise, the words "to be paid, &c.," being satisfied by being applicable to some part if not to the whole of the residue. *Ib.*

A father who died in 1806 by his will gave two freehold houses to one of his sons without any words of limitation, subject to legacies and annuities, with a gift over, in case of alienation or of death without issue, to his brothers and sisters, nominatim, also subject to the legacies and annuities, and with a direction to pay sums of 4*l.* to each of certain grandchildren as they

attained twenty-three :—Held, that on the death of the devisee without issue, and without barring any estate tail he might have had, the brothers and sisters took as joint tenants, and as the gift was coupled with a direction to pay several gross sums, their estates would in a case coming under the old law be enlarged to a fee-simple. *Wilkinson* v. *Wilkinson*, 20 L. T. 416.

A testator, by will made before 1837, devised lands to trustees to raise 4,000*l.*, and subject thereto he gave the lands to W. for his own special use :—Held, that W. took an estate for life only. *Oakley* v. *Wood*, 37 L. J., Ch. 28 ; 16 L. T. 450 ; 15 W. R. 862.

Effect of the Wills Act.]—A testator, subsequently to the 7 Will. 4 & 1 Vict. c. 26, gave to A. the house she lived in, and grass for a cow, in Gill Field :—Held, that she took an estate in fee-simple in the house, and the right of pasture of a cow during her pleasure. *Reay* v. *Rawlinson*, 29 Beav. 88 ; 30 L. J., Ch. 330 ; 7 Jur. (N.S.) 118 ; 9 W. R. 131.

The 28th section of the Wills Act (7 Will. 4 & 1 Vict. c. 26), which enacts that "where any real estate shall be devised to any person without any words of limitation such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of," applies to the devise of an existing estate or interest, and not to an estate or interest which the testator by his will creates de novo ; and therefore a gift by will, since the statute, of an annuity to A. without words of limitation, but which was by the same will charged upon real estate, is not a devise of a perpetual annuity or rent-charge, and is a gift of an annuity for life only, as it would have been before the statute. *Nichols* v. *Hawkes*, 10 Hare, 342 ; 22 L. J., Ch. 255 ; 1 W. R. 124. See also *Lord* v. *Wightwick*, 4 De G. M. & G. 803 ; 23 L. J., Ch. 235 ; 18 Jur. 253 ; 2 Eq. R. 349.

Devise by the testator by his last will, dated the 27th day of June, 1840, to his three daughters of real estate with the appurtenances, to hold the same in joint tenancy for their own sole use and benefit in succession, and not subject to the debts or control of their husbands ; the same not to be sold or disposed of, but held in succession by his three daughters, with right of survivorship :—Held, that the daughters took as joint tenants in fee. *Wisden* v. *Wisden*, 2 Sm. & G. 396 ; 18 Jur. 1090 ; 2 W. R. 616.

Effect of particular Words in passing the Fee—Word "Estate."]—The word "estate" in a will, without words to restrain the generality of the sense, will carry a fee. *Macaree* v. *Tall*, Ambl. 182.

The words "I devise all my temporal estate" the same as "I devise all my worldly estate" pass a fee, and this the plainer where it is afterwards said "all the rest of my real estate," the word "rest" being a term of relation. *Tanner* v. *Wise*, 3 P. Wms. 295 ; Cas. t. Talb. 284.

Devise of all that "estate" testator bought of M., held to pass the fee ; so held also as to another clause, which was a devise of "the reversion of that tenement his sister lived in," after her death :—Held, contra as to other devises, being first, "all those houses he bought of T. W., containing three dwellings with all their appurtenances," and next, as to a devise of the tenement in possession of M. B. presently after his death. *Bailis* v. *Gale*, 2 Ves. Sen. 48.

A. devises all the rest and residue of his real and personal estate whatsoever ; this will pass a fee. *Murry* v. *Wyse*, 2 Vern. 564.

The word "estate" does not of necessity pass the fee-simple. *Rogers* v. *Waterhouse*, 4 Drew. 329 ; 6 W. R. 823.

Testator gave to his heir one shilling, and devised to W. B. all his lands, and in the next sentence gave to him all his goods, chattels, personal and testamentary estate :—Held, that the fee-simple of the lands passed to W. B. *Bradford* v. *Belfield*, 2 Sim. 264 ; 29 R. R. 100.

A testator devised in the following words : "As to the rest of my estate, the two houses, one in St. John's Lane, and the other in Foggwell Court, in Charterhouse Lane, I give to my wife for her life, and after her decease, that in St. John's Lane to my daughter ; the other between my two sons, to be equally divided" :—Held, that the daughter took only an estate for life in the house in St. John's Lane. *Esdaile* v. *Gall*, 1 Russ. & M. 540 ; 8 L. J. (O.S.) Ch. 133.

B. devised thus, "all my freehold estate, of any nature or kind whatsoever, which at present is in my power to dispose of, I give to my wife." The question whether the wife took an estate for life or in fee was sent to B. R. *Snelson* v. *Corbet*, 3 Atk. 369.

One devises a third of all his estate whatsoever to his wife, and two-thirds of all his real and personal estate to his son J., and his heirs ; the wife has but an estate for life in the third part of the real estate. *Chester* v. *Painter*, 2 P. Wms. 335. But this seems overruled in principle by *Stewart* v. *Garnett*, 3 Sim. 398, 406.

—— **"Estate" coupled with Description by Locality or Occupation.**]—A testator setting out in his will, to give and dispose of his worldly estate, is a strong proof that he intends to dispose of the inheritance of his lands, when there are sufficient words in the following parts of the will for that purpose ; the words, "estate at such a place," or "in such a place," may carry a fee. The whole complexion of a will ought to be considered. *Ibbetson* v. *Beckwith*, Cas. t. Talbot, 157. But see *Denn* v. *Gaskin*, Cowp. 657.

I devise all my land and estate in D. to J. ; decreed, a fee passes ; these words charging not only the lands, but also the testator's interest in the land. *Barry* v. *Edgeworth*, 2 P. Wms. 523.

A testator, after giving his wife an annuity for her life to be issuing out of "all his real estate, lands, and hereditaments in P.," devised "the said estate, lands, and hereditaments" to his daughter and her heirs ; but in case his daughter died under twenty-one and without issue, he devised "the said estate, lands, and hereditaments" to his wife for her life, and after his decease to the children of A., share and share alike :—Held, that subject to the previous interests given to the daughter, and to the wife, the children of A. living at the testator's death took an estate in fee in the lands in P. *Wilkinson* v. *Chapman*, 3 Russ. 145.

Devise of all my estate at H. to A. for life, remainder to B. and C., is a devise in fee to B. and C. *Price* v. *Gibson*, 2 Eden, 115.

Devise of "my copyhold estate at P., consisting of three tenements, and now under lease," &c., but not specifying for what interest. An estate for life only passes. *Pettiward* v. *Prescott*, 7 Ves. 541.

A testator, resident in Jamaica, devised the rents, issues, and profits of his estate, called

Islington and Cove's Pen, in that island, to A. B. :—Held, that the estate and the slaves, mules, cattle, and machinery thereon passed under this devise. *Stewart* v. *Garnett*, 3 Sim. 398. See *Rucker, Ex parte*, 3 Deac. & C. 704.

One devised to J. all his freehold, leasehold, and copyhold estates in E., and gave the rest of his estates, both freehold and leasehold, to M. He had freehold and leasehold in M., but no copyhold out of E. :—Held, J. took the fee in the freehold and copyhold, and the absolute property in the leasehold in E. *Macaree* v. *Tall*, Ambl. 182.

A testator devised in the following words: "As to the rest of my estate, the two houses, one in St. John's Lane, and the other in Foggwell Court, in Charterhouse Lane, I give to my wife for her life, and, after her decease, that in St. John's Lane to my daughter; the other between my two sons, to be equally divided" :—Held, that the daughter took only an estate for life in the house in St. John's Lane. *Esdaile* v. *Gall*, 1 Russ. & M. 540; 8 L. J. (o.s.) Ch. 133.

Devise to executors of all real and personal estates in trust, as to his real estate, to his wife for life, and after her death he gave his houses, lands, and estates in B. to J. B., "but at his death I will that the whole shall be for the use of the said J. B.'s wife and children, and which children, at the death of their mother, shall inherit the same jointly during their lives, and, if they shall die before twenty-one, I will that my houses and estates in B. go to H. S." :—Held, that the children took for their lives only, and that, upon their having attained twenty-one, the inheritance was undisposed of. *Spry* v. *Bromfield*, 9 Sim. 534. But the court of exchequer, on a case sent, decided otherwise. *S. C.*, 7 M. & W. 546; 10 L. J., Ex. 457. And see *S. C.*, 10 Sim. 94; 5 Jur. 864.

Construction of will passing fee without words of limitation. As to effect of description of lands as in the occupation, &c., of particular tenant to restrain the legal effect of the word "estate" in a devise to pass the fee, quære. *Chorlton* v. *Taylor*, 3 V. & B. 160.

A devise before 1838 of all my estates in the occupation of A., in the parish of B., to C., without words of limitation, conferred upon C. the fee-simple. *White* v. *Coram*, 3 K. & J. 658.

Devise of "all my estates in the parishes of P. and T., to J. B., if he is living at the time of my death; but if he is dead" then over :—Held, that the fee-simple passed to J. B. *Ib.*

A devise of testator's "estate at A.," without more, will comprehend his whole interest in the lands rather than be referable to the mere locality. If, however, words of limitation be added, they will determine the extent of the benefit. *Southby* v. *Stonehouse*, 2 Ves. Sen. 611.

Devise of land and houses in L. Street, with all outbuildings, &c., "according to the tenor of the title deeds of the said land and houses," without any words of limitation :—Held, to pass an estate for life only, although by the deeds the testator held the property in fee. And held also that, although in a certain event which did not happen, and in another event which might happen, words of a larger signification were used, the estate for life could not be extended or enlarged. *Sturgis* v. *Dunn*, 19 Beav. 135.

Devise of "my property in houses, &c., at G." :—Held (independently of Wills Act), to pass the fee. *Bentley* v. *Oldfield*, 19 Beav. 225.

A testator, before the Wills Act, devised his estate at A. to S. K. for life, charged with life annuities, but in case the annuitants or any of them survived S. K. he gave the aforesaid estate to S. K.'s eldest surviving son, charged with the annuities, but in default of issue male he gave the aforesaid estate to T. K., charged in like manner, and unto his eldest son upon the same conditions; but in default of issue male the premises were to descend to the testator's heirs as aforesaid :—Held, that the word "estate" was not sufficient to give the eldest surviving son of S. K. a fee-simple. *Key* v. *Key*, 4 De G. M. & G. 73; 1 Eq. R. 82; 22 L. J., Ch. 641; 17 Jur. 769.

—— **"Executors or Administrators."**]—A devise of a testator's "property to W. H., his executors or administrators," was held to pass the fee of the testator's real estates absolutely to W. H. *Hunter* v. *Pugh*, 9 L. J., Ch. 62; 4 Jur. 571.

—— **"Interest."**]—A testator in a will made before the Wills Act gave and bequeathed "all the interest of my houses and cottages situated as follows." He then proceeded to dispose of this property, which was copyhold, and, after giving life interests, concluded with a gift to T. S. :—Held, that the words "all my interest" at the commencement of the will ran through the whole will, and were not in the nature of a recital merely, and that T. S. took the fee. *De la Hunt and Pennington, In re*, 57 L. T. 874.

A messuage was settled upon A. for life, remainder to B. in tail, remainder to A. in fee. A. devises all his right, title, and interest in this messuage to B., who was his son, but without adding any words of inheritance :—Held, that by this devise the fee passes. *Cole* v. *Rawlinson*, 3 Bro. P. C. 7.

—— **"Leaseholds"—Purchase of Reversion by Tenant for Life.**]—Testatrix devised leaseholds, renewable by custom, to J. P. for the residue of the term, and after the death of J. P., during the residue of the term, to the children of J. P. in equal shares. J. P. renewed the leaseholds more than once, and finally purchased the reversion :—Held, that the fee-simple in the property passed by the devise in the will to the children of J. P., and became subject to the trusts of the will. *Phillips* v. *Phillips*, 54 L. J., Ch. 943; 29 Ch. D. 673; 53 L. T. 403; 33 W. R. 863—C. A.

"Moiety."]—Devise of "my moiety" of closes at L. is insufficient, prior to the 7 Will. 4 & 1 Vict. c. 26, to pass the fee. *Arnold, In re*, 33 Beav. 163.

—— **"Part."**]—Testator devised to his son W. his (testator's) part of the lands of A., describing them as "being lately part of the estate of I. K., and purchased by me, and in which X. is jointly concerned with me," to hold same to W. and his assigns during his life and no longer, unless it should happen that W. should survive his then present wife and marry a second wife, by whom he should have issue living at the time of his death; and then and in that case he devised his said part of said lands upon the death of W., leaving issue male of such second marriage, to such issue male, share and share alike; and for want of issue male to the issue female of such second marriage, share and share alike; and in

case it should so happen that W. should die without leaving any such issue of a second marriage, then and in that case he devised said lands to his two grandsons James and John and their heirs, and the survivor of them, share and share alike, to hold to their own use and benefit for ever; and in case James and John should die without leaving issue, then he devised said lands to his grandson M. M. and his heirs; and in case of his death without issue he devised said lands to his grandsons Robert and William, and their heirs, share and share alike, for ever. W. having married a second wife, died, leaving issue male by her, but no issue of his first marriage:—Held, first, that under a devise of the testator's "part" of the lands the fee will pass; secondly, that W. took an estate for his life only, with concurrent contingent remainders in fee; first to the sons, secondly to the daughters of W. by his second marriage living at his decease; and thirdly to the testator's grandson in tail, of which one remainder only was to start. Review of the cases upon the subject. *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47; 8 Ir. Eq. R. 740. See comments on this case in *Woodhouse* v. *Herrick*, post, cols. 1296–7.

—— **"Freely to be Possessed," in Gift to Executors.**]—A gift to A. and B., "whom I appoint my executors of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or matter it may be," will pass the fee-simple of real estate. *Thomas* v. *Phelps*, 4 Russ. 348; 6 L. J. (o.s.) Ch. 110.

The words, "I bequeath to my sons A. and B., and likewise constitute and ordain them my sole executors of this my will, all and singular my lands, messuages, and tenements, with all my goods and chattels, by them freely to be possessed and enjoyed":—Held, not to be a devise in fee. *Bromitt* v. *Moor*, 9 Hare, 378; 22 L. J., Ch. 129.

—— **"Property."**]—Before the Wills Act a devise of realty could not carry more than a life estate in the absence of words of limitation shewing an intention to give a larger estate. The word "property" is such a word of limitation only if it occurs in the operative part of the will. *Hill* v. *Brown*, 63 L. J., P. C. 46; [1894] A. C. 125; 6 R. 440; 70 L. T. 175—P. C.

A testator directed that all his just debts and funeral expenses be paid as soon as possible after his decease. He appointed three persons as joint executors of his "entire property, for the purpose of putting it to the best advantage of my sister, wife, and children":—Held, that fee-simple lands were devised by the will. *Murphy* v. *Donnelly*, Ir. R. 4 Eq. 111.

A testator gave specific real estate and his personal estate, property, and effects to his wife for life; and after her death he gave the aforesaid specific real estate, with all moneys, rights, credits, &c., "and all property whatsoever that should be remaining after his wife's decease," to his children:—Held, that the children took his real estate in fee. *Footner* v. *Cooper*, 2 Drew. 7; 23 L. J., Ch. 229; 2 W. R. 5.

—— **"Rents and Profits."**]—A sale directed on the words "rents and profits" alone, though generally contrary to testator's intention, in aid of a creditor, on the ground of law, that in a will those words meant and passed the land itself. Another construction, however, as to legatees, upon the addition of the words "as the rents and profits, &c., should advance the money." *Baines* v. *Dixon*, 1 Ves. Sen. 41.

Devise of profits is a devise of land. *Johnson* v. *Arnold*, 1 Ves. Sen. 171.

Under a devise to sons and daughters of an equal share in all the income of real property the fee passes. *Mannox* v. *Greener*, L. R. 14 Eq. 456; 27 L. T. 408.

Devise of "one moiety of the rents, issues, and profits of my estate named T., in the parish of M., to be divided equally amongst my grandchildren; the other moiety of the rents, issues, and profits of my said estate I give to R. and his heirs":—Held, that the grandchildren take the fee as tenants in common in a moiety of the estate. *Stewart* v. *Garnett*, 3 Sim 398.

Testator, by a codicil to his will, reciting that certain lands produced a clear yearly rent of 237*l.*, devised them to trustees in trust for charitable purposes; he then directed that, in the event of there being an increase of the rents of the said lands by any new letting, the surplus so to arise should go to the only use and behalf of the person or persons of the S. and C. families, who for the time being should be lords or ladies of the manor of D.; and in case the said families did not protect the said charities, or if the said families should become extinct, then, and in either of such cases, the trustees were to apply the said surplus rents, in addition to the provision already made, for the charity:—Held that the gift of the surplus rents to the members of the S. and C. families was a good equitable devise in fee, and that the gift over to the trustees of the charity was bad for remoteness. *Charitable Donations Commissioners* v. *Clifford*, 1 Dr. & War. 245.

A father, after giving all the residue of his estate, both real and personal, to trustees, gave, devised, and bequeathed the yearly produce of his estate unto his six children, naming them, and the issue of them (such issue taking only their parents' share), to and for her or their own use and benefit absolutely, share and share alike:—Held, that the children of the testator, who all survived him, took absolute interests in his realty as tenants in common in fee. *Shacklock* v. *Jarvis*, 26 L. T. 682.

A testator, in 1857, devised freeholds to trustees to pay the rents to his five children, "or their heirs":—Held, that the children took a fee. *Adshead* v. *Willetts*, 29 Beav. 358; 9 W. R. 405.

—— **"Residue."**]—A testator, by his will dated in 1795, gave certain pecuniary legacies, and then gave all the residue of his effects, real and personal, to A. and B., and then gave an annuity for the life of C., and then gave all his lands in the county of Kent and elsewhere with his personal estate to three trustees (naming them), their heirs and assigns, in trust for the purposes above mentioned:—Held, that A. and B. took an equitable estate in fee in the lands in the county of Kent. *Torrington* (*Lord*) v. *Bowman*, 22 L. J., Ch. 236.

—— **Residuary Legatee.**]—After directing payment of his funeral expenses and his just and lawful debts, a testator gave his residence, describing it "as well as all my lands, tenements and hereditaments, to my dear wife . . . for and during the term of her natural life wheresoever and whatsoever, real and personal"; then, after bequeathing some pecuniary legacies, the testator proceeded, "And to this my last

will and testament I appoint and direct and make my dear wife . . . sole executrix. to this my will, and also at the same time I appoint and make her my residuary legatee" :—Held, that the widow took an estate for life only in the testator's real estate, which, subject to such life estate, passed to the testator's heir-at-law. *Morris, In re, Morris* v. *Atherden*, 71 L. T. 179.

ii. *Limitations Creating an Estate Tail.*

Principles.]—Construction of words of a devise as to giving an estate tail. *Willcox* v. *Bellaers*, Turn. & R. 491.

Where the intent of a testator, in creating an estate tail, is very doubtful, the court will lay hold of any circumstances, rather than put it in the power of a person on a remote contingency to bar all subsequent remainders. *Lethieullier* v. *Tracey*, 3 Atk. 797.

Where by plain words, in themselves liable to no doubt, an estate tail is given in a will, it cannot be cut down to a life estate, unless there are other words which plainly shew the testator to have used the former as words of purchase contrary to their ordinary sense, or unless in the other provisions of the will there should be a clearly expressed intention inconsistent with the giving an estate tail, and which intention can only be fulfilled by sacrificing the particular provision and regarding the expressions as words of purchase. *Fetherstone* v. *Fetherstone*, 3 Cl. & F. 67. *S. C.*, nom. *Jack* v. *Fetherstone*, 9 Bligh (N.S.) 237.

Limitation to A. and his Heirs—Heir Construed Heir of the Body.]—Under a devise to trustees, in trust for A. for life, and "after her decease to descend to her female heir, and whether sister or daughter," A. takes an estate in tail female. *Lewthwaite* v. *Thompson*, 36 L. T. 910.

Devise of land to W. for life, remainder to his first son for life, remainder to the right heirs male of his body, remainder to the second, &c., sons of W., and the heirs male of their bodies, remainder to T. for life, and after to his first heir male of his body, and for want of such over: —Held, T. took an estate in tail male. *Dubber* v. *Trollope*, Ambl. 453.

A devise to a man for life, and if he die without heir male remainder over, makes an estate tail. The words "for want of such issue" make an estate tail by implication. *Ib.*, 463.

—— **Heirs Construed Heirs of the Body.**]—A. devises lands to J., his wife, for life, then to his son H. for life, then to his son G. and his heirs for ever; if he died without heirs, then to his two daughters K. and L. This is an estate tail in G. *Tyte* v. *Willis*, Cas. t. Talb. 1.

One, having several children, devises land to one of them and his heirs, and for want of such, to the heirs of his other children :—Held, the first devise was an estate tail. *Pickering* v. *Towers*, Ambl. 363.

A. devised to B. and his heirs ; and said afterwards, "if he shall die without heirs of his body" : —This controls the devise to an estate tail. *Lampley* v. *Blower*, 3 Atk. 398. And see *Lee* v. *Prieaux*, 3 Bro. C. C. 381, where this case is stated from the register book.

Where A. devised to B. for life and to his heirs, and, for want of heirs to C. in like manner, and for want of heirs of him, to D. and his heirs for ever ; B. and C. were brothers, and D. was their cousin and heir :—Held, that B. and C. took an estate tail, and that the remainder over to D. was good. *Parker* v. *Thacker*, 3 Lev. 70.

Bequest to A. for life, remainder to his children ; but if he shall die without children living at his death, to B. for life ; remainder to her children ; and if she should die without children living at her death, then to her executors, administrators, and assigns. By a codicil, the same is given over "after the decease of the before-mentioned persons in my will, A. and his heirs for ever, and B. and her heirs for ever." The meaning of the word "heirs" in the codicil not to be confined to children from comparison with the will and the bequest over, therefore too remote. *Griffiths* v. *Grieve*, 1 J. & W. 31.

A devise by a father to a second son and his heirs for ever, and for want of such heirs, then to the right heirs of the testator, is an estate tail. But had the devise over been to a stranger, the second son would have taken a fee-simple, and consequently the devise over had been void. *Nottingham* v. *Jennings*, 1 P. Wms. 23.

A devise before 1838 of "my H. estate" to S., a grandson, with a gift over to the testator's other grandsons, should S. die without an heir, gives an estate tail in S., and not a devise in fee, for the persons to whom the limitation over was made were capable of being collateral heirs of S. *Hancock* v. *Clavey*, 25 L. T. 323 ; 19 W. R. 1044.

A. devised land to B. his son, and if C. his daughter survived B. and his heirs then she should have the land. Adjudged, that B. had but an estate tail : but if the will had said that S., a stranger, should have the land if he survived B., B. would have taken an estate in fee. *Webb* v. *Hearing*, Cro. Jac. 415.

A testator, having several children, directed the purchase of an estate for one of his daughters, "for her use and her lawful heirs," to be returned, "if she died without lawful heirs," to the other children that had heirs :—Held, upon the context, that "lawful heirs" must be construed "heirs of the body," that the daughter took an estate tail, and that the gift over was also an estate tail. *Simpson* v. *Ashworth*, 6 Beav. 412 ; 7 Jur. 410.

The word heirs, in a devise to first and other sons, construed heirs of the body, in order to give effect to the general intention, that the sons should take successively and in priority of birth.

Devise to A. for life, and afterwards to his "first and other sons successively, according to the priority of their respective births, and their respective heirs" (omitting "of their bodies"), to the extent that the elder should be preferred to the younger, and "for default of such son or sons," to the daughters as tenants in common in fee :—Held, that the sons of A. took successively as tenants in tail general. *Hennessey* v. *Bray*, 33 Beav. 96 ; 9 Jur. (N.S.) 1065 ; 11 W. R. 1053.

A., owner in fee of several denominations of land, devised different portions of the same to several of his sons respectively, such portions being devised to each individual devisee "and his heirs for ever." One of the devises was in these words : "I leave my third son M. T. the lands of G. for ever ; but in case he should die unmarried, or without lawful issue, in that case he may will one half of it as he pleases, and the other half to go, share and share alike, between

my surviving sons and their families." The concluding paragraph of the will ran thus: "All the bequests given to my son R. T., my son J. T., and my other three sons M. T., C. T. and H. T., of my property, no part of it shall or will be liable to pay any debts they may contract, nor sell or mortgage same, but always go in the male line free of any debt of theirs":—Held, that M. T. took an estate tail under A.'s will. *Thompson, In re*, 16 Ir. Ch. R. 228—C. A.

The general scope and object, as explained by the testator in his will, of a devise, sufficient in itself to pass the fee:—Held, to render it operative only to pass an estate tail.

A. had several great-nephews. His will was drawn up by himself while abroad. It contained the following passages: "I name and appoint my universal heir my great-nephew T., eldest son of my nephew W., to whom I give all my lands. The eldest son of my godson and great-nephew T., who may be living at his father's death, is always to be considered as heir to my estates." "If my godson and great-nephew T. should not leave any son at his death, I direct that his next brother and second son of my nephew succeed to my estate, and so on, in case of failure of male heirs to the third, fourth, &c." "The eldest great-nephew living always to be considered as my legitimate heir in case of failure of the other brothers, my express will and desire being that my estates do always descend in the male line":—Held, that the great-nephew T. should take an estate in tail male, and that that intent must prevail. *Jenkins* v. *Hughes*, 8 H. L. Cas. 571; 30 L. J., Ch. 870; 6 Jur. (N.S.) 1043; 8 W. R. 667. And see *Jenkins* v. *Clinton* (*Lord*), 26 Beav. 108; 4 Jur. (N.S.) 887.

—— **Where Gift over on Death of A. without Issue.**]—A. having a son and two daughters, devised the estate in question to his son and his heirs, provided that, if the son should die before twenty-one, or without issue of his body, then it should go to the testator's two daughters. A. died, and the son lived to twenty-one, and made his will, and devised the estate to plaintiff. The court inclined that the son had but an estate tail, and so the devise to the daughters took effect, the son having died without issue. *Helier* v. *Jennings*, 1 Freem. 509; 1 Ld. Raym. 505. *S. C.*, nom. *Hilliard* v. *Jennings*, Comyn. 90; 1 Free. C. C. 510; 12 Mod. 276; Carth. 514.

A. by will gives all his real and personal estate to trustees, in trust for the payment of his debts and legacies, and then to the use of his eldest son J. and his heirs for ever; and failing issue of that son, to his third son G. and his heirs for ever; and failing issue of that son, "then to the use of every other son that I shall or may have, and their heirs for ever; and failing issue male, then to the use of my issue female, and their heirs for ever":—Held, that according to the intention of the testator, his sons took successively an estate in tail male, and that upon the death of the eldest son, leaving only a daughter, the second took in the order of succession. *Fitzgerald* v. *Leslie*, 3 Bro. P. C. 154.

S. devised lands to his sons, to hold to them, their heirs and assigns, as tenants in common, and not as joint tenants, and he declared, that in case any of his sons should happen to die without any issue of his or their body or bodies lawfully begotten, the share of him or them so dying should go to, and be equally divided amongst the survivor or survivors of them in equal shares and proportions, to hold to them, their heirs and assigns, as tenants in common and not as joint tenants. S. charged a gross sum upon the lands in favour of his other children:—Held, that the words of the devise created an estate tail. *Taylor* v. *Walker*, 11 Jur. (N.S.) 723; 12 L. T. 793; 13 W. R. 986.

A father left and bequeathed his fee-simple estate at B. to his eldest son R., charged with 1,000*l.* each for his sons T. and J., subject to the restrictions mentioned in his will; he also left and bequeathed houses of a freehold tenure to each of his sons and daughters, and 1,000*l.* to each of his daughters on her marriage with consent, subject to the same conditions and restrictions which he had attached to any bequest in his will; he directed that none of his sons or daughters should alien or mortgage, or incumber any of the houses or lands to which they should become entitled under his will, but that on their death his or her portion of the property should go to his or her heirs, being issue lawfully begotten of him or her so dying, and so to continue in succession from father or mother to his or her heirs being issue lawfully begotten; and, in case any of his sons or daughters should die unmarried, and without issue, or on failure of lineal descendants of his or her lawful issue, he directed that his or her portion should go to and be equally divided among the survivors; by a codicil reciting the death of his youngest son J., since his will was made, and that his daughter P. had determined to become a nun, he charged 500*l.* on the lands of B. for his son T., in addition to the 1,000*l.* given by the will, and he left the residue of his estate at B. to R., and left both sons the full power he was invested with to enforce their claims, subject to the conditions and restrictions contained in his will:—Held, first, that the estates given by the will to the testator's children, whether in possession or in remainder, were estates tail. *O'Hanlon* v. *Unthank*, Ir. R. 7 Eq. 68.

Held, secondly, that under the codicil the eldest son, R., took an estate tail in B. *Ib.*

A testator by his will, dated in 1885, appointed executors, and continued as follows: "I give to my two sons . . . all my real and personal property . . . for their natural life, subject to the condition of paying" the legacies therein mentioned. "If my sons marry and have issue, I give to each of their heirs their father's share, and to their heirs for ever; if there is no male issue with either of my two sons, and there is female issue, then the father's share shall be divided between them share and share alike as tenants in common, and to their heirs for ever. Should either of my sons die without issue, then such son's share shall go to my other son and to his heirs for ever. Should both of my sons die without issue, then at the death of the last of them I give all my real property to the whole of my grandchildren share and share alike as tenants in common, and to their heirs for ever." He then directed that his two sons should pay out of his real property any payment due and owing thereon:—Held, that the two sons took the real estate in tail male. *Score, In re, Tulman* v. *Score*, 57 L. T. 40.

—— **"Lawful Heirs."**]—The words "lawful heirs":—Held, upon the context of a will, to mean "heirs of the body." *Simpson* v. *Ashworth*, 6 Beav. 412; 7 Jur. 410.

A devise to A. and his "lawful heirs" creates a fee, and not an estate tail. The addition "lawful" in no degree affects the word "heirs," for the qualification of being "lawful" is implied in the word "heirs."

Devise to testator's daughter "and her lawful heirs," "but in case she should not happen to leave any child," then to his nephew and his heirs:—Held, that the daughter took a fee simple with an executory devise over to the nephew. *Mathews* v. *Gardiner*, 17 Beav. 254.

—— **"Right Heirs."**]—Two testatrixes make mutual wills of property which they take as co-heiresses under the will of their uncle, and make devises in tail by apt words, with the ultimate gift as follows: "and for default of all such issue, to the right heirs of my grandfather Sir T. S., deceased (the father of my uncle Sir T. S.), by M. his second wife, also deceased, who was the daughter of Sir G. C., Knt., for ever," Upon the question whether by this clause a fee simple or an estate tail special passed:—Held, that an estate in special tail was created, and the plaintiff, by the disentailing deed executed by his wife, became seised in fee in the property in question. *Wright* v. *Vernon*, 2 Drew. 439; 2 W. R. 693.

—— **"Heirs in Due Succession."**] — The devise to J. W. and C., and their heirs in due succession as named, with usual limitations, gives an estate tail to the first taker, who, having a son born alive and since dead, is, as his personal representative, entitled to the personal estate absolutely. *Stratford* v. *Powell*, 1 Ball & B. 1.

"Son" Used with "Heir."]—Consideration of the meaning of the words "son" and "heir" used by a testator indiscriminately. *Jenkins* v. *Hughes*, 8 H. L. Cas. 571; 30 L. J., Ch. 870; 6 Jur. (N.S.) 1043; 8 W. R. 667.

The word "son" in connection with the words "heir" and "issue":—Held, by force of context, to mean issue male.

The word "son" is quite as flexible as the word "heir," and can as easily be read "issue male" as the word "heir" can be turned into "son."

A testator appointed A. "his universal heir":—Held, that these words were sufficient, if uncontrolled, to give the fee simple. *Jenkins* v. *Clinton* (*Lord*), 26 Beav. 108; 4 Jur. (N.S.) 887.

Limitation to A. and his Issue.]—Devise of premises to A., and the issue of his body living at his death, and for want of such issue over, is an estate tail in A. *Oxford* (*University*) v. *Clifton*, 1 Eden, 473; Ambl. 385.

Testator gave real and personal estate to his wife for life, remainder "to and amongst his three children and their lawful issue, in such proportions, manner, and form, and subject to such charges, &c., as the wife should appoint":—Held, that the words gave estates tail to the three children in default of appointment, and that an appointment to a deceased child and the heirs of her body was invalid. *Martin* v. *Swannell*, 2 Beav. 249; 9 L. J., Ch. 174.

A testator devised real and personal estate to A. for life, with a direction to the executors, after A.'s death, to divide it amongst all her children and their lawful issue, share and share alike. There was a gift over of the leaseholds to other persons on a total failure of issue of the children:—Held, that the children took estates tail in the realty, and absolute interest in the personalty; and that cross-remainders were not to be implied in regard to the leaseholds. *Beaver* v. *Nowell*, 25 Beav. 551.

"Devise of real estate upon trust for my nephews and nieces and their respective lawful issue, and also the issue of F. (if any) and their several and respective heirs and assigns for ever as tenants in common":—Held, that the nephews and nieces took in tail. *Campbell* v. *Bonskell*, 27 Beav. 325.

E. by his will, made in 1872, devised all "right, title, and interest" in the lands of G. to his daughter M. "for her life and to her lawful-begotten issue; and in the event of her leaving none," he devised his "said property" to F., if living at the time of M.'s death; and if not, then to F.'s "eldest son lawfully begotten"; and in the event of F. "dying without leaving a son lawfully begotten," then he devised the "said property" to the second son of S., "late of India, if he has a second son; and if not, to his eldest son and to his heir." He also directed that whoever possessed his property should take the name of E., and that, in the event of M.'s "not leaving lawful issue," she might charge the "property" to a specified amount:—Held, that M. took an estate tail. *Sandes* v. *Cooke*, 21 L. R., Ir. 445—C. A.

—— **A. and his Posterity.**]—Devise to A. and his posterity. Lord Keeper thought this would create an estate tail only; but the Master of the Rolls being of opinion that such a devise would amount to a fee, Lord Keeper ordered precedents to be searched. *Att.-Gen.* v. *Bamfield*, 2 Freem. 268.

—— **To A. for Life. Remainder to his Issue—Words of Explanation referring to "Issue."**]—It is a rule of construction, particularly in wills, that where words are of an ambiguous signification, or are of such a nature as that they may be sometimes considered as words of purchase, and sometimes as words of limitation, the intent of the devisor must fix the meaning of those words. The word "issue" is of this nature. In deeds it is a word of purchase, and technically speaking it is so. The case of *King* v. *Melling* (2 Lev. 58) was the first case where it was taken and considered as a word of limitation. Where the issue cannot take but through the father, there, though the father has only an estate for life given him by express words, yet he must, by necessary implication to effectuate the intention of the devisor, take an estate tail to convey the estate to his issue. Devise to E. during his life only, and after the determination of that estate to the said E.'s lawful issue male, and the lawful issue male of such heirs, the eldest always of such sons of the said E. to be preferred before the youngest, according to seniority in age, and for want of such issue in E., remainder over. This gives E. an estate for life only. *Mandeville* v. *Carrick*, 3 Ridgw. P. C. 365.

By a will coming into operation prior to the Wills Act, the testator devised all the freehold estate, right, title, and interest, in certain lands to his wife for life subject to legacies; remainder to his son J. for life; remainder, after the decease of J., "to his first and every other son lawfully to be begotten according to seniority of age and priority of birth"; remainder to T. for life; remainder to his first and every other son and their heirs.

In a subsequent part of the will the testator bequeathed a sum of money, charged on the said lands, to his daughter M., and desired that, in case she should die unmarried, it should go and enure to J., if then living, or the heirs male of his body. In action brought by J. B., who was J.'s younger son, to recover possession of the lands on the title :—Held, that the plaintiff was entitled to an immediate estate for his life, and accordingly to recover possession of the lands. *Palmer* v. *Palmer*, 18 L. R., Ir. 192—C. A.

A., by his will, left a certain leasehold for lives renewable for ever, and a leasehold for years, and his stock-in-trade, &c., to trustees, upon trust, for his daughter for life, and after her decease "to and amongst the issue of his said daughter, lawfully to be begotten, in such shares and proportions as his said daughter should by her last will and testament appoint, provided such child or children should arrive at the age of twenty-one years; and for want of such issue, or in case of the death of such issue, and of the death of his wife," then over :—Held, that the daughter took an estate for life only, and that the limitation over was good. *Ryan* v. *Cowley*, Ll. & G. t. Sugd. 7.

Devise of real and leasehold estates together to A. for life, and after his death to the male issue of the body of A., in equal shares and proportions, the leaseholds being the bulk of the property :—Held, that A. took an estate tail in the freeholds, and an estate for life only in the leaseholds. *Jackson* v. *Calvert*, 1 J. & H. 235.

Devise of "all my said manors, lands, tenements, and effects, real and personal," to one for life, and after his decease to his issue male, and the heirs male of such sons successively, one after another, with remainder to A., "and in default of his issue male, as before," then over to B., "and in default of his issue male, as before," then to the plaintiff :—A. held entitled for life, with remainder to his first and other sons in tail male; B. to take in remainder in the same manner, and that the plaintiff was entitled to the ultimate remainder in fee. *Macnamara* v. *Wentworth* (*Lord*), G. Cooper, 241.

A will contained a direction to trustees to convey to the testator's son in strict settlement if he should marry, followed by a declaration that if the son should die unmarried, or without lawful issue, the property should be limited and devolve upon A. for life, remainder to A.'s eldest son for life, remainder to his issue male, and in failure of such issue to A.'s other sons in succession, the eldest of such sons and his heirs male always to be preferred :—Held, that the trusts in favour of A. and her sons were not executory; and that, the testator's son having died unmarried, and A. having died subsequently, her eldest son was entitled in tail male. *Nelley, In re*, 26 W. R. 88.

A testator, who died in 1844, by his will dated in that year, devised his freehold and copyhold estates to trustees upon trust during the life of his son J. B. to receive the rents and profits thereof, and to pay the same unto J. B. and his assigns "during his life, or otherwise to permit him or them to receive the same"; and from and after the decease of J. B., the testator devised "the same to the sole use and behoof of the heirs of his body lawfully begotten"; and in case J. B. should die without leaving any issue of his body lawfully begotten, the testator devised the same unto his daughter E. G., her heirs and assigns for ever. By a disentailing assurance dated in 1845, J. B. granted all the freehold estates comprised in the residuary devise to R. H., discharged from all estates tail, to the use of J. B. in fee. In November, 1888, J. A., who claimed under J. B., agreed to sell certain freeholds which were included in and passed under the devise of freeholds contained in the will. Upon the investigation of the title by the purchaser's solicitors, a requisition was made that J. B. was equitable tenant for life only of the property, and that the persons entitled at J. B.'s death should concur in that conveyance. Upon a summons under the Vendor and Purchaser Act, 1874 :—Held, that, under the will, J. B. took a legal estate tail in the freeholds, and that therefore a good title had been shewn. *Allsop and Joy, In re*, 61 L. T. 213.

A will made in 1820 contained the following clause : "I give and devise unto my eldest son Thomas all my real and freehold estate and all leases and leasehold premises now in my possession (subject to the payment of the rents and the performance of the covenants mentioned in the said indentures of leases) during the term of his natural life, and after his decease to his legitimate child or children (if there be any); but if he dies without issue, my will is, it may go unto my other son William during the term of his natural life, and afterwards to his legitimate child or children (if any); but if he should likewise die without issue, my will is, it may go to my daughter Mary and to her heirs and assigns for ever." The will then gave legacies to the second son and the daughters, with provisions for the daughters, to be paid in the first instance by Thomas, but to be repaid in part or in whole to him in certain events by his successor in the estate. Thomas died without issue :—Held, by Earl Cairns and Lords Blackburn and Fitzgerald, that, reading the whole will together, Thomas took an estate tail in the realty; contra, by the Earl of Selborne, L.C., and Lord Bramwell, that Thomas took an estate for life, with remainder to his children (if any) in fee as purchasers. *Bowen* v. *Lewis*, 54 L. J., Q. B. 55; 9 App. Cas. 890; 52 L. T. 189—H. L. (E.)

—— **Words of Distribution added to "Issue."**] —A testator devised all his freeholds to trustees, and he subsequently devised some freehold houses to A., to have and enjoy the same to the exclusion of her husband for life, and at her decease the same to go to her lawful issue, share and share alike; but if A. should depart this life without leaving lawful issue, then the said houses to go to the issue of W. :—Held, that A. took an estate tail. *Heather* v. *Winder*, 5 L. J., Ch. 41.

Gift of lands to "the issue of A., as three persons shall affix the same," does not of itself give to the issue anything beyond a life estate, but points only to a power of partition and distribution.

A testator, by will dated 1789, gave to his wife and granddaughter A., during their natural lives, all his freehold and leasehold lands, except the leaseholds therein mentioned. The testator then gave his mansion-house at Moat House to his wife for life, and declared that if A. should die leaving issue, he gave unto her said issue (after the decease of his said wife and issue) all his said freehold lands, to be distributed among them, share and share alike, as three gentlemen learned in the law, or a major part of them, should affix the same; but in case A. should die leaving no

issue, and after the decease of his said wife, the testator gave the same lands to trustees to sell, and distribute the purchase-money among certain grandchildren therein mentioned:—Held, that A. took an estate tail in the premises at Moat House. *Kavanagh* v. *Morland*, Kay, 16; 2 Eq. R. 771; 23 L. J., Ch. 41; 18 Jur. 185; 2 W. R. 8.

Where in a devise there is a gift over on general failure of "issue," it is presumed that the word "issue" has been used by the testator as meaning "heirs of the body."

When the word "issue" is so employed, it is for the party seeking to give it a meaning other than that which it frequently bears, to shew clearly from the context of the will that the testator intended to give it a different meaning.

Devise in 1817 of a freehold estate for lives, renewable for ever, "to my son W. during his life, and after his death to his lawful issue, in such manner, shares, and proportions as he by deed or will shall appoint, and for want of such appointment then to his issue equally if more than one, and if only one child to said child, and on failure of issue of W." to J. Another estate, consisting of fee-simple lands, was devised in the same terms to another son, J.; and on failure of issue of J. it was to go to W. J. and W., before the birth of any child to W. (J. himself never married), joined in a recovery as to the lands devised to J., and to which W. afterwards succeeded in possession on J.'s death without issue. W. died leaving four children; he had not executed any appointment, but during his life disposed of both descriptions of lands to creditors for value:—Held, that under these devises each of the first devisees took an estate tail by implication.

The remainders were contingent, and therefore the recovery suffered as to the fee-simple lands operated as a bar to them, whether the first devisee did or did not take an estate tail. *Roddy* v. *Fitzgerald*, 6 H. L. Cas. 823.

Lands were devised to A., the testator's widow, for life, with remainder to trustees upon trusts "to pay and divide the rents unto and among all the brothers and sisters of the testator who should be living at the time of A.'s death, and to their issue male and female after the respective deceases of his said brothers and sisters for ever to be equally divided between them":—Held, that the words "issue male and female" were words of limitation, and that the children of a sister who died in the lifetime of A. took no interest. *Tute* v. *Clarke*, 1 Beav. 100; 8 L. J., Ch. 60.

Testator devised as follows: "I give and devise unto J. C. the lands of D., to hold to him during his natural life; and from and after his decease I give and devise the same unto the issue male and female of the said J. C., begotten or to be begotten upon the body of his present wife, C. C., to be divided between and amongst them in such manner, shares, and proportions as the said J. C. shall by his last will and testament limit and appoint:—Held, that J. C. took an estate for life only. *Crozier* v. *Crozier*, 2 Con. & L. 309; 3 Dr. & War. 353; 5 Ir. Eq. R. 415.

A testator, after reciting that he wished to dispose of all his worldly substance, and to settle and assure his several estates in the counties of C. and L. to the several uses and purposes therein set forth, devised the same unto his sister A. L. for life; and, on her death, he declared it to be his will and intention to settle and assure his said estates amongst certain families named, in the following "parts or proportions"; and he then gave to six persons one-sixth "part" each, and declared that the several six parts should remain to each of the said devisees for life, with remainder to the first and every other son of each of the said devisees, severally and successively in tail male, and in default of such issue, then with remainder to the issue female of each or any of the said devisees, to take as tenants in common and not as joint tenants; and that, in case of the decease of any of the said six devisees without issue male or female, either in the testator's lifetime or after his decease, then the one-sixth part or parts of those who should happen to die without issue should go to and augment the shares of such survivors, "so long as the entail intended to be thereby created should continue to subsist," and in case all his said estates should, under such limitations as aforesaid, vest in any one of his said devisees, or their heirs male, his will and intention was, that such person should take the name and arms of the testator:—Held, that under the above will, the six devisees took estates for life only, with remainder (after the express estates in tail male limited to their first and other sons) to their issue female in fee as purchasers. *Shannon (Earl)* v. *Good*, 15 L. R., Ir. 284—C. A.

Devise of a freehold estate to the testator's illegitimate son W., "to have and to hold during the term of his natural life, and in case he has issue then it is my will they should jointly inherit the same after his decease." In a subsequent part of the will the testator devised and bequeathed the rest and residue of his effects, real and personal, not thereinbefore disposed of, to his said son; but "in case my son W. dies without issue, then it is my will that the whole of my property be ascertained, and after bequeathing certain legacies and annuities, the rest and residue of my property, together with the before-mentioned annuities as they drop off, I give in equal proportions to A. and B.":—Held, that the illegitimate son took an estate tail in the real estate, and an absolute interest in the personalty. *Ward* v. *Bevil*, 1 Y. & J. 512; 30 R. R. 840.

—— **Words of Limitation added to "Issue."**]—Lands were devised in trust for A. for life, remainder in trust for her issue male and their issue male, in such manner as A. should appoint, and in default of such issue male then in trust for B. for life, remainder in trust for such of his issue male and their issue as he should appoint; and in default of such issue, then over:—Held, that B. took an estate tail. *Irwin* v. *Cuff*, Hayes, 30.

Devise to J. for life; remainder to his issue male, and to his and their heirs, share and share alike; and for want of such issue, to his issue female, and her and their heirs; remainder to J. K., his heirs and assigns, with a proviso that if J. K. or his issue, or any of them, shall alienate, mortgage, or incumber, or do any act to defeat the bequests, he or they shall pay, and he charges the premises with 2,000*l.* to such persons who should or ought to take next under the above limitations. J. had two daughters and no son, and he and his daughter suffered a recovery. Bill to be paid the 2,000*l.*:—Held, J. K. took an estate tail, and that the proviso

was repugnant to the estate. *King* v. *Burchell*, Ambl. 379; 1 Eden, 424; 4 Term Rep. 296, n. See comments on this case in *Woodhouse* v. *Herrick*, infra, col. 1297.

A. devised to B. an estate during the life of herself and her husband, and after their decease to the lawful issue of B.'s body for ever :—Held, that B. took an estate tail. *Griffiths* v. *Evan*, 5 Beav. 241; 11 L. J., Ch. 219.

A testator, by a will made in 1838, devised his lands and all his estate and interest therein to trustees, to permit and suffer his four sons to receive the rents during their lives in equal shares, and after the decease of them, or either of them, leaving issue male lawfully begotten, then for such issue male, according to priority of birth and seniority of age; but in case of their decease without issue, or there being such, in case such male issue should die before attaining the age of twenty-one, then upon trust as to the share or shares of the one so dying, original as well as accruing share, for the survivor or survivors and their issue male, it being his intention that, in case of the decease of his sons without male issue, or there being such issue male, and they should die before attaining the age of twenty-one, then the share of the one so dying should go to the survivors and their issue :—Held, that the sons took estates tail in their respective shares. *Warren* v. *Travers*, Ir. R. 2 Eq. 455.

"Issue" may primâ facie be taken as equivalent to "heirs of the body"; but the court will lean more to cut down this effect of the former word, by applying it to other portions of the will, than the effect of the latter. If there be a gift to A. for life, with another gift over to his issue, with words of limitation superadded, the issue take as purchasers in fee, fee tail, &c., as the case may be; and therefore, where there has been a preceding gift to the issue of A. and their heirs, a subsequent gift over, upon A. dying without issue, operates nothing. *Kavanagh* v. *Morland*, supra. See also *Hamilton* v. *West*, ante, col. 1048; and *Macnamara* v. *Wentworth* (*Lord*), supra, col. 1291.

—— **Words of Distribution and of Limitation added to "Issue."**]—Testator devised as follows: "I give and devise all that my freehold lease in P., and all and every my chief rents in the town of M., and also my two warehouses in the said town, unto my two sons, H. I. and O., in moieties, as tenants in common, and not as joint tenants, in such manner and subject to such charges as hereinafter mentioned, that is to say, as to one moiety or equal half part thereof to my son H. I. for life, with remainders to his lawful issue, and their respective heirs, in such shares and proportions, and subject to such charges, as he the said H. I. shall by deed or will appoint; but in case my said son H. I. shall not marry and have issue who shall attain the age of twenty-one years, then to my son O. in fee :—Held, that H. I. took an estate for life in the moiety, with remainder to his children as tenants in common in fee. *Lees* v. *Mosley*, 1 Y. & C. 589.

Devise to A. for his life, and from and after his decease "unto all and every the issue of the body of the said A., share and share alike as tenants in common, and the heirs of such issue" :—Held, that A. took an estate for life only. *Greenwood* v. *Rothwell*, 6 Beav. 492. And see *S. C.* at law, 6 Scott (N.R.) 670; 5 Man. & G. 628; 12 L. J., C. P. 259.

G. G. devised his house in G—— Street, of which he was seised in fee, to his wife for life, with power for her to sell the same; and directed the purchase-money, or so much thereof as might be necessary, to be applied by his executors in payment of his debts, and the surplus thereof he gave to his wife for her own benefit. He also devised the lands of B., of which he was seised under a lease for lives renewable for ever, to his wife for life, subject to the payment of his debts, and after her decease he devised the house in G—— Street, in case the same should not be sold by his wife, and also his lands of B., to his son C. G. for life, subject to the payment of his debts, with power to sell the house in G—— Street, the purchase-money thereof to be applied as aforesaid, and the surplus thereof he gave to him for his own benefit; and after the death of his said son he gave all the premises to the use of the issue of his said son, with power by deed or will to appoint same to all or any of his children or issue, male or female; and in default of such appointment, then to the first and other sons in tail male, remainder to the issue female of his son, as tenants in common, and to their issue; and in default of such issue, to his two grand-daughters C. G. and A. G. as tenants in common for their lives with several limitations over. The testator declared his intention to be that every person who should come into possession of his estates, by virtue of the devises aforesaid, should hold the same as tenants for life only, and he gave them power of leasing and jointuring, and appointed his son and his daughter executor and executrix. C. G., the son, entered after the death of the testator's wife, was discharged as an insolvent, and died without issue :—Held, that C. G. took an estate for life only. *Flood* v. *Digby*, 1 Jones, 520.

A testator devised a house and premises to M. for life, and immediately after her decease he gave and devised the same unto the issue of her body, to hold to them and their heirs for ever, as tenants in common; but in case M. should die without leaving such issue, then over: —Held, that M. took as tenant for life, and not as tenant in tail, with remainder to her children as tenants in common in fee. *Golder* v. *Cropp*, 5 Jur. (N.S.) 562.

In wills of real estate "issue," unless there be something to shew a contrary intention, means "heirs of the body," and includes all descendants to all time. *Woodhouse* v. *Herrick*, 1 K. & J. 352; 3 Eq. R. 817; 24 L. J., Ch. 649; 3 W. R. 303.

Devise in 1806 of lands to F., and M., his wife, for their joint lives, and the life of the survivor; remainder to all their children "already or hereafter to be born for their joint lives, and the life of the survivor"; but all the sons to take testator's name and arms; "remainder to trustees to preserve contingent remainders"; but nevertheless upon trust to permit all the said children to receive the rents during their lives; "and from and after their several deceases unto and equally between all their issue male and female," and "for want of such issue" a devise over to another family :—Held, first, that the name and arms clause was not a condition precedent; secondly, that "already or hereafter to be born," like "born or to be born," denoted children living at testator's death; thirdly, that such children took as tenants in common in tail, with cross-remainders between them in tail, notwithstanding the limitation to the issue was in terms to them as tenants in common, and the

limitation over was "in default of such issue," and not of issue absolutely. *Ib.*

King v. *Burchell* (supra, cols. 1294–5) remarked on, and *Montgomery* v. *Montgomery* (supra, col. 1283) explained. In the latter Lord St. Leonards did not disapprove of the rejection in a devise like the present of creating a tenancy in common, but of the cases where, although words of limitation were superadded to the word "issue," as in a devise to one for life, with the remainder to his issue and their heirs, it has still been held that the issue took not as purchasers, but by descent through the first taker. *Ib.*

Devise to trustees "upon trust for the children of her niece during their lives, and after the decease of the survivor then for all and every the lawful issue, male and female, of such of the children of her niece as should be living at her decease as tenants in common, and the heirs of the body of all and every of the issue of the said children; and on the death and failure of heirs of the body of any one or more of the issue of the said children, as well the original as the accrued share of him so dying, and of whom there shall be such, shall be in trust for the survivors or survivor of them as tenants in common, and for the heirs of the body of such surviving issue": — Held, that the rule in *Shelley's Case* did not apply, and that the children of the testatrix's niece took estates for life only, with remainder to their "issue" as purchasers.

Superadded words following "issue," or other words having no technically defined meaning, tend more strongly to shew an intention that they should take as purchasers than when superadded to words having a technically defined meaning, such as the words "heirs" or "heirs of the body." *Parker* v. *Clark*, 3 Sm. & G. 161; 3 W. R. 471. Affirmed, 6 De G. M. & G. 104; 2 Jur. (N.S.) 335. And see *Colclough* v. *Colclough*, 4 Ir. R. Eq. 263.

A testator by his will, dated 1860, disposed of all his real estate, subject to an interest therein to his wife for life, in favour of his six nephews, "and all my right, title, and interest to and in the same and every part thereof, to be equally divided amongst my six nephews, share and share alike, and their issue after them, to and for their heirs, executors, administrators, and assigns." The question arose whether the word "issue," with the words of limitation superadded, operated to give an estate tail, or whether the issue took as purchasers: — Held, that the words in question created an estate tail in the six nephews; that the addition of a limitation to the heirs general of the issue would not prevent the word "issue" from operating to give an estate tail as a word of limitation; that in this case the words "equally divided" made the estate divisible into six shares, and there were no words to subdivide those shares, and consequently that the subsequent words "heirs, executors, administrators, and assigns," must be rejected. *Williams* v. *Williams*, 51 L. T. 779; 33 W. R. 118.

A testator who held under a lease for lives renewable for ever, by his will made before the Wills Act, 1837, devised all his estate in the lands to trustees upon trust for the maintenance of his son G. S. R. during his minority. He directed that the residue of the rents should accumulate for G. S. R. till he married or attained twenty-one, when the accumulations should be handed over to him; and as to the said lands, the testator declared that they were given to the trustees on trust for accumulation of the rents as aforesaid, and, in the next place, to suffer G. S. R. to take the rents of the said lands for life, and after his death then to the issue of G. S. R. lawfully begotten, in such shares and proportions as G. S. R. should appoint, and, for want of appointment, the said lands to go to and among all the lawful issue of G. S. R. living at the time of his death, share and share alike, and if but one child living, then the whole of the lands to go to such only child, his or her heirs or assigns, for ever. If G. S. R. should die without leaving issue, the testator devised the lands over to E. R. and T. R. in fee. G. S. R. attained twenty-one and obtained a fee-farm grant of the said lands in which it was recited that G. S. R. was tenant for life:—Held, that G. S. R. took an estate for life only in the lands, with remainder to his issue living at his death in quasi-fee, and that on his death without issue E. R. and T. R. became entitled to the lands. *Rotherham* v. *Rotherham*, 13 L. R., Ir. 429—C. A.

—— To A. for Life, and then to his Children in Priority—Gift over on Death of A. unmarried.]—A testatrix left and bequeathed "all the property, whether in lands or otherwise," which she might die possessed of, to trustees, their heirs and assigns, in trust, "to the use of my nephew W. S. for his life use, and then to his children in priority in case he marries, the sons to inherit before the daughters; but in case the said W. S., my nephew, should die unmarried, I leave and bequeath for the use of my cousin M., her heirs and assigns, for ever." The will was made in 1856. W. S. married in 1865, and had a son J. S. and a daughter B. The testatrix died in 1894, M. having predeceased her. The testatrix died possessed of real and personal estate:—Held, that W. S. took an estate for life in the real and personal estate of the testatrix, and that J. S. took an estate tail in the realty and an absolute interest in the personalty subject to the life estate of his father W. S.; and that B. was entitled to an estate tail in remainder in the real estate after the estate tail of J. S., with an ultimate remainder to the right heirs of the testatrix. *Savile* v. *Savile*, [1896] 1 Ir. R. 249.

Quasi-Estate Tail—Personalty in Trust for A. for her Separate Use for Ninety-nine Years, with Remainder for her and Heirs of her Body.]—Testator having devised residue of his real and personal estate to trustees, upon trust, within six months after his decease, to raise 34,000*l.*, and having out of this sum made a provision for maintenance of his two daughters, E. and S., during their minorities, directed that a moiety of interest arising from it should be paid to each daughter on her attaining twenty-one or marrying, for her separate use, during the term of ninety-nine years, if she so long lived; and in case either of them died leaving no child or issue of a child, the whole of interest should be paid to survivor for her separate use, during remainder of term, if she so long lived; and subject to these and some contingent gifts, which never took effect, he bequeathed the 34,000*l.* to his trustees, upon trust, after decease of his daughters, for such person or persons as should, under subsequent limitations, be entitled to residue of his real and

personal estate. In these subsequent limitations, trustees were directed, upon each of his daughters attaining twenty-one or marriage, to yield up to her a moiety of residue of his real and personal estates, to hold same to her and heirs of her body, with remainder to other daughter and heirs of her body, remainder to his own right heirs. In suit instituted on behalf of the infant daughters for administration of testator's estate, a decree was made for raising 34,000*l.*, and personal estate proving insufficient, part of it was raised by sale of portions of real estate; afterwards S., with concurrence of the heir of surviving trustee, suffered a recovery of her moiety of lands to use of herself in fee, tenant to præcipe being made, and uses of recovery declared by bargain and sale, in which both S. and heir of surviving trustee were conveying parties, but which was not enrolled within due time. Subsequently E. suffered a recovery of her moiety of lands. S. died, leaving children, having received out of court moiety of principal of that part of charge which had been raised, but without having taken any steps to have remainder of it raised. Semble, that E. and S. did not take quasi-estates tail in sum of 34,000*l.*:—Held, that if E. and S. took quasi-estates tail in 34,000*l.* so as to be entitled to it absolutely, yet, under circumstances of case, unraised portion of S.'s moiety of charge was extinguished, and unsold estates entirely exonerated; that an equitable recovery is valid, though tenant to præcipe is made by bargain and sale not enrolled within due time. Effect, as to extinguishment of a charge, of conduct of parties who are interested both in money and in lands out of which money is to be raised. *Smith* v. *Frederick*, 1 Russ. 174.

Devise to Several in Succession—Successive Estates Tail.]—When there is a devise to several in succession in words sufficient to pass the fee, or the whole interest of the testator in freeholds, the court will, in order to give effect to the general intent, construe the gift as of successive estates in tail. This general intent must be ascertained from the whole will, and a name clause must be taken as an important element in ascertaining this intent. *Studdert* v. *Von Steiglitz*, 23 L. R., Ir. 564.

W. B., being seised in fee of lands, called the C. estate, and seised as of freehold of other lands, called the S. estate, by his will, dated the 24th May, 1854, left his C. estate to his nephew, S. B., and after him to his heirs male; and in failure of such heirs male, to his nephew J. B., with remainder to his heirs male, and in failure of heirs male on the part of his nephews aforesaid, he left the estate to the sons in succession of his eldest sister, L. S. He left his property in S. to his wife, A. B., for her life, and at her decease to his nephew, S. B., aforesaid, and should he (the said S.) die without male issue, the testator left the property to the sons of his sister L. S., as above mentioned, they taking in both these cases the name of B. The testator bequeathed certain chattels as heirlooms to the said S. B. and his heirs, as above mentioned, and certain other chattels to him as heirlooms, to be handed down in like manner. There was, as the court held, no residuary devise. L. S. had four sons, two of whom died in the lifetime of the testator, without having been married:—Held, that the two surviving sons of L. S. took successive estates in tail, or quasi-tail, in the S. estate as purchasers. *Ib.*

b. Contingent Remainder or Executory Interest.

See VESTED, CONTINGENT AND FUTURE INTERESTS.

c. Absolute Interests in Personalty.

i. *By Gift of Income.*

General Rule.]—Indefinite bequest of the dividends gives the absolute property of stock. *Page* v. *Leapingwell*, 18 Ves. 463; 11 R. R. 234.

An unlimited gift of the produce of anything, as the interest of stock, gives the principal also. *Stretch* v. *Watkins*, 1 Madd. 253.

On construction of will:—Held, that the capital of the residue passed by implication, though the interest and dividends only were expressly given. *Phillips* v. *Chamberlaine*, 4 Ves. 51.

General gift of income, arising from personal property, is equivalent to general gift of property itself, and it makes no difference whether it be given through trustee, or to legatee direct. *Haig* v. *Swiney*, 1 Sim. & S. 487; 2 L. J. (O.S.) Ch. 26.

Construction of an obscure will, first, that the income only, not the capital, was disposed of; secondly, that the disposition was in favour of the younger children, excluding the eldest. A legacy, not as an independent bequest, with a time for payment or distribution, appointed afterwards, but the time annexed to the substance of the bequest; the interests do not vest before that period. *Sansbury* v. *Read*, 12 Ves. 75.

State of circumstances under which the capital of a legacy, the interest of which was given to one for life, was held, on his death, not to devolve as on an intestacy of the testator, but to form part of the personal estate of the legatee for life. *Johnson* v. *Johnson*, 11 Jur. 862.

Testator, after various directions, embracing almost every particular of his property (except cash in the house and at his banker's), directed certain leaseholds to be sold, and the produce to be invested in stock; the interest and dividends to be paid to his wife for life. He then directed the sale of other property, to be invested in like manner, and the interest and dividends thereof, and also of all such stock as should, at the time of his decease, be standing in his name, to be paid to his wife for life; and at her decease "all interest and dividends" were to be accumulated and added to such stock, which stock, together with all accumulations, he gave to his nephew, J. C. There was no residuary bequest:—Held, as between J. C. and the next of kin, that the gift to J. C. carried the whole proceeds of the leasehold estates. *Curtois, In re*, 22 L. J., Ch. 1045; 17 Jur. 852.

Testator bequeathed the dividends, &c., of all stocks he should be entitled to, at the time of his decease, in the public funds. He had 10,000*l.* consols at his death:—Held, that this was a specific bequest of that sum. *Stephenson* v. *Dowson*, 3 Beav. 342; 10 L. J., Ch. 93; 4 Jur. 1152.

Bequest to Lady C., a widow of Sir N. C., considered valid, although at the date of the will she had married a second husband, R., and the fact of that marriage was unknown to the testator, and she continued to call herself Lady C. The bequest was the bequest of a fund to trustees to pay to her the dividends so long as she should

continue single and unmarried; and if she should anticipate such dividends, then the fund to become part of the testator's residue:—Held, that she took an absolute interest in the fund. *Rishton* v. *Cobb*, 9 Sim. 615; 5 Myl. & Cr. 145; 9 L. J., Ch. 110; 4 Jur. 261.

—— **Rents of Leaseholds.**]—A testatrix gave all her leasehold and personal estate to trustees, upon trust, to pay the rents and profits of two specified houses to A., and she gave the sum of 100*l.* bank stock to B. when he attained the age of twenty-one years, and in case of his death to C. At her death the testatrix had bank annuities, but no bank stock:—Held, that A. took an absolute interest in the leaseholds. *Bignall* v. *Rose*, 24 L. J., Ch. 27; 3 W. R. 77.

Testator by his will gave a legacy of 100*l.* to his wife "for her present wants" and appointed her sole executrix. And he gave, devised, and bequeathed the rents and income of all his freehold, copyhold, and leasehold properties at B., and all the rents and profits of his leasehold houses in P., to his wife. He also directed that she should be entitled to all other the income of his estate and effects, real or personal, and that any moneys which might be in his house or in the hands of his said wife might be invested in her name in consols, and the interest to arise therefrom might be retained or received by his said wife as part of his said income. He desired that his wife "should be at liberty out of the proceeds of the surplus residuary estate to erect any monument to my memory which she may please, not exceeding the sum of 300*l.*" He also gave and bequeathed to his wife all his household furniture, goods and effects in his house at E., and desired that she should "have the free use and occupation of his dwelling-house at E.," and directed that an inventory of such furniture and effects should be made. The court held, that there was no indication sufficiently clear to shew that the widow took only a life interest, and therefore that she took an absolute interest in all the property:—Held, on appeal, (1) that there is a well-settled rule that a gift of income carries the corpus unless there are in the will sufficient words to cut down the gift to a life interest only; (2) that the rule is merely one of construction, to be read only with reference to other parts of the will, and applicable only when the testator has himself given no rule for reading his will; (3) that there being nothing to cut down the gift of the property at B. and P. and the furniture, the widow was absolutely entitled to those properties; (4) that there was sufficient in the will to cut down the gift of the E. property and the residuary real and personal property to a life interest only. *Coward, In re, Coward* v. *Larkman*, 60 L. T. 1—H. L. (E.)

—— **Where Income Given for separate Use.**]—Testator gave the produce of his share and interest in his co-partnership business to his wife, and also the interest of the capital sum of 1,000*l.*, for her sole use and benefit, and free from the debts or control of any husband she might marry, and her receipt to be a sufficient discharge to his executors; and he gave all his furniture, plate, &c., to her absolutely:—Held, that the gift of the interest of the 1,000*l.* passed the principal. *Humphrey* v. *Humphrey*, 1 Sim. (N.S.) 536; 20 L. J., Ch. 425.

Bequest to a woman of a fund, with the interest thereon, to be vested in trustees, the income arising therefrom to be for her sole use and benefit, vests the capital for her separate use. *Adamson* v. *Armitage*, 19 Ves. 416; G. Cooper, 283.

Bequest of the produce of a fund is a gift of that produce in perpetuity, and consequently of the fund itself, unless not the intention on the face of the will. *Ib.*, 418.

Bequest to the testator's wife of "200*l.* per year, being part of the moneys I now have in bank security, entirely for her own use and disposal," together with all his household furniture and effects, interests for life being expressly given to other persons, an absolute interest to the wife in bank stock sufficient to produce 200*l.* a year, not a mere annuity for her life. *Rawlings* v. *Jennings*, 13 Ves. 39; 9 R. R. 137.

A testator bequeathed leaseholds, upon trust to pay the rents to his daughter, a married woman, for her separate use; but if she should die before the expiration of the lease, then upon trust to invest the rents and to allow the same to accumulate for the benefit of the children of the daughter living at her death. Other leaseholds were bequeathed in favour of the testator's two sons and their respective children in the same terms, except that the limitation as to separate use was omitted. The daughter survived the testator, but she died before the expiration of the lease without ever having had a child:—Held, that upon the true construction of the will the daughter took an absolute interest in the first-mentioned leaseholds. *Watkins* v. *Weston*, 3 De G. J. & S. 434; 32 L. J., Ch. 609; 8 L. T. 406; 11 W. R. 408. Affirming 32 Beav. 238.

A testator, after bequeathing certain stock and other property for the benefit of his children, directed the trustee of his will to pay to his daughter the income of her share; and directed that neither the principal nor interest should be subject to the control or debts of any husband she married, but should stand under the direction of the court of chancery, subject to her will only. There was no gift over, and the daughter was unmarried at the testator's death:—Held, that the words of the will constituted an absolute bequest to the daughter for her separate use. *Tawney* v. *Ward*, 1 Beav. 563; 8 L. J., Ch. 319.

—— **Where Prior Life Interest Given.**]—T., by will, gave to his wife the dividends which might become due and payable in her lifetime in certain stock standing in her name, the name of D., and the testator, to which the latter would be entitled on D.'s death; with a gift of all subsequent dividends after the wife's death to certain charities, "for ever." There were other gifts in like words, with an ultimate bequest to trustees on certain trusts. The testator survived D., and transferred the stock into his own name; the wife died; and on the questions—first, whether that was an ademption; secondly, whether the gift of the dividends carried the stock; and, thirdly, whether there was an apportionment of the dividends up to the day of the wife's death:—Held, that there was no ademption; that there was a gift of the stock; and that there was an apportionment, inasmuch as under the Apportionment Act there was no express stipulation to the contrary. *Tyrrell* v. *Clarke*, 2 Eq. R. 333; 2 Drew. 86; 23 L. J., Ch. 283; 18 Jur. 323; 2 W. R. 152.

Bequest of interest of residue of personal estate, after payment of debts, &c., to A. for life, and

after her decease to C.; passes an absolute interest to C., subject to prior life interest of A. *Clough* v. *Wynne*. 2 Madd. 188.

—— **Where Subsequent Legacies made Payable on Death of Person entitled to Income.**]—A testatrix by her will directed her executors to pay to M. S. or her assigns, or permit her to receive the income of her residuary personal estate, after payment of debts, and she then bequeathed certain legacies payable after the death of M. S. By a second codicil she gave a legacy payable after the death of M. S.:—Held, that M. S. took an absolute interest in the residuary personal estate. *Jenings* v. *Baily*, 17 Beav. 118; 22 L. J., Ch. 977; 17 Jur. 433.

—— **Where Gift Over.**] — Testatrix, being possessed of 3½ per cents. and long annuities, bequeathed to S. B., "if living, the interest of my property in the 3½ per cents.; if not living at my decease," the testatrix bequeathed the interest to E. S. for life, and, in case of her leaving children, directed the property to be divided between them at her decease; and subsequently directed that if E. S. left no child the capital should return to the children of J. B. As to her long annuities, the testatrix bequeathed the interest thereof to S. F. and M. S. jointly for their natural lives, and in case of "one or both their deaths before mine" the testatrix bequeathed the interest of the long annuities to J. B. for life, and after his death to A. E. B. and S. J. B. equally. S. B., S. F. and M. S. survived the testatrix. On the question as to who were entitled to the 3½ per cents. and the long annuities:—Held, that S. B. took the 3½ per cents. absolutely, and that the gift over only took effect in case he died in the lifetime of the testatrix:—Held, also, by the M.R., that S. F. and M. S. having survived the testatrix, she died intestate as to the long annuities, subject to the life estates to S. F. and M. S., and that her next of kin were entitled to them. But held, on appeal, that A. E. B. and S. J. B. were entitled to the long annuities from the death of J. B. *Boosey* v. *Gardner*, 18 Beav. 471.

Exception where Contrary Intention Shown.]—Where there are words in a gift of interest which clearly shows the testator intended to make a distinction between the capital and interest, and the disposition of them separate and distinct, a gift of interest will not pass the capital. *Baker* v. *Smith*, 1 W. R. 490.

Indefinite bequest of the income of personalty:—Held, not to carry the corpus. *Buchanan* v. *Harrison*, 1 J. & H. 662; 31 L. J., Ch. 74; 8 Jur. (N.S.) 965; 10 W. R. 118.

A testator gave the interest of his residuary estate to his widow for her life, and directed that in case it should not be sufficient she should be at liberty to go to the principal. The residue only produced 30*l.* a year, and the widow claimed the whole fund, but stated that 60*l.* a year was the least she required for her maintenance. She died before her claim was disposed of. Upon a petition by her administrator:—Held, that she was entitled to have 60*l.* a year made up to her out of the principal, and that if in her ordinary expenditure she left any debts they must also be satisfied. *Pedrotti's Will, In re*, 27 Beav. 583; 29 L. J., Ch. 92; 6 Jur. (N.S.) 187; 1 L. T. 390.

—— **By Gift until Bankruptcy or Alienation.**]—A bequest of the income of a fund until bankruptcy or alienation does not carry the corpus of the fund, but gives only a life interest, determinable on bankruptcy or alienation. *Banks* v. *Braithwaite*, 1 N. R. 306; 32 L. J., Ch. 198; 9 Jur. (N.S.) 294; 8 L. T. 80; 11 W. R. 298.

—— **By Gift of Income followed by Settlement of Residue.**]—Testator gave the residue of his real and personal estate to trustees, upon trust to pay the dividends of 1,500*l.* consols to S. T. for life, and after her death to divide the dividends of the said sum between his wife E. B. and his niece F. R., and the survivor of them. He then gave all the residue of his freehold, copyhold, and leasehold estates, and all other his estate and effects, upon trust to pay the dividends, interest, rents, profits, and annual produce to his wife for life, with remainder to his niece F. R. for life, with remainders over. The testator died, being at the time possessed of leaseholds, shares in canal and insurance companies, and Dutch bonds; and F. R., after surviving the testator, died in the lifetime of S. T.:—Held, that, on the death of S. T., E. B., the testator's widow, became entitled, not to the capital of the 1,500*l.* consols, but to a life interest only in the dividends thereof. *Blann* v. *Bell*, 2 De G. M. & G. 775; 22 L. J., Ch. 236; 16 Jur. 1103.

ii. *By Words which would give Fee Simple or Fee Tail in Realty.*

Principles.]—A limitation of personal property, after a disposition that would raise an entail express or implied in real estate, is void; and the person who would be tenant in tail takes the absolute interest. *Chandless* v. *Price*, 3 Ves. 99.

Words in a will which, in the case of a freehold estate, would have given to devisee either a fee tail or a fee simple, will, in the case of legatees of leasehold, give to them an absolute interest. *Harrison, Ex parte, Commercial Ry., In re*, 3 Y. & C. 275; 8 L. J., Ex. Eq. 28; 2 Jur. 1038.

By Limitation to A. and his Heirs.]—A testator, by will made in 1820, devised and bequeathed freeholds and leaseholds together to his daughter S. for life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, and "in case of default of issue" of S., to "the right heirs" of S. "for ever." S. having married and died a widow, without having had a child:—Held, that she took an absolute interest in the leaseholds. *Comfort* v. *Brown*, 48 L. J., Ch. 318; 10 Ch. D. 146; 27 W. R. 226.

A testator gives all his property to his daughter and her heirs, directing, at their decease, their debts, &c., to be paid; he then gives various legacies, and bequeaths the residue to his nephew:—Held, that the daughter takes the personal property absolutely, and an estate tail in the real property, and that the legacies were meant to be given only upon the failure of heirs of the body of that daughter. *Widdison* v. *Hodgkin*, 2 L. J. (O.S.) Ch. 9.

Devise of 100*l.*, and 50*l.* per annum to A. and his heirs, and if A. die without heirs then to a charity; A. dies without issue, living the testator: the will void as to the whole, and the charity cannot take. *Att.-Gen.* v. *Gill*, 2 P. Wms. 369.

Bequest of 2,000*l.* to A., and in the event of her death without children to her heirs, the nearest relations of her great-aunt A. :—Held, that A. took an absolute interest. *Yearwood* v. *Yearwood*, 9 Beav. 276; 10 Jur. 151.

—— **To A. and his Heirs Male.**]—Bequest to A., and his heirs male, equally to be divided among them, share and share alike, construed to A. for life, remainder to his children equally. *Wilson* v. *Vansittart*, Ambl. 562.

—— **To A. or his Heirs or Assigns.**]—A testator devised and bequeathed real and personal estate to trustees, upon trust for his wife for life, and after her decease to sell and divide the proceeds among his five children (whom he named), or their heirs or assigns. One of the children died in the lifetime of the testator's widow, leaving her husband and a son and a daughter surviving. The husband took out letters of administration to her estate, and on the death of the testator's widow claimed one-fifth of the produce of part of the real estate, which had been paid into court :—Held, that the gift to the five children was absolute, and that the share of the deceased daughter belonged to her husband as her administrator. *Walton, In re*, 8 De G. M. & G. 173; 25 L. J., Ch. 569; 2 Jur. (N.S.) 363; 4 W. R. 416.

A testator by his will devises all his real estate to his executors for the purposes thereinafter stated; and after empowering them either to continue his business or to dispose of it, he gives the profits of it in the one case, and the interest of the moneys arising from the sale in the other, and also the interest of the securities on which the rest of his capital should be invested, to his daughter for life, her receipt to be a discharge. He then gives her the rents and profits of all his real estates during her life; and at her decease he devises and bequeaths to her heirs all his estates real and personal as tenants in common; if his daughter has but one child, such child is to possess the whole; but if she should die without issue, then at her decease he gives certain legacies. He next directs all his goods and effects to be sold, his said legacies to be paid, and a sum invested sufficient to purchase 150*l.* a year, which is to be paid to the husband of the daughter. He then orders his real estates to be sold at the decease of his daughter, or at the decease of his brothers and sisters, according as a particular event may turn out; and he gives over to certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates when sold, and the rents of them until they are sold. The daughter died without having had issue :—Held, the daughter took an estate tail in the freeholds; that the real and personal estate being given over together, she took the personal estate absolutely; that the annuity of 150*l.* was charged both on the real and personal estate. *Dunk* v. *Fenner*, 2 Russ. & M. 557.

—— **To A. and the Heirs of his Body.**]—Devise of personalty to B., and the lawful heirs of his body, if he should have any; but if he should die without lawful heirs, 1,000*l.* to S., and 500*l.* to C., the contingencies are too remote. *Att.-Gen.* v. *Hird*, 1 Bro. C. C. 170.

On a bequest of a sum of money to each of four persons named, with a proviso, "should it so happen that the whole should die without heirs, the sum is ultimately to revert to the estate of the family, but should all or any of them die with heirs of their body, the sum of which they severally died possessed is to be continued to their heirs for ever, and not to revert to the estate" :—Held, that the legatees took absolutely. *Brooks* v. *Lake* (*Lord*), 10 Jur. 485.

Devise of a personal estate to a trustee in trust for testator's only son, and the heirs of his body, and if his son die during his minority, and without issue, then to A., and makes his son executor, and B. executor in trust for his son during the son's minority. The son lives to eighteen, and then dies without issue; the personal estate shall go to the executor of the son, and not to A. *Whitmore* v. *Weld*, 1 Vern. 326; 2 Ch. Rep. 383; 3 Ch. Cas. 167.

Testator having devised residue of his real and personal estate to trustees, upon trust, within six months after his decease, to raise 34,000*l.*, and having out of this sum made a provision for maintenance of his two daughters, E. and S., during their minorities, directed that a moiety of interest arising from it should be paid to each daughter on her attaining twenty-one, or marrying, for her separate use, during the term of ninety-nine years, if she so long lived; and in case either of them died, leaving no child or issue of a child, the whole of interest should be paid to survivor for her separate use, during remainder of term, if she so long lived; and subject to these and some contingent gifts, which never took effect, he bequeathed the 34,000*l.* to his trustees, upon trust, after decease of his daughters, for such person or persons as should, under subsequent limitations, be entitled to residue of his real and personal estate. In these subsequent limitations, trustees were directed, upon each of his daughters attaining twenty-one or marriage, to yield up to her a moiety of residue of his real and personal estates, to hold same to her and heirs of her body, with remainder to other daughter and heirs of her body, remainder to his own right heirs. In suit instituted on behalf of the infant daughters, for administration of testator's estate, a decree was made for raising 34,000*l.*, and personal estate proving insufficient, part of it was raised by sale of portions of real estate; afterwards S., with concurrence of the heir of surviving trustee, suffered a recovery of her moiety of lands to use of herself in fee, tenant to præcipe being made, and uses of recovery declared by bargain and sale, in which both S. and heir of surviving trustee were conveying parties, but which was not inrolled within due time. Subsequently E. suffered a recovery of her moiety of lands. S. died, leaving children, having received out of court moiety of principal of that part of charge which had been raised, but without having taken any steps to have remainder of it raised. Semble, that E. and S. did not take quasi estates tail in sum of 34,000*l.*: —Held, that if E. and S. took quasi estates tail in 34,000*l.* so as to entitle to it absolutely, yet under circumstances of case, unraised portion of S.'s moiety of charge was extinguished, and unsold estates entirely exonerated; that an equitable recovery is valid, though tenant to præcipe is made by bargain and sale not inrolled within due time. Effect, as to extinguishment of a charge, of conduct of parties who are interested both in money and in lands out of which money is to be raised. *Smith* v. *Frederick*, 1 Russ. 174.

Devise and bequest to A. and the heirs of his body, with limitations over in case of no such

heirs :—Held, an estate in tail in real estates, and an absolute interest in personal, the limitations over being void ; but if expressed, if he leaves no such heirs, it would be good as confined to the time of the death, and not after an indefinite failure of issue. *Crooke* v. *De Vandes*, 9 Ves. 197.

A testator bequeathed the interest of his residuary personalty to William and the heirs of his body in equal proportions, subject to a life annuity in favour of Sarah ; and in the event of William dying during the life of Sarah, without leaving heirs of his body, the testator desired that Sarah should receive the whole interest of such residue for her life, and at the decease of the aforesaid Sarah, William, and the heirs of his body, he desired that such residue might be allowed to accumulate until the interest thereof might be sufficient to support two persons for ever in a certain hospital :—Held, that the testator's intention was to give the property successive, i.e. not to give it to Sarah or the hospital so long as the heirs of the body of William should be unexhausted, and that, as a bequest in such terms was unlawful, the gift must be construed as a gift to William absolutely. *Barker's Trusts, In re*, 52 L. J., Ch. 565 ; 48 L. T. 573.

—— **To A. and his Children.**]—A testator left all his property to his "brother B. and his children in succession" :—Held, that this gave to B. an estate tail in the realty, and an absolute interest in the personalty. *Tyrone (Earl)* v. *Waterford (Marquis)*, 1 De G. F. & J. 613 ; 29 L. J., Ch. 486 ; 6 Jur. (N.S.) 567 ; 8 W. R. 454.

The mortgagee for a term of years, being in possession, devises the premises as an estate of inheritance to three several persons for life successively, with remainder to their first and other sons, remainders over ; the remainders over are void as tending to a perpetuity. *Brett* v. *Sawbridge*, 3 Bro. P. C. 141.

Testator bequeathed two leasehold houses to his sisters A. and B. during their natural lives, they keeping them in good repair, and at their death to be disposed of as follows : One house to descend to his sister A.'s eldest son or daughter, and the next heirs male or female, until the expiration of the lease, and the other house in like manner to B.'s eldest son or daughter, &c. :—Held, that A. and B. took an absolute interest in the leaseholds. Quære, whether, if it had been a devise of freehold, the words would have conferred a fee. *Harrison, Ex parte, Commercial Ry. Act, In re*, 3 Y. & C. 275 ; 8 L. J., Ex. Eq. 28 ; 2 Jur. 1038.

A testator gave all his real and personal estate to trustees in trust, as to one moiety for A. for life, remainder to her children, and as to the other moiety for B. and her children, in like manner. By a codicil, he declared that his estates should not be divided equally between A. and B. but in proportion to the number of their children, and he left A. and B. jointly his residuary legatees. By another codicil, in order to prevent disputes, he gave one of his estates to A. and her heirs, and the other to B. and her heirs ; the number of their children nearly equalising the value of the two estates. In a subsequent codicil, he mentioned that he had bequeathed the first estate to A. and her children, and the second to B. and her children :—Held, that A. and B. were entitled to these estates for their lives only, with remainders to their children, and that they were not entitled to the personal estate absolutely, but for their lives only, with remainders to their children, and in shares proportioned to the number of their children. *Lushington* v. *Sewell*, 1 Sim. 435.

—— **To A., and B., and C., and their Children.**]—A testator bequeathed the interest of certain personal property to his wife for life ; "at her death one half of the said property I give to my son G. M., the remaining half to be equally divided between my two daughters, and at their deaths such shares to be equally divided among their children respectively" :—Held, that the son took an absolute interest in the moiety. *Scrivener* v. *Smith*, 2 De G. M. & G. 399.

—— **To A. and his Offspring.**]—A bequest of personalty to his offspring confers upon A. an absolute interest. *Young* v. *Davies*, 32 L. J., Ch. 372 ; 9 Jur. (N.S.) 399 ; 11 W. R. 452.

—— **To A. for Life, Remainder to his Heirs.**]—A testator, as to all his real and personal estate, directed that after his wife's death his son J. and daughter A. should "receive its income, and after their decease their heirs" :—Held, that they took a joint estate in fee in the realty, and a joint interest for their lives in the personalty. *Herrick* v. *Franklin*, 37 L. J., Ch. 908 ; L. R. 6 Eq. 593.

A testator by his will, dated in 1885, appointed executors, and continued as follows : "I give to my two sons . . . all my real and personal property . . . for their natural life, subject to the condition of paying" the legacies therein mentioned. "If my sons marry and have issue, I give to each of their heirs their father's share, and to their heirs for ever ; if there is no male issue with either of my two sons and there is female issue, then the father's share shall be divided between them, share and share alike as tenants in common, and to their heirs for ever. Should either of my sons die without issue, then such son's share shall go to my other son and to his heirs for ever. Should both of my sons die without issue, then at the death of the last of them, I give all my real property to the whole of my grandchildren, share and share alike as tenants in common, and to their heirs for ever." He then directed that his two sons should pay out of his real property any payment due and owing thereon :—Held, that the two sons took the personalty absolutely, subject to the conditions mentioned in the will. *Score, In re, Tolman* v. *Score*, 57 L. T. 40.

A testatrix bequeathed a sum of money to "M. for the term of her life and to her heirs after her" ; and in case M. should not survive her, the testatrix bequeathed the said sum to E. for her life ; and at the death of E. to certain other persons :—Held, that the legacy did not upon the death of M., who survived the testatrix, pass to her heir-at-law as a persona designata, but that M. took the bequest absolutely. *Atkinson* v. *L'Estrange*, 15 L. R., Ir. 340.

—— **Remainder to his Heirs Male.**]—A testator gave leasehold estate to trustees, on trust for his son Benjamin, to take the rents until he should attain twenty-one, remainder on trust to support contingent remainders ; and subject thereto on trust for such son for life, remainder for the heirs male of such son ; remainder to the second and other sons of Benjamin, and the heirs male of their bodies, with remainder

over of a like nature in favour of other children of the testator and their sons:—Held, that this would have been an estate tail in the son of Benjamin, and, being personalty, he would have taken an absolute estate. *Williams* v. *Lewis*, 6 H. L. Cas. 1013; 28 L. J., Ch. 505; 5 Jur. (N.S.) 323; 7 W. R. 349.

—— **Remainder to the Heirs of his Body—Where Corpus Given.**] — Devise of real and personal estate in trust for A., for life, afterwards for B. for life, and afterwards for the heirs of his body, afterwards for the other sons of A., successively in tail, taking testator's name; then to the daughters in tail, for want of such issue to convey to C. in fee: B. is entitled to a conveyance in tail of the real, and to the absolute property of the personal; the intent being at least doubtful, the legal operation of the words cannot be taken away, and as to the personal, it vested absolutely by such limitation, whether so intended or not. *Garth* v. *Baldwin*, 2 Ves. Sen. 646.

A. devises real and personal estate to B., for life, with remainder to the heirs of her body; this limitation over is void as to the personal estate, and B. shall take it absolutely. *Stratton* v. *Payne*, 3 Bro. P. C. 99.

Devise to the use of the devisor's second son A. for life, without impeachment of waste, and from and after his decease to the heirs of his body, to take as tenants in common, and not as joint-tenants; and in case of his decease without issue, to the devisor's eldest son B., his heirs, &c.; and in case both sons should die before twenty-one, over:—Held, an estate tail in the land, and absolute interest in personalty bequeathed with it. *Bennet* v. *Tankerville* (*Earl*), 19 Ves. 170.

A., by will, gives bank stock, exchequer-orders, and other personal estate to B. for life, and after his death to B.'s heir, and, for want of issue, to C. for life, &c.; B. takes absolutely, and devise over to C. void. *Chatham* (*Earl*) v. *Tothill*, 7 Bro. P. C. 453.

Bequest of personalty to A. for life, and after A.'s death to heirs male of A.'s body for ever, and for want of such issue, to B. for life, &c.; A. takes absolute interest, and gift over to B. is void. Semble, *S. C.*, nom. *Tothill* v. *Pitt*, 1 Madd. 488.

Real and personal estate was devised to a feme covert for life, for her independent use and benefit, with remainder to her husband for life, with "remainder to the heirs of her body in tail," with remainders over; and then followed a declaration in the will that "all the aforesaid limitations were intended by the testator to be in strict settlement":—Held, in accordance with the certificate of the court of C. P., that, subject to her husband's life estate, the wife took an estate tail in the realty and an absolute interest in the personalty. *Douglas* v. *Congreve*, 1 Beav. 59; 8 L. J., Ch. 53; 3 Jur. 120. And see *S. C.*, 4 Bing. (N.C.) 1; 5 Scott, 223; 7 L. J., C. P. 43; 1 Keen, 410; 6 L. J., Ch. 51.

Testatrix bequeathed a leasehold house and 3,000*l.* stock to trustees, in trust to permit her daughter to receive the rents and interest for life for her separate use; and from and immediately after her daughter's decease, she gave the rents and interest to the heirs of the body of her daughter lawfully begotten; but in case her daughter should happen to die without leaving any lawful issue living at the time of her decease, she gave the house and the stock over:—Held, that the daughter took the property absolutely. *Verulam* (*Earl*) v. *Bathurst*, 13 Sim. 374; 12 L. J., Ch. 359; 7 Jur. 295.

A testator bequeathed to his grand-daughter the interest arising out of 1,500*l.* consols during her life, and at her decease to descend to her heirs, male or female, by paying to her uncle 10*l.* per annum during his life, but the said 1,500*l.* stock to be by no means sold whatsoever, except on failure of issue, and then to descend to the testator's son and his heirs for ever:—Held, that this was an absolute bequest of the 1,500*l.* stock to the testator's grand-daughter. *Ousby* v. *Harrey*, 17 L. J., Ch. 160.

Residuary trust by will to apply the rents and profits for A. during his life, and afterwards for the heirs of his body if any, and in default of such issue over, is an estate tail in the real estate, and the absolute interest in the personal. *Elton* v. *Eason*, 19 Ves. 73; 12 R. R. 142.

N. T. devised an annuity of 300*l.* per annum to his wife for life, then to accumulate, to make a portion for his first daughter who should marry, then in order to raise portions for other daughters, then to remain to his eldest son, and on his decease, to the heirs male of his body, and in case of his having no issue, remainder to the next eldest son and his heir male. The daughters married in the life of the wife; the eldest and two other sons of testator died, leaving the wife without issue. This is not personal estate vesting absolutely in the eldest son (on the principle that it would be an estate tail in hand), neither does it vest as an executory devise on the fourth son of testator, who survived; but it is an annuity, and being exhausted by the events, there being nobody to take it, as such, sinks into the residuary estate of the testator. *Turner* v. *Turner*, 1 Bro. C. C. 317; Ambl. 776.

A testator gave a leasehold estate to trustees during the term of thirty years, upon trust to receive the rents and profits and pay debts, and, subject thereto, "to lay out and continue the same at interest, upon the best security that they could get for the same, and shall accumulate the same yearly, by making the interest thereof principal, and to bear interest until the legacies hereinafter given and bequeathed, and hereby made chargeable thereon, shall be satisfied and paid; and immediately afterwards the legacies shall be satisfied and discharged, or immediately after a sufficient sum or sums of money shall be had and received for that purpose by and out of the rents and profits of the premises"; then he bequeathed the leasehold estate to the trustees and their heirs for the term in him vested, upon trust for his son B., until the son of his son B., if he had one, should attain twenty-one, and then to the trustees to preserve contingent remainders, but to permit such son to receive the rents and profits during his life; and after his decease, to the heirs male of such son; and for want of such issue, to the second and other sons of the body of B., lawfully to be begotten, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; and in default of such issue, a similar limitation in remainder to L.; "and then for default of such issue, upon trust to receive the rents and profits for the use and benefit of the son of the testator's daughter A. until he should attain twenty-one," with similar limitations as those in favour of B. B. and L. died without issue:—Held, that B.'s son took the term absolutely. *Williams* v. *Lewis*, 6 H. L.

Cas. 1013; 28 L. J., Ch. 505; 5 Jur. (N.S.) 323; 7 W. R. 349.

Held, also, that the trust for accumulation was not void for remoteness. *Ib.*

Devise of freehold and leasehold to A. for life, and after his death to the heirs of his body, their heirs, executors, &c.:—Held, this gives A. an estate tail in freehold, and absolute interest in the leasehold. *Kinch* v. *Ward*, 2 Sim. & S. 409; 4 L. J. (O.S.) Ch. 28.

Devise of all the rest, residue, and remainder of estate, both real and personal, unto A., to be placed at interest, until her age of twenty-one years or day of marriage, and then the whole thereof, together with the interest accumulated thereon, to be paid to her, to and for her use during natural life, and from and immediately after her decease unto the heirs of her body lawfully begotten, equally to be divided between them, share and share alike, and in default of such issue, or the death of A. before her age of twenty-one, or day of marriage, then unto her (the testatrix's) brother, is an estate for life in A. *Jacobs* v. *Amyatt*, 4 Bro. C. C. 542.

Devise to A. for life, remainder to trustees, to preserve contingent remainders, remainder to the heirs of his body, with remainder over for life and in tail male, declaring that the respective devises to A., &c., and their respective heirs male, are on condition of taking the testator's name; the residue of the personal property bequeathed to A., on attaining the age of twenty-four, to go over if he died under twenty-four, without leaving any child or children living at or born in due time after his death. Codicil giving an after-purchased leasehold for years for such estate and estates, and in such manner and form as the real estates are devised by the will, and with, under, and subject to the like limitations, trusts, conditions, &c. A. takes an estate tail in the freehold, and the absolute interest in the leasehold estates. *Brouncker* v. *Bagot*, 19 Ves. 574; 1 Mer. 271.

—— **Where Interest Given.**]—Remote limitation: devise of 400*l.* to be put out on good security for T. B., that he may have the interest for his life and for the heirs of his body; if he dies without issue, then over. The whole property vests in the first taker, and the limitation too remote. *Butterfield* v. *Butterfield*, 1 Ves. Sen. 133.

Interest of a sum given to A. for life, at his death to devolve to the heir of his body with remainder over, vests the principal sum absolutely in A. *Robinson* v. *Fitzherbert*, 2 Bro. C. C. 127.

Testator directs 20,000*l.* which he has in the three per cents. to be firmly fixed there, to remain during the life of his wife for her to receive the interest, and after her death to be in the same manner firmly fixed on the infant W. C. "to be so secured that he may only receive the interest during his life, and after his decease to the heir male of his body, and so on in succession to the heir-at-law, male or female"; with a direction that the principal sum is never to be broken into, but the interest only to be received; "his intent being that there should always be the interest to support the name of Cobb as a private gentleman." Though the intention be manifest to give only a life interest to W. C., yet there being nothing to shew that the word "heir male" was not used in a strictly technical sense:—Held, that W. C. took an absolute interest, the words being such as would create an estate tail of freehold property; secus, if the words "for life" had been added to the words "heir male," in which case the latter words might have been construed to be a mere "designatio personæ":—Held, the declaration that the principal stock should not be broken into, not sufficient to turn the heir into a tenant for life, being like an attempt at perpetual restraint of alienation, which in the case of land would not prevent the creation of an estate tail. *Britton* v. *Twining*, 3 Mer. 176; 17 R. R. 53.

—— **Remainder to the Heir of his Body.**]—A house, together with the furniture thereof, is limited to a feme, and such heir of her body as should be living at her death, and in default of such remainder, over:—The female has an estate tail in the house, and absolute property in the furniture.

Devise to A. for life, remainder to the heir of his body (though in the singular number), is an estate tail. *Richards* v. *Bergavenny*, 2 Vern. 324.

—— **Remainder to his Issue.**]—Construction of will, whether issue take by way of purchase or limitation.

A residue of personal estate was directed by will to be divided equally amongst the testator's sons (named), share and share alike, as tenants in common, and to the issue of their several and respective bodies lawfully begotten; but in case of the death of any or either of them without issue, lawfully begotten, living at the time of his or their respective deaths, then the part or share of him or them so dying to go to the survivors and survivor equally, share and share alike, and to the issue of their several and respective bodies lawfully begotten:—Held, that the bequests to the four sons passed absolute interest, but that on the death of one of such sons without issue, the shares survived to his brother. *Lyon* v. *Mitchell*, 1 Madd. 467; 16 R. R. 248.

Devise to devisor's wife of all his real and personal estates for her life, "after her" to A. and his male issue; "for want of male issue after him," to B. and his male issue; for want of male issue, to two others and their male issue. An absolute interest in A. as to the personal estate. *Donn* v. *Penny*, 19 Ves. 545; 1 Mer. 20; 13 R. R. 255.

Bequest of personal property to a man and his issue is an absolute interest, but a limitation over for want of issue living at his death is good. *Ib.*, 547.

A bequest to all the children of A. and their issue, share and share alike, and to be paid twelve months after the testator's death, is an absolute gift to such children of A. as are living at the testator's death. *Butter* v. *Ommaney*, 4 Russ. 70; 6 L. J. (O.S.) Ch. 54; 28 R. R. 6.

A testator bequeathed the residue of his estate to his widow, in trust to apply the proceeds for her own use, and at her death he gave what should then be remaining of such residuary moneys equally among all the daughters of A. and their issue, with benefit of survivorship and accruer (which latter clause was not set forth in the bill):—Held, that a daughter of A., who died in the lifetime of the widow, took no share, and that two surviving daughters took the whole residue absolutely. *Gibbs* v. *Tait*, 8 Sim. 132; 5 L. J., Ch. 344.

A testator bequeathed ten Pelican shares to his son, and his heirs, executors, administrators,

and assigns for ever, "he paying the profits of eight to the testator's daughters for life"; and after their decease the daughters' shares were to "return to his son and his issue"; and "in default of such issue" there was a gift over to the daughters and their issue":—Held, that subject to the life interest of the daughters the son was absolutely entitled to the shares. *Hedges* v. *Harpur*, 9 Beav. 479; 10 Jur. 578.

A testator appointed his executors guardians of his children until they should attain the age of twenty-five, and he desired that all his estate (which consisted of personalty only) should be equally divided among his four children, share and share alike. He then gave certain powers to his executors, and at the end of the will came this passage: "And I hereby direct that all moneys inherited by my daughters under this will shall be placed in the hands of trustees appointed by their guardians, to be settled on them for the sole use of themselves and their lawful issue":—Held, upon the petition of a daughter who attained her age of twenty-five and was unmarried, that she was entitled to her share absolutely. *Samuel* v. *Samuel*, 14 L. J., Ch. 222; 9 Jur. 222.

A testator by his will gave 4,000*l.* to be invested in stock in trust to pay the dividends to his daughter S. during her coverture, and upon the death of G., her husband, to transfer the capital to her for her sole use; but in case G. should survive his daughter, then in trust for H., F., E., A., and W., his five sons, and their respective issue (if any), to be divided among them in equal shares and proportions, such issue to take per stirpes, and not per capita; he also gave the residue of his personal estate to his sons, H. F., E., A., and W., "and their respective issue (if any), such issue to take per stirpes, and not per capita, to be divided among them in equal shares and proportions; the shares of such of them as shall have attained the age of twenty-one years to be paid to them respectively forthwith after the testator's decease; the shares of such of them as should be under that age to be paid to them when and as they should respectively attain such age":—Declared, that, S. dying in the lifetime of G., the sons of the testator living at such event would be absolutely entitled to the stock in equal shares, but if any of the sons should die in the lifetime of S. leaving issue, such issue, if living at the death of S., would be entitled to the share or shares of the fund which their parents would have been entitled to if living, such issue to take such shares equally among them, and adjudged, that the sons living at the death of the testator took an absolute interest in the residue. Dictum, that if any of the sons had died in the lifetime of the testator, his children, living at the death of the testator, would have taken, by substitution, the share of the parent. Whether grandchildren or more remote descendants would take as issue, and in what proportions, quære. *Pearson* v. *Stephen*, 5 Bligh (N.S.) 203; 2 Dow & Cl. 328.

Bequest of personalty to four daughters "and their issue":—Held, that they took absolutely. *Stanhope, In re*, 27 Beav. 201.

A testator devised real and personal estate to A. for life, with a direction to the executors, after A.'s death, to divide it amongst all her children and their lawful issue, share and share alike. There was a gift over of the leaseholds to other persons on a total failure of issue of the children:—Held, that the children took estates tail in the realty, and absolute interest in the personalty; and that cross remainders were not to be implied in regard to the leaseholds. *Beaver* v. *Nowell*, 25 Beav. 551.

A testator gave a share of his estate to L., subject to the condition that L. should receive for professional services 150*l.* in some one year, and the executors were to invest the principal, and pay L. the interest; "and in the event of his death, he being at the time unmarried, or not leaving legal issue, or not having fulfilled the above condition," then there was a gift over. L. never fulfilled the condition, but died leaving lawful issue:—Held, that his representatives took the share. *Law* v. *Thorp*, 25 L. J., Ch. 75; 1 Jur. (N.S.) 1082; 4 W. R. 69.

A testator gave the interest of all his money in the funds to his daughter, and he desired his outstanding money to be put into the funds. He then desired the interest of the moneys directed to be put into the funds to be paid to his daughter, "as and for her own and issue's proper moneys." But in the event of her dying without issue, he desired the whole of his funded property to be divided between his brothers and sisters and their children. The daughter died without issue:—Held, that she took the funds absolutely, and that the gift was inoperative. *Andrews' Will, In re*, 26 Beav. 608; 29 L. J., Ch. 291; 6 Jur. (N.S.) 114; 1 L. T. 319.

Devise of a freehold estate to the testator's illegitimate son W., "to have and to hold during the term of his natural life, and, in case he have issue, then it is my will they should jointly inherit the same after his decease." In a subsequent part of the will the testator devised and bequeathed the rest and residue of his effects real and personal, not thereinbefore disposed of, to his said son, "but in case my son W. dies without issue, then it is my will that the whole of my property be ascertained; and after bequeathing certain legacies and annuities, the rest and residue of my property, together with the before-mentioned annuities as they drop off, I give in equal proportions to A. and B.":—Held, that the illegitimate son took an estate tail in the real estate, and an absolute interest in the personalty. *Ward* v. *Bevil*, 1 Y. & J. 512; 30 R. R. 840.

The testator gave the sum of 500*l.* stock to S. T., to receive the interest during life, and then to her issue; but in case of her death without issue, the said 500*l.* stock to be divided between her father's children by his second wife; and in default of any children by his second wife being living at the testator's death, over:—Held, that S. T. took an absolute interest in the sum of 500*l.* stock. *Att.-Gen.* v. *Bright*, 2 Keen, 57; 5 L. J., Ch. 325.

Gift of stock in the public funds upon trust to pay the dividends to the four brothers and two sisters of the testator in equal shares for their respective lives, and after their respective deceases, to pay the dividends unto and amongst the eldest sons or son of his said brothers, and the survivors or survivor of them, for their lives or life, in equal shares and proportions, upon their attaining twenty-one, with a provision for maintenance in the meantime; and after the decease of such eldest sons or son, to pay the said dividends unto and amongst the eldest male issue only for the time being of their bodies ad infinitum for ever:—Held, that the bequests to the brothers and sisters of the testator were

valid; that the bequests in remainder to the four eldest sons of the four brothers, each of whom had a son living at the death of the testator, were valid, but that such eldest sons took absolute interests in their several shares of such stock; that, according to the language of the will, the issue of the nephews would take, if at all, as purchasers; but if the limitations to their issue male should be construed as words of limitation, the nephews would have taken a life estate only. *Harvey* v. *Towell*, 7 Hare, 231; 17 L. J., Ch. 217; 12 Jur. 241.

Testator gives the accumulation of rents till A. should attain twenty-one, to be laid out, and to permit A. to receive the interest during life; after his death, he gives the said moneys to the issue male of A., and in default to the plaintiffs; A. died without issue; the issue would have taken as purchasers, and therefore the limitation to the plaintiffs takes place. *Knight* v. *Ellis*, 2 Bro. C. C. 570.

Devise of leaseholds on trust for A. for life, and afterwards to his issue male severally and respectively, according to their seniorities; and in default to his heirs, according to their seniorities; and in default over:—Held, that A. took an absolute interest. *Jordan* v. *Lowe*, 6 Beav. 350.

The word "issue" is construed differently in limitations by will of real and personal property, because of the different order of succession to such property on the death of the owner intestate. *Wynch's Trusts, In re*, 1 Sm. & G. 427. Affirmed 5 De G. M. & G. 188; 2 Eq. R. 1025; 23 L. J., Ch. 930; 18 Jur. 659; 2 W. R. 570.

J. W. bequeathed to A. M., the wife of R., "an annuity for her life and the issue from her body lawfully begotten, in failure of which to revert to my heirs; and I request that K. and T. will act as trustees for the said A. M., so that the said annuity may be secured for her sole use and benefit":—Held, that the word "issue," in this gift, must be construed a word of purchase—that A. M. took an equitable interest only for her life, and that upon her death the children and other issue took the annuity as a class in equal shares as joint tenants. The authority of Lord Thurlow's decision in *Knight* v. *Ellis* (supra) upheld. *Ib.*

In construing bequests of personal estate it is not correct to apply rules which, with reference to real estate, have been derived from laws of tenure, such as that "issue" or "heirs of the body" shall be primâ facie words of limitation; but the intention must decide the construction. Per the Lord Chancellor and Sir G. J. Turner, L.J. *Ib.*

The authorities do not bear out the general proposition sometimes found in the report, namely, that the same words in a will which would create an estate tail in realty will give the absolute interest in personalty. Per Sir G. J. Turner, L.J. *Ib.*

A deed was executed in 1797 putting a particular construction upon the will. A. M., not being a party to the deed of 1797, executed a deed in 1808, previously to her marriage, which deed recited the former deed:—Held, by Knight-Bruce, L.J., that, as against the issue of the marriage, A. M. was bound by that recital, and could not put an opposite construction upon the will. *Ib.*

A testator gave certain leasehold houses to his wife for her life; and after her decease, to the niece A. for life for her separate use, and after her decease, to the issue of the body of A. lawfully begotten; and if A. should die leaving no issue, then to B. A. died, leaving three children:—Held, in conformity with *Wynch's Trusts, In re* (supra), that A. took only an estate for life. *Goldney* v. *Crabb*, 19 Beav. 338; 2 W. R. 579.

Devise of real and leasehold estates together to A. for life, and after his death to the male issue of the body of A., in equal shares and proportions, the leaseholds being the bulk of the property:—Held, that A. took an estate tail in the freeholds, and an estate for life only in the leaseholds. *Jackson* v. *Calvert*, 1 J. & H. 235.

A testatrix gave real and personal estate upon trust for all her children after they should attain twenty-one, share and share alike for their respective lives, and after the death of any of them before attaining twenty-one, upon trust as to the share of the child so dying for the issue of such child in equal shares and proportions, and their respective heirs, executors, administrators, and assigns, but if there should be but one such child who should attain the age of twenty-one (which event happened), upon trust as to the whole property for such child for life, with the remainder in trust for the issue of such child, and their respective heirs, executors, administrators, and assigns as tenants in common:—Held, that the word issue was to be construed as a word of purchase, and that the testatrix's only child took an estate for life with remainder to her issue as tenants in common in fee as to the realty, and absolutely as to the personalty. *Bannister* v. *Lang*, 17 L. T. 137.

Bequest of chattel interest in houses to E. (who afterwards married, but died without issue) for life, and to his issue in case he shall marry:—Held, to give a life estate only to E. *Foster* v. *Wybrants*, Ir. R. 11 Eq. 40.

d. Gifts Over of Undisposed-of Interests in Personalty.

After Life Interest.]—One devises that such part of his personal estate as his wife should leave of her subsistence shall go to his sister; devise over good. *Upwell* v. *Halsey*, 1 P. Wms. 651; 10 Mod. 441. But see 2 Ves. Sen. 532; 1 Ll. & G. 298.

Testator gave his whole property to his wife, making no express provision for his daughter; "but in case of death happening to his wife, desired his executors to take care of the whole for his daughter." The wife shall have the whole for life only, with remainder absolutely to his daughter. *Wall* v. *Bushby*, 1 Bro. C. C. 489.

A testator directed his debts and funeral expenses to be paid, and gave to his wife all his estate, effects, goods, chattels, houses, lands, moneys, securities for money due or growing due, every matter and thing whatsoever and wheresoever the same might be at the time of his decease, for her sole separate use and benefit; and he further directed that at her decease whatever remained of his estate and effects should go to and be equally divided, share and share alike, among certain specified persons, or such of them as should be then living:—Held, that there was a substantial gift after the widow's death. *Constable* v. *Bull*, 3 De G. & Sm. 411; 18 L. J., Ch. 302; 13 Jur. 619.

Held, that the widow was entitled to an estate for life only in the residuary personal estate of

the testator after payment of his debts and funeral and testamentary expenses. *Constable* v. *Bull*, 22 L. J., Ch. 182.

Gift by will to A., and in the event of her death, over. By codicil the testator left all he possessed to A., as stated in his will, wishing her to pay certain legacies; "and at A.'s death I wish all remaining to be for the benefit of B. and her children":—Held, that A. took a life interest only, with remainder to B. and her children as joint tenants. *Adam, In re*, 11 Jur. (N.S.) 961; 13 L. T. 347; 14 W. R. 18.

F. W. by will gave certain freehold and leasehold estates to trustees in trust for his wife for her life, and after her death he gave the same unto, amongst, and between a class of persons, naming them, share and share alike; and after their decease, to three children, share and share alike. The will contained a residuary gift. After the death of the testator and his wife one of the class died without issue:—Held, that he was not entitled absolutely to the share given to him, but that on his death without children, as the will contained no express words to shew that an absolute interest was intended, the share fell into the residue. *Waters* v. *Waters*, 26 L. J., Ch. 624; 3 Jur. (N.S.) 654.

E. and A., sisters, were tenants in common of freehold and leasehold property. E. by her will gave all her estates and effects, both real and personal, to A. absolutely, and by a codicil which she directed to be taken as part of her will she gave, after the death of A., "all property of mine which may then be remaining" (except a house and furniture) "to my brother W. B." and three other persons in certain proportions, "my brother W. B. to have one-half of the property for his whole and sole disposal." A., who survived E. a year and eight months, remained in possession of the whole of the property, and by her will gave a portion of it to W. B. for life only, and after his death to other persons. On bill filed by W. B. for administration of both estates:—Held, that the intention of E. was, construing the two instruments together, that A. should have a life interest only in her property. *Bibbens* v. *Potter*, 10 Ch. D. 733; 27 W. R. 304.

A testator possessed of personal property gave a beneficial and apparently absolute interest in it to his wife, whom he made his sole executrix, but with a direction that, in case his property should be more than she wanted to live on for her lifetime, she was to give weekly the remainder to the testator's two daughters so long as she lived; and he directed the whole of his property to be sold, and the money to be put into the Bank of England in trust as might be thought best for her and those in trust:—Held, that the wife took beneficially an interest for life only; that the gift to the daughters was invalid; and that there was an intestacy as to the beneficial interest in the capital after the widow's death. *Hudson* v. *Bryant*, 1 Coll. C. C. 681.

Bequest of residuary personal estate after decease of testator's widow, or her marriage in his daughter's lifetime, to his "daughter, the same to be always considered as vested in her upon her attaining her age of twenty-one years, and to be subject to her disposition thereof"; and in case his daughter should die "without attaining twenty-one, or without disposing by her will of the property," then over:—Held, upon the context, that the daughter took for life, with a testamentary power of disposition. *Borton* v. *Borton*, 16 Sim. 552; 18 L. J., Ch. 219; 13 Jur. 247.

A testator bequeathed the residue of his personal estate to his widow in trust, to apply the interest and proceeds for her own use, and after her decease he gave what should be remaining of such residuary moneys unto and equally amongst all the daughters of T. D. and their issue, with benefit of survivorship and accruer. T. D. had three daughters living at the testator's death. One of them died without issue in the lifetime of the testator's widow. The two others survived the widow, and had issue living at her death:—Held, that the two surviving daughters were entitled to the whole of the residue absolutely. *Gibbs* v. *Tait*, 8 Sim. 132; 5 L. J., Ch. 344.

A. by his will gave all his real and personal estate to his wife, with full power to sell his landed property in her lifetime, or to retain the same during her lifetime, and to dispose of one moiety of such real and personal estate as she might be possessed of at her decease by her will; and he gave the other moiety of such realty and personalty as might remain in his wife's possession at her death to C. (but not until after his wife's decease). C. predeceased the testator's widow, who sold the whole real estate and died; but the purchaser only paid half the purchase-money, on the doubt whether one moiety was not undisposed of. On bill filed by C.'s representative:—Held, he was entitled to one moiety of the purchase-money with 4 per cent. interest from the widow's death. Costs of the plaintiff out of the moiety of the purchase-money, the purchaser and widow's executor paying their own costs. *Phillips* v. *Powell*, 3 W. R. 2.

Testator, reciting his intention to dispose of all his property, and that his daughter was likely to die (of a violent distemper), left his wife, if she died, the revenue and dividends of such property; but if his daughter lived, directed that his wife should only have her dower, giving the residue and dividends to that daughter; if she died without children, testator gave his brother "all that should be left"; the daughter survived the testator, but died of the same illness without issue:—Held, that the mother was still entitled for life, and that the words "what should be left" constituted a good residuary bequest to the brother. *Duhamel* v. *Ardovin*, 2 Ves. Sen. 162.

After Life Interest with Power of Disposition.]—Testator gave the residue of his personal estate to his wife, desiring her to provide for his daughter, A., out of the same, as long as she (his wife) should live, and, at her decease, to dispose of what should be left among his children, in such manner as she should judge most proper. This is not an absolute trust for the children after the death of the wife. *Pushman* v. *Filliter*, 3 Ves. 7.

Bequest to A. and B. of a fund, upon trust to invest on security, and to apply the interest on the principal for the benefit of C., in such way as A. and B. should think fit, during the life of C., and so that A. and B. should have entire power over the fund, to dispose of the principal and interest or any part thereof or to withhold the same, as they should think fit, without being accountable to C. or any other person; and on the death of C., in case the said sum or any part thereof should be undisposed of, to stand possessed

thereof on the trust therein mentioned. A. and B. paid the income to C. during their lives, and died, leaving C. surviving:—Held, that C. was absolutely entitled to the capital. *Gude* v. *Worthington*, 18 L. J., Ch. 303; 13 Jur. 847.

A devise of all the testator's property in trust for his niece, subject to a discretionary power in the trustees, on her attaining twenty-one or marriage, to settle the whole, or such part as they should think fit, upon her and her children, if she should have any, with remainder, in default of children, to her mother absolutely. The niece attained twenty-one, but before any settlement was made under the power she died without having been married:—Held, that the power could not then be exercised, and that her heir was entitled to the whole of the real estate. *Lancashire* v. *Lancashire*, 2 Ph. 657; 17 L. J., Ch. 270; 12 Jur. 363.

Bequest of household goods, &c., after payment of debts, &c., to testator's wife for life or widowhood, with power to her to sell same as she should think fit for her own benefit and the maintenance of testator's nephew, &c., during their minority, with a bequest over on death or second marriage of wife of the same, or so much as should then remain, to such nephew, &c.:—Held, that widow was entitled to residue for her life or widowhood, with power to apply any part of the capital for her own benefit, proper maintenance of nephew, &c., during minorities, and that, on death or marriage of widow, remainder of capital unapplied was well limited over. *Surman* v. *Surman*, 5 Madd. 123; 21 R. R. 286.

A bequest of residue to trustees, upon trust to permit the testator's wife to receive the annual produce for her life, with power to apply to her own use such parts of the capital as she should think proper; and after her decease, upon trust, as to such portions as should remain after such application of any part thereof by his wife, for such persons as she should by will appoint; and in default of and subject to any such appointment, in trust for certain persons named:—Held, that the widow took a life interest only in the residue, with power of disposition of the capital, and of appointment by will. *Scott* v. *Josselyn*, 26 Beav. 174; 28 L. J., Ch. 297; 5 Jur. (N.S.) 560.

A wife by will appointed real estate to her husband upon trust for his own use for life, "with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit," after his death, "subject as aforesaid," over to other persons. The husband died without exercising the power:—Held, that he had only a life estate, and that the property went to the persons to whom it was given in remainder after his death. *Pennock* v. *Pennock*, 41 L. J., Ch. 141; L. R. 13 Eq. 144; 25 L. T. 691.

A testator gave his personal estate "for the use of his wife, not doubting but she would exercise due discretion and economy in expending the same, the whole to be under the care of his wife and the other executor, who were likewise requested to pay out of the same all just debts; and after the decease of his wife he gave the residue to be equally divided in five shares":—Held, that the word "residue" meant "residue after payment of debts," and that the wife took a life interest followed by a gift over. *Brooks, In re*, 2 Dr. & Sm. 362; 34 L. J., Ch. 616; 12 L. T. 172; 13 W. R. 573.

A testator left to M., E., and R. the entirety of his property during their joint and several lives, subject to legacies and annuities, and added, "In leaving my property to my three nieces, as co-heirs, it is my wish that if my grand-nephew, J. W. C., conducts himself to their satisfaction, that the (sic) should leave him the property I now leave to them." J. W. C. died in the lifetime of M., E., and R. There was no evidence that J. W. C. did not conduct himself to their satisfaction. E. having died:—Held, that M. and R. were entitled to the testator's real estate for their lives only. *Moore* v. *ffolliott*, 11 L. R., Ir. 206.

A testator by his will gave all his property to his widow "for the term of her natural life, to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof," and "in the event of her decease, should there be anything remaining of the said property or any part thereof," he gave "said part or parts thereof" to certain persons:—Held, that the widow had no power to dispose of the property by will, and that on her death it went to the ulterior takers named in the husband's will. *Thomson's Estate, In re, Herring* v. *Barrow*, 49 L. J., Ch. 622; 14 Ch. D. 263; 43 L. T. 35; 28 W. R. 802—C. A.

Whether she took anything more than a life estate, with a right to enjoy the property in specie, quære. *Ib.*

A testator, by his will, gave his residue to his wife absolutely. By a codicil he revoked this gift, and after making a specific gift, gave his residue to his wife "for her own absolute use and benefit and disposal"; but, without prejudice to the absolute power of disposal by his wife of all the said residue, in case at her decease any part thereof should "remain undisposed of" by her, he gave the same to two other persons equally as tenants in common, subject to the payment by them of his wife's debts and funeral expenses:—Held, that the testator's wife took a life interest, with a power of disposition by act inter vivos, but not by will. *Pounder, In re, Williams* v. *Pounder*, 56 L. J., Ch. 113; 56 L. T. 104.

After Gift of Absolute Interest.]—Wife, having a power to dispose, by will signed and sealed by her, of 300*l.* in the hands of trustees, having made a will, agreeably to the power, afterwards makes a testamentary paper, by which she gives it to her husband, but so much as shall be remaining at his death, &c., to her brother and sisters. This paper is not sealed, found annexed to the will by a wafer, and is on a stamp:—Held, that it vested absolutely in her husband, and it was decreed to be paid to him, the property not being sufficiently certain to raise a trust. *Sprange* v. *Barnard*, 2 Bro. C. C. 585.

Gift by will to A. to be paid to him at twenty-one, with a bequest over, in the event of dying under that age, or afterwards without heirs, and intestate:—Held, an absolute interest in A. on his attaining twenty-one. *Cuthbert* v. *Purrier*, Jac. 415; 23 R. R. 104.

J. gives the residue of his estate to his daughter C., to dispose of as she shall think fit; but if she should die unmarried, or intestate, then what was left to her should go to his brother's children. C. possessed this residue, and disposed of it in making purchases, and taking securities in her own name. She afterwards died intestate and unmarried:—Held, that all her personal estate belonged to her next of kin; and that no part of it could be considered as the specific

personal estate of her father, or go to his brother's children. *Lightburne* v. *Gill*, 3 Bro. P. C. 250.

A testator bequeathed his residuary estate to his wife, "her executors, administrators, and assigns"; but if she died intestate, then his will was that it should be bequeathed to A. and B. The wife predeceased the testator:—Held, independently of that circumstance, that the gift over, after an absolute interest, was void. *Hughes* v. *Ellis*, 20 Beav. 193; 24 L. J., Ch. 351; 1 Jur. (N.S.) 316; 3 W. R. 310.

A testator gave real and personal estate upon trust for the benefit of his son to vest in him on his attaining twenty-one. He then directed that in case his son should die under twenty-one, or having attained twenty-one, should not have made a will, then the property should go over. The son attained twenty-one, and died intestate:—Held, that the real and personal estate vested in him absolutely at twenty-one, and that, therefore, the devise over was repugnant and void. *Holmes* v. *Godson*, 20 Beav. 193; 25 L. J., Ch. 317; 2 Jur. (N.S.) 383; 4 W. R. 415.

A. devised real estate to his second son in fee if he attained twenty-one, charged with a legacy to a daughter, and if the second son died under twenty-one, then to the eldest son when he attained twenty-one, charged with the legacy; and in case it should happen that all the testator's three children should die without issue, and without appointing the disposal of the estate, then over:—Held, that the devise over was repugnant and void. *Gulliver* v. *Vaux*, 8 De G. M. & G. 167.

A testator gave all his property, consisting of realty and personalty, to his three children, A., B., and C., share and share alike, the share of A. to be for her during her life, and then to be divided among her children at twenty-one; and if she leave no children, or all her children die under twenty-one, then the one-third share to be divided between B. and C.; but in case B. and C., or either of them, should die intestate, his or their share or shares was or were to be divided between their children respectively, share and share alike:—Held, that the gift over in case B. and C., or either of them, should die intestate, was void, as being annexed to a condition repugnant. *Barton* v. *Barton*, 3 K. & J. 512; 3 Jur. (N.S.) 808.

The rule that such a condition is repugnant when annexed to an absolute interest previously given in the same will is the same whether the subject-matter be real or personal estate. *Ib.*

A testator made an indefinite bequest of the interest of his residue to a class of children equally, with a declaration that they should have the right to will away their shares on their deaths. There was a gift over, if they should omit to make their wills:—Held, that they took absolute vested interest, and not a life interest, with a power to bequeath, and that the gift over was void for repugnancy. *Weale* v. *Ollive*, 32 Beav. 421.

The testator bequeathed a leasehold house and premises, with the furniture and plate, to his son, and added, "and should he die without heir or will, the profits of the said house to be equally divided between all my grandchildren, by the consent of his mother":—Held, that the son took an absolute interest in the house. *Green* v. *Harvey*, 1 Hare, 428; 11 L. J., Ch. 290; 6 Jur. 704.

A testator devised to his four sons, in trust, to pay an annuity to his widow, and on her death, or second marriage, to divide equally between his said sons and his two daughters; and on the decease of either of his sons or daughters, or the children of his sons or daughters, then to their children; and in case any person becoming entitled to his property should attempt to sell it, then he should forfeit his share:—Held, that the first takers, the children of the testator, each took his share absolutely, subject to the annuity. *Bartlett* v. *Bartlett*, 11 L. J., Ch. 11.

A testator bequeathed his residuary personal estate (after a life interest) to his grandson to and for his own use: but if he should die under twenty-one without leaving lawful issue, or if he should attain twenty-one and die without leaving lawful issue, and without having disposed of the same by his will or otherwise, then over:—Held, upon the construction of the whole will, that in the event (which happened) of the grandson attaining twenty-one, he took an absolute interest. *Yalden, In re*, 1 De G. M. & G. 53.

Bequest of a legacy to A. to be paid at twenty-five, or between twenty-one and twenty-five, if the executors should think proper, and maintenance in the meantime, with a limitation over, in case A. should not receive or dispose of it by will or otherwise in his lifetime. The limitation over held void. *Ross* v. *Ross*, 1 J. & W. 154; 20 R. R. 263.

Where a money fund is given to a person absolutely, a condition cannot be annexed to the gift that so much as he shall not dispose of shall go over to another person. *Watkins* v. *Williams*, *Harverd* v. *Church*, 3 Mac. & G. 622; 21 L. J., Ch. 601; 16 Jur. 181.

W. D. devised certain estates to R. D., with a power to sell and dispose of the premises, or to raise any sum or sums of money by way of mortgage or otherwise, as he should think proper, with a proviso that such portion of all and every sum and sums of money so raised, "either by sale or mortgage, as shall be unexpended at my decease," &c., should be charged by him on certain property of his own, in favour of other parties:—Held, establishing the validity of mortgages executed by R. D., that this proviso did not operate as a condition precedent, but was a limitation over of so much of the money to be raised by R. D. as should be unexpended. *Ib.*

A testator gave to his wife the residue of his personal property, with a proviso that, if not disposed of by her in her life or by her will, it should go over. It passed as part of her property by her will, although not specifically noticed. *Bourn* v. *Gibbs*, 1 Russ. & M. 614; Tam. 414; 8 L. J. (O.S.) Ch. 151.

Bequest of personal property in trust for A. (a married woman) for her separate use; with a power of disposing by will (except to particular persons); "and in case she dies without a will, I give all that may remain at her decease to B.," followed by a gift of "all the rest and residue" to A., who is appointed executrix: A. takes the absolute interest in the property, not a power of disposing merely; and the gift to B. of "all that may remain at her decease" is void for uncertainty. *Bull* v. *Kingston*, 1 Mer. 314.

A bequest to M. E., testator's wife, of "the legal interest on bonds, debentures, and funded property, together with household furniture, &c., to be disposed of as he shall think proper"; and in case F. E. should survive the said M. E., that he should have "the interest of money, and whatever does belong to her that she does not dispose of":—Held, that M. E. having survived

F. E., the absolute gift to her was not cut down by the subsequent bequest over, and that that bequest was void for uncertainty. *Phillips* v. *Eastwood*, Ll. & G. t. Sudg. 270.

Bequest of residue to A. for life "and whatever she can transfer to go to her daughters," B. and C.:—Held, that the gift to B. and C. was void for uncertainty. *Flint* v. *Hughes*, 6 Beav. 342; 7 Jur. 523.

Bequest of a residue to the testator's father, "to spend both principal and interest, or any part of it, during his lifetime"; should he "not spend the property," then in trust for the testator's sisters:—Held, that the bequest to the father was absolute, and that the gift over was inconsistent with it, and inoperative. *Henderson* v. *Cross*, 29 Beav. 216; 7 Jur. (N.S.) 177; 9 W. R. 263.

A testator, by his will, bequeathed unto his wife all his leasehold property wheresoever situate, for her sole use and benefit, except a house therein described; and in a subsequent part of his will he directed that as soon after the decease of his wife as might be practicable, all his leasehold property not already disposed of by her (save and except the house) should be sold, and the produce thereof distributed by his executors (of whom the wife was named one) among certain persons, in the proportions therein stated:—Held, that, upon the death of the testator, his widow became absolutely entitled under his will to the leasehold property bequeathed to her by such will, and that the direction to sell contained in such will and the expressed disposition of the proceeds of sale were repugnant to the preceding absolute gift to the wife, and void. *Bowes* v. *Goslett*, 27 L. J., Ch. 249; 4 Jur. (N.S.) 17; 6 W. R. 8.

A father directed the residue of his property to be divided into equal portions, and to be paid to as many of his children as should be living at the time of his death, to be for ever at their disposal, with the following reservation only: the equal share or portion which should fall to his eldest daughter should remain in certain investments, and the proceeds or interest of such her equal portion should be applied for her support and maintenance during her life, and at her death the property thus bequeathed to her should be divided into equal portions among as many of his other children as might be living at the time of her decease. She survived all the other children of the testator:—Held, that she took an absolute interest in her equal portion of the residue. *Bishop* v. *Wise*, 26 L. T. 530.

A devise of lands for ever conveys an estate in fee, and is not affected by subsequent words requesting the devisee, "in case of failure of issue of his said body," to give the estate to another. *Bland* v. *Bland*, 9 Mod. 478.

A husband gave all his real and personal estate to trustees upon trust, after paying his debts, to pay the residue of his personal estate to his wife for her own absolute use and benefit, and the rents and annual income of his real and leasehold estates to her during her life; and after making provision for certain legatees and annuitants, he gave his freehold estate, after the death of his wife, to his grandson, and all the money (if any) that should be remaining, after payment of his wife's just debts, he gave to legatees named as tenants in common equally. The widow died shortly after the testator intestate:—Held, that she took an absolute interest in the residuary personal estate, and that it belonged to her next of kin. *Perry* v. *Merritt*, 43 L. J., Ch. 608; L. R. 18 Eq. 152; 22 W. R. 600.

A fund was settled in trust for W., the illegitimate daughter of the settlor, for life, and in the event, which happened, of her not at her death being under coverture, for her absolutely; with a proviso that if any estate, interest, or benefit should, under the powers and provisions of the settlement, be undisposed of, or in the events which should happen, would but for the proviso be held in trust for the crown or belong beneficially to the crown, then and in every such case the estate, interest, or benefit should belong to and be held in trust for her father for life, and after his death for her mother. W. having died intestate, the crown claimed the fund:—Held, that the fund vested absolutely in W. at her death, and that the gift over was repugnant and void; and consequently that the crown was entitled to the fund. *Wilcocks, In re*, 1 Ch. D. 229.

—— Death of First Donee in Life of Testator.]—*See* sub tit. LAPSE, post, cols. 1596, et seq.

e. Gifts to benefit in Particular Manner.

i. *To benefit Legatee alone.*

Gift in Trust to do certain Acts.]—The words "I appoint A. B. trustee of my real estate," to do such and such acts, constitute him in equity the taker of the estate. *Fingal* (*Earl*) v. *Blake*, 2 Moll. 50.

A testator left a certain sum to A. during his natural life, and his assigns, in trust to defray the expenses of a certain chapel:—Held, that this constituted a permanent gift, and not terminable at A.'s death. *Wall, In re*, 12 Jur. (N.S.) 995.

A bequest of terms for years upon trust to permit S. M. to receive all rents and profits, and to dispose of the same as she might think proper, and upon further trust that S. M. should pay out of the rents, issues, and profits certain debts and legacies, and that the premises should revert for the residue of their different periods to T. H.:—Held, that S. M. took an estate for life only. *Egan* v. *Morris*, Ll. & G. t. Plunk. 297.

Life Interest in Furniture.]—A testator directed his widow "to be in possession of all his furniture, plate, glass, and books, and for the time of her natural life to receive the yearly interest and profits of all his property that he was in possession of at his death":—Held, that the widow took a life interest only in the furniture, &c. *Low* v. *Carter*, 1 Beav. 426.

—— With Power of Disposition.]—"I bequeath to my wife all the household furniture and movable goods and chattels in and belonging to my dwelling-house, except my books; I bequeath to her the use of my plate, with power to dispose of such portion thereof as she shall think proper":—Held, that the wife took a life interest only in the plate, and that, as she had not disposed of it during her life, it fell into the residue. *Espinasse* v. *Luffingham*, 3 Jo. & Lat. 186; 9 Ir. Eq. R. 129.

Gift for Maintenance of Adult.]—Devise of real estate in trust to raise an annual sum for the support and maintenance of an adult, held to create a trust for his benefit generally, and

to pass to his assignees under the Insolvent Act, notwithstanding a clause in the will against anticipating or charging, &c. *Younghusband* v. *Gisborne*, 1 Colly. 400. *S. C.*, 8 Jur. 750. Affirmed 15 L. J., Ch. 355 ; 10 Jur. 419.

—— **Without Power of Disposition.**]—The testator gave all his real and personal estate to his wife and J. H., "upon trust to allow my said wife to have the full and entire use and enjoyment thereof for her maintenance during her lifetime" ; and he declared that she might, "at any time during her lifetime, sell, lease, mortgage, or otherwise absolutely dispose of all or any part of the said estate for her maintenance, but not by way of testamentary disposition." And he declared that after her death J. H. should call in and convert all his said estate, or the residue then remaining thereof, and stand possessed thereof upon certain trusts mentioned in his will :—Held, that the wife was not absolutely entitled to the capital of the estate, but only to a life interest, with power to resort to the capital during her life for maintenance, but not for any other purpose. *Fox, In re, Fox* v. *Fox*, 62 L. T. 762.

Gift to clear Mortgaged Estate.]—An estate was mortgaged to A., who sub-mortgaged it to B. A. devised the estate to C., and bequeathed to B., the sub-mortgagee, through his executors, 1,000*l.* to clear in part the estate. The sub-mortgagee, after the death of the testator, foreclosed the estate :—Held, that the devisee of the estate was entitled to the 1,000*l.* *Lockhart* v. *Hardy*, 9 Beav. 379 ; 10 Jur. 728.

Where Purpose of Gift fails—Principles.]—Where a benefit is conferred by will for a specific purpose, although that purpose cannot be achieved modo et formâ as intended by the testator, still, if there is a clear intention on the part of the testator that the benefit should be conferred, if the testator has accepted from the general property bequeathed to the residuary legatee the property the subject of the specific bequest, for the benefit of the specific legatee, the latter is entitled to the benefit of the bequest, and to enjoy it in manner he may think fit. *Lonsdale* (*Earl*) v. *Berchtoldt* (*Countess*), 3 K. & J. 185 ; 3 Jur. (N.S.) 328. And see *S. C.*, Kay, 646 ; 23 L. J., Ch. 816 ; 18 Jur. 811.

Where the purpose for which one of two bequests, given by will to the same parties, is expressed in the will to be for the better enjoying of the other, the mere circumstance that the legatees cannot enjoy the latter shall not deprive them of the benefit of the former. Therefore, where the interest of a fund was directed to be laid out in payment of the rent and charges of leaseholds specifically bequeathed, and the leaseholds prove damnosa hæreditas, and could not be specifically enjoyed, and were therefore sold by order of the court :—Held, that the legatees were entitled not only to the proceeds of the sale, but also to the interest of the fund set apart for the enjoyment of the leaseholds in specie. *Ib.*

If a legacy is given for the benefit of an infant in one way, and it cannot be so applied, it may be applied for his benefit in another way ; as if it were to put him into orders, and he became a lunatic. *Barton* v. *Cooke*, 5 Ves. 461.

Where Purpose impracticable.]—A sum of money was paid by A. to B. for the purpose of purchasing C. a promotion in the army, and it remained unapplied in the hands of B. at the death of A. C. having been compelled from the bad state of his health to quit the army, and having no prospect of being able to enter into the service again, filed a bill for the money, and it was decreed to be paid to him. *Leche* v. *Kilmorey* (*Lord*), Turn. & R. 207 ; 24 R. R. 19.

A testator bequeathed manuscripts to trustees "for my grandson, that they may provide for the books being published to the best advantage for the interests of the child, so as to contribute towards raising a fund to assist him when he goes to college," and bequeathed 1,000*l.* towards the printing :—Held, that the grandson was entitled to elect to take the 1,000*l.*, it appearing to be impossible to publish the book at a profit. *Skinner, In re*, 1 J. & H. 102 ; 8 W. R. 605.

A devise that if cestui que vie of a church lease which the testator had should die, the testator's executors should purchase the premises for the life of J., the testator's kinsman ; but if such purchase could not be made, then the surplus of his personal estate to go to another : whether J. takes any interest by the will, quære. *Stephens* v. *Stephens*, 2 P. Wms. 323.

A testator gave his residuary estate to his executors "upon trust out of the rent or produce of my said real estate, and other moneys on loan or otherwise, to form a fund, the same to be applied in establishing my three sons in their several professions in such proportions as my executors deem fit. One of the sons had been entered in a profession by his father, but neither of the other two sons had adopted a profession or expressed an intention of doing so :—Held, that, notwithstanding the testator's purpose had failed, the sons were entitled to the whole residue in equal shares for their own benefit. *Hutchinson* v. *Rough*, 40 L. T. 289.

Legacy left to procure a dukedom, void. *Kingston* (*Earl*) v. *Pierepont*, 1 Vern. 5.

Where Purpose defeated by Legatee.]—Bequest of 8,000*l.* to testatrix's daughter, a married lady, towards purchasing a country residence :—Held, to be an absolute bequest. *Knox* v. *Hotham* (*Lord*), 15 Sim. 82.

Testator, by his will, gave an annuity of 1,000*l.* a year to his wife for her life, and directed his plate and furniture, and H., his family mansion, to be sold. By codicil, he desired that his wife should be accommodated with any plate she might choose for her own use, and that an inventory should be made of it, and that it should be returned at her death : "I give to her absolutely any one of my silver inkstands which she may select : I also give to my dear wife any part of the beds, bedding, linen, carpets, or other household furniture at H., which she may require for her own use, as likewise any wardrobes or glass cases at H., according to her wish ; and I give to her in addition to all other provisions, 400*l.* per annum during her life, to be applied to the rent of any residence she may choose to live at, and to be raised and paid in like manner as the annuity bequeathed to her by my will" :—Held, that the wife was entitled, absolutely, to such parts of the furniture as she might select ; and that she was entitled to be paid 400*l.* a year, although she had fixed her residence with her son, at the family mansion. *Amherst* (*Lord*) v. *Leeds* (*Duchess*), 12 Sim. 476 ; 6 Jur. 141.

A legacy being given to A. to bind her apprentice :—Held, that she was not entitled to

the legacy while she refused to be apprenticed. *Woolridge* v. *Stone*, 4 L. J. (o.s.) Ch. 56.

A legacy of 500*l.* is given to the eldest son of A., to be begotten, to place him out apprentice. A. has a son born after the testator's death, who brings a bill for the legacy; and it is decreed to be paid him forthwith, though not born in the testator's lifetime, and though the 500*l.* was given for a particular purpose. *Nevill* v. *Nevill*, 2 Vern. 431.

A testator bequeathed a sum of stock to trustees, upon trust, during sixty years from his death, if the law should allow, or, if not, then during the lives of his two sons and of the survivor, and twenty-one years after his death, to lay out the dividends in repairing and insuring the houses, &c., on his farms called H. and S. (it being his desire that upon no account should the timber of such farms be cut down during the said term of sixty years, on pain that the person so cutting such timber should lose all interest in the said estates, as if he were dead), and upon trust to pay the surplus, if any, of the said dividends equally among the persons for the time being in possession of the estates under his will, during the continuance of the said trust; and immediately after the expiration thereof, to transfer one moiety of the said stock to the person then in possession of the H. farm, such person being one of his sons, or a descendant of a son; but if not, then to the descendants of the testator's brothers and sisters, and to pay the other moiety in like manner to the person in possession of the S. farm. And the testator devised the H. farm to the same trustees in fee, upon trust for his son John, for ninety-nine years, if he should so long live, remainder to the use of his first and other sons in tail, with divers remainders over. And the testator devised the S. farm in like manner for the benefit of his son James and his issue. John and James, and their eldest sons, barred the entail in remainder in the said farms, and re-settled the same, and the stock, having been transferred into court under the Trustee Relief Act (10 & 11 Vict. c. 96), petitioned for the payment out of the fund to them:—Held, that the fund being intended for the benefit of the sons and their issue, the period for the enjoyment of the capital had been accelerated by barring the entail, which had determined the restriction against cutting down timber. *Colson's Trusts, In re*, Kay, 133; 2 Eq. R. 257; 23 L. J., Ch. 155; 2 W. R. 111.

—— **By Negligence.**]—A direction by a testator to his executors "to take a suitable house for three daughters to reside in with their governess":—Held, to entitle the daughters to the sums which ought to have been expended in taking a house for such a purpose during their minorities. *Hutchinson* v. *Rough*, 40 L. T. 289.

Testator authorised his executors, at any time before T. L. should attain the age of twenty-six years, to raise by sale of a sufficient part of certain bank annuities, any sum of money not exceeding 600*l.*, and pay and apply the same towards the preferment or advancement in life, or other the occasions of T. L., as the said executors should think proper; and at the age of twenty-six, he gave the said 600*l.* to T. L. absolutely. The executors declining to act, the court will not give this 600*l.* to T. L. before twenty-six, without referring it to the master to inquire whether T. L.'s situation requires the 600*l.*, or any part thereof, to be advanced. *Lewis* v. *Lewis*, 1 Cox, 162. *S. C.* cited also 15 Ves. 527.

—— **By Lapse of Time.**]—Legacy for the board and education of an infant until he shall be fit to be put out apprentice, and then a farther sum with him as an apprentice fee; the infant having attained nineteen, and not having been put out, was held entitled to the legacies. *Barton* v. *Cooke*, 5 Ves. 461.

B. made his will in 1830, directing, after payment of debts and legacies, "all my remaining property to be placed in proper securities, and appropriated to the education of my sister C.'s children, as shall seem most meet and beneficial to them, by the executors of this my will, recommending to them that the boys receive a classical education, to fit them for the learned professions, and the girls to fit them for the purpose of teaching in respectable private families, or in schools of the first respectability." B. died in 1859, having survived his executors, leaving a brother and three sisters his only next of kin, and children of his sister C., all grown up, surviving him. On a question as to administration with the will annexed:—Held, that C.'s children were entitled as beneficial residuary legatees. *Presant* v. *Goodwin*, 1 Sw. & Tr. 544; 29 L. J., P. 115.

A testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A.; and next to apply the rents to the maintenance, education, and bringing up of the three children of A. during A.'s life; the sole survivor of the three children attained twenty-one in the lifetime of A.:—Held, that the interest of such surviving child in the surplus rents and profits did not cease on his attaining twenty-one, but that he continued entitled to them during the life of his father. *Badham* v. *Mee*, 1 Russ. & M. 631.

—— **By Death.**]—Legacy given to an infant to put him out apprentice, and he dies before he is of competent age to be put out. It shall go to his executor or administrators. *Barlow* v. *Grant*, 1 Vern. 225.

Testator ordered and empowered the trustees of his will, at their free will and pleasure, to sell part of the trust property, and out of the proceeds to pay not exceeding 2,000*l.* to his son, for setting him up in business, or for such other purposes as the testator's wife should think proper and most beneficial to him. The son survived the testator, and afterwards died without having entered into business, and without the 2,000*l.*, or any part of it, having been raised. A general demurrer to a bill filed by his personal representatives to have the 2,000*l.* raised was overruled. *Gough* v. *Bult*, 16 Sim. 45. Affirmed 17 L. J., Ch. 401; 12 Jur. 859.

Trustees of a will were empowered to raise 600*l.* for church preferment for B. B. died before the money was raised:—Held, that the gift failed. *Cowper* v. *Mantell*, 22 Beav. 231; 2 Jur. (N.S.) 745; 4 W. R. 500.

A., seised of an estate of 600*l.* per annum, devises 300*l.* per annum to an infant, whose father was his heir-at-law, and the other 300*l.* per annum he devises to the father for his care in looking after the son's estate till he should come to the age of twenty-one. The father dies, leaving the son six years of age, having by his will devised this 300*l.* to his wife, and desired

her to save what she could out of it for a portion for his daughter, and appointed her guardian for his son. This 300*l.* per annum does not determine by the father's death, but the wife shall have it till the son arrives at the age of twenty-one. *Anon.*, Pre. Ch. 597.

Bequest for maintenance of a child held not to cease on his death, but to pass to his representative. *Bayne* v. *Crowther*, infra.

One devises that his executors shall sell his lands and invest the money in purchasing an annuity for J. S., and gives her the residue of his personal estate; the testator dies, and the annuitant dies three months after the testator; yet the administrator of the annuitant shall compel a sale, and shall have the money arising therefrom, and also the rents and profits till sale. *Yates* v. *Compton*, 2 P. Wms. 308.

A testatrix by her will gave an annuity to M. for her life, chargeable on the real estate mentioned in the will, and, subject to and charged with such annuity and other annuities, the testatrix devised the real estate to trustees upon trust to sell; and by a codicil she declared that her trustees might purchase government annuities for the annuitants, to be in place of the annuities given by the will, the purchase-money to be the first charge upon the proceeds of sale of the estates charged, which, upon such purchase being made, were to be thereupon discharged from the annuities. The estates charged were sold by the trustees on the 7th of August, 1890, and the contract fixed the 29th of September, 1890, for completion of the purchase. M. died before the 21st of September. The sale was completed on the 29th of September, and, in pursuance of the contract, the purchase-moneys were deposited at a bank for the purchase of the government annuities; but no such purchase was actually made. It was contended that M.'s representatives were entitled to the value of her annuity:—Held (distinguishing *Yates* v. *Compton*, supra), that the claim to the value of the annuity failed by M. having died before the actual completion of the sale, inasmuch as by the act of God the annuitant was not there to receive the money when it was paid to the trustees, and there was no enforceable trust and no vested right in her to receive the money. Secus as to the annuitants who survived completion. *Mabbett, In re, Pitman* v. *Holborrow*, 60 L. J., Ch. 279; [1891] 1 Ch. 707; 64 L. T. 447; 39 W. R. 537.

—— **Of Trustees with Discretion.**]—A testator gave 3,000*l.* to his executors for the benefit of M. during her life, and from and immediately after her death "in trust for the benefit of her children, to do that which they (my executors) may think most to their advantage." The executors died in the lifetime of M.:—Held, that the children of M. who were living at the time of her death were entitled to the fund in equal shares as tenants in common. *Phene's Trust, In re*, L. R. 5 Eq. 346.

—— **Where Gift to B. during Life of A.**]—A gift of income to arise from a fund during the life of A. to B. for his maintenance is an absolute gift to B., his executors and administrators, during the life of A., and is not confined to the joint lives of A. and B. *Attwood* v. *Alford*, L. R. 2 Eq. 479; 14 W. R. 956.

A gift for the maintenance and education of a legatee during the life of a third party is an absolute gift, so as to entitle the representatives of the legatee to the income accruing after his death.

Testator directed his trustees to apply the rents of his freehold estates during the life of his wife for the maintenance and education of his two great-nieces, and after his wife's death to sell the estates, of which he gave the proceeds equally between both his great-nieces, or, if there should be but one of them then living, to her only. One of the great-nieces died an infant in the lifetime of the widow:—Held, that a moiety of the rents from her death to the death of the widow did not go to the surviving great-niece, or result to testator's heir, but belonged to the deceased great-niece's representatives. *Webb* v. *Kelly*, 9 Sim. 469.

Bequest of leaseholds, in trust to pay half of the rents to A. for life, and the other half to B. for life, and in case of the death of either, his share of the rents "to be paid and applied for the maintenance of his children" until the decease of the survivor of A. and B., and then to sell and divide equally between the children of A. and B. After the death of A., one of his children died:—Held, that his representative was entitled to a share in the rents until the death of B. *Bayne* v. *Crowther*, 20 Beav. 400; 3 W. R. 395.

Where Discretion given to Legatee.]—Bequest to A. for such purposes as he shall think fit is for his own benefit. *Paice* v. *Canterbury* (*Archbishop*), 14 Ves. 370.

The testator having given his wife the option to occupy his house at a certain rent, and if she should choose to do so declared she should have the use of the furniture, by codicil revoking the bequest of an annuity to her, gave her a legacy to provide furniture in case she should not choose to occupy his house, or for any other purpose she should think proper. She occupied the house and furniture till her death, and her executor was held entitled to her legacy. *Isherwood* v. *Payne*, 5 Ves. 877.

—— **To Legatee's Father.**]—A testatrix directed her trustees to pay and apply the sum of 800*l.* in and upon the education of her grandson, it being her desire that her trustees should follow all the reasonable suggestions of the infant's father as to the school and mode of learning in which he should desire to have his son educated:—Held, that this was an absolute legacy vesting immediately, and fell within the general rule of legacies upon which interest was payable from a year after the death of the testatrix. *Noel* v. *Jones*, 16 Sim. 309; 17 L. J., Ch. 470; 12 Jur. 906.

—— **To Trustees.**]—Trust by will as to the residue of real and personal estate for a nephew and his heirs, to pay him the interest for life, with power to the trustees, in case they should see it would be for his benefit, to advance him, when it may be in their power, any part of the principal for his advancement in life, that they will not withhold such assistance as they may deem necessary; but in case no part should be advanced, the residue to be divided among the nephew's issue, with a limitation over if he should have no issue: the nephew is entitled, not to the absolute property, but for life only; and no advancement having been made, an inquiry was directed whether his circumstances required advancement. *Robinson* v. *Cleator*, 15 Ves. 526; 10 R. R. 118.

A testator bequeathed the residue of his personal estate to three trustees in trust to pay, apply, and dispose of all the interest thereof for the maintenance, support, and benefit of his three children, and the survivors and survivor of them, in such shares and proportions, and in such manner, as the trustees should think most proper and advisable; and if all the children should die without leaving issue, then to two of the trustees upon another trust:—Held, that the whole income of the residue was given for the children's benefit, and, part only having been so applied, the surplus devolved to the personal representative of the survivor. *Beevor* v. *Partridge*, 11 Sim. 229; 10 L. J., Ch. 89.

Testator authorised his executors, at any time before T. L. should attain the age of twenty-six years, to raise, by sale of a sufficient part of certain bank annuities, any sum of money not exceeding 600*l.*, and pay and apply the same towards the preferment or advancement in life, or other the occasions of T. L., as the said executors should think proper; and at the age of twenty-six he gave the said 600*l.* to T. L. absolutely. The executors declining to act, the court will not give this 600*l.* to T. L. before twenty-six without referring it to the master to inquire whether T. L.'s situation requires the 600*l.*, or any part thereof, to be advanced. *Lewis* v. *Lewis*, 1 Cox, 162. *S. C.* cited also 15 Ves. 527.

A testatrix gave a fund to A. and B., who were her executors, in trust to place out the same at interest, and to apply the interest thereof, or the principal, for the benefit of Mary Ann S., in such way as they might in their discretion think fit, during her life, it being the wish of the testatrix that they should dispose of the principal and interest, or any part, or should withhold the whole, and let the interest accumulate; and, upon the decease of Mary Ann S., in case the trust fund, or any part thereof, or interest, should then remain undisposed of, upon trust for other persons. A. and B. paid the interest of the trust fund, and 100*l.*, part of the capital, to Mary Ann S., and died without any other exercise of their discretionary power:—Held, that Mary Ann S. was entitled to the whole of the trust funds. *Gude* v. *Worthington*, 3 De G. & Sm. 389; 18 L. J., Ch. 303; 13 Jur. 847.

A testator empowered his trustees to raise a sum of money to be applied in the purchase of church preferment for his nephew. The nephew died before the money was raised:—Held, that a discretion was vested in the trustees, which not having been exercised by them, the gift failed. *Cowper* v. *Mantell*, 22 Beav. 231; 2 Jur. (N.S.) 745; 4 W. R. 500.

Gift of a share of residue to trustees, at their discretion, to apply the whole or part of the capital or income for the benefit of J., or, at the option of the trustees, to apply the whole to the augmentation of the other shares. J. died, and the trustees refused to exercise their option:—Held, that the share was undisposed of. *Eddowes, In re*, 1 Dr. & Sm. 395; 7 Jur. (N.S.) 354; 5 L. T. 389.

Devise of real estate and personal, to be laid out and settled, with directions to the trustees out of the rents of residue of testator's personal estate to raise and pay any money they should think proper and convenient, not exceeding 3,000*l.*, for the advancement of the plaintiff in any business, art, or profession, or in any civil or military employment:—Held, to be a gift of the money. *Metcalfe* v. *Wilmot*, Ambl. 704. And see *Phene's Trust, In re*, supra, col. 1329.

A legacy was given to trustees to be expended by them for the benefit and advancement of an infant as they in their absolute discretion should think fit. There was also a gift by the will of the income of a share of the residue to the infant for life on his attaining twenty-one, with a power to the trustees to apply the income during his minority for his maintenance and education. A suit for administration was instituted by the trustees immediately after the testator's death, and orders were from time to time made in it for the advancement, and also the maintenance and education, of the infant out of the legacy. On his attaining twenty-one:—Held, that he was absolutely entitled to the unapplied residue of the legacy. Held, also, that, inasmuch as maintenance would have been ordered out of the income of the contingent share of the infant, he was entitled to be recouped out of the past income of the residuary estate which had been expended out of the legacy for his maintenance and education. *Furley* v. *Hyder*, 41 L. J., Ch. 583; 26 L. T. 864.

A., by will, gave all his real and personal estate to trustees, upon trust, during the life of J. (a person non compos), to apply the whole or any part of the income of the real and personal estate for his maintenance, attendance, and comfort. The testator directed a sale of his real estate after the decease of J., the moneys to be deemed part of his personal estate, and the rents and profits of his real estate until a sale to be deemed part of the income of his personal estate, and then made a disposition of all his personal estate to residuary legatees. During the life of J. the trustees maintained him out of the income of the real and personal estate, without trenching on his private property, and accumulated the savings. After the decease of J. the trustees sold the real estate, and then, doubts arising as to the rights of parties to the savings, and also to the produce of the real estate, paid the whole into court:—Held, first, that the expression "comfort" in the trust for J. was so wide as to justify the application by the trustees of all the income devoted to that purpose, however large; but held, secondly, that, the whole not having been so applied, the gift was not such a gift for the benefit of J. as that the savings belonged to J. or his personal representative as part of his personal estate. *Sanderson, In re*, 3 K. & J. 497; 26 L. J., Ch. 804; 3 Jur. (N.S.) 658; 5 W. R. 864.

Bequest of consols in trust to purchase a life annuity for a lady, to be held for her separate use without power of anticipation; and in case of her illness or incapacity, the testator gave the trustees a discretionary power as to the application of the annuity for her maintenance, support, or otherwise for her personal benefit. The legatee being unmarried:—Held, that she was entitled to a transfer of the consols. *Brown, In re*, 27 Beav. 324.

A testator, after giving a life annuity, from and after the death or marriage of his sister-in-law, in trust for his nephew, her son, bequeathed the residue of his mixed real and personal estate specifically in favour of his nieces, their husbands and children. He then declared that, for making a further provision for the maintenance of his nephew, it should be lawful for his trustees,

during the life of his sister-in-law, upon her request in writing, to expend any sums not exceeding 6,500*l.* in the purchase of a commission for, or in obtaining the promotion of, his nephew in the army. After the testator's death the nephew, being in the army, exchanged from one regiment into another, and in so doing paid 600*l.* for the exchange and 550*l.* for horses and outfit, after which, in May, 1868, his mother signed and sent a formal request to the trustees desiring that the whole of the 6,500*l.*, with interest from the day of the date of the request, should be raised out of the residuary estate, and paid to her son. From the 1st November, 1871, purchase of commissions in the army was by royal warrant abolished:—Held, that the nephew was entitled to the full sum of 6,500*l.*, with interest at 4 per cent. from the date of the request, subject to the payment of legacy duty. *Palmer* v. *Flower*, 41 L. J., Ch. 193; L. R. 13 Eq. 250; 25 L. T. 816; 20 W. R. 174.

When by a separation deed a sum of money was directed to be held by trustees for the wife for life, and after her death, as to four-sixth parts, for W., one of the children of the marriage, who was then an officer in the army, during his life, and after his death for his children, and it was declared that it should be lawful for the trustees, if in their discretion they should think fit, to apply any portion of the fund, not exceeding 2,000*l.*, in or towards effecting the promotion of W. in the army, and the trustees applied 850*l.* in the way pointed out by the deed, but in consequence of the abolition of purchase of commissions in the army no further sum could be applied for the same purpose:—Held, that, the purpose for which the power was given to the trustees having failed, the residue of the 2,000*l.* could not be raised and applied in any manner for the benefit of W. *Ward, In re*, 42 L. J., Ch. 4; L. R. 7 Ch. 727; 27 L. T. 668; 20 W. R. 1024.

In the event of the object failing for which money has been advanced by trustees, under a power of advancement, the money belongs to the person for whose benefit it was advanced, and cannot be recalled into the original fund. Therefore where, under such a power, the trustees purchased a commission in the army, and the person for whom the commission was purchased sold out shortly after joining his regiment, there being no fund:—Held, that he was, and not the trustees were, entitled to the purchase-money. *Lawrie* v. *Bankes*, 4 K. & J. 142; 27 L. J., Ch. 265; 4 Jur. (N.S.) 299; 6 W. R. 244.

A direction in a will to invest a sum of money "for the benefit and advantage of . . . J. A. . . . , such sum to be applied to his professional or other advancement, at the discretion and judgment" of the executor and trustee, is an absolute gift of the money, and the discretionary power is inoperative. *Johnston, In re, Mills* v. *Johnston*, 63 L. J., Ch. 753; [1894] 3 Ch. 204; 8 R. 563; 71 L. T. 392; 42 W. R. 616.

ii. *To benefit Legatee and Others.*

Gift to Parent and Children—When Parent takes absolutely.]—Legacy given to A., to be divided between himself and his family, is well paid to A. *Cooper* v. *Thornton*, 3 Bro. C. C. 96, 186.

A testator, by his will, gave to his sister J. C., a married woman, 1,000*l.* for her or for her children's sole use, benefit, and behoof for ever, and desired his executors to pay the same to her as soon as practicable. By a codicil, reciting that he was desirous of making further bequests in relation to his sister J. C. and her family, he desired his executors to invest a sum of 1,000*l.* upon certain trusts, for the benefit of J. C. and her children. J. C. survived the testator:—Held, upon a bill filed by J. C. and her husband against their children and the executors of the will, that J. C. was absolutely entitled to the 1,000*l.* legacy given by the will, and that it was not given to her separate use. *Chipchase* v. *Simpson*, 16 Sim. 485; 18 L. J., Ch. 145; 13 Jur. 90.

Bequest to testator's daughter for life, and on her death to the testator's son and his children. The son had no child at his father's death, but had children living at the death of the daughter:—Held, that his children were neither joint tenants with him, nor entitled in remainder after his death, but that the fund belonged to him absolutely. *Scott* v. *Scott*, 15 Sim. 47; 14 L. J., Ch. 439; 9 Jur. 580.

Testator devised a freehold estate to his wife for her life, and then directed that she should dispose of the same amongst the testator's children by her at her decease as she should think proper. The wife made no disposition of the estate. The children took no interest in the estate under the will. *Crossling* v. *Crossling*, 2 Cox, 396; 2 R. R. 88.

Bequest to A. for her and her children's use; a transfer decreed to A. *Robinson* v. *Tickell*, 8 Ves. 142; 7 R. R. 5.

Under a residuary devise and bequest to a wife, "to be used by her in such ways and means as she may consider best for her own benefit and that of my three children," the wife takes the testator's residuary estate absolutely, unaffected by any trust in favour of the children. *M'Alinden* v. *M'Alinden*, Ir. R. 11 Eq. 219.

A. devised his estate to his wife, she maintaining his four younger children; but if she married, she was to enjoy but one-half, and the younger children were to have the remainder. The wife did maintain the children, and did not marry:—Held, that she was entitled to the whole estate so devised. *Seagrave* v. *Eustace*, 3 Bro. P. C. 11.

A testator devised all the rest, residue, and remainder of his real and personal estate to a married woman, her heirs and assigns, for ever, but upon trust, "as to all the freehold," as he proceeded to declare; "and as to the personal property so given as aforesaid to her to and for her own proper use and benefit for ever," separately from her husband, "and the proceeds to be applied by her in the bringing up and maintenance of" all her children. She died, leaving several infant children:—Held, that she took an absolute interest in the personalty, unaffected by any trust. *Mackett* v. *Mackett*, 41 L. J., Ch. 704; L. R. 14 Eq. 49; 20 W. R. 860.

Where there is a gift by will to a person "for the maintenance or support of himself and his family," such gift is not clothed with any trust; but the legacy having been paid into court under the Trustee Relief Act, the court will order payment to the legatee in the words of the bequest. Costs out of the fund. *Robertson's Trust, In re*, 6 W. R. 405. S. P., *Bond* v. *Dickinson*, 33 L. T. 221.

The testator, by his will, desired that everything, during the life of his wife, should remain as it was for her use and benefit; and after her decease he gave his real estate to his male heir, and his personal estate to his children; adding,

that he gave the above devise to his wife that she might support herself and her children according to her discretion, and for that purpose :—Held, that the widow took an absolute interest for her life in the real and personal estate. *Thorp* v. *Owen*, 2 Hare, 607 ; 12 L. J., Ch. 417 ; 7 Jur. 894.

A gift of income of residue to wife during widowhood not cut down by its being a gift for bringing up, maintenance, and education of, or by subsequent gift to, children. *Leigh* v. *Leigh*, 12 Jur. 907.

Construction of a will as to whether a bequest was to operate as a gift absolutely, or only for life. *Woodbridge* v. *Mears*, 6 L. J., Ch. 149.

A testator gave the residue of his estate to trustees upon trust to permit his wife to receive the rents, issues, and profits, and carry on his trade for her own benefit, and to enable her to bring up, maintain, and educate his children, durante viduitate :—Held, that the wife was absolutely entitled to the business. *Jones* v. *Greatwood*, 16 Beav. 527.

—— **When Children take Entire Interest.**]—A testatrix, under a power given by her marriage settlement, bequeathed a sum of stock to trustees, in trust to pay the interest to her husband, in order the better to enable him to maintain the children of the marriage until their shares should become assignable to them ; and if no children, or none that should live till their shares became assignable, she gave the interest of the fund to her husband for his life, and after his decease the principal to such person or persons as should be her next of kin. There was only one child of the marriage :—Held, that this bequest was a trust for the benefit of the child until the principal should become assignable to the child, and gave no beneficial interest, so as to entitle trustees for creditors, to whom the husband had assigned all his personal property, to claim the income, or any part of it. *Wetherell* v. *Wilson*, 1 Keen, 80 ; 5 L. J., Ch. 235.

A testator gave 50*l.* and certain houses to K., he paying the rent, and performing the covenants in the lease, to be solely applied for the benefit of his children :—Held, that the children took the whole beneficial interest, with a discretionary trust to K. as to the application during their minority. *Kennett* v. *Gadbury*, 11 L. T. 17 ; 12 W. R. 1072.

Testator bequeathed the remainder of his property to his sister, A. B., to dispose of amongst her children as she might think proper : —Held, that A. B. took no interest in the residue. *Blakeney* v. *Blakeney*, 6 Sim. 52.

—— **When Parent takes subject to Maintenance of Children.**]—Under a bequest of residue to wife of testator to the intent that she might dispose of the same for the benefit of herself and their children in such manner as she might deem most advantageous, the wife does not take an absolute interest. *Raikes* v. *Ward*, 1 Hare, 445 ; 11 L. J., Ch. 276 ; 6 Jur. 530.

Testator gave all his property in trust to pay the income to his wife for the support and education of his children, and after her death to be divided among them :—Held, that the wife was entitled for life, she maintaining the children. *Gilbert* v. *Bennett*, 10 Sim. 371.

Direction for payment of residue to E., to be applied by her at her discretion for or towards the education of her sons, and that she should not be liable to account to him or any other person for the disposal or application of it, the residue being considerable :—Held, that E. was entitled to it, subject to the application of so much as the court might think fit to the education of the son during his minority. *Hamley* v. *Gilbert*, Jac. 354.

A testator by his will directed that all his property should be "at the disposal of his wife for herself and children" : — Held, reversing the decision below, that there was no joint tenancy between the widow and children ; but that the widow, though not entitled to the property absolutely, had a personal interest in it, and, as between herself and her children, was either a trustee of the fund, with a large discretion as to the application of it, or had a power in favour of the children, subject to a life interest in herself. *Crockett* v. *Crockett*, 2 Ph. 553 ; 17 L. J., Ch. 230 ; 12 Jur. 234—L. C. Reversing 1 Hare, 451 ; 5 *id.* 326.

A testator gave his residuary estate to trustees in trust for his sister's younger children equally, and to vest in them at the usual periods ; and he directed his trustees, during the minorities of the children, to pay the interest of their shares to his sister, or to the guardians of the children, to be applied for their maintenance and education : —Held, that the sisters were entitled to receive the interest of their children's shares during the minorities of their children. *Berkeley* v. *Swinburne*, 6 Sim. 613 ; 3 L. J., Ch. 165.

Testator gave one-third of his residue to his wife, the other two-thirds to trustees in trust for his two sons, to be paid them at twenty-one, in equal shares, with benefit of survivorship, the income, until the shares should be payable, to be paid to the wife, to be applied by her, or, in case of her death, by the trustees, for the maintenance and education of the two sons :—Held, that the wife was entitled to the income of the children's shares during their respective minorities, and one son having died, to the income of the whole during the minority of the survivor. *Hadow* v. *Hadow*, 9 Sim. 438.

—— **When Parents and Children take jointly.**]—Held, that a bequest of 30*l.* a year to A., together with her children, B., C., and D., and for their joint maintenance, was a bequest of that annual sum to the mother and her children, as joint tenants, for the life of the longest liver of them. *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372 ; 12 L. J., Ch. 420 ; 7 Jur. 572.

Bequest to a widow "to be applied by her for the payment of my lawful debts, and the residue for her own use and benefit and that of our infant daughter" :—Held, that this was not a discretionary trust, but that they were equally entitled. *Bibby* v. *Thompson*, 32 Beav. 646.

A bequest of a fund to trustees, in trust to pay the dividends to A., the wife of B., for the benefit of B., herself, and children, during B.'s life, and at B.'s death the fund to remain in trust for the benefit of A. and children for her life, and at her death to be equally divided among the children :—Held, that A. was a trustee of the interest for herself, her husband and children, in equal shares during her life. *Taylor* v. *Bacon*, 8 Sim. 100.

—— **When Parent takes for Life—Children in Remainder.**]—Legacy to a father the better to enable him to provide for his younger children ;

he consented to secure the capital, but was held entitled to the interest. *Brown* v. *Casamajor*, 4 Ves. 498.

A testator thus expressed himself: "It is my wish that 10,000*l.* be given to my dear brother, knowing that he is not so well off pecuniarily as he ought to be with his large family, and the kind obligations which he imposes on himself in aiding poor relations, and I should wish the 10,000*l.* held by trustees for the benefit of his family, the interest paid half-yearly, and the principal divided among them according to the discretion of the trustees or their executors after the children shall have come of age":—Held, that the brother took a life interest in the legacy, with remainder to his children as tenants in common. *Gladstone* v. *Gladstone*, 18 L. T. 49; 16 W. R. 537.

A testator gave his property to trustees for the benefit of his daughter "for her use and the use of" certain of her children for their education, &c., adding a direction that his daughter should only use the income until the youngest child attained twenty-one or married. Six of the children specified attained twenty-one, and survived their mother:—Held, that there was a gift of the income to the daughter for life, subject to the trust for the education, &c., of her children, and a gift of the capital at her death to the six children as joint tenants. *Whitty, In re, Evans* v. *Evans*, 43 L. T. 692.

—— **Interest of Children on Sale.**]—A testator devised his real and personal estate to his wife "absolutely, and at her own disposal, for the maintenance of herself and bringing up of my children":—Held, that she could sell the real estate. *Wood* v. *Richardson*, 4 Beav. 174; 5 Jur. 603. S. P., *Pratt* v. *Church*, 4 Beav. 177, n.

A testator devised certain estates by name, together with his farming stock and furniture, to his beloved wife to sell, to discharge all his creditors; and he constituted his wife and T. W. his executors, whom he appointed to sell and dispose of all his estates and chattels in such manner as they should jointly agree upon, or not to sell if it seemed most advisable to keep them, or in any way they should think proper, so that every creditor had his money, and if sold, all overplus to his wife, towards her support and her family:—Held, upon demurrer, that the testator's children had such an interest in the devised estates as enabled them to sustain a bill against the widow and her co-executor, impeaching a sale on the ground of a fraud, and praying an account of the rents and profits. *Woods* v. *Woods*, 1 Myl. & Cr. 401.

—— **Separate Use of Mother.**]—Bequest of residuary estate to trustees in trust to pay income to testator's wife for her life, to be by her applied for the maintenance of herself and children by the testator:—Held, not to be a gift to the separate use. *Wardle* v. *Claxton*, 9 Sim. 524; 8 L. J., Ch. 119; 3 Jur. 145. And see *Chipchase* v. *Simpson*, supra, col. 1334.

Where Power of Disposition given.]—A testator by his will, having enumerated the particulars of his property, gave certain portions to his daughter A., and other portions to his daughter B., subject to legacies charged thereon respectively. By a codicil he cancelled that part of his will, and said that his sons-in-law, C. and D. might "dispose of the property which he had left for the good of their families," subject to legacies:—Held, that C. and D. respectively took absolute interests in the portion given by the will to their respective wives. *Alexander* v. *Alexander*, 6 De G. M. & G. 593; 3 Jur. (N.S.) 28; 5 W. R. 28—C. A.

S. G. granted and devised to trustees certain freehold property for the term of ninety-nine years, at a peppercorn rent, upon trust, to permit his wife and such persons as she should by will bequeath the same, to take to his, her, or their own use and benefit the rents, &c., of the said lands for the said term of ninety-nine years, exclusively of any husband of his said wife. The wife, after her husband's death, conveyed her interest in the property to certain persons represented by the defendant, and subsequently made her will, giving the property to the plaintiff:—Held, that the wife of S. G. took the property for the whole term of ninety-nine years, and not merely a life estate, with remainder to such persons as she should appoint by will; and that she had conveyed away all her interest to the defendant. *Glover* v. *Hall*, 16 Sim. 568; 18 L. J., Ch. 305.

Gift of residuary real and personal estate to the testator's wife, with power to her to dispose of the same unto and amongst all the testator's children, or to any one or more of them, for such estate, either in fee-simple or in tail, term of life, or other interest, temporary or lasting, or in such other shares, proportions, or interest, as his wife should, in her discretion, see most fitting and proper:—Held, to be an absolute gift to the wife. *Howarth* v. *Dewell*, 29 Beav. 18; 6 Jur. (N.S.) 1360; 9 W. R. 27.

Where Trust created.]—Bequest to A., his heirs and assigns, "for his and their own use and benefit, and for the maintenance and education of his children":—Held that A. took no beneficial interest under this gift, which constituted him a trustee for the children. *Steadman* v. *Rodwell*, 1 W. R. 464.

A testatrix, by her will, directed her trustee to pay 1,000*l.* into the hands of C. H., to be laid out by him in the education of his two eldest sons, who should be alive at testatrix's death; if only one son, then 500*l.*, for the like purpose; if no son of C. H. living at her death, she directed the legacy in his favour to fall into the residue. C. H. died before the testatrix, leaving two sons living at her death:—Held, that the legacy was not an absolute gift to C. H., but a trust to some extent for the sons, and therefore the limitation over did not take effect by the predecease of C. H. *Hodgson* v. *Green*, 11 L. J., Ch. 312; 6 Jur. 819.

A testator bequeathed a house, &c., to his wife for the use of herself and his daughter, subject to the following trust: "that his wife and daughter should live together, and that his wife should take charge and see to the maintenance and support of his daughter during her minority, with the instructions of H. C." He also gave 100*l.* to his wife, in addition to the house, &c., for the further support of herself and his daughter:—Held, that the widow took absolutely, subject to a trust for the maintenance and support of the daughter during minority, and which did not cease upon her marriage under age. *Conolly* v. *Farrell*, 8 Beav. 347; 14 L. J., Ch. 189; 9 Jur. 242.

A testator devised his property as follows: "I give and bequeath all my property, real and personal, of whatever nature or kind, wheresoever to be found in possession, reversion, or expectancy, to which I am legally or equitably entitled, unto my dear wife, absolutely, and to be by her willed to any or either of my children in any manner suitable to her wishes, to hold to her for ever; and I appoint her executrix of this my will, revoking all other wills":—Held, that the wife took the property absolutely, but that a trust was engrafted on it for the benefit of the children who might survive her, with a power for her to appoint it among them by will, as she might think fit. *Evans* v. *Evans*, 33 L. J., Ch. 662; 10 L. T. 59; 12 W. R. 508.

The widow made a will, by which she devised part of his real estate to a son of his, in liquidation of a debt due to him from the testator; and she afterwards made an agreement with that son and another, that the latter should have the property on the terms of his paying the debt due to the former, and also stipulating for certain benefits for herself:—Held, that neither the will of the widow, nor the agreement, was an exercise of the power of the testator's will. *Ib.*

A testator constituted his widow guardian of his two children then living with him (one, a boy, being the child of another woman), and he gave her 4,000*l.* "to be used for her own and the children's benefit, as she should, in her judgment and conscience, think fit":—Held, that the fund must be invested, and that she was entitled to the income for her life, and that the children had an interest in the capital, and that the wife had a discretion as to the application of the income between the three objects, which the court would not control if bonâ fide exercised. *Hart* v. *Tribe*, 19 Beav. 149: 2 W. R. 289.

A testator bequeathed to his wife all his right, title, and interest in certain real and personal property to be disposed of as she thought fit amongst his children during her life, or by her will, provided she did not marry, but should she marry, then he ordered his executors to enter into possession of his property, and divide it amongst his children, or dispose of it as they thought proper for their benefit, paying to his wife 20*l.*, and she should have no further claim. The widow died without having married again, and without having made any disposition of the property:—Held, that the widow had taken an interest for her life in the property, with a trust to dispose of same during her life, or by will, amongst the children, and that as she had failed to make any such disposition, it was divisible amongst the children in equal shares. *Rorke* v. *Abraham*, [1895] 1 Ir. R. 334.

Bequest of "everything to my trustees under my marriage settlement, adding the name of J. P. to the same, for the benefit of my wife and children":—Held, that the testator's estate was held subject to the trusts of his marriage settlement. *Pybus* v. *Cottrell*, 30 Beav. 106.

Gift to A. and the Children of B.]—Testator gave annuities out of any money arising from whatever dividends he might die possessed of in the Bank of England, and the residue of the said dividends to his brother A., to enable him to assist such of the children of his brother F. as he should find deserving of encouragement, and, upon the demise of the annuitants, or any of them, the testator gave each annuitant's proportion of the before mentioned dividends to his brother A., to be at his disposal, but the principal to remain in the bank:—Held, that no trust was created for the children of F., but that A. took absolutely the capital of the testator's stock, subject to the annuities. *Benson* v. *Whittam*, 5 Sim. 22.

A gift of dividends to A., to be by him used and applied for the maintenance of the children of his late wife during their minorities:—Held, to confer a life interest in A. for his own benefit after the youngest child had attained twenty-one. *Walker's Trusts, In re*, 16 Jur. 1154; 1 W. R. 408.

—— **Conditional Payment to A.**]—A testator gave the income of his residuary estate to his children in equal shares, and made provisions for a home to be maintained under the charge of M. for such of his unmarried children as chose to take advantage of it, and directed that while any child resided with M. a sum of 50*l.* a year should be deducted from his or her share of the income and paid to M. A., an unmarried son of the testator, ceased to reside with M., and assigned all his interest under his father's will to B. for a valuable consideration. He afterwards returned to reside with M.:—Held, that notwithstanding the assignment, M. was entitled to be paid the 50*l.* a year out of A.'s share of the income while he resided with her. *Greenwood, In re, Priestley* v. *Griffith*, 66 L. T. 101; 40 W. R. 357—C. A.

Gift to A. for Child of B.]—Testatrix gave 1,000*l.* to her nephew to maintain and bring up her natural son F. B.; and she directed the interest of one-fourth of her residue to be applied to the maintenance and education of F. B. during his infancy, and the capital to be paid to him on his attaining twenty-one:—Held, that the nephew was not a trustee of the 1,000*l.* for F. B., but was entitled to it for his own benefit. *Biddles* v. *Biddles*, 15 Sim. 1. *S. C.*, nom. *Ward* v. *Biddles*, 16 L. J., Ch. 455; 11 Jur. 624.

—— **To A.'s Husband and Child.**]—A testator gave a sum of money to trustees to pay the income to his then unmarried daughter for life, and after her decease to permit her husband to receive the income for his life, nevertheless to be by him applied for the maintenance and education or benefit of the children of his daughter. The daughter afterwards married, and her husband subsequently took the benefit of the Insolvent Debtors Act; his wife afterwards died, leaving her husband and two children surviving:—Held, that he took beneficially a life interest in the legacy. *Byne* v. *Blackburn*, 26 Beav. 41; 27 L. J., Ch. 788; 4 Jur. (N.S.) 803; 6 W. R. 681.

—— **To A. and a Charity.**]—Bequest to trustees to be divided between the testator's wife and six poor members of a chapel, share and share alike:—Held, that the wife was entitled to one-seventh absolutely, and that the other six-sevenths formed a permanent charitable fund, the interest alone of which was from time to time payable to the poor. *Gregory* v. *Att.-Gen.*, 2 Beav. 366.

—— **Of what Property.**]—Testatrix concluded her will as follows: "My house in Trevor square I give to my brother as residuary legatee of my remaining property for the benefit of his children":—Held, that the brother took the residue

as well as the house in trust for his children. *Inderwick* v. *Inderwick*, 13 Sim. 653; 8 Jur. 53.

Where Purpose of Gift fails—Gift to Parent and Children—No Children.]—If estate be given to father for the benefit of his children at twenty-one, and he has no children, the father takes absolutely. *Salt* v. *Chambers*, 9 Mod. 260.

Under a bequest of stock in trust to pay the dividends to M., the niece of the testator, "for and towards the maintenance, education, and bringing up of all and every the child and children of the said M., until he, she, or they shall attain twenty-one," then to transfer the principal equally among the children, with a bequest over of principal, in default of such issue, to the nephews and nieces of the testator living at the death of M.; the dividends are payable to M. although she has no child. *Hammond* v. *Neame*, 1 Swan. 35; 1 Wils. Ch. 9; 18 R. R. 15.

Testator directed his trustees to apply a fund to the support and maintenance of his son's wife, and for the support and education of his children born in wedlock. The son had no children living at the testator's death:—Held, that the wife took the fund absolutely for her separate use. *Cape* v. *Cape*, 2 Y. & C. 543; 1 Jur. 307.

A testatrix bequeathed 500*l.* to A. absolutely, but revoked the gift by codicil, whereby she gave a like sum to A. for life, with a direction to the trustee to sell the same for the benefit of A.'s children, or to purchase an annuity for A. A. died a spinster, and no settlement was made or annuity purchased:—Held, that the legacy formed part of A.'s estate, and did not sink into the residue. *Traill, In re*, 18 L. T. 176.

—— **Maintenance becoming impracticable.**]—One devises a house to his cousin, directing that an annuity of 1,200*l.* per annum shall be paid her, and that she should maintain her son there; the son chooses to go from her; still the cousin shall have her annuity in the same manner as if the son had died. *Blackborn* v. *Edgley*, 1 P. Wms. 604.

A gift for the "present expenses of a wife and the children":—Held, that she was absolutely entitled, though one of the children was an adopted child, and was taken away from her. *Hart* v. *Tribe*, 18 Beav. 215; 23 L. J., Ch. 462; 2 W. R. 289.

—— **By Misconduct of Widow.**]—A hotel-keeper by his will bequeathed his property to trustees, upon trust, to permit his widow to carry on the business so long as it could be carried on with advantage to his estate, and to permit her to receive the profit so that she might maintain herself and her family, and educate the testator's children. He also directed that if the profits were insufficient for this purpose, the deficiency should be supplied out of the income of the general estate, which, subject to this direction, was to be accumulated, and, with the principal, to be divided among the testator's children on their attaining twenty-one. There was a proviso that if from any cause it should be advisable to discontinue the business (which the trustees were to have power to do), the stock-in-trade should be sold, and the proceeds form part of the general estate, and that the income of the whole, or so much of the income as should be required, should be applied in the maintenance of the testator's wife and family, and the education of the children:—Held, that on the widow, by misconduct, becoming unfit to maintain and educate the children, she was not entitled to the surplus profits, after setting apart sufficient for their maintenance and education, but could only claim maintenance for herself. *Castle* v. *Castle*, 1 De G. & J. 352; 3 Jur. (N.S.) 723; 5 W. R. 643.

—— **Gift to A. and B.—Death of A.**]—"I devise 100*l.* per annum to my son A. and his wife for their respective lives, 60*l.* whereof is to be paid to the wife for the support of herself and daughter, the remaining 40*l.* to my son." The son dies; the wife shall have the whole 100*l.* per annum. *Cowper* v. *Scott*, 3 P. Wms. 121.

See also *Scott* v. *Key*, 35 Beav. 291; 6 N. R. 349; 11 Jur. (N.S.) 819; 13 W. R. 1030. *Smith* v. *Smith*, 2 Jur. (N.S.) 967. *Cowman* v. *Harrison*, 10 Hare, 234; 22 L. J., Ch. 993; 17 Jur. 313; 1 W. R. 96. *Ford* v. *Fowler*, 3 Beav. 146; 9 L. J., Ch. 352; 4 Jur. 958. *Surman* v. *Surman*, 5 Madd. 123; 21 R. R. 286. *Jubber* v. *Jubber*, 9 Sim. 503. *Webb* v. *Wools*, 2 Sim. (N.S.) 267; 21 L. J., Ch. 625. *And cases* sub PRECATORY TRUSTS, post, cols. 1467, et seq.

f. Absolute Gifts when Cut Down.

i. *By Repugnant Words.*

General Rules.]—It is a rule of the courts, in construing written instruments, that when an interest was given, or an estate conveyed in one clause of the instrument in clear decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate. *Thornhill* v. *Hall*, 2 Cl. & F. 22; 8 Bligh (N.S.) 88.

A testator recites, seriatim, in his will, the interests he had in several leaseholds for lives, and after each recital he devises the rents and profits of each leasehold to his wife and a married daughter, and to each of his sons and unmarried daughters, severally and respectively, devising to his son R. part of the profit-rent of Blackacre during the term of the lease, which was for the lives of the testator, and of R. and another, and devising to his unmarried daughters nominatim different parts of the rents of Whiteacre, in addition to equal shares given to them by the preceding clause in the rents of another estate; "and, further, if any of the above legatees should die, or die unmarried," he left the property bequeathed to them to be divided equally among the survivors of them:—Held, that the devise to R. in Blackacre was for the whole term of the lives of the cestuis que vient, and was not, on R.'s dying unmarried, cut down to an estate for his life only, by the clause of survivorship, but that the words of the clause applied to the last-mentioned unmarried daughters only. *Ib.*

A testator gave the income of all the residue of his property, subject to two annuities, to his wife for life, and after her death to his son for life, and then bequeathed (a second time) the residue of his property to his son, excepting all money in the funds, which he gave to the children of his son:—Held, that after the death of the wife, the son took the income of all money

in the funds for his life, as well as all the residuary property, since a preceding unambiguous gift cannot be cut down by subsequent implication. *Bell* v. *Bell*, 3 Jur. 554.

Where an absolute interest is given by a will, it will not be cut down except by distinct words. *Adshead* v. *Willetts*, 29 Beav. 358; 9 W. R. 405.

An absolute gift in clear language, in a will, is not taken away unless by language equally clear. *Kiver* v. *Oldfield*, 4 De G. & J. 30.

Where, therefore, a testator having made a provision in his will for his eldest grandson by a bequest of leasehold property, directed that his residuary real and personal estate should be equally divided between his four other grandchildren in common, and declared that the share of each should remain vested in the trustees of the will, upon trust, to permit him and her to receive the income for life, and after the decease of each, his or her share to be in trust for his or her children; provided, that if the share of any one or more of the four grandchildren should not vest in any children or child of his or her body, or in case the term in the leasehold given to the eldest grandson should expire in his lifetime, then and in either of such cases the eldest grandson should be let into and take an equal share in the residuary estate intended for the other four grandchildren and their issue equally with such other grandchildren, or their respective issue:—Held, that on the death of one of the four younger grandchildren, without issue, the residue remained divided into four, and was not redistributable into five parts. *Ib.*

A., by will dated in October, 1837, but not executed until 1844, gave his real and personal estate to his son when he should have attained twenty-one, subject to an annuity to his widow. He then proceeded thus: "But should the hand of death fall on my widow and son, and my having no children, or my son any issue, my will is, that, should he leave a widow, she shall receive the annual sum of 50*l.*, during her widowhood, out of my real estates; the residue then to be equally divided, after paying such legacies as I may hereafter name, the division of property to be between my late brother's surviving children, and my sister C. D.'s children, my sister E. F.'s children, and my nieces G. H. and I. J., they paying all my son's just debts, funeral expenses, and demands, or my wife's should she be the longest liver." At the date of the testator's will his son was an infant, but when it was executed he had attained the age of twenty-six:—Held, that the gift over of the real estate took effect on the son dying without issue; but that in respect of the personalty the son was absolutely entitled. The proposition that where there is a clear gift in a will it is not to be cut down by anything subsequent, unless it is equally clear, not approved. The subsequent clause may have that effect, if it indicates, with reasonable certainty, the intention of the testator. *Randfield* v. *Randfield*, 8 H. L. Cas. 225; 6 Jur. (N.S.) 901; 9 W. R. 1.

Express bequest or power not controlled by the reason assigned; which, though it may aid the construction if doubtful, cannot warrant the rejection of clear words. *Cole* v. *Wade*, 16 Ves. 46; 10 R. R. 126.

When there is an express gift in a will, and there is a subsequent clause inconsistent with the first, but with only an implied revocation, the prior gift takes effect. *Kerr* v. *Clinton* (*Baroness*), L. R. 8 Eq. 462; 17 W. R. 980.

A testator having real estates subject to mortgages, for which he was not personally liable, devised his personal estate for payment of his debts, and the surplus to his wife absolutely, and in a subsequent devise of his real estate directed that his trustees should raise by sale thereof so much as his personal estate should prove insufficient for payment of the existing mortgages and charges upon the estate, and subject thereto he devised the estate to his sons:—Held, that this was not a revocation of the prior gift, and that the mortgage debts were not payable out of the personal estate. *Ib.*

Where in a will there are successive limitations of personal estate in favour of several persons absolutely, the effect of the failure of an earlier gift is to accelerate, and not to destroy, a later gift. Therefore, if one or more of such persons die in the testator's lifetime, the first in order who survives the testator takes absolutely, although he would have taken nothing if a prior legatee had survived. The doctrine of repugnancy between an absolute gift and any ulterior disposition of the same property does not come into operation until some legatee actually takes. *Lowman, In re, Devenish* v. *Pester*, 64 L. J., Ch. 567; [1895] 2 Ch. 348; 12 R. 362; 72 L. T. 816—C. A.

See also *Goodwin* v. *Finlayson*, 25 Beav. 65; *Walmsley* v. *Foxall*, 1 De G. J. & S. 605. *And cases* sub tit. INCONSISTENCY, ante, col. 695.

Where General Words followed by Limited Gift.]—A. bequeathed to his wife all his property whatsoever and wheresoever of which he should be possessed at the time of his death, and "as to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, both real and personal, whether in possession, reversion, remainder or expectancy," to trustees, to permit his wife to have the use and enjoyment of all such parts as should yield income during her life, with a gift over to his children:—Held, that the bequests were not inconsistent, and that the wife was entitled to a life interest in the whole of the estate. *Hare* v. *Westropp*, 4 L. T. 578; 9 W. R. 689.

A testator gave a share of his residuary estate upon trust for his sister absolutely. The will contained a subsequent proviso and declaration by which the whole interest in the share previously disposed of was settled, and under which the sister was given merely a life interest:—Held, that the first trust was only for the purpose of division, and that the sister took a life interest in the settled share which did not lapse on her death in the testator's lifetime. *Stewart* v. *Jones* (3 De G. & J. 532) and *Roberts, In re* (30 Ch. D. 234), distinguished. *Pinhorne, In re, Moreton* v. *Hughes*, 63 L. J., Ch. 607; [1894] 2 Ch. 276; 8 R. 264; 70 L. T. 901; 42 W. R. 438.

By his will, dated in 1870, a testator gave all his household furniture, and all his real and personal estate, and sums of money in the house, and all sums of money in the savings bank, and all other his estate and effects with the exception of two 5*l.* shares in a certain company, unto his wife, and he gave to his sons the two 5*l.* shares; and he also desired that, at the decease of his wife, what might remain of his property should be equally divided amongst his surviving children. The question was whether this was an absolute gift of the property to the testator's widow, or whether there was a trust in favour of

the testator's children :—Held, that the testator's widow took only a life interest in the property. *Sheldon and Kemble, In re*, 53 L. T. 527.

A father gave all his personal estate upon trust for his two sons "to be disposed of" as follows : Income to accumulate until sons respectively attained twenty-five, when each was to take half of the accumulations or the survivor the whole ; between twenty-five and thirty the sons or their widows were to receive the income. Sons on attaining thirty, and having children, the whole to be paid to "them" ; if either or both should be without children, then they should only be entitled to the income. One son died unmarried in the testator's lifetime ; the other son attained the age of thirty and had a child :—Held, that he was only entitled to a life interest. *Allen* v. *Allen*, 21 W. R. 747.

Devise to A., "unto him and his heirs for ever," forbidding any mortgage, "but to be free from all charge unto the respective heirs for ever" :—Held, a gift of fee simple to A. *Pye* v. *Bradbury*, 3 L. T. 327.

The putting limiting words in the first or last part of a sentence makes no difference as to the construction.

A testator may give one thing to a person for life, together with an absolute property in another, unless the latter should be appurtenant to the thing before given.

Where testator bequeathed to his wife all his household goods, furniture, plate, linen, and china in his house to E., or to the said house belonging, and also the said house, gardens, field, and land thereto belonging, so long as she continued his widow and no longer, and he likewise gave her his jewels, &c. :—Held, that the household goods, furniture, plate, linen, and china were put under the same restriction as the house itself ; but that the jewels were the wife's absolute property. *Richards* v. *Baker*, 2 Atk. 321 ; 9 Mod. 325. And see *Coward* v. *Larkman*, 60 L. T. 1 —H. L. (E.)

Limited followed by Unlimited Gift.]—Bequest of 140*l.* to A., the interest to be paid to her during her life, and, at her death, to be paid to her children, followed by the appointment of a trustee and by a direction (not limited to her life) to pay her the interest :—Held, that A. took a life interest only, and not an absolute interest, subject to the gift to her children. *Graham, In re*, 33 Beav. 470.

Where General Gift to A. followed by Gift of Residue to B.]—A testator gave to his wife, F. H., the interest of all his property in the public funds during her life, the principal being placed in the names of the undermentioned trustees for that purpose, and he also gave to his wife all his other property which he might be possessed of at his decease, after paying his funeral expenses and debts, part of his funded property being applied for that purpose, if necessary. On the death of his wife he gave to his daughter, J. H., 200*l.* stock 3 per cent. reduced annuities, and to two other persons 50*l.* 3 per cent. reduced annuities, respectively, and to his son the residue of his property, after paying those legacies. And he appointed two persons his executors and trustees. At the date of his will the testator had 700*l.* 3 per cent. reduced annuities, but he afterwards sold out that stock, and invested part of the produce on mortgage : —Held, that the gift to F. H. of the interest of the testator's property in the funds was specific, and consequently adeemed by the sale of the stock, but that the other legacies were general, and that F. H. took only a life interest in the testator's residuary estate. *Hayes* v. *Hayes*, 1 Keen, 97 ; 5 L. J., Ch. 243.

A husband bequeathed certain specified goods and all other his personal estate to his wife absolutely for her sole and separate use, and after devising his real estate to his wife for life, with divers limitations over, he bequeathed the residue of his personal estate in trust for his children or their issue, and in default for his brothers and sisters and their issue as therein mentioned :—Held, having regard also to the general scope of the will, that the wife took only a life interest in the personal estate. *Bagshaw, In re*, 46 L. J., Ch. 567 ; 36 L. T. 749 : 25 W. R. 659—C. A.

Life Estate to A. followed by General Devise to B.]—A testator having given a life estate in remainder expectant upon a prior life estate to R., by a codicil made twenty-five years afterwards, devised all his estates and property of every description to B., which latter clause would, taken by itself, have carried the estate devised by the will to R. :—Held, that R. was entitled to the life estate devised to him by the will. *Robertson* v. *Powell*, 10 Jur. (N.S.) 442 ; 12 W. R. 623.

Life Estate to A., Remainder to B., Remainder to C.] — Testator bequeaths certain leasehold hereditaments to A. for life, remainder to B., remainder to C. :—Held, that B. takes a life interest only in the leaseholds. *Lonsdale (Earl)* v. *Berchtoldt (Countess)*, Kay, 640 ; 23 L. J., Ch. 816 ; 18 Jur. 811.

A testatrix bequeathed the "interest of a sum of money to her eldest child for life," and afterwards to devolve in succession on her (the testatrix's) remaining children :—Held, on the death of the eldest, that the others were entitled for life in succession, according to their priority of age. *Young* v. *Shepherd*, 10 Beav. 207 ; 16 L. J., Ch. 247.

Absolute Gift subject to Interim Term.]—The testator devised a freehold estate (which he declared should be considered as personalty) to his executors and trustees, upon trust "for the second surviving son of my brother James W., on his arriving at the age of twenty-five, the annual rental in the meanwhile (after all just and necessary expenses for the benefit and maintenance of the estate being deducted) to be annually divided between my surviving brothers. In failure of such second surviving son of James W., I leave the estate to my brother Daniel W., and his heirs male. Failing such heirs male, I leave and bequeath the estate to the heirs of the W. family." Daniel died in the lifetime of the testator. E. was the second son of James W. :—Held, that E. was entitled in fee-simple absolute to the estate, subject to a term from the death of the testator until such day as E. should attain, or but for death would attain, his age of twenty-five, which term was vested in the testator's three brothers as tenants in common. *Blount* v. *Wheble*, 21 L. T. 259.

—— **Followed by Gift over of Property undisposed of.**]—B., who was possessed of a house in Stephen's Green, Dublin, held under a lease for

three lives, by his will dated May 27th, 1833, devised to his eldest son J. R. B. his house in Stephen's Green, with all the furniture therein (except certain articles), his pictures, books, &c., except plate and linen, he paying the rent thereof, and in case J. R. B. should not think proper to occupy or keep his said house, he might be at liberty to sell the same together with (if he though fit) the pictures, &c.; but it was the testator's wish that his books should not be sold, but remain in his family; the amount of the sale to be applied to his own use and benefit; and in case J. R. B. should die without having a family before he should have sold the said house, the testator devised the house in the same manner to his second son W. B.; and in case he should so die, the house was to be sold and the proceeds divided among his daughters. The testator died in 1836, and J. R. B. entered into possession. He died in 1890, having by his will devised all his property to the defendant, who entered into possession of all the property except the house in Stephen's Green. By deed poll, dated March 16th, 1895, the defendant disclaimed the interest in this house. In an action against the defendant for arrears of rent of the house:—Held, that J. R. B. took the house absolutely under the will of the original testator, and not for life only, and that it was not competent for the defendant to disclaim one portion of the property devised to him by J. R. B., while accepting the rest. *Parnell* v. *Boyd*, [1896] 2 Ir. R. 571—C. A.

—— **Followed by Proviso for Substitution.**]—G. left the residue of his property to trustees in trust (after the death of his wife) for his children, who, being sons, should attain the age of twenty-one or leave issue, or being daughters, should attain twenty-one or marry; and if only one child then for him or her absolutely. The will went on to provide that the children of the testator's children should stand in the place of their respective parents, which provision was followed by clauses of survivorship, accruer, maintenance, and accumulation. In the accumulation clause reference was made to "the parties entitled for life":—Held, that the testator's children took life interests only in the residue. *Green, In re*, 17 W. R. 1081.

A testator gave all his property to his wife during her life, and at her death to his brothers and sister, share and share alike, at their death to their surviving children, share and share alike:—Held, that subject to the life interest of his widow, the testator's brothers and sister took absolute interests. *Hyndman* v. *Hyndman*, [1895] 1 Ir. R. 179.

—— **Of Residue to A., followed by Gifts to B. and C. on A.'s death.**]—A testatrix gave her residuary personal estate to A. absolutely. She then gave legacies to several persons after the death of A.:—Held, that this did not cut down A.'s interest in the residue to a life interest. *Jennings* v. *Sparrow*, 17 Jur. 433; 1 W. R. 297.

—— **Followed by Precatory Words.**]—Testator gave his house, his stock in the public funds, and residuary personal estate to trustees upon trust, to let the house and convert the furniture and other effects into money, and pay the income, &c., to his wife for her life, and after her death upon trust to assign the house and pay and transfer the said stocks, funds, and premises to his nephew R., for his own use and benefit absolutely. An undated letter from the testator to R. was found amongst his papers after his death, by which the testator purported to explain the intentions of his will. This letter contained expressions of wish that R. should be considerate and liberal to his relations, should have some one of his nephews educated as a physician, and bequeath to such nephew the greater part of the property, the interest of which "I now bequeath to your dear aunt, and after her to yourself (R.)." This letter was admitted to probate:—Held, that the absolute gift to R. contained in the will was not cut down by the expressions in the letter, which were too ambiguous to create any trust capable of being enforced in equity. *Pinckard's Trust, In re*, 27 L. J., Ch. 422; 4 Jur. (N.S.) 1041—L.JJ.

A devise of lands for ever conveys an estate in fee, and is not affected by subsequent words requesting the devisee, "in case of failure of issue of his said body," to give the estate to another. *Bland* v. *Bland*, 9 Mod. 478.

An appointment of a person as residuary legatee, with a desire that the testator's residuary estate be afterwards left in the residuary legatee's and his own name to charitable purposes, is not sufficient to create a charitable trust, and to cut down the beneficial interest of the legatee. *McCulloch* v. *McCulloch*, 1 N. R. 535; 11 W. R. 504.

—— **With Power of Appointment Ceasing on Re-marriage.**]—A testator left all his property to his wife, in trust for the uses thereafter mentioned. He then bequeathed certain pecuniary legacies, and stated that it was his will that his youngest son P. should live and reside with his mother, and be attentive to her, and directed by her in order that she might by deed or by her last will and testament provide for him in such manner as to her might seem most expedient and proper; and he appointed and nominated his said wife his residuary legatee and trustee of his will, in order that she might direct and govern his said children and assist to arrange all matters between them; and previous to her death, provided that she did not marry again, that she might dispose of the residue of his property to and amongst his said children and provide for his son P. as she might think expedient; and he directed that if she married again she should cease to be trustee, and receive the sum of 100*l.* only; and that in such case his son E. should act as trustee in her stead. He nominated his son E. and his wife executor and executrix:—Held, that the testator's wife took the residue absolutely, and that there was not an estate for life merely in the wife, with power of appointment. *Morrin* v. *Morrin*, 19 L. R., Ir. 37.

Where Gift Over on Death.]—Residuary devise and bequest, after the death of testator's brother and sister, J. C. and S. C., to his sister M. K., to be held by her, and in the event of her decease, by her trustee or trustees for the benefit of her daughter A. K., and in the event of the death of A. K. to go among her brothers and sisters:—Held, to give the absolute interest to A. K. *Kerr* v. *Cusac*, 1 Jur. 792.

When an absolute gift is followed by words importing a contingency, it is not thereby cut down to a life estate, without these words being accompanied by other circumstances than the

mere fact that there is a gift over on the death of the legatee. *Bourke's Trusts, In re*, 27 L. R., Ir. 574.

Testator directed his debts to be paid, and subject thereto gave his personal estate to his widow for her own use as long as she might live, and on her death directed the remainder of his personal estate and effects which might then exist to be made into money, and bequeathed the same to his brothers and sisters, and appointed his widow co-executrix of his will. The estate included a sum of cash at the bank :—Held, that the widow had no absolute power of disposal over the personal estate, but took only a like estate, with a right to enjoy the property in specie, and that the cash at the bank must be invested. *Holden, In re. Holden* v. *Smith*, 57 L. J., Ch. 648 ; 59 L. T. 358.

Under a gift by A. to his wife of 10,000*l*., "afterwards to go to the understated residuary legatee E." :—Held, that the legacy of 10,000*l*. was given to the wife absolutely, but that interest upon such legacy did not begin to run until after one year from the testator's death. *Percy* v. *Percy, Percy, In re*, 53 L. J., Ch. 143 ; 24 Ch. D. 616 ; 49 L. T. 554.

A testator bequeathed leaseholds to a trustee upon trust to give yearly equal portions of the rents to the two brothers and three sisters of the testator ; that was to say, each to receive one-fifth part of the net proceeds of rent ; and he directed that, on the decease of any or all of his brothers and sisters, "the same should go to their children" :—Held, that the brothers and sisters of the testator took life interests only. *Houghton, In re, Houghton* v. *Brown*, 53 L. J., Ch. 1018 ; 50 L. T. 529.

Where leaseholds were bequeathed to three for life, subject to certain annuities, and after the death of the three, "to A. B. if then living, her executors, administrators, and assigns, subject to the said annuities during her life," and in the event of her death living either of the three, the property was given to her issue : the court :—Held, with some hesitation, that A. B. took only for life. *Morrall* v. *Sutton*, 4 Beav. 478 ; 5 Beav. 100. And see *S. C.*, 1 Ph. 533 ; 14 L. J., Ch. 266.

J. C. by his will, dated 19 March, 1877, gave and bequeathed his leasehold messuage in W. road, and also all the plant, stock-in-trade, fixtures, and utensils of trade, and the goodwill of the trade or business of tyresmith carried on on the said premises, but not including the book-debts owing at the testator's decease, unto his three sons, J. C., W. C. and T. C. in equal shares, provided that upon the death of either of them the said J. C., W. C. and T. C. (whether in the testator's lifetime or after his decease), the share or shares of him or them so dying of and in the said leasehold messuage, plant, stock-in-trade, &c., should go to his or their next-of-kin according to the statutes of distribution. The testator died on the 21st of March, 1877. The three sons purchased the book-debts from the testator's estate, and carried on the business in partnership until the year 1886, during which time they had largely increased the value of the stock-in-trade, and had purchased additional leasehold premises for the business. In 1886 T. C. agreed to purchase the share of W. C. in the business for 4,500*l*. :—Held, that W. C. had a right to receive the whole of the purchase-money, and it was not necessary to set apart any part thereof for the persons who might be ultimately entitled under the gift to the next-of-kin. *Connolly* v. *Connolly*, 56 L. T. 304.

—— **On Death under Age.**]—Testator, first giving all his estates real and personal to his executors in trust to be disposed of as after mentioned, then gave all his real estates to his wife for life, and after her decease he gave his lands and estates to J. B. ; but at his decease the whole to be for the use of J. B.'s wife and children, and which children, at the death of their mother, should inherit the same jointly during their lives ; and if they should die before twenty-one, he gave the houses and estates to H. S., to the use of himself and his children :—Held, on demurrer, that the children of J. B. took only joint estates for life. *Spry* v. *Bromfield*, 9 Sim. 534. But a case having been sent to law :—Held, by the court of exchequer, that the children of J. B. took an estate in fee as tenants in common. *S. C.*, 10 Sim. 94 ; 5 Jur. 864. *And see the argument at law*, 7 M. & W. 546 ; 10 L. J., Ex. 457.

—— **On Death without Issue.**]—Devise to E. for ever, that is if he leaves a son or sons who shall attain twenty-one, "but if E. should chance to die without son or sons to inherit, my will is, that the son of my son W. shall inherit." This is a fee simple to E., with executory devise to the son of W. *Heath* v. *Heath*, 1 Bro. C. C. 147.

Bequest of residue to be divided equally between A., B., C. and D., with benefit of survivorship between them in case of the death of any or either of them without issue :—Held, that the gift was absolute, and the clause of survivorship void. *Wells* v. *Maling*, 3 Jur. 36.

Testator set out a schedule of his property, calling it 5,000*l*. He then directed 1,000*l*. to be invested in each child's name, and 1,000*l*. in his wife's ; interest to them, for their life, and afterwards to their descendants, except his wife's, which was, at his death, to be sold and divided amongst them, except 200*l*. to M. L.'s child by him. Then followed in the same paper : "The above is increased by the working up of stock, to 5,000*l*. I wish the same division and appropriation, except that if any share falls in, it may be added to the others, in case the original holder shall have no children." The testator died, leaving four daughters :—Held, that by the will alone, the daughters would have taken absolute interest ; but that by the will and codicil together, they took interests which, if absolute in the first instance, were defeasible. *Bird* v. *Webster*, 1 Drew. 338 ; 22 L. J., Ch. 483 ; 1 W. R. 121.

—— **On Death leaving Issue.**]—Bequest to A., his executors, administrators, and assigns, but in case he shall die leaving lawful issue, then in trust for his children :—Held, that the subsequent gift cut down the former to a life estate. *Johnston* v. *Antrobus*, 21 Beav. 556.

A testator gave a fund to M. for life, and if she should die without issue (which happened), then to C. and S. equally between them, or to the survivor, unless either of them should have departed this life leaving lawful issue, "in which case I give the share of him or her so dying unto his or her children, if more than one, in equal proportions." The testator died in 1813. C. died without issue in 1825 ; S. died, leaving issue, in 1851 ; and in 1855 M. died without issue :—Held, that words introducing the gift over were too ambiguous to cut down the preceding clear gift to C. and S., and that the children of S. took nothing. *Larkin, In re*, 2 Jur. (N.S.) 229.

Testator directed trustees to invest 5,000*l*. on government or real securities, and to pay the interest, &c., to his wife for life, and after her decease to divide the same, and pay one moiety to his son, W. W. C., and the other to be invested, and held, subject to the trusts declared concerning such share of his residuary estate as thereinafter bequeathed, for the use of his daughter, C. C. One part of the residuary estate the testator directed to be paid to his son, and the other he directed to be invested on government or real securities, and the interest, &c., paid to the separate use of his daughter for life; "but in case either of them, W. W. C. or C. C., should be then dead, leaving lawful issue him or her surviving," the testator directed that his or her share "of or in the trust moneys and securities should be paid unto and amongst the issue of such deceased child or children in equal shares, &c. . . . Provided always, that in case either W. W. C. or C. C. should die in his lifetime, or in the lifetime of his wife, without leaving lawful issue," then the testator "directed that the share of him or her so dying of and in the trust moneys and securities respectively" should be paid to the survivor of his children absolutely. The testator died in 1850, leaving his wife, and his son and daughter, W. W. C. and C. C. (each of whom had issue one child). On claim as to whether W. W. C. took an absolute interest in the gift of the residue:—Held, that the direction, "in case W. W. C. should be then dead," meant his death in the lifetime of the testator; and that as W. W. C. survived the testator, he took an absolute interest in the gift of the residue. *Cooper* v. *Cooper*, 1 Jur. (N.S.) 105; 3 W. R. 80.

—— **On Remarriage.**]—Testator gave a freehold house to his wife for her sole use and benefit, and another freehold house to her for her life; and he also gave to her all his household goods, plate, &c.; but if she married again, the whole of the above property was to become the property of his daughter; and in case his wife should remain unmarried, then he gave the second-mentioned house to his daughter for her life, and to her children after his wife's death:—"I also appoint my wife, provided she remains unmarried, sole executrix and residuary legatee to all other property I may possess at my decease":—Held, that the fee-simple in the first-mentioned house passed to the wife. *Day* v. *Daveron*, 12 Sim. 200; 10 L. J., Ch. 349.

—— **On Daughter marrying beneath her.**]—A gift over of real estate in the event of the devisee marrying "a man beneath her in life, that is to say, below her in social position," is good. *Greene* v. *Kirkwood*, [1895] 1 Ir. R. 130—C. A.

Gift Cut down by Condition Subsequent.]—Testator gave a sum of money for the separate use of his daughter, a feme sole, and declared that she should not be at liberty to sell or dispose of it, and if she attempted so to do, that such sale should be void. The daughter afterwards married:—Held, that the restraint on alienation was void, there being no gift over. *Newton* v. *Reid*, 4 Sim. 141.

A testator gave all his property, real and personal, to trustees for division among his children, their shares to be paid when they respectively attained twenty-eight. The will further contained a clause cutting down the children's share to 1,000*l*. each in the case of sons and to 500*l*. in the case of daughters, if any of them should embrace a religious life:—Held, (following *Saunders* v. *Vautier*, Cr. & Ph. 240), that there was an absolute gift to the children vesting on the testator's death, and the provision as to payment at twenty-eight was nugatory; and that the clause as to embracing a religious life was a condition repugnant to the former gift, and must be disregarded. *Thompson, In re, Griffith* v. *Thompson*, 44 W. R. 582. *And see* CONDITION.

Gift out of Proceeds "on any Sale"—Repugnancy.]—An absolute gift of property in a will was followed by a direction that, on any sale by the beneficiary, sums were to be paid to other persons out of the proceeds of such sale:—Held, that the direction was repugnant and void. *Elliott, In re, Kelly* v. *Elliott*, 65 L. J., Ch. 753; [1896] 2 Ch. 353; 75 L. T. 138; 44 W. R. 632.

ii. *By Trusts Qualifying Enjoyment.*

Principles.]—Illustration of the distinction between a direction in a will which goes to cut down or qualify a prior absolute gift, and one which only goes to regulate the mode in which such gift shall be dealt with and enjoyed. *Gompertz* v. *Gompertz*, 2 Ph. 107; 16 L. J., Ch. 23; 10 Jur. 937.

If a testator leaves a legacy absolutely as regards his estate, but restrains the mode of enjoyment adapted to secure certain objects for the benefit of the legatee, on failure of such objects the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but modes of enjoyment are prescribed which fail, the legacy forms part of the testator's estate. Quære, the effect, on an absolute gift which is ambiguous, of pointing out the mode of enjoyment in every possible event to which the testator's mind was turned. *Lassence* v. *Tierney*, 1 Mac. & G. 551; 2 Hall & Tw. 115; 14 Jur. 182.

Bequest to a daughter of 1,000*l*. stock, and 70*l*. a-year for life, which two sums were to be under the trust of the executors, and not to permit her to assign "her said annuities," and pay the interest from the 1,000*l*. to her for her life, and at her decease to divide it between her children:—Held, that the daughter took for life only, and not an absolute interest subject to be defeated by the interests given to her children. Distinction between an absolute bequest with a subsequent gift in derogation, and a limited bequest followed by a subsequent restricted gift over. In the former case, the absolute gift remains upon failure of the subsequent gift, but in the latter the limited bequest is not enlarged by such an event. *Seawin* v. *Watson*, 10 Beav. 200; 16 L. J., Ch. 404; 11 Jur. 576.

Bequest to the children of A. B. for life; but in case of death before marriage, his share to go to the survivors. In the margin was written, "What is to become of the principal? The share of the parent to be divided amongst the children, if any. Quære, to be put in afterwards in a proper manner." The children of A. B. all died unmarried:—Held that the gift was for life only, and not an absolute gift cut down merely to admit their children. *Kay* v. *Winder*, 12 Beav. 610.

If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails. *Kellett* v. *Kellett*, L. R. 3 H. L. 160.

A testator directed his trustees holding his real estate to levy and raise for his five daughters, naming them, 1,000*l.* each :—Held, that this was in itself an absolute provision for each. *Ib.*

The will directed that the sum of 1,000*l.* each should be raised "subject to the provisoes thereinafter expressed"; i.e., the trustees were to permit each daughter to take the interest for life —in case she should marry, her husband was to take the interest for life—and after the decease of any daughter unmarried or without issue, the principal was to be applied amongst all or any of his other children, in such shares as the daughter dying should appoint, and, in default of appointment, amongst the surviving children or their issue in equal shares. By a codicil he revoked his will "so far as the said sum to each of my daughters is given absolutely, and I declare that, in the event of any of my daughters remaining unmarried, she shall only be entitled to an interest for her natural life," and he then confirmed the gift, "subject to the restriction aforesaid":—Held, that these provisions did not qualify the gift, except so far as the restriction as to remaining unmarried was concerned. *Ib.*

Held, also, that, notwithstanding the revocation, by the codicil, of the absolute gift, the court had properly declared the survivor entitled for her life to a distributive share of her deceased sisters' interests in the sums given to them. *Ib.*

When an absolute gift or an appointment in a will is attempted to be cut down by a subsequent inoperative modification or restriction, the original gift remains unaffected by the intended restriction. *Churchill* v. *Churchill*, L. R. 5 Eq. 44; 16 W. R. 182.

When either in a settlement or a will there is an absolute gift to children followed by a direction that the daughters' shares shall be settled on themselves for life, with remainder to their children, the daughters' interests are only cut down for the sake of the children, and any daughter who dies without issue takes her share absolutely. *Sidway Hall Estate, In re*, 37 L. T. 457.

Where in a will there is an absolute gift followed by a qualification of the mode of its enjoyment to secure certain objects for the benefit of the legatee, then, if the object fails, the absolute gift remains. But if there is an absolute gift, followed by a clause diminishing the estate so given to the first taker, the absolute gift has, in effect, been cut down, and the court can only give effect to it as so diminished. *Richards, In re, Williams* v. *Gorvin*, 50 L. T. 22.

Where in a will there is a general absolute devise of real and personal estate, and in a subsequent clause the testator uses language plainly restrictive of the absolute gift in one species of property, but not in words confining it to that one, the restriction will be held applicable to both, in order to carry out the clear intention of the testator, unless there exists a clear necessity for excluding the other from its operation. *Ridgeway* v. *Munkittrick*, 1 Dr. & War. 84.

Where Absolute Gift followed by Remainder which Fails.]—Gift by a testator of all the residue of his estate and effects, real and personal, whatsoever and wheresoever, to his wife, and after her death to be equally divided to the children, should there be any; he also appointed his wife sole executrix. There were no children :—Held, that the wife was absolutely entitled. *Crozier* v. *Crozier*, L. R. 15 Eq. 282; 21 W. R. 398.

Testator gave 4,000*l.* to his grand-daughter, and directed his executors to pay it to her on her attaining twenty-one, and to apply the interest of it for her maintenance during her minority. By a codicil, he directed that his grand-daughter should have only the interest of 2,000*l.* for her maintenance until she attained twenty-three, and that the interest of the other 2,000*l.* should be accumulated, and that, on her attaining twenty-three, his executors should have the whole settled upon her for her life, and, after her death, to her child or children, in equal proportions, so that no husband of hers might spend it. The grand-daughter attained twenty-three, and died without having had a child, and without the executors having made any settlement of the legacy :—Held, that the gift in the will was an absolute gift, and that, in the events that had happened, it was not affected by the codicil. *Bell* v. *Jackson*, 1 Sim. (N.S.) 547.

Where the bequest of residuary estate gave absolute interests to children in their respective shares, but afterwards, by a direction as to those of the daughters, that a moiety of their shares should be settled on them for life, with remainder to their children :—Held, that, on the death of a daughter unmarried, the purpose of such limitation in favour of her children failing, her representatives were entitled absolutely to her interest in the moiety directed to be so settled. *Winchworth* v. *Winchworth*, 8 Beav. 576; 9 Jur. 793.

A testator directed his trustees "to raise 5,000*l.* for his daughter," his said daughter's legacy to be invested, and the interest paid to her for her separate use for life, with remainder to her children absolutely, but with power to her to appoint a life interest to her husband. The daughter died unmarried :—Held, that she took an absolute interest in the legacy. *Mayor* v. *Townsend*, 3 Beav. 443; 10 L. J., Ch. 216; 5 Jur. 91.

A testatrix bequeathed her residuary estate to trustees upon trust for her daughter for life, with remainder to the "younger children" of her said daughter, the shares of sons to be paid at twenty-one, and those of daughters at twenty-one or marriage; with a direction to invest the shares of daughters, and pay them the income for their separate use from the time of marriage or upon their attaining twenty-one, so that the capital of each daughter's share should pass to the children of such daughters; with such trusts or remainders, in the event of there being no such issue, as the trustees should think proper :—Held, that the absolute interest given to daughters by the first part of the will was cut down only in the event of their having issue; and that an unmarried daughter, aged fifty-six, was entitled to receive her share upon entering into personal recognisances. *Lyddon* v. *Ellison*, 19 Beav. 565; 18 Jur. 1066.

Where the testator directed his trustees to apply the interest arising from his residuary estate for the maintenance of all his children, and the surplus to accumulate until the youngest should attain twenty-one, and then the capital to be divided into as many shares as there should

be children then living, one to be allotted to each, and the issue of such as should be then dead to take their parents' shares, the shares of sons to be payable at twenty-one, and of daughters to remain in the hands of his trustees, upon trust to pay the interest for their lives for their separate use, and on the decease of such daughters leaving issue on the youngest attaining twenty-one :—Held, that a daughter living at the time when the youngest child attained twenty-one who died single took an absolute interest in a share of the residue, the gift which was absolute in the first instance not being affected by the direction as to settling the shares of the daughters having issue. *Hulme* v. *Hulme*, 9 Sim. 644.

A testatrix directed her fortune to be divided between A. and R. K., appointing trustees for R. K. to pay him half-yearly his share. By codicil, reciting that A. was dead, she desired that her fortune should be divided between R. K. and T. K., for the use of their children, and when they came of age to be settled upon them, share and share alike. R. K. survived the testatrix, and died without ever having had a child :—Held, that the gift to him by the will of a moiety was absolute, and that the modification introduced by the codicil affected it so far only as was necessary to give effect to the disposition in favour of his children, and that, this disposition having failed, the absolute gift remained, so that his personal representatives were entitled to his moiety. *Norman* v. *Kynaston*, 3 De G. F. & J. 29 ; 7 Jur. (N.S.) 129 ; 3 L. T. 826 ; 9 W. R. 259. Affirming, 30 L. J., Ch. 189.

By will, dated in 1829, a testator gave to A. 800*l*., "to enable him to take his father's farm after his decease, if the landlord will consent, or to place him in any other situation which the trustees may think fit," and if not, then the interest was to be paid to A. for life, with remainder to his son, if he should have any. A. died intestate and unmarried. No part of the legacy was ever paid to A. or applied for his benefit :—Held, that the first gift to A. was never taken away, except in the event of his leaving a son as above mentioned ; and that, he having died without a son, his administrator was entitled to the legacy. *Lord* v. *Lord*, 3 Jur. (N.S.) 485.

Gift of residue to be equally divided between the testator's wife, sons, and daughters, subject, nevertheless, as to the shares of the daughters, which were to be placed in funds in the names of trustees ; the interest to be paid to them for their lives for their separate use, and after their deaths the testator gave the shares, to the interest of which his daughters should have been entitled for life, to their children equally, with benefit of survivorship. Two of the daughters having survived the testator, died without children :—Held, that their representatives were entitled to their shares. *Whittell* v. *Dudin*, 2 J. & W. 279 ; 22 R. R. 124.

Under a gift of a sum of money "to my daughter J. H., to be employed for her use in the following manner," accompanied by a direction that the fund should be invested, and the interest only paid to the daughter during her life, and, in case she should marry and have children, then the principal to be divided amongst such children :—Held, upon the construction of the whole will, the daughter having died without children, that her personal representative, and not the residuary legatee, was entitled to the fund. *Campbell* v. *Brownrigg*, 1 Ph. 301 ; 13 L. J., Ch. 7.

A testatrix bequeathed personalty in trust for A. B. for life, and after his decease for his issue, and on failure of his issue to F. H. S. and R. S., share and share alike, "and after the decease of the said F. H. S. and R. S. to their children, share and share alike, and to their heirs for ever." F. H. S. died without having had issue, R. S. survived him and died leaving children, and A. B., who survived them both, died without issue. Upon a petition by the children of R. S. for payment out of a portion of the trust fund which was in court : — Held, that, upon the authorities, the bequest must be construed as a gift after the respective deaths of F. H. S. and R. S. to their respective children, and that, there having been an absolute gift to each of them in the first instance only cut down in favour of his children, in the events which happened the fund was divisible in moieties between the representatives of F. H. S. and the children of R. S. *Hutchinson's Trusts, In re*, 51 L. J., Ch. 924 ; 21 Ch. D. 811 ; 47 L. T. 573.

A testator bequeathed his residue to his nieces A. and B., and he then confined the gift to A. and B. and their children, without comprehending their husbands, unless his nieces should die without issue :—Held, that A. and B. took for their separate use for life, with remainder to their children ; and that in default the nieces took absolutely. *Dawson* v. *Bourne*, 16 Beav. 29.

—— **Followed by Contingent Executory Devise to Children.**]—A testator by will, dated in 1853, gave the residue of his property to his three brothers and nephew for their lives, as tenants in common ; and after the decease of his brothers and nephew, then in trust for their heirs and assigns, as tenants in common ; provided always, that in case any or either of their children should die under twenty-one, without leaving issue, the share of each child so dying should be in trust for the survivors or survivor ; but in case any or either of such children should die leaving lawful issue, then the share of each such child to go to his or her child or children ; and if there should be only one such child of his brothers or nephew who should attain twenty-one or be married, then in trust for such child, his or her heirs and assigns, for ever. Upon a bill for the construction of the will :—Held, that it must be assumed that there was an omission of a gift to the children of the testator's brothers and nephew after the gift to them, and that the will must be read as giving the brothers a fee in the first clause of the devise, which was cut down to a life estate in the event of their having children, with a devise in fee to the children. *Spence* v. *Handford*, 27 L. J., Ch. 767 ; 4 Jur. (N.S.) 987.

—— **Followed by Gift for Life with Power of Appointment among Children.**] — A testator gave all his property, real and personal, to trustees, and directed that they should sell his freehold estate, and make up an account of his estate, so that they might be able to make a division among his nine children, to whom he left the same in equal shares. After other directions, he declared that he left the shares of his daughters to them, for their lives, free from the control of their husbands, with power to appoint among their children, notwithstanding coverture. In a subsequent clause he directed that the shares of

his sons who should have attained twenty-one at the time of his death should forthwith vest in them, and that the shares of the other sons should vest as they should afterwards attain twenty-one, and the shares of daughters on marriage; and that the shares of sons who should die under twenty-one, and of daughters who should die unmarried, should go amongst the survivors as therein mentioned. A., one of the daughters, married, and died without having exercised her power of appointment, leaving one child:—Held, that A. took an absolute interest in her share of the fund. *M'Tear* v. *M'Dowell*, 11 Ir. Ch. R. 338.

—— **Followed by Void Remainder.**]—Where there was a bequest of personalty in terms giving an absolute interest in the first instance to the legatees, followed by a direction to invest in trust for them for life, with a remainder to their children, that was too remote, it was:—Held, that the absolute gift was not cut down by the subsequent direction. *Ring* v. *Hardwick*, 2 Beav. 352; 4 Jur. 242.

—— **By Void Gift Over.**]—A bequest to M. E., testator's wife, of "the legal interest on bonds, debentures, and funded property, together with household furniture, &c., to be disposed of as she shall think proper"; and in case F. E. should survive the said M. E., that he should have "the interest of money, and whatever does belong to her that she does not dispose of":—Held, that, M. E. having survived F. E., the absolute gift to her was not cut down by the subsequent bequest over, and that that bequest was void for uncertainty. *Phillips* v. *Eastwood*, Ll. & G. t. Sugd. 270.

—— **By Direction to Settle on Marriage.**]—A testator gave shares of his property to his two infant daughters "to be settled on themselves at their marriage." Upon the daughters attaining twenty-one without having married:—Held, they were entitled to have their shares paid and transferred to them absolutely. *Magrath* v. *Morehead*, 41 L. J., Ch. 120; L. R. 12 Eq. 491.

A testator bequeathed one-third of his residue to his daughter, her executors, &c., to be vested at twenty-one, but not to be payable until twenty-five. He declared it should not be subject to the control of any husband, but should devolve and be settled by deed upon her as a feme sole, and that the income should not be anticipated, and that until her marriage she should only be entitled to receive the dividends, and retain the power to bequeath the capital by will. The daughter being unmarried:—Held, that she took absolutely, and was entitled to payment of the fund out of court on attaining twenty-one. *Young's Settlement, In re*, 18 Beav. 199.

Where Condition Attached.]—There is no doctrine that if there is a limitation in a will which by itself gives a vested estate, and a condition is afterwards added on a breach of which the estate is to go over, the limitation and the condition will be construed into a contingent devise. *Clavering* v. *Ellison*, 7 H. L. Cas. 707; 29 L. J., Ch. 761. Affirming, 8 De G. M. & G. 662; 2 Jur. (N.S.) 201; 3 Jur. (N.S.) 276.

A condition which is to defeat a vested estate must depend on an event ascertainable from the beginning. *Ib.*

Bequest of residue after decease of testator's widow, to be divided equally amongst children, the son's shares to be paid immediately, and as to the daughters' to be invested for them for life, with remainder between all their children, to become vested at twenty-five, remainder over; in case of either of his daughters having no child attaining twenty-five, to the children of the others who should attain that age:—Held, that such gift over was too remote and void, and that, the bequest to the daughters in the first instance being absolute, and the conditional limitation not being such as would legally take effect, the absolute interest remained according to the original gift. *Ring* v. *Hardwick*, 2 Beav. 352; 4 Jur. 2.

A. bequeathed 1,000*l.* to his solicitor by a payment of 50*l.* per annum for twenty years after his death, with a condition to attend meetings of his executors and assist in auditing the accounts of the estate:—Held, to be an absolute bequest of 1,000*l.* *Wells* v. *Wood*, 4 L. T. 768; 9 W. R. 780.

Devise upon condition to pay certain legacies within twelve months. See *Wright* v. *Wilkin*, 9 Jur. (N.S.) 715; 10 W. R. 403—Ex. Ch.

And see CONDITION.

Where Prohibition against Alienation.]—Bequest of money and leaseholds to a feme sole "for her own absolute use, without liberty to sell or assign during her natural life":—Held, to confer an absolute interest without power of alienation during life. *Baker* v. *Newton*, 2 Beav. 112; 8 L. J., Ch. 306; 3 Jur. 649.

By an instrument in the form of a settlement but proved as a will, real and personal estate was given to trustees upon trust for the sole use and benefit of the respondent (son of the settlor), his heirs, executors, and administrators, to be assigned and transferred to him as soon as conveniently might be after the settlor's death, subject to a proviso that if the respondent should die unmarried and without issue his share should go over, and also that the property assigned in trust for the respondent was to be held by the trustees upon the express condition that he should not during his life have power to mortgage, sell, alien, charge, or incumber any part of the property, and in that event the trustees should stand possessed of such property in trust for other persons:—Held, that the respondent took an absolute interest in fee simple under the instrument, and that the condition of forfeiture in case of charge or alienation was therefore void as repugnant; and accordingly that he could be ordered to secure to his divorced wife an annual sum for maintenance by a charge on his interest under the instrument. And semble (per Bowen, L.J.), that the condition was limited to alienation during the lifetime of the settlor, in which case there would be no repugnancy. *Corbett* v. *Corbett*, 58 L. J., P. 17; 14 P. D. 7; 60 L. T. 74; 37 W. R. 114—C. A.

A testator who died in 1871, after reciting in his will that he was seised of certain lands, devised the same to his son, T. M., without words of limitation, and directed that his said son should not have power to sell, assign, transfer, or make over the said therein before-mentioned lands, or part with the possession of any part thereof to any person or persons whomsoever, except by will to his wife, child, or children lawfully begotten, or next of kin, in such shares and proportions as, by his last will and testa-

ment, he should direct or appoint; and in case the testator's said son should happen to die intestate and without lawful issue, then the testator declared that his executor should have power to dispose of the lands, but always to the testator's next heir or heirs, or next of kin, it being the testator's will that said lands should not pass out of his family. And it was also the testator's will that any lawful issue of his said son, T. M., should not sell, assign, transfer, or make over the said lands or any part thereof, except in like manner as his (the testator's) said son, T., by will to his or their child or children, or next of kin. T. M. died without issue, but made a will, whereby he devised and bequeathed all his property to his wife, H. M. T. M. died seised and possessed of other property besides that devised and bequeathed to him by his father:—Held, that neither the restraint on alienation, nor the gift over, were indicative of an intention contrary to the devise to T. M. passing the fee simple or absolute estate and interest of the testator in the lands devised. *Martin* v. *Martin*, 19 L. R., Ir. 72.

Where Restriction to Separate Use.]—Bequest of 1,000*l.* to a married woman for her own use, nevertheless, during her life, to pay the dividends for her separate use, independent of any husband:—Held, an absolute interest. *Gurney* v. *Goggs*, 25 Beav. 334.

Gift of Interest at Discretion of Trustees with no Gift over.]—Testator gave all his property to trustees, in trust to invest it in securities at interest, for the use of his nephew, to be paid in such manner as the trustees should think fit; and when the nephew should attain twenty-one, that the trustees should pay him the amount of the interest or proceeds of the money come to their hands, as they might think most for his advantage, in weekly or quarterly payments for his life:—Held, that the nephew took an absolute interest in the property. *Billing* v. *Billing*, 5 Sim. 232.

Absolute Interest cut down by Subsequent Gifts thereout.]—A. directed his executors to raise a legacy "to or in trust for his son." It was to be invested in the names of trustees, and life annuities were given to the son and his wife out of the income, and interests were given to the children of the son and to their issue, with gifts over:—Held, that there was an absolute gift to the son cut down to the limited extent of the subsequent gifts. *Salmon* v. *Salmon*, 29 Beav. 27.

—— **By Direction to pay Interest "as long as she lives."**]—An absolute gift of residue to the testator's widow:—Held, to be reduced to a life interest only by subsequent directions as to the payment of interest on money lent, to be made to her "as long as she lives." *Flinn* v. *Jenkins*, 1 Coll. C. C. 365; 8 Jur. 661.

—— **By Direction to Pay Interest for Life with Remainder to Next of Kin.**]—A husband bequeathed property to his wife for life, with remainder to his sons and daughters, the share of the daughters "to be vested in the bank in their own names, and the interest for life to be received by them to remain as a jointure for their use in case of their marrying, untouchable by their husbands, but to descend to their legal or nearest of kin":—Held, that a daughter, whether marrying or not, took only a life interest, with remainder to her next of kin. *Harris* v. *Newton*, 46 L. J., Ch. 268; 36 L. T. 173; 25 W. R. 228.

Devise to A. for Life, Remainder to B. in Trust—Whether Trust includes A.]—Testatrix by her will devised all her fee simple, freehold, and leasehold estate, to R. E. for life, remainder to J. E. for life, with remainder, save a certain rent-charge, to the commissioners of charitable donations, in trust to pay the head-rents and to apply the annual profits to certain charities:—Held, that R. E. and J. E. took beneficial interests for their lives. *Charitable Donations Commissioners* v. *Espinasse*, Fl. & K. 164; 3 Ir. Eq. R. 324.

Property to be enjoyed with and go with Title.]—A testatrix by a codicil to her will bequeathed to C. A., sixth Earl of E., and to his successors, all her plate, and also gave, devised, and bequeathed a leasehold house to him and "to his successors, and to be enjoyed with and to go with the title":—Held, that the plate and leasehold house passed to the sixth earl absolutely; the words "to be enjoyed with and to go with the title" not being sufficient in themselves to create an executory trust or to cut down the interest to a life estate. *Montagu* v. *Inchiquin* (*Lord*) (23 W. R. 592) discussed. *Johnson, In re, Cockerell* v. *Essex* (*Earl*), 53 L. J., Ch. 645; 26 Ch. D. 538; 52 L. T. 44; 32 W. R. 634.

g. Successive and Concurrent Interests—Joint Tenancy and Tenancy in Common.

Distinct Gifts of Same Property to Two Persons.]—It has been held, where there has been a devise of an estate to A. at the beginning and to B. at the end of a will, they shall take as joint tenants. *Ulrich* v. *Litchfield*, 2 Atk. 373.

Where a man gives a farm in Dale to A. and his heirs in one part of his will, and in another to B. and his heirs, it is now construed either as a joint tenancy or a tenancy in common, according to the limitation. *Ridout* v. *Pain*, 3 Atk. 492.

Gift to Two Persons with Maintenance for One of them.]—Bequest to A. and B., with direction that B. shall be maintained, &c., during minority out of fund, and power to place B. out apprentice:—Held, to create a tenancy in common. *Gant* v. *Lawrence*, Wightw. 395.

Gift to Two Persons for One Object.]—A testator, in 1641, devised lands to two colleges, one at Cambridge and one at Oxford, for educating ten of the descendants of certain persons named in his will in piety and learning:—Held, that this was a gift to the two colleges as tenants in common, subject to the trusts of educating the persons specified in the will in piety and learning, according to the course and usage of education in the colleges respectively, and according to the regulations and discipline thereof. *Att-Gen.* v. *Sidney Sussex College*, 38 L. J., Ch. 656.

Lands Purchased by A. and B. under Option in Will.]—A. by will directed that his sons should have the option of purchasing certain premises at a given sum. They agreed to do so, and signified their intention by a note in writing

to the trustees, and they were let into possession of the premises. No conveyance had, however, been made of the premises to the sons, but a draft conveyance had been prepared, in which they were treated as tenants in common. They both subsequently executed marriage settlements, in which the shares which they took under the will were treated as separate shares. They both died. After the death of the sons their representatives received the rents and profits of the premises in moieties:—Held, that the sons took as tenants in common. *Harrison* v. *Barton*, 1 J. & H. 287; 30 L. J., Ch. 213; 7 Jur. (N.S.) 19; 3 L. T. 614; 9 W. R. 177.

Devise to several Persons in Tail.]—If the devise of real estate be "to the sons of A. in tail," simpliciter, the court will not supply any words denoting that the sons are to take successively in order of priority of birth. *De Windt* v. *De Windt*, 4 N. R. 184; 10 L. T. 568; 12 W. R. 776.

A testator gave, devised, and bequeathed his freehold property in N. to his nephew J., and after his death to his sons lawfully begotten, and in the event of his or their death without sons lawfully begotten, then he left the estates to his cousin H., and after his death to his sons lawfully begotten, beginning with the elder. The residuary clause was as follows: "Whatever is left after what I now give or bequeath of my personal property, I leave to my nephew J., and to his sons in tail lawfully begotten." At the testator's death J. had one son, and subsequently another son was born to him:—Held, that these sons took estates tail male in remainder. *S. C.*, 35 L. J., Ch. 332; L. R. 1 H. L. 1; 14 L. T. 529; 14 W. R. 545.

A testator directed his trustees to purchase lands in certain counties, to be settled, on the death of the eldest son of S. without issue (which happened), to the use of every son of S. then living or who should be born in the testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his death to the use of such son's first and every other son successively in tail male, and on failure of such issue to the use of the testator's right heirs:—Held, that the younger sons of S. took as tenants in common for life, with remainder as to each son's share to his first and other sons in tail male, with cross-remainders over. *Surtees* v. *Surtees*, L. R. 12 Eq. 400; 25 L. T. 288; 19 W. R. 1043.

C., after devising an estate for life to A. and B. in succession, with remainder in each case to trustees, devised the estate to the first son of the body of B. in tail male; and in default of such issue, to the second, third, and all and every other the son and sons of B. severally and successively in tail male; and in default of such issue, to the third and all and every other the son and sons of the body of A., and the heirs male of such son and sons; and in default of such issue, to his own (the testator's) right heirs in fee. A. died in 1820, leaving six sons. B. died in 1845 without leaving issue male. Upon the death of B., J., the third son of A., entered into possession and continued in possession to the time of his death in 1856, and thereupon his eldest son entered into possession. On a bill filed by the three youngest sons of A.:—Held, that the devise to the third and all and every other the son and sons of the body of A. did not give them an estate in joint tenancy, or a tenancy in common, but an estate in succession in tail male, and that J. took the entirety; and he having executed a disentailing deed, his heir-at-law was entitled to the estate in fee. *Cradock* v. *Cradock*, 4 Jur. (N.S.) 626; 6 W. R. 710.

Semble, a devise to the children of A. and "the heirs of their bodies respectively" would give them estates tail as tenants in common. *Tanner, Ex parte*, 20 Beav. 374. *S. C.*, nom. *Tiverton Market Act, In re*, 24 L. J., Ch. 657; 1 Jur. (N.S.) 487; 3 W. R. 118.

Gift to Two, with Gift over of Estate of One of them.]—A testator devised certain real property to A., B. and C., to possess and enjoy the same jointly during their lifetime, and on the death of any or some of them he devised their shares to be possessed and enjoyed by D., together with E., during their lifetime; provided that in the event (which happened) of E.'s marrying her share was to be lost immediately, and was to be possessed and enjoyed by the other mentioned parties, share and share alike:—Held, that the estate created in D. and E. was a tenancy in common, and not a joint tenancy; and that the heir-at-law was entitled, on the death of D., to her share in the property. *Jones* v. *Jones*, 44 L. T. 642; 29 W. R. 786.

A devise to two persons in terms importing a joint tenancy is not changed into a tenancy in common by a subsequent gift over of the estate of one of them upon a certain contingency. A testator devised his real estate to his wife and his son Daniel, and he then proceeded thus: "If my son Daniel shall happen to die without issue living, my will is that all his estate is to be divided between all my children in equal shares"; and, "If my wife will intermarry, she is to enjoy none of my property":—Held, that the wife and Daniel took as joint tenants. Held, secondly, the wife having died in the life of the testator, and Daniel having survived the testator, and died a bachelor, that the whole estate was divisible between the testator's children, and that Daniel's representatives took his share of it. *Edwardes* v. *Jones*, 33 Beav. 341.

Indefinite Gift, with several Inheritances.]—When testator devised to trustees in fee, in trust for his three sisters and their assignees, and as his said sisters should severally die he gave the premises to their several heirs:—Held, that the sisters should take as tenants in common, and not as joint tenants. *Sheppard* v. *Gibbons*, 2 Atk. 441.

Joint Life Estates, with several Inheritances.]—A devise to two, and the heirs of their bodies; it is a joint estate for life, and several inheritances; and so it is if there is a devise over; but if there is a devise over, and one of them dies without issue, a moiety shall go over to the remainderman. *Cook* v. *Cook*, 2 Vern. 545.

J. devised lands to be sold for payment of his debts and legacies, and the surplus to be laid out in the purchase of other lands to be settled on A. and B., and the survivor of them and their heirs, equally to be divided between them, share and share alike. A. died in the lifetime of the testator, and the question was, whether his moiety should descend to the testator's heir-at-law as a lapsed devise, or should go to B., the surviving devisee:—Held, that the first part of the devise

made A. and B. plainly joint tenants, and therefore B., by survivorship, became entitled to the whole for life, but that the inheritance being devised to them as tenants in common, one moiety having lapsed by A.'s death in the lifetime of the testator, shall descend to the testator's heir-at-law, expectant on the death of B., and the other moiety shall go to the heir of B. *Barker* v. *Gyles*, 3 Bro. P. C. 104. *S. C.*, 2 P. Wms. 280; Select Ca. Ch. 17; 9 Mod. 157; 2 Eq. Cas. Abr. 536, pl. 4.

A devise of lands to B. and C., and the survivor of them and their heirs, equally to be divided between them, share and share alike; B. and C. are joint tenants for life, with several inheritances. *Id.* 107.

Joint tenancy for life, the words of severance being confined to the subsequent limitations. *Folkes* v. *Western*, 9 Ves. 456; 7 R. R. 271.

Y., by his will dated in 1815, gave a copyhold estate held upon lives to his wife as long as she should remain a widow, and if his wife should marry, then to his daughters J. and S., and their heirs; and for want of such issue, then, &c.:—Held, that J. and S. took as joint tenants for life, with several inheritances in tail, and cross-remainder in tail. *Edwards* v. *Champion*, 1 Eq. R. 419; 3 De G. M. & G. 202; 1 W. R. 497.

A devise to A. and B. and their "respective heirs" gives to them a joint tenancy for life with several inheritances in fee. N. M., by his will dated in 1776, devised certain lands to his daughter S. M. for life, and after her decease "unto the child and children of her body, if more than one, lawfully to be begotten, and the heirs of their respective bodies." N. M. died in the lifetime of S. M., who died leaving six children. One of these six children died a bachelor, two others died leaving issue. On the question what interest the children of S. M. took under the will:—Held, that they took joint estates for life with several inheritances in tail. Semble, that, if the devise had been "to the children of my daughter, and the heirs of their bodies respectively," the children would have taken estates as tenants in common in tail. *Tanner, Ex parte*, 20 Beav. 374. *S. C.*, nom. *Tiverton Market Act, In re*, 24 L. J., Ch. 657; 1 Jur. (N.S.) 487; 3 W. R. 118.

A testator gave the residue of his real and personal estate to trustees, in trust for his nephews A., B. and C., and for their respective heirs, executors, administrators, and assigns. A. died before the testator; C. died after the testator:—Held, that the nephews were joint tenants for their lives, and the life of the survivor, with several remainders to them as tenants in common in fee; and that B. took the income of the whole for his life. *Atkinson, In re, Wilson* v. *Atkinson*, 61 L. J., Ch. 504; [1892] 3 Ch. 52; 66 L. T. 717; 40 W. R. 666.

A testator devised an estate to trustees and their heirs, upon trust to permit the rents and profits to be received by A. and his wife for life; and after the death of the survivor he devised the estate unto and amongst his four grand-daughters, to hold to them as tenants in common, and not as joint tenants, during their natural lives, with benefit of survivorship; the remainder to the trustees and their heirs, upon trust to support the contingent remainders thereinafter limited; the remainder to the issue male of his grand-daughters successively lawfully to be begotten; with remainder, in default, to his own right heirs:—Held, that the four grand-daughters took estates for life as tenants in common, with benefit of survivorship, with several inheritances in tail male limited to their respective issue upon the death of the survivor. *Haddelsey* v. *Adams*, 22 Beav. 266; 25 L. J., Ch. 826; 2 Jur. (N.S.) 724.

Joint Power of Disposition.]—A testator by his will gave "my landed estates in W., of whatever description, with their appurtenances, and all allotments of common now inclosed or hereafter to be granted to my daughters, J., M. and S., to be jointly and equally enjoyed or divided in the case of the marriage of any of them; and they or the survivor, in case of death, are by this my will fully authorised to dispose of the same by will or assignment, as they shall think proper, giving preference to those of my name and relations, according to behaviour"; and he gave them also all his personal property, "to be by them equally divided and shared among them," and he recommended them to live together. The three daughters died unmarried. M. and J. survived S., and executed wills respectively devising all their real estate to each other for life, but with different remainders over. J. survived M. After the death of J., the plaintiffs claimed a moiety of the real estates under the will of M. The defendant claimed the entirety under the will of J.:—Held, that though the power of disposition by deed might have been exercised by J., M. and S., or by J. and M., in their lifetime, yet that J., as the survivor, had alone the power of disposing of the estates by will, and that the defendant, as her devisee, was entitled to the entirety; and semble, that the will of the testator created a joint tenancy in fee. *Cookson* v. *Bingham*, 17 Beav. 262; 3 De G. M. & G. 668; 23 L. J., Ch. 127; 17 Jur. 1039; 2 W. R. 45.

Several Powers of Disposition.]—D. by his will settled real and personal estate upon trusts in favour of two of his daughters and their children. By a codicil he revoked this portion of his will, and empowered the husbands of his two said daughters to dispose of the property in question "for the good of their families":—Held, that the husbands took absolutely as tenants in common. *Alexander* v. *Alexander*, 6 De G. M. & G. 593; 3 Jur. (N.S.) 28; 5 W. R. 28—C. A.

Gift of Realty and Personalty "for Life to E. and to any lawful Issue she may have."]—A testator devised and bequeathed all his real and personal estate to B. for life, and after her decease to P. for life, subject to a forfeiture in a certain event, and the will proceeded: "And from and after the decease of" P., "I give and bequeath the property so given and belonging to" P. "for life to my ward" E. "and to any lawful issue she may have, such issue to take a vested interest in my said property upon attaining the age of twenty-one years." The testator died possessed of real and personal estate. E. survived the testator, and died intestate without having been married:—Held, first, that the direction that the issue should take vested interests was inconsistent with the use of the word "issue" as a term of limitation, and that consequently E.'s issue took as purchasers, and that her heir-at-law was entitled to the real estate; and, secondly, that as to the personal estate E. and her issue (had she had any) would have taken concurrently as

joint tenants, and that consequently her legal personal representative was entitled to the personalty. *Wilmot, In re, Wilmot* v. *Betterton*, 76 L. T. 415; 45 W. R. 492.

Gift of Chattels to several without Words of Distribution.] — Surplus of a personal estate bequeathed to A. and B.; it is a joint devise, and shall survive. There are two executors, and one dies; his executor or administrator shall not have an account against the survivor. *Shore* v. *Billingsly*, 1 Vern. 482.

Devise of a residue of a personal estate to three is a joint devise, and shall survive. *Webster* v. *Webster*, 2 P. Wms. 347.

"I give to my two sisters A. and B. the residue of my personal estate":—Held, joint tenancy. *Keys* v. *Luffkins*. Dick. 392.

Devise of the residue of personal estate to the wife for life; if she die without issue living at her death, to testator's two brothers, or if one of them shall be dead to the survivor. They both died in the life of the wife; the legacy was vested in both as joint tenants, and therefore goes to the representative of the survivor. *Barnes* v. *Allen*, 1 Bro. C. C. 181.

A legacy given to two or more persons without words of severance makes a joint tenancy; therefore his honour determined that where in a will as to a residue two-thirds were given to and amongst the children of A. and B., they took as tenants in common; but the remaining third being given to the children of C., they took as joint tenants. *Campbell* v. *Campbell*, 3 Bro. C. C. 15.

Notwithstanding the leaning of late to a tenancy in common, an interest given to two or more, either by way of legacy or otherwise, is joint unless there are words of severance as "equally among," &c., or an inference of that sort arises in equity from the nature of the transaction, as in partnership, a joint mortgage, &c. *Morley* v. *Bird*, 3 Ves. 628; 4 R. R. 106.

Bequest to two without words of severance; they take jointly. *Ib.*

Residue bequeathed to two; they take a joint interest. Agreement for severance as to the whole may be inferred from their conduct, dividing as the property was received. *Crooke* v. *De Vandes*, 11 Ves. 330.

Legacy and residue bequeathed to two, without words of severance, is a joint interest, and cannot be taken in common, under effect of previous disposition of the interest, with words of severance, viz. to be equally divided. *S. C.*, 9 Ves. 197.

Construction of will giving a vested interest, though subject to contingent charge, and creating a tenancy in common as to part of the property, and as to the residue a joint tenancy, there being nothing to control the legal effect of the words. *Jackson* v. *Jackson*, 7 Ves. 535. But on appeal it was held that, though by residuary disposition to testator's two sons "and the survivor, their or his heirs, executors," &c., they took as joint tenants the leasehold and personal estate embarked in trade, upon all the circumstances, the transactions for twelve years, as between themselves a severance was to be implied both as to the profits and the capital. *S. C.*, nom. *Crooke* v. *De Vandes*, 9 Ves. 591.

Joint tenancy under a bequest of personal property to more than one, without words of severance. *Swaine* v. *Burton*, 15 Ves. 371.

Devise and bequest of leasehold, freehold, and copyhold estates to trustees, their heirs, executors, &c., upon trust to sell and pay debts, &c., and after payment thereof to pay and apply the rents, &c., to A. for life, and after his decease devising and bequeathing to the heir- or heirs-at-law of B., and the heirs, executors, &c., of such heir or heirs, to whom the trustees were directed to convey and assign accordingly; co-heiresses of B. being also co-heiresses of the devisor, take, not as coparceners by descent, but as joint tenants by purchase, and therefore subject to survivorship. *Id.* 365.

Testator bequeathed several legacies, and among others to S. W. 14,000*l.*, "and to the latter gentleman's family 6,000*l.*" S. W. had six children, all living at the date of the testamentary instrument and at the death of the testator, and no other issue:—Held, that such six children were, as joint tenants, exclusively entitled to the legacy of 6,000*l.* *Wood* v. *Wood*, 3 Hare, 65. And see *Gregory* v. *Smith*, 9 Hare, 708.

A testatrix, having three daughters, gave one-third of a fund to each for life, with remainder to their children respectively, with cross-remainders between them, with an ultimate limitation to her own "next of kin and legal personal representatives":—Held, that the class of next of kin was to be ascertained at the death of the testatrix, and that they took as joint tenants. *Baker* v. *Gibson*, 12 Beav. 101.

A direction in a will that the testator's wife and brother should be his residuary legatees, and enjoy all the benefits arising from that appointment, creates a joint tenancy in the residue. *M'Donnell* v. *Jebb*, 16 Ir. Ch. R. 359.

Where words of Distribution used—Intention of Testator.] — Survivorship by words creating a joint tenancy, the intention of severance not being sufficiently clear. *Whitmore* v. *Trelawney*, 6 Ves. 129. And see *Booth* v. *Alington*, infra, col. 1367.

—— **Where Option given.**]—A testator by his will gave his residuary estate to W. and S., "to be held jointly or divided equally at their pleasure":— Held, that W. and S. held as tenants in common. *Oakley* v. *Wood*, 37 L. J., Ch. 28; 16 L. T. 450; 15 W. R. 862.

"All and Every."]—Where the court, in construing a will, can find words implying an intention to sever a gift to several persons, it will favour a tenancy in common rather than a joint tenancy. The words, "all and every" the children of a certain individual do not import any intention to sever. *Morgan* v. *Britten*, infra, col. 1373, followed. *Binning* v. *Binning*, 13 R. 654.

"Between them."]—A money legacy to two (not executors), "jointly and between them," is not a joint legacy, but is a tenancy in common, the words meaning the same as to be equally divided between them. *Perkins* v. *Baynton*, 1 Bro. C. C. 118.

Devise to A. and B. "between them." These words constitute a tenancy in common. *Lashbrook* v. *Cock*, 2 Mer. 70; 16 R. R. 144.

A direction in a will that a class should take "between them" creates a tenancy in common. Under a gift in a will to such of the nephews and nieces of A. and the children of A.'s deceased niece B. thereinafter named (then followed the

names of the nephews and nieces and children of the deceased niece), as should be living at the time of the decease of the testatrix, to be divided between and among them per stirpes equally, and not per capita, the children of B. taking between them only the equal share to which B. would have been entitled if named in that bequest instead of her children, and living at the time of the decease of the testatrix:—Held, that the children of B. took as tenants in common. *Att.-Gen.* v. *Fletcher*, 41 L. J., Ch. 167; L. R. 13 Eq. 128; 25 L. T. 892.

"**To be Divided.**"]—Bequest of legacies to R. and M. if they survive the testatrix; but if not, then R.'s legacy to be divided among his children, and M.'s legacy among hers; and gift of residue to all the children of R. and M. equally:—Held, that the children of R. and M. took the residuary estate in equal shares as tenants in common. *Lloyd's Estate, In re, Baker* v. *Mason*, 2 Jur. (N.S.) 539.

The effect of the words "joint tenants" in a will:—Held, to be controlled by the context, and effect given to the bequest as a gift to tenants in common. *Booth* v. *Alington*, 27 L. J., Ch. 117; 3 Jur. (N.S.) 835; 5 W. R. 811.

W. bequeathed unto trustees a large sum, upon trust to pay the interest and dividends as his daughter should direct; and in default into her hands during her coverture, for her separate use. He gave his daughter a power of appointment over the principal; but in default of appointment then upon trust "to pay, assign, and divide the principal, . . . and the stocks, funds, and securities upon which the same should be invested, unto and equally between all the children of his daughter, if more than one, as joint tenants; and if but one, then to such one child." The testator gave all the residue of his money unto and equally between his grandchildren as tenants in common. The daughter appointed only one-fourth part of the principal, and died intestate, leaving three sons surviving, one of whom received from the trustees a third of the remaining fund:—Held, that the bequest was a tenancy in common, and not a joint tenancy, and that the residue of the fund must be carried to the separate accounts of the two surviving children. *Ib.*

Bequest in the form of a letter to the testator's mother and sisters, expressed thus: "To be divided among you." A tenancy in common among those living at that time, and the shares of those who died in the testator's lifetime lapsed. *Ackerman* v. *Burrows*, 3 Ves. & B. 54.

"**To be Distributed.**"]—Devise of the profits of land in trust for his six younger children, to be distributed in joint and equal proportions:—Held, a tenancy in common. *Ettricke* v. *Ettricke*, Ambl. 656.

"**Each.**"]—A devise of a term to A. and B., paying 25*l.* a year, out of the rents to one during his life, "viz., 12*l.* 10*s.* by each of them," is a tenancy in common. *Kew* v. *Rouse*, 1 Vern. 353.

"**Equally amongst them.**"]—A devise of a leasehold interest to A. and her three sons equally amongst them creates a tenancy in common, though there is no mention of any division to be made. *Warner* v. *Hone*, Pre. Ch. 491; Gilb. Eq. R. 146.

"**Equally to be Divided.**"]—Devise to A. for life of messuage and other freehold estate at ——; and after her decease "I give the same estate to all and every the child and children of A., equally to be divided amongst them; and for want of such issue" over:—Held, that the children of A. took as tenants in common in fee-simple. *Esdaile* v. *Wilshere*, 9 L. J. (O.S.) Ch. 71.

G., being seised of a gavelkind estate by deed poll, in consideration of natural love to his wife and children, granted to his daughters, M. and H., the rents of his lands, equally to be divided between them, paying 5*l.* to their mother for life, and after her decease to hold to his said two daughters and their heirs, equally to be divided between them. This creates a tenancy in common, whether the instrument be considered as a deed or a will. *Rigden* v. *Vallier*, 3 Atk. 731; 2 Ves. Sen. 252.

Testator devised residue of his estate to A. and B., and then added, "My will is, that my estate be equally divided between A. and B., whom I appoint executors." The devise is not a joint tenancy; for the words "equally divided," though not annexed to the clause which gives the residue, can relate to that only. *Owen* v. *Owen*, 1 Atk. 494.

Though the words "equally to be divided" in a strict settlement at common law have never been determined barely of themselves to make a tenancy in common, yet it has been stated that they do so in a will, both with regard to real and personal estate. *S. C.*, 1 Atk. 495.

Devise to trustees by sale or mortgage to pay debts, the remainder to go and be equally divided among three children, and the survivor of them and their heirs for ever. A tenancy in common. *Stones* v. *Heurtly*, 1 Ves. Sen. 165.

Bequests to several to be equally divided, share and share alike. They take in common, and no survivorship. *Bolyer* v. *Mackell*, 5 Ves. 510.

One assigns a term to trustees, in trust to permit himself to receive the profits during his life, and after his death in trust to permit his two daughters B. and C., the executors and administrators to receive the profits during the residue of the term, equally to be divided between them, they paying so much within two years to his other two daughters. B. dies; C. mortgages to D.:—Held, that B. and C. were tenants in common, and not joint tenants, by the intention of the father, which was to make distinct provisions for them. *Hamell* v. *Hunt*, Pre. Ch. 164.

A. by will devises lands to trustees and their heirs, in trust, that the profits should be equally divided between his wife and daughter during the wife's life, and after her death he devised the same to the use of his daughter in tail, with remainders over. The daughter died during the mother's life:—Decreed, this to be a tenancy in common between the mother and daughter; and that during the mother's life the daughter's moiety did not descend or result to the heir, but was an interest undisposed of, and in nature of a tenancy pur autre vie; and should go to the administrator of the daughter. *Phillips* v. *Phillips*, 2 Vern. 430; Pre. Ch. 167; 1 P. Wms. 34.

Devise to A. for life, the reversion to B. and

C., to be equally divided betwixt them. B. and C. tenants in common for life only. *Peiton* v. *Banks*, 1 Vern. 65.

A devise to two persons to be equally divided between them makes it a tenancy in common. *Thickness* v. *Vernon*, 1 Vern. 32.

The words "equally divided between them" make a tenancy in common in a will, but not in a deed. *Thrustout* v. *Peak*, 8 Vin. Abr. tit. Devise, pl. 11.

A testator gave a fund to the children of A. C., equally to be divided amongst them, share and share alike, during their lives, and after their decease to G. W. and J. W.:—Held, that the children of A. C. took as tenants in common for life, with an implied clause of accruer, both of original and accruing shares, to the survivors and survivor. *Draycott* v. *Wood*, 8 L. T. 304; 2 N. R. 55.

A testator (under a power to that effect contained in a settlement) appointed a rent-charge to a person for her life, with powers of distress, and directed that after her death the rent-charge should be continued to her three daughters, and equally divided during their lives, and the life of the longest liver, with powers of distress during their lives and the life of the longest liver of them:—Held, to create a tenancy in common between the three daughters, with interests transmissible to their respective representatives during the life of the longest liver of them, notwithstanding that one of them predeceased the tenant for life. *Chatfield* v. *Berchtoldt*, 18 W. R. 887. And see *Fletcher* v. *Rogers*, 10 Hare (App.) xiii.; 1 W. R. 125.

Legacy of 10,000*l.* to two sisters, to be equally divided when they should arrive at twenty-one, is a tenancy in common; and one dying under twenty-one, her share shall go to her representative. *Jolliffe* v. *East*, 3 Bro. C. C. 25.

"**In Equal Moieties.**"]—Bequest to A. for life, and after her decease to B. and C. in equal moieties, and in case of the decease of either in the life of A., the whole to the survivor of them living at her decease. B. and C. have vested interests as tenants in common, subject to be divested only upon the contingency expressed. *Harrison* v. *Foreman*, 5 Ves. 207; 5 R. R. 28.

"**In Equal Proportions.**"]—A testator had two sisters, M. and E., and property of three classes: first, "his property," in possession; secondly, property which had been left to him by his late wife, also in possession; and, thirdly, an absolute reversionary interest in two-thirds of the capital of a sum of 10,000*l.* consols standing in the names of trustees, his two sisters M. and E. being entitled to the dividends on the whole of that sum for their lives and the life of the survivor, and being also entitled in reversion to one-third of the capital. By his will he left the whole of his property in trust to A., B. and C., the interest of his own to be paid to his sisters in equal moieties during their lives, with benefit of survivorship, the interest of property that had been left to him by his late wife to be paid to H. (a woman); in case of the death of the above three females, the interest to be divided amongst his (the testator's) four cousins, A., B., C. and X., for their lives; and the property, including the 10,000*l.* 3*l.* per cent. trust money, to devolve to the children of three of the said cousins: viz., A., B. and C., in equal proportions:—Held, first, that on the death of the survivor of the two sisters, H. living, there was no gift over of the testator's own property to H.; secondly, that the property let loose on the respective deaths of the sisters and of H. was then to be divided amongst the four cousins for their lives; thirdly, that the four cousins took as tenants in common, and as they respectively died their respective shares of the property were to devolve on the children of A., B. and C., as tenants in common; fourthly, that the sisters were not entitled to retain both their rights under the will and in the reversionary one-third of the 10,000*l.* consols. *Swan* v. *Holmes*, 19 Beav. 471.

"**In Equal Shares.**"]—A testator devised real estates to trustees for five hundred years, in trust to pay life annuities and the residue of the rents to his two sons, "in equal shares," and subject thereto he devised them to his two sons in fee as joint tenants:—Held, first, that during the term they were tenants in common; and, secondly, that the employment by the two sons of the estates in their partnership trade had not the effect of making them tenants in common of the fee. *Brown* v. *Oakshot*, 24 Beav. 254.

Testator devised to A. and B. generally, and then added, "My meaning is that the rents of my houses should be equally shared between A. and B.":—Held, that they take as tenants in common, and not as joint tenants. *Prince* v. *Heylin*, 1 Atk. 493.

—— **Effect of, where Gift Over on Death of Survivor.**]—*See* infra, col. 1382.

"**Every**"]—*See* "**All and Every,**" supra, col. 1366.

"**Participate.**"—A testator, after giving his residuary estate to J. and F., in terms which would create a joint tenancy, by codicil directed that W. should participate in the bequest with J. and F.:—Held, that the residuary legatees took as tenants in common. *Robertson* v. *Fraser*, 40 L. J., Ch. 776; L. R. 6 Ch. 696; 19 W. R. 989.

"**Respective.**"]—H. devises three-fourths of his personal estate to his three sons, equally to be divided between them; and the other fourth to them, in trust for his two daughters; the interest to be paid them respectively during their natural lives, and afterwards to their or either of their child or children; and for default of such issue to his three sons, equally to be divided between them. One of his daughters leaves a son, under whom the plaintiff claims, and the other dies without issue. The moiety of the sister who died without issue shall not go to the three brothers, but to the representative of the nephew. *Stephens* v. *Hide*, Cas. t. Talbot, 37.

Devise to A., the daughter of the testator, for life, and after her decease to all and every the child or children of A., male or female, begotten or to be begotten, and their assigns, for their respective lives, and after the decease and respective deceases of such child or children of A., to all and every the child or children of A., male or every such child or children of A., male or female, to be begotten, and the heirs of his, her, and their respective body and bodies, as tenants in common; and in case of the death of any of the said children of such child or children of A.,

and failure of issue of his, her, or their body or bodies respectively, then as well the original as the accrued share of such of them so dying without issue to go to the survivors or survivor, others or other of them, as tenants in common, if more than one; and for default of such issue over. A. had three children born in the lifetime of the testator and living at his decease, and another was born after the testator's death; one of the three born in his lifetime died during the life of A., without issue:—Held, that the children of A. took as tenants in common, and not as joint tenants; that, inasmuch as the children of the after-born child of A. could not take as purchasers, the devise would be supported according to the rule of cy près or approximation, by giving an estate tail to the after-born child of A.; that the rule of cy près, being an arbitrary principle of construction, introduced to effect the intention of a testator in the exigency of a particular case, was not to be applied, except when the necessity of the case required it, and that therefore, although the devise was to the children of A., as a class, the children of A., born in the testator's lifetime, would take estates for life, and the estates devised to the children of the after-born child would alone be altered; that cross-remainders were to be implied between the children of A., and therefore that the three children of A. who survived or left issue took according to their respective estates the share of the child of A. who died without issue, and that the inequality among the devisees, some of them being tenants in tail, and others tenants for life with remainder to their issue in tail, was no objection to the implication of cross-remainders among them. *Vanderplank* v. *King*, 3 Hare, 1; 12 L. J., Ch. 497; 7 Jur. 548.

Testator, after desiring his trustees to divide a principal sum into and equally between his nephew and four nieces, share and share alike, directed, in case any of them should die leaving issue of his, her, or their body or bodies before their shares of the trust fund should become payable under his will, that the share or proportion of each of them his said nephew and nieces so dying, of and in the said trust fund, should be paid to his or her children respectively, the children to stand in the place or stead of their respective deceased parents, and to be entitled to receive their respective parents' shares of his trust funds accordingly:—Held, a gift to such children as joint tenants, the effect of the word "respectively" being to allot the several families of children each to its respective parent. *Hodgson's Trust, In re*, 1 K. & J. 178.

A gift to several persons "during their respective lives, and, subject thereto, in trust for their respective children," creates a joint tenancy for life, and the children take their parents' shares per stirpes as tenants in common. *Sutcliffe* v. *Howard*, 38 L. J., Ch. 472; 17 W. R. 819.

Bequest of personal estate upon trust to assign the same to four persons "and to each of their respective heirs, executors, and assigns":—Held, to create a tenancy in common. *Gordon* v. *Atkinson*, 1 De G. & Sm. 478.

Gift of a personal estate for the benefit of testator's brothers and sisters, their executors and administrators, respectively for ever:—Held, to create a tenancy in common, and not a joint tenancy. *Moore, In re*, 31 L. J., Ch. 368; 6 L. T. 43; 10 W. R. 315.

Bequest to A. for life, with remainder to B., C. and D., with a substantial gift of their "respective shares," in case of the death of any of them:—Held, that B., C. and D. took as tenants in common. *Ive* v. *King*, 16 Beav. 46; 21 L. J., Ch. 560; 16 Jur. 489.

Courts of equity are far from favouring joint tenants. The word "respectively" will separate an estate, and make it a tenancy in common. *Heathe* v. *Heathe*, 2 Atk. 122.

"For Sole and Separate Use."]—A testator who was the proprietor of three hotels, after reciting that he was part proprietor with another of the S. hotel owned by them in equal shares and proportions, share and share alike, directed that the entire of his interest therein "shall be vested and become the property of my present wife M. J., for her own benefit, and for the benefit of my two sons by her, viz. C. and E.; and my further wish in this respect is, that said M. J. shall, in the event of my decease, continue to carry on the business of the said S. hotel until my sons C. and E. shall attain the respective ages of twenty-one years; at which periods respectively it is my wish and desire that my said wife M. J. shall make over one-third of such interest in said S. hotel to my said sons C. and E. for their own sole and separate use and benefit." He bequeathed another hotel to two other sons "in equal shares and proportions share and share alike." E. died a minor. In an action by E.'s administrator, claiming his share in the S. hotel:—Held, that on E.'s death under twenty-one the testator's widow and C. became entitled to E.'s share by survivorship. *Jury* v. *Jury*, 9 L. R., Ir. 207.

"Share and Share Alike."]—Though the words "share and share alike" in a will generally create a tenancy in common, they cannot do so where there is an express joint tenancy. *Armstrong* v. *Eldridge*, 3 Bro. C. C. 215. But see *Jones* v. *Randall*, 1 J. & W. 100; 20 R. R. 237.

The words "share and share alike" have been held for two hundred years to be a tenancy in common. *Heathe* v. *Heathe*, 2 Atk. 122.

Legacy to A. for life, and after her decease to her children; if she should leave none, to B. and C., share and share alike, or to the survivor, is a vested interest in B. and C. upon the death of the testator, as tenants in common; A., though she survived them, dying without children. *Perry* v. *Wood*, 3 Ves. 204.

Gift of a share over to the children of testator's late cousins, W. U. and J. U., share and share alike, at their respective ages of twenty-one; that is a tenancy in common among those then living, and one of them dying in the lifetime of the testator, that share is lapsed. *Martin* v. *Wilson*, 3 Bro. C. C. 324.

Gift to Children after Prior Life Estate.]—Under the following bequest: "All my lawful debts to be paid, and the remainder for my daughter; and at her decease to be left to her children":—Held, that the children took as joint tenants. *Mence* v. *Bagster*, 4 De G. & Sm. 162.

A bequest of residuary personal estate to A. for life, and should she have a child or children, then to it or them for ever. After the death of the testatrix A. married, and had issue:—Held, that pursuing the intent of the gift, and by analogy to estates created by way of use or devise, as distinguished from estates raised by

conveyance at common law, the children of A., notwithstanding their interests vested necessarily at different times as they came into esse, took as joint tenants. *Woodgate* v. *Unwin* (infra) commented on. *Kenworthy* v. *Ward*, 11 Hare, 196; 1 Eq. R. 389; 17 Jur. 1047; 1 W. R. 493.

Under a gift to A., with a direction that upon her death the property is to be left to her children, the children take as joint tenants. *Noble* v. *Stow*, 29 Beav. 409; 5 Jur. (N.S.) 1115; 7 W. R. 709.

Devise to a daughter for life, and afterwards to her children or heirs for ever:—Held, that the surviving children took as joint tenants. *Ruck* v. *Barwise*, 2 Dr. & Sm. 510; 35 L. J., Ch. 16; 12 L. T. 841; 13 W. R. 1016; 6 N. R. 375.

A fund was bequeathed to be invested in stock, to pay an annuity to A., "the principal to go to her children at her death":—Held, a joint tenancy. There were eight children, who, in the life of the tenant for life, concurred in signing an authority to the trustee, which was acted on, to invest the fund or mortgage, three of the children being minors at the time:—Held, that the shares of the five were thereby severed from the three, though not from one another. The trustee advanced to one of the children the estimated amount of his share, the tenant for life providing for the interest on the amount, and all the other children jointly and severally covenanted not to call upon the trustee to make up any deficiency in case the share should fall short of the advance, and also to indemnify the trustee against all claim, damage, and expenses by reason of the advance:—Held, that this severed all the shares. Where joint tenants, by their conduct, treat their interests as several, the effect of this, in severing the joint tenancy, is not prevented by the circumstance that they were not aware that their interests were originally joint. *Williams* v. *Hensman*, 1 J. & H. 546; 30 L. J., Ch. 878; 7 Jur. (N.S.) 771; 5 L. T. 203.

A testator gave a moiety of his residuary estate, as well real as personal, upon trust to pay the income equally amongst all his children who should be living when his youngest child attained twenty-one for their lives, and after the death of any of them, as to an equal portion of the moiety proportionate to the number of his children then living for the use of the issue of such child or children so dying, absolutely for ever:—Held, that, pursuant to the intent of the gift, and by analogy to dispositions operating under the statute of uses, or of dispositions operating under wills as distinguished from conveyances operating at common law, the children of a child who died after the youngest child of the testator attained twenty-one took as joint tenants the proportionate share of the deceased child, although their respective interest in the proportionate part vested in them at different times as they respectively came into esse. *M'Gregor* v. *M'Gregor*, 1 De G. F. & J. 63.

A gift in trust for all and every the child and children of A. and his, her, and their executors, administrators, and assigns, for his, her, and their own absolute use and benefit, creates a joint tenancy. *Morgan* v. *Britten*, 41 L. J., Ch. 70; L. R. 13 Eq. 28.

Personal property was bequeathed to trustees in trust for A. for life, and if she should have children that survived her then at her death for her children equally; but if she should have no heirs the trust fund was then bequeathed to B., who was A.'s mother, and her heirs:—Held, that upon the death of A., without having ever had any issue, the gift over took effect, and that B. and all her children, other than A., became entitled to the fund as joint tenants. *Dakin* v. *Nicholson*, 6 L. J., Ch. 329.

Bequest of leaseholds in trust for F. for life, and after his decease for the issue of the body of F., if any such there should then be. If F. died before twenty-one, or afterwards without issue, gift over:—Held, to confer a life interest upon F., with a gift over to his issue, meaning descendants who should be living at his death, as joint tenants. *Hall* v. *Nalder*, 22 L. J., Ch. 242; 17 Jur. 224.

Gift of personal estate to C. during her life; and after her decease among all her children and their issue, such children and their issue to be entitled, as amongst themselves, to the benefit of survivorship, and accruer of surviving shares:—Held, that the children and grandchildren of C. took as tenants in common. *Law* v. *Thorp*, 27 L. J., Ch. 649; 4 Jur. (N.S.) 447; 6 W. R. 480.

A testator left property on trust for his widow for life, and after her death on trust for his brothers and sisters A., B., C., D. and E.; but in case any of them should die leaving lawful issue, he directed that the share or shares of him, her, or them so dying should go to his, her, and their respective issue. A. and B. died before the testator, leaving issue. D. and E. died after the testator, but before his widow, and left issue:—Held, that the persons taking as issue in each case took as joint tenants. *Hobgen* v. *Neale*, 40 L. J., Ch. 36; L. R. 11 Eq. 48; 25 L. T. 680; 19 W. R. 144. And see *Pollard, In re*, post, col. 1429.

Gift to Several in Remainder or Quasi-remainder at Twenty-one.]—Bequest to A. for life, and after her decease to her children when they arrived at twenty-one. A. had two children, both of whom attained twenty-one:—Held, that they were tenants in common. *Woodgate* v. *Unwin*, 4 Sim. 129. See comments on the case in *Kenworthy* v. *Ward*, 11 Hare, 196; 1 Eq. Rep. 389; 17 Jur. 1047; 1 W. R. 493.

Devise to trustees, as soon as testator's three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies as joint tenants; this not a joint estate, but to be construed, as it may be, so that the conveyance must be at twenty-one respectively, with cross-remainders. *Marryat* v. *Townly*, 1 Ves. Sen. 102.

A will, after giving a life interest to A. in stock, continued, "and after her decease I give and devise the said stock to her children when they attain the age of twenty-one years":—Held, that the children who attained twenty-one took vested interests as tenants in common. Only two children attained twenty-one, one of whom died in the lifetime of the tenant for life; and on a bill filed by the survivor for the whole stock, a general demurrer by the representatives of the other was allowed. *Woodgate* v. *Atkins*, 9 L. J. (O.S.) Ch. 166.

A devise or bequest to the children of A., as they should become of age, constitutes a tenancy in common. A gift to the children of A., as they shall come into esse, does not, by reason of its taking effect at different periods, prevent its being a joint tenancy; but a gift to the children of A. as they shall become twenty-one is a tenancy in common; these words being operative

as words of severance, the children taking vested interests at different periods. *Hund* v. *North*, 3 N. R. 239; 33 L. J., Ch. 556; 10 Jur. (N.S.) 7; 9 L. T. 634; 12 W. R. 229.

If testator devises lands in trust for his nephew A. and niece B., and the children of the said B. by her husband, to receive the profits when they come of age, and also bequeaths them money at their age of twenty-one, B. having but one child at the time, and afterwards makes a codicil confirming those bequests, all the children of B. take as tenants in common, and have an immediate vested right in the money. *Bateman* v. *Roach*, 9 Mod. 104.

A testator devised freehold estates to trustees in trust to settle and convey them to the use of G. R. for life, with remainder to his issue in tail male in strict settlement, and in default of such issue the estates to go over. G. R. had no son, but had several daughters, all born after the testator's death:—Held, that the words "in tail male" were descriptive, not of the issue, but of the interest they were to take, and that the daughters were entitled to take under the limitation in remainder as tenants in common. *Trevor* v. *Trevor*, 1 H. L. Cas. 239. Affirming, 13 Sim. 108; 11 L. J., Ch. 417; 6 Jur. 863.

A. devised his real estate to trustees to pay the rents and profits to his wife for life, she continuing his widow; and after her decease or second marriage, upon trust to pay the same rents and profits to "all and every the child and children" of his late sister T. until the youngest of them should have attained twenty-one; and when and so soon as the youngest should have attained twenty-one, then to sell the real estate and divide the moneys equally between and among "the said" children, share and share alike. A testator also bequeathed his personalty upon precisely similar trusts, as to the interest and capital, as he had previously declared with regard to the rents and corpus, of his real estate:—Held, that the children of T. took interest as tenants in common, and not as joint tenants, in the rents of the realty and the interests of the personalty, and also in the corpus of either fund. *Groves' Trust, In re*, 3 Giff. 575; 9 Jur. (N.S.) 38; 6 L. T. 376.

A testator bequeathed property to a tenant for life, and after her death to her children:—Held, that the children took as joint tenants. Semble, had the gift been made contingent on their attaining twenty-one, they would have taken as tenants in common. *Buck* v. *Barwise*, 6 N. R. 375. *S. C.*, nom. *Ruck* v. *Barwise*, 2 Dr. & Sm. 510; 35 L. J., Ch. 16; 12 L. T. 841; 13 W. R. 1016.

Issue Substituted for Parents who took as Tenants in Common.]—Upon a gift of part of the residue to testator's wife for life, and after amongst such children as should be then living, equally to be divided, and the issue of such as should be dead to take their parent's share:—Held, that the latter took as between themselves as joint tenants, and not as tenants in common. *Bridge* v. *Yates*, 12 Sim. 645.

G. by will gave the residue of his real and personal estate to trustees, upon trust to pay the interest and dividends to L. for life; and as to the principal, from and after her decease, he gave that as follows: "in trust for all the children of L. who shall be living at her decease, and the issue of such of them as shall be then dead leaving issue, as tenants in common; but the issue, if more than one, of any deceased child shall take as a class, as if by representation, and not as individuals." One of the daughters of L. married P., and died in the lifetime of L., leaving two children, W. and J. J. died in the lifetime of L., an infant and unmarried:—Held, that upon the death of L. the fund became divisible between the surviving children of L. and the issue of deceased children, according to the stirpes; but that the issue of deceased children, in the shares they took, took as joint tenants. *Penny* v. *Clarke*, 1 De G. F. & J. 424; 29 L. J., Ch. 370; 6 Jur. (N.S.) 307; 8 W. R. 286. And see *S. C.*, Johns. 619.

Where a testator gave a reversionary interest in a fund to his three sons, or such of them as should be then living, or the issue of such of them as should be then dead, share and share alike, the issue of each son taking only the share which he would have been entitled to if then living:—Held, that the issue took in joint tenancy. *Coe* v. *Bigg*, 1 N. R. 536.

Where a testator gave property, after the death of a previous tenant for life, to several of his nieces for life, and after their deaths to their children respectively; "but in case all the children of his nieces or of any or either of them should die (either in their respective lifetimes or after their decease) under age or without having issue, then upon trust that his trustees should pay the same unto and equally amongst all and every his nephews and nieces, and the issue of such of them as should be then dead":—Held, first, that the issue of the testator's deceased nephews and nieces to take under this last gift were to be restricted to their children; held, secondly, that the gift to such issue was an original gift, and not one by substitution; held, thirdly, that, whether the gift were original or by substitution, it was not necessary for such issue to survive the tenant for life in order to take under it; held, fourthly, that, the gift being original, it was not necessary for such issue to survive their own parents in order to take under it, but that it would have been necessary for them to do so had the gift been one by substitution; held, fifthly, that such issue took as joint tenants. *Lamphier* v. *Buck*, 6 N. R. 196; 2 Dr. & Sm. 484; 34 L. J., Ch. 650; 11 Jur. (N.S.) 837; 12 L. T. 660; 13 W. R. 767.

A testator gave the residue of his real and personal estate to his nephews and nieces living at his death; but if any should be then dead, their offspring was to be considered to stand in the place of their parents, and to take the same benefit:—Held, that, though the nephews and nieces took as tenants in common, their offspring took as joint tenants. *Leak* v. *M'Dowall*, 32 Beav. 28.

In a gift among children and issue of children, but so that children should take in substitution for parents, the children and issue take as tenants in common, but children substituted for the parents take as joint tenants inter se. *Heasman* v. *Pearse*, 40 L. J., Ch. 258; L. R. 11 Eq. 522.

A father gave property to the children of A. living at a prescribed period, and the issue of deceased children, so as such issue should have no greater share than their parents would have taken if living, and he afterwards provided that if any one or more of such issue should be then dead, having left lawful issue, then the issue of such issue as should be so dead should receive the share which their, his, or her parent would have taken if living:—

Held, that the effect was to create a joint tenancy amongst the members of the various families, subject to this, that if any one died leaving issue it must be considered for the purpose of determining the share which such issue were to take as if he had survived the period of distribution, but had severed the joint tenancy at the date of his death. *S. C.* 41 L. J., Ch. 705; L. R. 7 Ch. 275; 26 L. T. 299; 20 W. R. 271.

By a codicil to his will A. desired his son to insure his life for 5,000*l.*, and to bequeath that sum to his wife for life, and at her death, or at the death of the son, to bequeath the 5,000*l.* to A.'s daughters or their "descendants" in equal proportions:—Held, that although the daughters were to take as tenants in common, the words "in equal proportions" did not apply as between the descendants themselves, such descendants taking as joint tenants. *Flower, In re, Matheson* v. *Goodwyn*, 62 L. T. 216.

Gift among all and every the testator's "brothers and sisters who should be then living, and the children of such of them as should be then dead, such children to take their respective parent's share only":—Held, that the children of the testator's brothers and sisters took their parent's share as tenants in common inter se. *Shepherdson* v. *Dale*, 12 Jur. (N.S.) 156; 13 L. T. 699. And see *Lyon* v. *Coward*, 15 Sim. 287; 15 L. J., Ch. 460; 10 Jur. 486.

A testator devised real estate to trustees in fee, upon certain trusts during the lives of his sons and daughters and the survivors and survivor of them, and from and after the death of the survivor of his sons and daughters, or during the lives or life of all or any, with their concurrence, upon trust to sell the property, and to stand possessed of the proceeds "upon trust for all and every my said sons and daughters who shall be then living and the issue of any then dead (such issue standing in loco parentis) share and share alike":—Held, that the sons and daughters and the issue of a deceased son or daughter (as representing their deceased parent) took as tenants in common, but that, there not being words of severance among the issue of a deceased son or daughter, such issue took inter se as joint tenants. *Shepherdson* v. *Dale* (supra) disapproved. *Yates, In re, Bostock* v. *D'Eyncourt*, [1891] 3 Ch. 53; 64 L. T. 819; 39 W. R. 573.

A testatrix appointed property to trustees to sell all the property except certain real estate, and to hold the proceeds to pay the legacies thereinafter given, and to pay an annuity to A. for life, and subject thereto for B. and her children, and after B.'s death without children to sell the real estate not before sold, and out of the proceeds to pay A., his executors, administrators, and assigns, a legacy in lieu of the annuity, and to hold the residue for all the children of C., and the issue of such as should be then dead, equally to be divided between such children and issue, share and share alike, but so that such issue should take such share only as their respective parents would if living have been entitled to. A. died in the lifetime of B., who had no children:—Held, that in the events which had happened the legacy to A. was payable, that it was a demonstrative legacy, and that the issue of the deceased children of C. took as tenants in common. *Hodges* v. *Grant*, 36 L. J., Ch. 935; L. R. 4 Eq. 140; 15 W. R. 607.

The testator gave the interest in a fund to his niece A. as long as she continued unmarried, but he declared that if she married or died unmarried the fund was "then to be divided between the brothers and sisters of the said A. and their children." A. had six brothers and sisters living at the testator's death. A. died unmarried, her sister B. having predeceased her. B. left two children, one of whom predeceased A.:—Held, that the two children of B. took vested interests at her death in one-sixth of the fund as tenants in common, subject to A.'s life interest. *Crosthwaite* v. *Dean*, 40 L. T. 837.

M. by her will gave the whole of her property to A. for her life, remainder as to one-fourth to L. or her issue, as to one-fourth to the issue of C., deceased, as to one-fourth to G. or his issue, and as to the other fourth to H. or her issue. The question having been raised as to the period at which the class of issue entitled under the gift was to be ascertained:—Held, that all issue coming into existence before the death of the tenant for life were included in the class, and that they took as joint tenants. *Jones, In re, Hume* v. *Lloyd*, 47 L. J., Ch. 775; 26 W. R. 828.

A testatrix devised and bequeathed all her real and personal estate to trustees upon trust to pay a competent portion of the annual proceeds thereof for the maintenance, education, and support of such of her children as should be under the age of twenty-one years until the youngest of them should attain that age, and as to the residue thereof "upon trust for all or such of my children as shall be then living, and the issue of such of my said children as may be dead leaving issue, and their respective heirs, executors, and administrators, in equal shares as tenants in common, but the issue of any deceased child shall take only as a class, as if by representation of their parents, and not as individuals, for and during the natural life of the last survivor of my said seven children," with subsequent trusts after the death of such last survivor:—Held, that the children of a deceased child of the testatrix were entitled to their parent's share as tenants in common, and not as joint tenants. *Quirk, In re, Quirk* v. *Quirk*, 61 L. T. 364; 37 W. R. 796.

Words of Survivorship between Legatees.]—Words "equally among them," coupled with subsequent words "and to the survivors and survivor of them," create a joint tenancy. *Oakley* v. *Young*, 3 Eq. Abr. 536.

Devise to two equally to be divided, and to the survivor of them; they are joint tenants. *Clerk* v. *Clerk*, 2 Vern. 223.

Devise of the residue of personal estate to the wife for life, if she die without issue living at her death to testator's two brothers, or if one of them shall be dead to the survivor. They both died in the life of the wife; the legacy was vested in both as joint tenants, and therefore goes to the representatives of the survivor. *Barnes* v. *Allen*, 1 Bro. C. C. 181.

Devise of lands to younger children equally as tenants in common, with benefit of survivorship:—Held, to refer to a survivorship spoken of in the former part of the will, and therefore to be a tenancy in common, with a limitation to the survivors after the death of any before twenty-one without issue. *Hawes* v. *Hawes*, 3 Atk. 524; 1 Ves. Sen. 13; 1 Wils. C. B. 165.

Words of survivorship in a will shall not defeat the effect of words importing a tenancy in common, but shall be referred to some time, as

the death of the tenant for life, or even to the death of the testator, though a construction not to be adopted if there can be any other. *Russell* v. *Long*, 4 Ves. 551.

J., being entitled to a debt of 20,000*l.* due from the Crown, devised the same to six of his relations, equally to be divided between them, share and share alike, and if either of them die to the survivor or survivors of them. All the legatees survived the testator, but before the debt was recovered one of them died:—Held, that the legatees were joint tenants, and that the representative of the legatee dying, was not entitled to any part of this legacy. *Bindon (Earl)* v. *Suffolk (Earl)*, 4 Bro. P. C. 574. Reversing 1 P. Wms. 96.

Legacy to A. for life, and after her decease to her children, if she should have none to B. and C., share and share alike, or to the survivor. A. vested interest in B. and C., upon the death of the testator, as tenants in common, although she survived them, dying without children. *Perry* v. *Woods*, 3 Ves. 204.

Bequest of an annuity to the children of A., in equal shares and proportions, to continue during their lives, and the life of the survivor of them. The children take as tenants in common, and there is no survivorship between them by implication; therefore the share of one dying goes to its representative. *Jones* v. *Randall*, 1 J. & W. 100; 20 R. R. 237. See also *Armstrong* v. *Eldridge*, 3 Bro. C. C. 215.

A testator by his will gives to his five daughters a sum of money in gross, the interest to be paid to them in equal parts or shares during their lives, the principal to be placed in the funds, in trust for them, or the survivor or survivors of them; the principal, after their deaths, in equal parts to the surviving children as they arrive at the age of twenty-one. One of the daughters dies:—Held, that the surviving daughters take the whole for their lives, as tenants in common. *Minton* v. *Cave*, 10 Jur. 86.

A testator devised a farm to his two sons, with permission to dispose of it to certain persons, if they thought proper; but if it should not be sold, he bequeathed it, after the decease of either of his sons, to the survivor, and directed that after the death of both it should be sold, and the money divided equally between the children of his sons:—Held, that the sons were only joint tenants for life, with a power of sale; that they could make a good title, and give discharges for the purchase-money; that they were joint tenants for life of the purchase-money: and that, upon the death of the survivor, it would devolve to their children. *Breedon* v. *Breedon*, 1 Russ. & M. 413; 8 L. J. (O.S.) Ch. 104.

A testator, by will in 1819, devised freehold and copyhold estates to trustees, after the death of all his three children except one, in case there should be no issue of such deceased children, or being such, they should all die, to pay the rents to such one only child for life, and after the death of such surviving child, in the event aforesaid, leaving lawful issue, then to pay and divide the rents unto and among the children of such surviving child so dying, if more than one; and in case there should be but one child of such surviving child living at his or her death, or in case there should be more than one, and they should all except one depart this life, then, so soon as such event should happen, absolutely to convey the estates in fee to such only or surviving child of the survivor of his children so dying on his or her attaining twenty-one, and in the meantime to apply the rents for his or her benefit:—Held, that this was a gift to the surviving children of the testator's surviving child for life in equal shares as tenants in common, with remainder to the survivor of those children in fee; and that the remainder in fee was void for remoteness, and passed as undisposed of to the heir-at-law. *Garland* v. *Brown*, 10 L. T. 292.

By a will, made before 1838, a testator devised unto his seven children, "and their heirs for ever, the fee simple" of real estate; and if either of his children should die leaving children, the share of him or her so dying to go to such children; but if any of his children should die and leave no child, the share of him or her dying to go to his (the testator's) surviving children and their heirs for ever. All the seven children survived the testator:—Held, that the word "die" must be construed to mean die in the lifetime of the testator, and therefore that the seven children took as tenants in common in fee. *Apsey* v. *Apsey*, 36 L. T. 941.

W. by his will, subject to a life estate, gave all his real and personal property to seven children, equally to be divided among the survivors or survivor of them; and if any of them should die leaving issue, he gave the share of such child so dying equally to be divided among such issue:—Held, that the children took as tenants in common in fee simple. *Bird* v. *Swales*, 2 Jur. (N.S.) 273; 4 W. R. 227.

Bequest to A. and B., with benefit of survivorship as to the moiety of B. at B.'s death to A., her executors, administrators, and assigns:—Held, that A. and B. took as tenants in common, and A. having died in the testator's life, that her share lapsed, and that B. took a life interest only in the other moiety, which fell into the residue on his death. *Patterson* v. *Rowland*, 28 Beav. 347.

A gift to A. and B. (in terms creating a joint tenancy), followed by a proviso for survivorships to B. if A. died without children, creates a tenancy in common. *Ryves* v. *Ryves*, 40 L. J., Ch. 252; L. R. 11 Eq. 539.

Where a testator gives residuary property to trustees upon trust to pay the interest to one for life, and after her decease divide the same among her children and their issue, such children and their issue to be entitled as amongst themselves to the benefit of survivorship and accruer of surviving shares, all the children coming into esse during the lifetime of their mother are entitled as tenants in common, with benefit of survivorship. *Law* v. *Thorp*, 27 L. J., Ch. 649; 4 Jur. (N.S.) 447; 6 W. R. 480.

Testatrix gave an annuity of 50*l.* to her son-in-law for his life, provided he remained unmarried, but if he should marry the annuity to cease; and after his death or second marriage, whichever should first happen, she gave 1,000*l.* to be equally divided between her brother and sisters; and if they should not all be then living, she gave the share of him, her, or them so dying to be equally divided between them, her surviving brother and sisters. The testatrix's brother and sisters all died in her son-in-law's lifetime, and he died unmarried:—Held, that the brother and sisters took a vested interest in the 1,000*l.* as tenants in common. *Peters* v. *Dipple*, 12 Sim. 101.

A testator gives to his wife all his household goods, &c., absolutely, and the dividends of a

sum of stock to be paid half-yearly, subject to a defeasance in case of her marrying in a particular manner, in which event the capital was to sink into the residuary estate. Then followed specific gifts of further portions of his stock to his daughter A., to be paid at twenty-one, for her separate use; and in case she died under twenty-one leaving children, to such children equally at twenty-one; but in case she died under twenty-one without children, such sum to sink into the residue. Then followed specific gifts of other portions of his stock to his daughter A. and his other children for life, and after to their children equally at twenty-one, with power to make advances for maintenance to his daughters for their separate use, and in default of children to sink into the residue, with a provision that, as to such of his children as should be under age at his death, the dividends should be applied for their maintenance; and whereas he gave the capital to his daughters, he gave the dividends only to his two sons, and there was a proviso for forfeiture in case of any attempt at assignment, charge, or anticipation, and no deduction to be made from the gifts to his wife in case of a deficiency. There was then a gift to trustees of leaseholds and personalty, in trust to sell, and pay debts and funeral and testamentary expenses, and to invest the residue after paying debts and legacies, and to pay the dividends to his wife for life, or until her second marriage as aforesaid; and after her decease or second marriage, to pay the dividends of all the residuary estates unto and among his seven children (by name) during their several and respective lives, to be divided in the proportion which the dividends and stock specifically bequeathed bore to each other; and on the decease of his said children, upon trust to pay the principal or capital among the children of his aforesaid seven children share and share alike at twenty-one; but in case any of his said grandchildren should happen to die without children surviving, or there being such, all should die under twenty-one without issue, the share of his said grandchildren so dying to go to the others, share and share alike, with trusts for maintenance, with a gift over in the event of the death of all his children and grandchildren without issue. There was then a proviso that this last gift to his wife and children should be subject to the aforesaid proviso for forfeiture, and the shares so forfeited to go to the others of the children. The testator made two codicils, by which he revoked the specific legacies to his two sons, and gave them smaller sums in the same terms as by the will directed, as also to his daughter E. The testator left his widow and children surviving, and, on the death of his two sons, one having two sons, questions arose as to the effect of the will, and on bill filed for the purpose of putting a construction upon it:—Held, that there was a gift to the seven children as tenants in common in unequal shares during their respective lives, the word "deceases" shewing that intention, and that as each died a certain portion should become subject to distribution, and be let loose to go to all the grandchildren who had then attained twenty-one, and so on as each child died; that the codicils only affected the share of the sons, and not of their children, to whom with the other grandchildren all the undisposed-of residue would go, and there was no intestacy as to corpus or dividends. *Alt* v. *Gregory*, 3 W. R. 630.

Held, on appeal, that on the true construction of the will the surviving children of the testator for the time being were entitled to the whole income of the residue till the death of the last surviving child. *S. C.*, 8 De G. M. & G. 221; 2 Jur. (N.S.) 577; 4 W. R. 436.

See also *Cookson* v. *Bingham*, *Barker* v. *Gyles*, and *Haddelsey* v. *Adams*, supra, also *Taafe* v. *Conmee*, 10 H. L. Cas. 64; 8 Jur. (N.S.) 919; 6 L. T. 666, *and cases* sub tit. SURVIVORS, ante, col. 937, *and* ANNUITY.

Effect of Words "Equal Shares" where Gift over on Death of Survivor.]—Testator gave a residue to trustees to pay the interest to four persons for life, and after decease of the survivor then to divide the principal among their children; two died: the interest shall be paid to the other two. Though the words "share and share alike" in a will generally create a tenancy in common, they cannot do so where there is an express joint tenancy. *Armstrong* v. *Eldridge*, 3 Bro. C. C. 215.

Gift of the income of property to A., B., and C. for their lives and the lives of the survivors and survivor of them during their and her lives or life; and from and after the death of the survivor of them, then in trust for their children:—Held, that A., B., and C. took as joint tenants. *Pearson* v. *Cranswick*, 31 Beav. 624; 9 Jur. (N.S.) 397; 11 W. R. 229. Affirmed 9 L. T. 275.—L.JJ.

A testatrix gave 50*l.* long annuities to her sister M. P., and her said sister's husband, for their joint lives, and after their decease to her nephew. The husband, having survived the sister, was held to be entitled to the long annuities. *Townley* v. *Bolton*, 1 Myl. & K. 148; 2 L. J., Ch. 25.

A testatrix gave unto A. and B. a sum in the long annuities, to be equally divided during their lives, "after which" she gave the said sum to C.:—Held, that the survivor of A. and B. took for life. *M'Dermott* v. *Wallace*, 5 Beav. 142.

A gift upon trust to pay the income to wife for life, and after her death to pay the interest to the testator's three sons "for their natural lives, in equal shares," and after their decease he gave one-third of the fund to the children of each of them in equal shares and proportions, to be paid when and as they should respectively attain the age of twenty-one years, and directed that the interest be paid to the children until they should attain twenty-one; and he gave the residue to the same three sons:—Held, that the life interest was, notwithstanding the words "in equal shares," a joint tenancy; and one of the three sons having survived, took the whole income; and that, on the death of the survivor, the capital was divisible among the children of the sons in three shares per stirpes, and not per capita. *Begley* v. *Cook*, 3 Drew. 662; 5 W. R. 66.

A testator gave to A. an annuity of 50*l.* per annum for her life, and after her decease to the children she might have born in wedlock, equally to be divided between them during their lives, and after the decease of the survivor to go to his nephew and his two nieces, equally between them. A. having died without issue:—Held, that the gift to the nephew and nieces was not void for remoteness, and that they took the capital from whence the annuity proceeded absolutely, in equal shares, as tenants in common. *Evans* v. *Walker*, 3 Ch. D. 211; 25 W. R. 7.

Testator gave to C. B. and J. T. all his houses at W., "each to have one-half, share and share alike, and what debts he should owe at his death, both to pay a like share of the same; all the above premises he gave, devised, and bequeathed to C. B. and J. T., each to enjoy one-half during their lives, and at their decease the said premises to go to their children." J. T. died without issue and intestate, leaving C. B. his heiress-at-law, and also heiress-at-law of the testator:—Held, that C. B. and J. T. each took a life estate in the property, with remainders to their children in fee as joint tenants; and that in the events which had happened J. T.'s share went to C. B. in fee, and C. B.'s share to C. B.'s children in fee as joint tenants. *Laverick's Estate, In re*, 18 Jur. 304; 2 W. R. 113.

W. bequeaths the residue of his real and personal estate (directed to be converted) in trust for M. F. for life, and then upon trust to pay the interest, &c., unto and between his two grandchildren E. G. and G. G. during their respective natural lives in equal shares, and after their decease unto and between all and every their child and children in equal shares; and if no child, to the testator's legal personal representatives. There being several children, four of whom died before the death of the survivor of the testator's grandchildren, upon the question what was the period of division:—Held, that the children took equally vested interests on the death of the tenant for life. *Pearce* v. *Edmeades*, 3 Y. & C. 246; 3 Jur. 245.

Accruing Shares where Original Shares held in Common.]—A testator gave his real and personal estate to A., B., and C., as tenants in common. By a codicil he declared that if any of the devisees should die in his lifetime, his estate and interest should "go to the survivors or survivor of them, and the heirs, executors, administrators, and assigns of such survivor." A. died in the testator's lifetime:—Held, that B. and C. took as joint tenants the share intended for A. *Leigh* v. *Mosley*, 14 Beav. 609.

A testator gave all the property he possessed in the parish of K., consisting of houses, lands, debts, ready money, and other effects which he then possessed or might possess at the time of his decease, and also all his funds in the Bank of England, or that of the United States of America, to his reputed children, Anthony, James, and Richard, and their heirs, share and share alike, as soon as they should have attained twenty-one, it being his will that if one of them should die before he attained that age his share should vest in and belong to the survivors. James died under twenty-one, leaving Anthony and Richard surviving:—Held, that the share of the testator's property which James would have been entitled to if he had attained twenty-one vested in Anthony and Richard as joint tenants. *Jones* v. *Hall*, 16 Sim. 500.

Gift of Residue following Gift in Common to same Persons.]—A testator devised certain properties to his sons A., B., C., D., and E. respectively as tenants in common, and appointed them residuary legatees:—Held, that they took the residue as joint tenants. *Wallis' Trusts, In re*, 23 L. R., Ir. 460.

Effect of Gift by Reference.]—O. devised all his real estate, charged with an annuity and bequests, to his three sons, I., W., and C., "as tenants in common" in fee. I. gave his property to his two brothers, "absolutely for their uses, under the directions of the will of my late father." C. devised all his estates to E.; when I. made his will, all the moneys charged on the estates by the will of O. had not been paid:—Held, that the will of I., the son, created a joint tenancy in the property to his father thereby devised, and that the plaintiff took the whole of his share. *Oliver* v. *White*, 4 De G. F. & J. 17; 31 L. J., Ch. 689; 6 L. T. 198; 10 W. R. 276.

h. Amounts, Shares, and Proportions.

Amounts where doubtful.]—Testator bequeathed to his grandchildren, naming them, the sum of 1,000*l.*, payable to each of them on their attaining twenty-one, and in case of the death of either of them before that period, the legacy to be divided amongst the survivors:—Held, that the grandchildren were entitled to one sum only of 1,000*l.*, and not each of them to a separate legacy to that amount. *Stewart* v. *Garnett*, 3 Sim. 398.

Where there is a proviso in a will, that in case what is left to one daughter shall exceed in value what is given to another, the former shall refund pro tanto, what is given to either of the daughters' children is to be looked upon as given to the daughter. *Thomas* v. *Bennet*, 2 P. Wms. 343.

Testator, possessed of 5,000*l.* 3 per cent. consols, bequeathed 2,000*l.* thereof to trustees in trust as to 1,000*l.* for G., and as to 2,000*l.* for B.:—Held, that testator meant to give trustees 3,000*l.* in trust; bequest to them being mentioned only once, and the legacy of the 2,000*l.* to B. being mentioned twice. *Alfred* v. *Green*, 5 Madd. 92.

A. bequeathed property amounting to 1,279*l.* to B. Subsequently B., after referring to the will of A., and that he was desirous of making the following legacies to A.'s relations, bequeathed to them legacies amounting to 2,800*l.*; and proceeded: "But if the property I became entitled to under the will of A. should fall short and be deficient in paying such legacies, my desire is, that 500*l.* out of any other part of my personal estate shall be paid and applied for that purpose":—Held, that the legacies, though nominally amounting to 2,800*l.*, were limited to 1,279*l.* plus 500*l.*, and that they must therefore abate. *Read* v. *Strangways*, 14 Beav. 139; 20 L. J., Ch. 487.

Shares and Proportions.]—A testatrix bequeathed as follows: "As to all the rest of my personal estate, I give the same to A., B., C., D., &c., upon trust, to pay one-third to P. S. T. for her own proper use; as to the remaining two-thirds, in trust to invest the same and receive the dividends, and pay the same for the use of F. I. T. and C. H. T. for and during the term of their natural lives; and after the decease of either of them (the said F. I. T. and C. H. T.), then in trust to pay one-fourth part of the trust fund unto P. S. T. to and for her own use and benefit, and to pay the dividends and profits of one other fourth part of the said trust fund unto the survivor of them (the said F. I. T. and C. H. T.), to and for his use, for and during the term of his natural life; and from and after the decease of the survivor of them (the said F. I. T. and C. H. T.), in trust, to pay, assign, and transfer, and set over the said trust fund, together with all interest that shall be due thereon, unto P. S. T., to and

for her own proper use and benefit." P. S. T. died in 1821, F. I. T. in 1831, and C. H. T. in 1837:—Held, that C. H. T. was entitled, on the death of his brother F. I. T., to three-fourths of the two-thirds of the income of the trust-fund. *Wentworth* v. *Williams*, 11 L. J., Ch. 107.

By his will the testator bequeathed his residue between Ann Sarah Parker and ten other persons (naming them). Two of the legatees having died, the testator, by a codicil, gave the residue between eight persons, naming them, and Ann Sarah Parker, G. F., and Ann Parker. It appeared that Ann Sarah Parker and Ann Parker were the same persons:—Held, that she was entitled to one-tenth, and not to two-elevenths of the residue. *Read* v. *Strangeways*, 12 Beav. 323.

Under words in will "to pay to each of my younger children (three daughters), as and for their respective portions, a sum equal to one-fourth of what shall remain to my (eldest) son William, payable to each of my said daughters respectively, at her or their respective ages of twenty-one, or marriage," &c.:—Held, that all daughters were only entitled to a sum equal to a fourth of what remained to the eldest son, or each of them to one-seventh (such appearing to be testator's intent), and that the time of testator's death was that at which the amount of his property and proportions of the shares were to be computed. *Colclough* v. *Gaven*, 3 Dow, 267.

Testator directed his trustees to invest 1,400*l.* upon trust for his wife for life, and 800*l.* upon trust for his daughter for her life; and he directed the income of the 1,400*l.* to be paid to his daughter for life if she survived his wife. He then directed his trustees, after the decease of his daughter, to pay and divide the two sums of 1,400*l.* and 800*l.* between his daughter's children; but if she died unmarried, or, being married, died without issue, then he gave the two sums, as to the sum of 800*l.*, equally between the brothers and sisters of his wife, and the remainder of the sums equally between his own brothers and sisters. The testator's daughter having survived the testator, and having died unmarried in the lifetime of the testator's widow, the brothers and sisters of the testator's widow claimed the whole fund in which the 800*l.* had been invested:—Held, that the same was divisible in the proportion of eight to fourteen between the brothers and sisters of the testator's widow and the brothers and sisters of the testator. *Hewitt* v. *George*, 18 Beav. 522.

A testator devised his Upton Park estate to his five daughters and his grandson, as tenants in common for their respective lives, with remainders over. By a codicil he devised to his son Alfred and his heirs "the like share he had given to his five daughters in the Upton Park property, in every respect whatever":—Held, that Alfred took one-seventh in fee. *Bedborough* v. *Bedborough*, 34 Beav. 284.

A testator bequeathed 2,400*l.*, part of his preferential stock in a railway company, upon trust for the benefit of a niece; 1,000*l.*, other part of his preferential stock, upon like trusts for the benefit of another niece; and the rest of his preferential stock upon like trusts for the benefit of a third niece. The preferential stock was composed of various kinds of stock of different values:—Held, that the whole of the stock must be apportioned rateably amongst the three nieces. *Shey* v. *Barber*, 16 W. R. 842.

And see PAYMENT, post, col. 1697, *and cases* ante, col. 834.

i. Copyholds.

Formalities of Will.]—Copyhold surrendered to the use of a will shall pass by a will attested by one or two witnesses only. *Wagstaffe* v. *Wagstaffe*, 2 P. Wms. 258; *Appleyard* v. *Wood*, Select. Cas. Ch. 42.

Though, where a copyhold is surrendered to the use of a will, there need not be three witnesses to such will, because the copyhold passes by surrender and not by the will, yet a trust, or equity of redemption of a copyhold, cannot pass by a will unless attested by three witnesses. *Id.* 261.

A devise of a copyhold, surrendered, &c. signed only by the testator, is sufficient. *Fenoulet* v. *Passavant*, 2 Ken. Ch. 109.

Where the legal estate is in trustees, so that the cestui que trust cannot surrender it, it will pass by his will, though unattested; for equitas sequitur legem. *Tuffnell* v. *Page*, 2 Atk. 37; Barnard. 91. *Carr* v. *Ellison*, 3 Atk. 75.

So also copyhold estate surrendered to use of will. *S. C.*, Dick. 76.

J. surrendered to the use of his will, to be published in the presence of three or more credible witnesses. He made his will and devised the copyholds, but the will not being attested by any witness:—Held, the copyholds did not pass. *Godwin* v. *Kilsha*, Ambl. 684.

Testator devised to a charity his copyhold lands, which he had previously surrendered to his will. His will consisted of eleven sheets, two of which he signed in extremis, and then died. There were no witnesses; yet held a good appointment under 43 Eliz. c. 4. *Att.-Gen.* v. *Sawtell*, 2 Atk. 497.

Copyhold lands are not devisable by will, but the devisee may come and be admitted, as though his name were inserted in the surrender. Devise of customary freeholds, where there is no custom to surrender to use of will, must be according to the Statute of Frauds. *Hussey* v. *Grills*, Ambl. 300, 301.

By the custom of the manor of Shap, the legal interest in land of customary tenure, parcel of the manor, is not devisable, but is transferred by a deed of bargain and sale, having the effect of a surrender, in which the operating words are "bargain, sale, and surrender," and on the presentment or production of which admittance is granted to the alienee; but an equitable interest in such customary lands is capable of being passed by devise, without regard to the custom. A tenant of this manor, who was seised of customary lands, conveyed them, by a deed of bargain, sale, and surrender, to a trustee, upon trust, for such person as the tenant, by any deed, instrument in writing, or by his last will, or any codicil thereto, or any instrument in the nature of a last will or codicil to be by him legally executed, should appoint or devise the same; and under his conveyance the trustee was admitted:—Held, that the equitable interest in the lands would not pass by an unattested codicil of the tenant. *Willan* v. *Lancaster*, 3 Russ. 108; 27 R. R. 25.

C., by his will, devised all his freehold and copyhold estates to his two daughters, A. and M., and all other daughters that he might thereafter have, as tenants in common in fee. He had afterwards another daughter, L.: he then gave directions for another will, by which he gave all his real estates to his two eldest daughters, and

a sum of 15,000*l.* to his daughter L. The attorney took the minutes of this second will in writing, but before it was prepared the testator died; these minutes were proved in the Spiritual Court as a testamentary paper :—Held, this paper being proved in the Spiritual Court was insufficient to pass the copyhold estate. *Carey* v. *Askew*, 2 Bro. C. C. 58; 1 Cox, 241. *And see* 8 Ves. 492, 498, 499.

Surrender, where Necessary.]—Where the legal estate is in trustees, copyhold lands will pass under the will of cestui que trust, without surrender before the statute. *Gibson* v. *Rogers*, Ambl. 94; 1 Ves. Sen. 485; 4 Ves. 288, n.

Devise of copyhold by mortgagor or cestui que trust would be good without surrender of copyhold. *Gibson* v. *Styles*, 9 Mod. 267.

An equity of redemption in copyholds passes by will without surrender. *Macnamara* v. *Jones*, 1 Bro. C. C. 481.

The trust of a copyhold not necessary to be surrendered. *Macey* v. *Shurmer*, 1 Atk. 390.

Devise of copyhold, good without mention of surrender. *Manwood's Case*, Cary, 25.

Copyhold estates surrendered to the use of mortgagees, but they had not been admitted; the mortgagor devising them must surrender to the use of his will. *Kenebel* v. *Scrafton*, 8 Ves. 30.

Whatever words there may be in a will relative to copyhold lands, they can have no effect if there were no surrender; for nothing can pass a legal estate, but what will pass it in law. *Trodd* v. *Downs*, 2 Atk. 304; 9 Mod. 292.

Testator by his will taking notice that he had not surrendered copyhold estates which he devised, but directing his son to convey them, and devising to the son other estates, though the copyholds are not devisable by custom, yet the surrenders decreed to be made. *Wardell* v. *Wardell*, 3 Bro. C. C. 116.

A will so called of copyholds does not operate strictly as a devise, but rather as a designation of the person to take under the previous surrender, analogous in some respects to the appointment of a use under a power created by deed. Whether in the absence of a special custom it is necessary to surrender a reversion or remainder in copyhold property to the use of a will, quære. A testator being entitled to a reversion in fee in copyhold property, which he had not surrendered to the use of his will, and being also entitled to certain freeholds in fee-simple in possession, made a will in 1804, by which he affected to devise these copyholds, and all other his freehold, leasehold, and copyhold estates, to his wife for life, with remainder to his three younger children, Thomas, John, and Eliza. In 1807 he made another will, commencing with the words, "This is the last will and testament of me," &c.; and thereby after reciting, that on his death his eldest son, Edward, would become entitled to all his freehold estates, the testator gave all his real and personal estates to his wife for life, and after her death all his "property" and effects to all his children, except Edward, equally, share and share alike. The testator died in 1807, leaving his said four children, and also two others born since the date of the former will. In 1851 the reversion of the copyholds fell into possession :—Held, that the court would, if necessary, supply a surrender in favour of the objects to whom the first will expressly devised the copyholds :—Held, also, that as there was freehold property upon which the general devise in the second will could operate, there was no ground for deciding that it revoked the intended devise of the copyholds by the former will :—Held, further, that it was impossible to consider the intention to devise the copyholds expressed in the first will to be a reason for supplying a surrender to the uses of the testator's will generally, and thus to make the general devise in the second will operate to pass the copyholds, by revoking the former will, except so far as it expressed that intention, because the intention expressed by the first will was to give all the copyholds to three only of the five objects to whom the general devise in the second will was made, and therefore that intention could not apply to the second will :—Held, further, that though the words of the second will did not sufficiently express an intention to pass the copyholds to enable the court to supply a surrender to the uses of that will, yet if a surrender were supplied generally to the use of the testator's will, the general devise in the second will would pass the surrendered copyholds. *Freeman* v. *Freeman*, Kay, 479; 2 Eq. R. 522. Affirmed 23 L. J., Ch. 838; 2 W. R. 658—L.JJ.

—— **Effect of.**]—Copyhold estates pass by the surrender, not by the will, which operates as a declaration of uses. *Att.-Gen.* v. *Vigor*, 8 Ves. 286.

Surrender of copyhold to such uses as he shall by will appoint, does not give effect to a will made before. *Warde* v. *Warde*, Ambl. 299.

A testator, being absolute owner of some copyholds of which he had been admitted tenant, and having the legal fee of other copyholds holden of the same manor to which he had not been admitted, but subject to trusts under which he was in equity only tenant for life, with remainder to his son in tail, remainder to himself in fee, surrendered, to the use of his will, all his copyholds holden of that manor, or which he was seised of, or entitled to, in possession, reversion, remainder, or expectancy; he was subsequently admitted tenant of all the copyholds which were subject to the trusts, except the moiety of one tenement, and afterwards made a will, devising all his hereditaments, freehold and copyhold, in possession, reversion, remainder, or expectancy, to trustees and their heirs, upon trust for his son for life, with remainder over :—Held, that the surrender and the will passed both the legal and beneficial interest in all the copyholds upon which the surrender operated, including those of which the devisor was in equity only tenant for life, and that the son was bound to elect whether he would give effect to this general devise, or would insist upon the benefit of the equitable estate tail, which he took under the old trusts to which some of the copyholds were subject. *Abdy* v. *Gordon*, 3 Russ. 278.

In two manors in Durham there is no custom for surrendering to the uses of the will, but the tenant divests himself of the legal estate, and by surrender vests it in a trustee, who subscribes a memorandum or defeasance that the surrender is to the uses of the surrenderor's will. In this case the father and maternal grandfather of the testator, R. N., being both copyholders, had respectively caused their copyhold tenements to be surrendered to the other, who had subscribed the usual defeasance. The legal estate in both descended to the testator. But with regard to

the tenements in the manor of Houghton, they were devised by the father of the testator to trustees, to the intent that his widow might receive an annuity thereout, and subject thereto to the testator R. N., in fee. The widow being alive at the time the testator R. N. made his will, and died, it was held that the copyholds in the manor of Houghton passed by his will. With respect to the tenements which were in the other manor, the testator's maternal grandfather, who had the beneficial interest in them, devised them unto trustees, upon trust for the testator. R. N.:—Held, that there being nothing to separate the legal estate and equitable interest, the equitable interest had merged in the legal estate in the testator, and could not be devised by him according to the custom of the manor:—Held, also, that his widow was entitled to free bench, and the heir, subject thereto, to the inheritance, but they, taking benefits under the will, were bound to elect. *Nicholson* v. *Nicholson*, Tam. 319.

A., seised of freehold estates, and of customary freeholds, which were not devisable, made a voluntary surrender of the latter to B. in fee, in trust, as B. admitted, for A., and after his death for the purposes of his will; but B. executed no declaration of trust. A. made a general devise of all his real estates, and after A.'s death B. was admitted:—Held, that he was a trustee for the devisees, and not for A.'s customary heir. *Wilson* v. *Dent*, 3 Sim. 385.

Effect of Devise before Admittance.]—Devisee of a copyhold, who has not been admitted, cannot devise the same. *Wainewright* v. *Elwell*, 1 Madd. 627.

When a testator, at the making of his will, has the legal seisin of a copyhold, and devises it, and the devisee is not admitted, nothing passes by the will of the devisee, and an admittance of the devisee subsequent to his will will not alter the case. But where the testator has only an equitable interest in a copyhold and devises it, the equitable interest will pass to the devisee, and the devisee, though never admitted, may devise such equitable interest. *Phillips* v. *Phillips*, 1 Myl. & K. 649; 1 L. J., Ch. 214.

The right of the equitable owner of a copyhold estate to dispose of his equitable interest by will, cannot be controlled by the custom of a manor. *Lewis* v. *Lane*, 2 Myl. & K. 449.

A copyhold estate will pass by the will of a devisee who dies before admittance. *King* v. *Turner*, 1 Myl. & K. 456; Coop. t. Brough. 64. Reversing 2 Sim. 545.

A testator seised in fee of a copyhold estate, devised it to his wife for life; and after her decease he (without giving any estate to his executors) directed them to sell the copyholds, and then divide the proceeds. The testator's widow was admitted for life; and after her decease the executors sold the estate, and executed a bargain and sale to a purchaser, and he, without having been admitted, made his will and devised the estate to his wife; he was subsequently admitted to the copyhold estate, and died. Upon a suit to administer the estate of the purchaser's wife:—Held, that the admission of the wife of the first testator inured for the benefit of the purchaser under the executors; that the customary heir of the purchaser took no estate in the copyholds, but that they passed to the wife as devisee. *Seaman* v. *Woods*, 24 Beav. 372; 27 L. J., Ch. 538; 4 Jur. (N.S.) 725.

After-acquired Copyholds.]—One by will, reciting that he was seised of a copyhold, devises all his real estate, not being seised of any copyholds, but being seised of freehold estates at the time; he afterwards bought a copyhold:—Held, it did not pass. *Warde* v. *Warde*, Ambl. 299.

Copyhold estates purchased and surrendered to uses declared or to be declared by will concerning the same, passed according to a will previous to the purchase, devising all copyholds generally; and, therefore, containing a description applicable to them. *Att.-Gen* v. *Vigor*, 8 Ves. 256.

After-purchased copyholds would pass by a previous will, if surrendered to the uses of that will. *Heylyn* v. *Heylyn*, Cowp. 130; *Spring* d. *Titcher* v. *Biles*, 1 Term Rep. 435, n.

The lord of a manor before the Wills Act devised all his real estates; subsequently he purchased freeholds held of his manor:—Held, that the freeholds did not pass by his will. Distinction between escheat and purchase explained. *Delacherois* v. *Delacherois*, 11 H. L. Cas. 62; 4 N. R. 501; 10 Jur. (N.S.) 886; 10 L. T. 884; 13 W. R. 24.

Effect of General Devise on Copyholds.]—Where a man devises all his estate, real and personal, to a wife or child, and has no other real estate but the copyhold, it shall pass by those general words. *Smith* v. *Baker*, 1 Atk. 386.

C. gave all his messuages, lands, tenements, and hereditaments in A. and elsewhere, and all other his real estates, to trustees for 500 years, and after the determination of the term he gave all the premises to his wife for life, sans waste. All the estates having come originally from the wife, testator could not mean to sever the copyhold from the freehold; therefore, by the general words of the will, the copyhold passed. *Carr* v. *Ellison*, 3 Atk. 73.

By a devise of all lands and tenements, only freeholds will pass; yet, if the testator had nothing but copyholds, they shall pass; and leaseholds, if there are no other, will pass by these words. *Caswall, Ex parte*, 1 Atk. 560.

Copyhold surrendered to use of a will will pass by a general devise of lands, notwithstanding there are freeholds. *Tendril* v. *Smith*, 2 Atk. 85.

Devise of "all lands, messuages, &c.," will pass copyholds, where the introductory words shew testator's intent to dispose of all his estate. *Goodwyn* v. *Goodwyn*, 1 Ves. Sen. 226.

Whether by words "all the rest of my estate and fortune" in a will, copyhold estate as well as freehold passed, quære. *Dod* v. *Dod*, Ambl. 275.

Testator gave to his executors "all his goods, estates, bonds, debts, to be sold," &c. The word "estates" will pass a copyhold which was surrendered to the use of the will. *Jongsma* v. *Jongsma*, 1 Cox, 362.

Estate held by copy of court roll according to custom of manor, but in case of intestacy distributable as personal estate, and in other respects differing from copyhold:—Held, to pass under a residuary bequest of personal estate, and not with copyhold messuages, &c., with limitations in strict settlement, upon whole will and circumstances. *Wathins* v. *Lea*, 6 Ves. 633.

Copyhold estate shall not pass by general description, where there is freehold to satisfy the words, though it had been supposed to be freehold; and the first devise was for payment

of debts, and then given to a younger child, otherwise provided for. *Lindopp* v. *Eborall*, 3 Bro. C. C. 188.

Under a devise of "all my property," copyhold estate passed to the devisee and his heirs. *Nicholls* v. *Butcher*, 18 Ves. 193.

A testator seised of freeholds and copyholds in fee, and leaseholds for lives, devised "all his real estate whatsoever and wheresoever":—Held, that the copyholds and leaseholds for lives, as well as the freeholds in fee, passed, notwithstanding some parts of the will were inapplicable to them. *Weigall* v. *Brome*, 6 Sim. 99.

If I devise all my lands and hereditaments in Dale, and have a manor in Dale, the manor, as it is an hereditament in Dale, will pass; but if I have the manor in Dale, and also land there, not parcel of the manor, it is a question whether the manor will pass by devise of all my lands. If I have a freehold and copyhold lands in Dale, and devise all my lands and hereditaments in Dale to pay my debts, only my freehold shall pass if that be sufficient; secus, if I have surrendered the copyhold to the use of my will. *Haslewood* v. *Pope*, 3 P. Wms. 322.

Copyholds held not to pass under a devise of "all and every my freehold hereditaments and estate in the county of Surrey," although the freeholds and copyholds were to some extent intermixed, and usually let together. *Quennell* v. *Turner*, 13 Beav. 240; 20 L. J., Ch. 237; 15 Jur. 547.

Devise and bequest of freehold, leasehold, copyhold, and 1,000*l.* stock to A., B., and C., tenendum, the said last-mentioned freehold and leasehold messuages, tenements, estates, and premises, and the 1,000*l.*, upon trust for A.:—Held, that A. was not interested in the copyholds, which descended to the customary heir. *Jackson* v. *Noble*, 2 Keen, 590; 7 L. J., Ch. 133; 2 Jur. 251.

A testator gave and devised "all the rest, residue, and remainder of my property, whether freehold or personal, and wheresoever situate, to my wife, her heirs and assigns for ever, being fully satisfied that she will dispose of the same, by will or otherwise, in a fair and equitable manner, to our united relatives, bearing in mind that my relatives are generally in better worldly circumstances than hers are." The testator died seised of copyhold as well as freehold estates:—Held, first, that no trust was created by the will, but that the wife was entitled to the property absolutely:—Held, also, that, looking to the whole scope and object of the will, the copyholds passed under the general devise. *Reeves* v. *Baker*, 2 Eq. R. 476; 18 Beav. 372; 23 L. J. Ch. 599; 18 Jur. 588; 2 W. R. 354.

A gift of "all my freehold estate and effects wheresoever situate," does not include copyholds. *Ballard, In re*, 22 W. R. 433.

—— **When Unsurrendered.**]—Devise of all testator's "real and personal estate subject to debts," affects copyhold land unsurrendered, for the benefit of the creditors, there being no freehold lands; if there had been it would have been otherwise. *Ithell* v. *Beane*, 1 Ves. Sen. 215; Dick. 132.

Devise of "all freehold and copyhold lands, the copyhold part whereof I have surrendered to the use of my will, subject to debts"; some were surrendered, others not: the latter did not pass. A person entitled under a will, and also paramount and against it, must elect. *Wilson* v. *Mount*, 3 Ves. 191.

Devise of copyhold estates in general terms unrestrained, to a child, passes all copyholds surrendered and not surrendered to use of will. *Blunt* v. *Clitherow*, 10 Ves. 589.

Where there is a surrender of copyhold lands to the use of the will, they will not pass by a general devise of lands. *Hawkins* v. *Leigh*, 1 Atk. 387. *See* 1 P. Wms. 60.

Devise by general words, viz. messuages, lands, tenements, and hereditaments, for payment of debts will include copyholds, if required; and the want of a surrender will be supplied *Kidney* v. *Coussmaker*, 12 Ves. 136; 2 R. R. 118.

Copyholds not intended to be comprehended in a devise to the wife in the general terms, "real and personal estate," so as to entitle her to have the surrender supplied. *Church* v. *Mundy*, 12 Ves. 426.

Upon appeal, the Lord Chancellor's opinion being that the reversion of the copyhold estate passed under the general devise, "as to all such worldly estate and effects as it may please God to bless me withal, or I may leave, or I may be entitled to at the time of my decease, whether real or personal, not before given or disposed of," especially if there was no freehold estate: inquiries were directed to ascertain that fact, and also whether there was any custom of surrendering a vested interest in reversion or remainder expectant upon an estate tail. *S. C.*, 15 Ves. 396.

Construction of a residuary devise as including under the general words, "estate and effects," a copyhold, not surrendered in favour of a younger son, subject to debts, the will reciting that the eldest son was provided for, and no freehold estate. *Pennington* v. *Pennington*, 1 V. & B. 406.

Testator, having surrendered some only of his copyholds to use of will, devised all his copyhold messuages, &c., whatsoever and wheresoever, and which he had surrendered to use of his will:—Held, that surrendered and unsurrendered passed equally. *Strutt* v. *Finch*, 2 Sim. & S. 229.

A devise of "all my real estate" will carry copyhold surrendered, and if no freehold, will for favoured objects carry copyhold not surrendered. *Wentworth* v. *Cox*, 6 Madd. 363.

Devise of "all my freehold messuages, &c., the copyhold parts thereof having been duly surrendered to the uses of this my will," passes unsurrendered as well as surrendered copyholds. *Oxenforth* v. *Cawkwell*, 2 Sim. & S. 558.

Testator, seised of freehold and copyhold estates in the counties of H. and C., devises all his lands, tenements, and messuages and hereditaments in those counties, to his wife for life, remainder to his first and second sons in tail, remainder to his wife in fee, having, in the beginning of the will, declared that as to all his worldly estate he disposed thereof as therein followed; but not having surrendered the copyhold to the use of his will, the court would not supply the want of a surrender, there being freehold estates to answer the words of the devise. *Milbourne* v. *Milbourne*, 1 Cox, 247; 2 Bro. C. C. 64.

A., by will, gave all his real estate, except certain copyholds, which he was about to settle on similar trusts as had been declared by a former settlement, in favour of his wife and children, but, so far as the same should be subject to the trusts of his will, he devised them upon trust for his wife and children. By a voluntary settlement subse-

quently executed, he covenanted to surrender the copyholds to trustees, to be held upon other trusts in favour of his wife and children. He died without having surrendered the copyholds to the trustees :—Held, that they passed under and were subject to the trusts of the will. *Tatham* v. *Vernon*, 7 Jur. (N.S.) 815 ; 4 L. T. 531 ; 9 W. R. 822.

A testator was in 1792 possessed of freehold lands, and of an equitable fee in copyhold estate. He made a will by which he subjected his real estate in aid of his personalty to the payment of his debts, and, subject thereto, he gave all his "messuages, tenements, lands, hereditaments, and premises, with the buildings, mines, &c.," thereon and therein, over which he had a disposing power, to trustees, for 500 years, out of the rents, &c., or by assignment, &c., of the term, to raise money, to pay his debts, legacies, and after payment thereof to apply the rents, &c., or the remainder of the estate to the use of his grandson W. C. on his attaining twenty-three, and to raise 1,000*l*. to pay to his other grandson R. C. on his attaining twenty-three, and in order that these grandsons might be properly educated, the testator directed that 200*l*., until W. C. should attain twenty-three, and 100*l*. afterwards, and till R. C. should attain twenty-three, should be raised for that purpose. By the custom of the manor, the copyholds which the testator possessed would descend to his customary heir or heirs, the tenure being gavelkind. The testator had not made any surrender of them to the use of the will. When he died in 1799, his only daughter (the mother of W. C. and R. C.) was his customary heir, and on her death they became her customary heirs :—Held, that the testator's copyhold interest did not pass by the will, but descended to his customary heir. *Turre* v. *Browne*, 5 H. L. Cas. 555 ; 24 L. J., Ch. 757.

The annuities created for the maintenance of the grandsons had fallen into arrear :—Held, that they were charged on the real estate itself, and not merely on the annual rents and profits ; held, also, that the annuities did not carry interest. *Ib.*

Before the statute 55 Geo. 3, c. 192, general words of devise included a legal estate in copyholds surrendered to the uses of the will by force of the intention shewn by the surrender that such general words should include it ; and where the question is of an equitable estate, some intention must be shewn that such general words should include it ultra the words themselves. *Ib.*

—— **Of Particular Words of Description.**]—Devise of copyhold estate by the description of copyhold ground rent good. *Walker* v. *Shore*, 19 Ves. 387.

Copyholds held to pass under a will by the words "moneys, property, and effects," aided by the context. A will commenced with a statement that it was the disposition of the testatrix's "estates, property, and effects." She then gave and "bequeathed" her "moneys, property, and effects" to her daughters, with an ultimate limitation to her own next of kin. The disposition pointed to personal estate. There was a direction to invest. The words "devise" and "heirs" were not used, and the expressions "legacy," "capital," and "principal" were applied to the gift ; there being a trust for conversion :—Held, that the copyholds passed under the gift to the children. *Streatfield* v. *Cooper*, 27 Beav. 338.

J. G., by his will, declared his daughter M. A. to be his sole residuary legatee. J. G. at his death was entitled to certain copyhold estates, which were not specifically mentioned in his will : —Held, that the copyholds did not pass under the will to M. A. *Lea* v. *Grundy*, 1 Jur. (N.S.) 951.

—— **Of Devise without Words of Inheritance.**]—Testator, after expressing an intention to dispose of all his property, directed his just debts and funeral expenses to be paid by his executor thereinafter named, and then, after giving several pecuniary legacies, devised all his copyholds, which were his only real estates, to his son J., without words of inheritance, and left all the rest and residue of his estate and effects to his said son, whom he appointed sole executor and residuary legatee, such son being also his heir :—Held, that the will was sufficient to pass the fee in the copyholds, and that it charged them with the debts. *Dover* v. *Gregory*, 10 Sim. 393 ; 9 L. J., Ch. 81.

—— **Of Devise to Trustees where Custom to Nominate Successor.**]—By the custom of the manors of Y., P., and S., the tenant of a copyhold tenement held only for life, with a power to nominate by writing one or more successors, but so that if there were more than one, they held concurrently for their lives or the life of the survivor, who had power to nominate a successor to himself. A copyhold tenant of these manors by his will devised all his copyholds to three trustees, to the use of his grandson A. for life, with remainder to the use of the trustees to preserve the contingent remainders, with remainder to the use of the children of A. and their heirs as tenants in common, with remainder to the use of the plaintiff. By a codicil the testator, after reciting that he had ascertained that his "copyhold estates" were held of the manors of P. and S., directed that "all his copyhold estates within the manors of P. and S." should be held by his trustees to the uses and upon the trusts in his will declared, if and so far as the custom of the respective manors would warrant and authorise ; and if the custom of the manors or either of them did not warrant or authorise the entail created by his will, then and in that case his grandson A. and his assigns, or his successor or successors, should have and hold his copyhold estates according to the custom of the manors. A. was admitted tenant for his life, and nominated the defendant as his successor, who was admitted accordingly :—Held, first, that the trustees took the legal estate in the copyholds held of the manor of Y., and ought to have been admitted instead of A., and that all the beneficial limitations in the will were equitable interests. *Allen* v. *Bewsey*, 7 Ch. D. 453 ; 37 L. T. 688.

Held, secondly, that the codicil had no reference to the copyholds held of the manor of Y. ; and that even if it did refer to them, it did not revoke the equitable limitations of the will. *Ib.*

Held, thirdly, that, although by the custom of the manor the tenements were only held for life with power of nominating a successor, the testator had power to dispose of the equitable inheritance by giving successive equitable interests. *Ib.*

—— **Of Gift of Rents and Profits.**]—See *Fitzroy* v. *Fitzroy*, 2 L. J. (O.S.) Ch. 185.

k. Mortgages.

Where Fee Acquired by Foreclosure.]—Testator, having a foreclosed mortgage in fee of certain farms in Lancashire, gave, amongst other things, to his wife for life, "the interest or proceeds of certain farms, in the county of Lancaster, mortgaged to me for 2,500*l.*," and after her decease "one-third part of the sum of 2,500*l.* principal money disposed of in mortgage of the farms aforesaid" to his daughter Harriet; and he declared that upon his wife's decease his daughter Elizabeth should inherit and enjoy the bequests aforesaid in the same proportion as her sister Harriet; and that his son should in like manner inherit and enjoy one-third part of the aforesaid bequests upon the same condition as his daughters:—Held, that the farms passed as real estate to the testator's wife for life, with remainder to his son and daughters, as tenants in common in fee. *Le Gros* v. *Cockerell*, 5 Sim. 384.

Construction of will passing an estate originally on mortgage, but foreclosed, the testator's intent being to dispose of all his interest, though inaccurately mentioned both as land mortgaged and as money due on mortgage. *Silberschildt* v. *Schiott*, 3 V. & B. 45.

Arrears of Interest on Mortgage Debt.] — Bequest: "To my son W. G. I give all my interest and claim on household property in P. court, belonging to J. H., on which I have a mortgage for 1,500*l.*":—Held, that this passed arrears of interest due on the mortgage at the time of the testator's death, as well as the principal. The testator was mortgagee in possession, and repairs had been done to the mortgaged property during his lifetime, by his orders:—Held, that the amount of the repairs was a debt payable by the executrix out of the general estate, and not chargeable to the legatee of the mortgage. *Gibbon* v. *Gibbon*, 22 L. J., C. P. 131; 17 Jur. 416.

Under Devise of Freeholds by Mortgagee in Possession.]—The lessee for a term of years of four houses assigned the term, by way of mortgage, to the owner in fee of the immediate reversion, who afterwards devised the houses by the description of "my freehold houses," mentioning the numbers of the houses in the street where they were situated; and he was in possession as mortgagee at the time of his death:—Held, that the mortgage debt did not pass under the devise, but formed part of the testator's personal estate. *Bowen* v. *Barlow*, 42 L. J., Ch. 82; L. R. 8 Ch. 171; 27 L. T. 733; 21 W. R. 149—C. A.

Under Devise in Fee where Property subsequently Sold by and Mortgaged to Testator.]—Testatrix devised all her freehold messuages in S. to trustees, in trust to sell and stand possessed of the proceeds in trust for A., and gave the residue of her personal estate to the trustees, in trust for B. After the date of the will she sold the houses, and conveyed them to the purchaser, and he deposited the conveyance and title-deeds thereon with her, to secure part of the purchase-money:—Held, that the security and the money due on it did not pass under 7 Will. 4 & 1 Vict. c. 27, s. 23, to the trustees in trust for A., but to the trustees in trust for B. *Moor* v. *Raisbeck*, 12 Sim. 123.

A testator, by a codicil to his will, devised certain specific freehold property to a devisee. At the date of the codicil he was seised in fee of the property so devised. He subsequently sold the property, taking a mortgage of it from the purchaser to secure part of the purchase-money. He died during the continuance of the mortgage:—Held, that the benefit of the mortgage debt did not pass to the specific devisee. *Moor* v. *Raisbeck* (supra) approved. *Woodhouse* v. *Meredith* (1 Mer. 450) distinguished. *Clowes, In re*, [1893] 1 Ch. 214; 2 R. 115; 68 L. T. 395; 41 W. R. 69—C. A.

Under Locke King's Act—Interest of Devisee where Land Delivered in Execution under Elegit.]—A testator, who died in 1890, devised certain land to his brother. In 1884 judgment had been recovered for a sum of 1,550*l.* against the testator; and the land devised to the brother was, under a writ of elegit, delivered in execution for the judgment debt. The judgment remained unsatisfied at the testator's death:—Held, that the judgment debt was a charge on the land, and was a sum of money charged "by way of mortgage or other equitable charge" within 40 & 41 Vict. c. 34, s. 1, and must, therefore, be paid by the devisee of the land in exoneration of the testator's general personal estate. *Anthony, In re, Anthony* v. *Anthony*, 61 L. J., Ch. 434; [1892] 1 Ch. 450; 66 L. T. 181; 40 W. R. 316.

—— **Where Land Subject to Vendor's Lien for Unpaid Purchase-money.**]—A testator who had contracted to purchase real estate, and paid the deposit money, by will made in 1881, specifically devised such real estate to his daughter for life, with remainder to her children, without shewing any intention that the purchase-money should be paid out of his personal estate; and he died without having disposed of his personal estate, which was rather less in amount than the unpaid purchase-money, and without having completed the purchase or paid any further part of the purchase-money. After his death an action by the vendor against the executor and trustee of the will for specific performance of the contract was compromised by the defendant thereto, and the contract was put an end to upon the terms that the vendor should retain the deposit money and have his costs; and this compromise was confirmed by the court by an order made by consent in an administration action in the presence of the tenant for life of the real estate and the trustee, all the remaindermen being infants. Upon the further consideration of the administration action, the devisees contended that they were entitled to so much of the personal estate as was equivalent to the unpaid purchase-money, upon the ground that the purchase was a conversion by the testator of his personal estate to that extent, and that Locke King's Acts had not altered the law in that respect:—Held, that there was a vendor's lien, and that Locke King's Acts Amendment Act applied; that, accordingly, all the devisees were entitled to was the real estate charged with the unpaid purchase-money, and therefore on the facts to nothing; but held, moreover, that the order of compromise would be fatal to their claim, if otherwise good. *Cockcroft, In re, Broadbent* v. *Groves*, 52 L. J., Ch. 811; 24 Ch. D. 94; 49 L. T. 497; 32 W. R. 223.

Locke King's Acts Amendment Act, 1877

(40 & 41 Vict. c. 34), s. 1, applies to leaseholds. A testator by his will, made in 1884, bequeathed to his wife the leasehold house "in which I now reside." At the date of the will he was residing in a leasehold house. In 1887 he entered into a contract with his lessor to purchase the reversionary ground lease, but died before the purchase was completed. His widow accepted the bequest:—Held, that all the testator's interest in the house passed to the widow, subject to her liability to pay the purchase-money. *Kershaw, In re, Drake* v. *Kershaw*, 57 L. J., Ch. 599; 37 Ch. D. 674; 58 L. T. 512; 36 W. R. 413.

A building agreement provided that when the lessee of certain land had built and taken leases on a sufficient number of houses thereon to secure by the ground rents a total annual rent of a fixed amount the lessor would either convey to the lessee in fee simple the surplus land not included in any lease, or, at the option of the lessor, would purchase the ground rents to be created out of such surplus land at an agreed price. The lessee built and obtained leases of houses sufficient to secure the total annual rent, and subsequently built houses upon the surplus land. The lessor elected to purchase the ground rents of these latter houses, but died before the "completion" of the purchase, having specifically devised the land which was the subject of the agreement, but without having made any disposition of residuary, real, and personal estate. The executors completed the purchase and paid the money:—Held, that the purchase-money of the ground rents was a charge or lien upon the land in question within Locke King's Act. *Kidd, In re, Brooman* v. *Withall*, 63 L. J., Ch. 855; [1894] 3 Ch. 558; 13 R. 101; 71 L. T. 481; 43 W. R. 51.

—— **Contrary Intention.**]—A testator, after reciting that the absolute interest in reversion in a sum of consols, subject to some life interests, might be acquired by him in exchange for a charge upon his real estate for an annual sum equal to the dividends, devised his real estate subject to any such charge. The reversionary interest was acquired, the consols transferred, and repayment secured by mortgage:—Held, that the will and other documents shewed a "contrary intention" within the meaning of Locke King's Act, and that the real estate was not liable for the debt. *Campbell, In re, Campbell* v. *Campbell*, 62 L. J., Ch. 594; [1893] 2 Ch. 206; 3 R. 331; 68 L. T. 851.

A testator directed his private debts to be paid out of the proceeds of certain life policies; he bequeathed his residue, subject to the payment of his trade debts; after the date of his will he deposited the title-deeds of real estate with his bankers to secure an overdrawn trade account:—Held, that this amounted to a declaration of intention contrary to Locke King's Act, and that the devisee of the real estate was entitled to have it exonerated from the banker's lien. *Fleck, In re, Colston* v. *Roberts*, 57 L. J., Ch. 943; 37 Ch. D. 677; 58 L. T. 624; 36 W. R. 663.

A testator, after directing the payment of his debts, devised a freehold house to his wife "absolutely, to do with as she thinks proper"; and he requested his executors to sell and convert into money whatever freehold or other property he possessed, and to collect all debts due to him, and to apply the proceeds in the payment of certain legacies. The testator's real estate was all subject to one mortgage:—Held, that the will did not shew any "contrary or other intention" within the meaning of Locke King's Act, and that consequently the widow took the house subject to its rateable proportion of the mortgage debt. *Brownson* v. *Lawrance* (L. R. 6 Eq. 1) dissented from. *Sackville* v. *Smyth* (L. R. 17 Eq. 153) and *Gibbins* v. *Eyden* (L. R. 7 Eq. 371) followed. *Smith, In re, Hannington* v. *True*, 55 L. J., Ch. 914; 33 Ch. D. 195; 55 L. T. 549; 35 W. R. 103.

—— **Implied Exoneration.**] — Testator, who was a baker, by his will made in 1885, gave his trade property, which included real and leasehold estate, and business to his son, subject nevertheless to, and charged, in exoneration of the rest of his estate, with payment of all debts and liabilities owing at the time of his death in connection with the said business. The testator included in this gift his freehold premises situated at Acton, which he had purchased and meant for his said business, subject, as to such estate, to any purchase or other moneys payable in respect thereof at the testator's death. The testator then gave the residue of his real and personal estate to trustees upon trust to convert, and out of the proceeds to pay his funeral and testamentary expenses and debts other than those thereinbefore provided for. At his death the testator owed trade debts not secured by mortgage, and private debts which were secured by mortgage of real and leasehold estate used in his business, and also of real and leasehold estate not used in his business. On the question whether the real and leasehold estate used in the business was primarily liable together with the other real and leasehold estate to the payment of the mortgage debts under Locke King's Act and the Amendment Acts:—Held, that, the testator having divided his debts into two classes, trade debts and private debts, and as to the first class having clearly indicated a contrary intention so as to exclude the operation of the acts, the necessary implication was that he had the same intention in dealing with the second class, and that the mortgage debts were therefore primarily payable out of the proceeds of sale of the residuary real and personal estate. *Nevill, In re, Robinson* v. *Nevill*, 59 L. J., Ch. 511; 62 L. T. 864.

A testator, who died in 1874, bequeathed three leaseholds, A., B., and C., to his wife, and directed that "should there be at the time of my death any incumbrances on C., I desire the said incumbrances to be paid off." A. and B. were subject to mortgages at the time of his death, but C. was unincumbered:—Held, that the above direction did not raise an implication that A. and B. were not to be exonerated out of the general estate of the testator. *Bull, In re, Catty* v. *Bull*, 49 L. T. 592; 31 W. R. 854.

3. Gifts by Reference and Implication.

a. By Reference.

Words whether of Reference or Limitation.] —A testator bequeathed "a sum" of consols to trustees for his daughter L. for life, with remainder to her children. By a codicil he directed "that the sum of 200*l.* per annum be added to the sum" by his will, "granted to his daughter L. during her life, and invested in the same manner and trusts" as governed the will:—Held, that the words, "during her life,"

were words of reference, and not of limitation, and that the gift by the codicil was of a sum sufficient to produce 200*l.* a year, which was to be held for the daughter for life, with remainder for her children. *Auldjo* v. *Wallace*, 31 Beav. 193.

Reference to "Trusts then subsisting"—Trusts not yet in Operation.]—A general reference in a gift to the terms of a former disposition does not determine the time when the gift is to take effect. By a marriage settlement a fund was settled by the husband in favour of the husband and wife during their respective lives, and after the decease of the survivor for the children. Another fund was settled by the husband's mother for herself for life, and after her decease upon such of the trusts thereinbefore declared concerning the first fund in favour of the children as should be then subsisting or capable of taking effect:—Held, that the trust of the second fund in favour of the children arose at once upon the death of the tenant for life in the lifetime of the husband and wife. *Hare* v. *Hare*, 24 W. R. 575.

—— **To Directions in Non-existent Paper.**]—A testator, after devising his real estate upon certain limitations, bequeathed all the residue of his property to trustees "to form a trust fund to purchase land to go with the inheritance in a manner as described in a paper marked B*." After his death no such paper could be discovered:—Held, that, notwithstanding the non-existence of the paper, there was an imperative trust declared for the conversion of the residuary estate into land, which was to go according to the limitations affecting the real estate. *Willoughby* v. *Storer*, 22 L. T. 896; 18 W. R. 658.

—— **To "Legatees before Named."**]—Real and personal estate given to trustees, upon trust to pay the income to the testator's wife for life, and, within or at the expiration of ten years from the death of the survivor of himself and his wife, to sell and convert the same into money, and out of the income to pay annuities to several persons and classes of persons for the said term of ten years, with pecuniary legacies to the same persons and classes, and also to other persons, at the expiration of that time; and annuities to other persons for the lives of the annuitants, and specific legacies to others. The residue was then given to all and every the several legatees before named (with exceptions) rateably and in proportion to the amount of their respective legacies. The wife survived the testator:—Held, that the "legatees before named" should be construed to be the legatees taking benefits out of the fund which fell in at the wife's death, and the "legacies" such legacies as remained to be satisfied at the expiration of the ten years; that annuitants for life, not having other legacies, were legatees of shares in the residue; that the specific legatees, including one taking a bequest of a watch, chain, and seals, were entitled to share in the residue according to the value of their respective legacies; that annuitants who survived the testator and died before the expiration of the ten years, when their pecuniary legacies were payable, took vested interests in such annuities and legacies; that a class described as "the children" of B., but not otherwise named, came within the description of "legatees before named"; that the widow of the testator did not take under the residuary gift; that the annuities which ceased at the expiration of the ten years were not legacies in respect of which the annuitants took any share in the residue. *Bromley* v. *Wright*, 7 Hare, 334.

—— **To "Relations Named in Will"—Legatees under Codicil.**]—The testator gave the residue to his relations named in the will. He made a codicil which he directed to be taken as part of his will, and a second by which he gave legacies, but gave no such direction in this codicil; there were legacies given to two of his relations: they shall take shares of the residue. *Sherer* v. *Bishop*, 4 Bro. C. C. 55.

—— **To "Relations hereafter Named"—Names Omitted.**]—A testator by his will, dated in 1861, devised and bequeathed all his property to his wife for life, and after her death he directed it to be divided amongst his "relations hereafter named." No relations were named in the will, and the testator's heir-at-law claimed on the ground that there was an intestacy:—Held, that the word "named" must be taken in its plain sense, indicating an intention to specify certain relations; and that, as the testator had not done so, there was an intestacy, and the heir-at-law was entitled to the real estate. *Crampton* v. *Wise*, 58 L. T. 718.

—— **To Legatees "Specially Named."**]—A testator gave legacies to various legatees by name, and some to classes described, but the persons composing which were not named; he gave his residue to his legatees "specially named," except one of the classes described:—Held, that this shewed that by the words "specially named" the testator meant described or mentioned; and that all the legatees, whether named or only described, took shares. *Holmes' Trusts, In re*, 1 Drew. 321; 22 L. J., Ch. 393.

Reference in Codicil to Will thereby Altered.]—A testator bequeathed his personal estate to his wife absolutely, and he devised two real estates to her for life, and after her death in trust for sale and division amongst other parties. Having sold one of the estates, he made a codicil changing his trustee, and authorising the sale of the remaining estate at any time, and he gave the produce thereof to his wife for life, and then "upon the trusts and for the intents and purposes in his will expressed and declared as concerning all his real and personal estate"; and in all other respects he confirmed his will:—Held, that the produce of the estate was not divisible amongst all the devisees and legatees rateably, but was subject to the trusts declared by the will. *Baker* v. *Richards*, 27 Beav. 320; 5 Jur. (N.S.) 697.

By will the testatrix gave a share of her property to A., a married woman, for her separate use during her life, with a general power of appointment on her decease; and another share to B., also a feme covert, for her separate use during her life, with remainder to the children of B. By a codicil, revoking this disposition, the testatrix declared that B. should have her share, "the same as A., to be at her own disposal, independent of her children, so that no part of it should be put under trust, as mentioned in the will, but to be entirely at her (B.'s) own disposal,

to give to any of her children (the R.'s) who may be kind and dutiful to her" :—Held, that B. took an estate for her separate use during her life. *Ker* v. *Ruxton*, 16 Jur. 491.

By articles of agreement, it was provided that the interest of a fund which was vested in trustees should be paid to Lady C. for her life, and after her death the principal to go amongst the then unmarried children of herself and husband, as the husband should by deed or will appoint, and in default of appointment equally among the children who should be living at the death of the husband. The fund having been invested in lands pursuant to a trust in the articles, the husband, by his will, appointed the lands among his sons as follows: Ballygriffin to John, Gurtaneelig to George, Knuttery to Henry, and Gneeve to Nelson, to go to them immediately from and after the decease of Lady C., with a clause of survivorship among the brothers, if any of them should die before they became respectively entitled thereto. The testator, by two subsequent deeds of appointment, irrevocably appointed Ballygriffin to John, and Knuttery (which he had by his will given to Henry) to George, and by a codicil (in which these two deeds were recited) he revoked the appointment of Knuttery to his son Henry in the will contained, and instead thereof appointed to him Gurtaneelig. Henry died after the testator, but before the death of Lady C. :—Held, that the devise of the lands of Gurtaneelig by the codicil was to be considered in the light of an absolute appointment, and that same was not subject to the clause of survivorship contained in the will. *Charitable Donations and Bequests Commissioners* v. *Cotter*, 1 Dr. & War. 498; 2 Dr. & Wal. 615; 2 Ir. Eq. R. 196.

—— **To Limitations in Will altered by Effect of subsequent Codicil.**]—A testator by his will devised his real estate upon trust for his brother for life, and after his death upon trust for the brother's four sons in order as named in the will and their respective issue male in strict settlement severally in succession according to seniority; and he directed his personal estate to be held upon such trusts as would best correspond with the trusts thereinbefore declared concerning the real estate. By a codicil, after reciting the trusts in the will relating to the real estate, the testator directed that his will should be read as if there were contained therein immediately after the limitation upon trust for his brother for life a limitation upon trust for the brother's four sons and their respective issue male in such order of succession as the testator's wife should appoint. The wife altered the order of succession :—Held, that the personal estate devolved in the order of succession appointed by the wife as to the real estate. *Martineau* v. *Briggs* (ante, col. 711) distinguished. *Liddell* v. *Liddell*, 66 L. J., Ch. 62; 74 L. T. 105—H. L. (E.)

Reference whether to Whole or Part of Antecedent Expression.]—Testatrix gave pecuniary legacies to A., B., and C. respectively, and appointed A. and B. her executors, and bequeathed her residuary property to her executors A. and B. By a codicil she declared that C. should be also executor, and that her will should take effect as if his name had been originally inserted therein as third executor; and she requested C. to accept a legacy of 50*l.* as some slight acknowledgment for the trouble he would have, &c., to be independent of and in addition to the benefit he derived under her will; and she declared that her trust estate and property should vest in C. jointly with A. and B., and confirmed her will in all other respects :—Held, that C. was not entitled to one-third of the residue. *Hillersdon* v. *Grove*, 21 Beav. 518.

A testatrix, by her will, after reciting that being joint heiress with her two sisters, she was possessed of a third part of the rectorial tithes of B., gave to her sisters the said third part or share to be equally divided between them, and to be held by and subject to the same conditions by which they, her two sisters, held the other two parts or shares. At the date of the will both of the sisters were married, and on the occasion of the marriage of each her shares of the tithes had been put into settlement :—Held, that the sisters became entitled respectively to a moiety of the third upon the trusts declared by their respective marriage settlements of the shares originally vested in them in their own right. *Ord* v. *Ord*, L. R. 2 Eq. 393; 15 L. T. 51.

Testator by his will gave an annuity of 300*l.* a year to his grand-daughter A., and after her death he directed that the said sum should be raised and paid among her children as she should appoint, and in default of appointment in equal shares during their respective lives; and he gave to his grand-daughter E. a like annuity, to be paid to her and her children in the same manner as the annuity thereinbefore given to his grand-daughter A. By a codicil he revoked the devises of the several annuities, and instead thereof gave to each of his grand-daughters A. and E. an annuity of 150*l.*, to be payable in the same manner as the annuities of 300*l.* :—Held (Rigby L.J., dissenting), that the substitution of the smaller annuities extended to the interests of the children of the grand-daughters. *Freme's Estate, In re, Freme* v. *Hall*, 64 L. J., Ch. 862; [1895] 2 Ch. 778; 73 L. T. 366; 44 W. R. 164—C. A.

A. bequeathed leasehold estates, after the failure of previous limitations in favour of A. and his issue, "in trust for such persons as at the time of such failure of issue should be his (the testator's) next of kin according to the Statute of Distributions, and as if the testator had survived A., and in the like shares as they would be entitled to the same under the statute." He afterwards bequeathed a legacy in trust for M. for life, and, after her decease without issue, in trust for his own "next of kin in manner aforesaid" :—Held, that the persons entitled to the legacy would be the persons who would be next of kin of the testator living at the death of M., and not the next of kin at his own death. *Bessant* v. *Noble*, 26 L. J., Ch. 236; 4 W. R. 475—L. C.

Bequest to the children of a deceased niece who should be living at the testator's death, followed by a bequest to a nephew for life, and after his decease upon the like "trusts" for the benefit of his issue, and subject to the same powers, "limitations," &c., in respect of his issue, as those expressed as to the niece's children. The nephew had no child living at the testator's death, but he afterwards had one child born :—Held, that such was entitled to the second legacy. *Yardley* v. *Yardley*, 26 Beav. 38.

A testator devised his real and personal estate to trustees, upon trust to sell and put out one-ninth of the produce in government or real securities, and to pay the interest to A. for life,

and afterwards to her children. By a codicil he bequeathed a leasehold to the trustees, to hold upon the same trusts, in all respects, and for the same persons and subject to the same powers, provisoes, condition, and limitations as the above one-ninth :—Held, that A. was not entitled to enjoy the leasehold in specie, but that it must be sold and invested for the benefit of the parties entitled in succession. *Murton* v. *Markby*, 18 Beav. 196.

Where legacies were given to children "subject to the same limitations" as certain portions they were entitled to :—Held, that the expressions put them on the same footing as to interest. *Bredin* v. *Bredin*, 1 Dr. & War. 494.

A testator left 20,000*l.* upon trust to pay the income to his widow during her life, with a provision that if he should marry again she should only receive the income of 10,000*l.*, the income of the remaining 10,000*l.* going to his children. He bequeathed all his residuary estate "upon the trusts hereinbefore declared with reference to the sum of 20,000*l.*" The widow married again :—Held, that the widow took no interest in the testator's residuary estate. *Trew* v. *Perpetual Trustee Co.*, 64 L. J., P. C. 49 ; [1895] A. C. 264 ; 11 R. 423 ; 72 L. T. 241 ; 43 W. R. 636—P. C.

—— **Of Property mentioned.**]—A testator gave his estate to four children in equal proportions, but his wife was to have "her proportionate part" for life, and it was given afterwards to the four children. And as to "the part of his estates" thereinbefore given to his daughter, she was to have it for life, with remainder to her children : —Held, that the "part" of the daughter included her share in the part given to the wife for life, and that therefore she was only entitled to a life interest in it. *Watson* v. *Pryce*, 34 Beav. 71.

Leasehold for years, being mentioned in former part of will :—Held, to pass by the residuary devise, in which, although the word "leasehold" occurred, yet, unless extended beyond the antecedent, it could have comprised only the leasehold for life. *Sherratt* v. *Sherratt*, Coop. t. Brough. 35.

A testatrix, after bequeathing certain property to her two daughters and to her three sons, T., G., and J., gave the residue of her property to her sons T. and G. if both living at her decease, and, if either should be then dead, leaving no issue, the whole to the survivor ; and, if both should be then dead, leaving no issue, then the whole to J. ; and, if he should be then dead leaving no issue, then to and amongst her daughters equally, or the survivor of them, or to an only surviving one ; but directing, if either of her sons or her daughters should die, leaving issue, that such should take the parent's respective share of the provisiom already made for the sons and daughters respectively, unless otherwise appointed by the parent :—Held, that the word "provisions" meant only the residue so disposed of, that the sons T. and G. having survived the testatrix, were entitled absolutely to the residue. *Young* v. *Martin*, 2 Y. & C. C. C. 582 ; 7 Jur. 1147.

A specific devise or bequest is a devise or bequest by a description which identifies a particular subject then existing as intended to pass to the donee in specie either directly or indirectly. A father devised three properties to his three sons respectively for life, with remainder in fee to their respective children, and in case of the death of either of them without issue between the others "in the same manner as the estates devised were limited to them respectively," subject to the proviso that if either died leaving a widow, but no children, the widow should have an estate for life in the premises "so specifically devised" to her husband :—Held, that the devise to such widow attached, not only to the property originally devised to her husband, but also to property coming to him under the contingent limitations. *Giles* v. *Melsom*, 42 L. J., C. P. 122 ; L. R. 6 H. L. 24 ; 28 L. T. 789 ; 21 W. R. 417.

A bequest of leaseholds by reference to the uses declared respecting freeholds make the leaseholds subject to other limitations and restrictions declared concerning the freeholds. *Heasman* v. *Pearse*, 40 L. J., Ch. 258 ; L. R. 11 Eq. 522 ; 24 L. T. 864 ; 19 W. R. 673.

A testatrix by her will duly appointed some settled property to her husband, upon trust, that so soon as certain proceedings in law and equity (pending with respect to the property) should be terminated, and the same should come into his possession, then he should pay, assign, transfer, and set over the stock, which, by four several indentures, had been assigned or appointed by the testatrix, to the persons in the several indentures mentioned ; and secondly, that he should pay to each of her brothers and sister 2,000*l.* :—Held, that the termination of the legal proceedings applied equally to the stock and the legacies of 2,000*l.* *Luff* v. *Lord*, 11 L. T. 656 ; 10 Jur. (N.S.) 1248.

—— **To some or all of Persons named.**]—A testator gave 1,000*l.* to his sister Sarah for life, with remainder to her children ; he then said : "To each of my sisters, M., A., C., and B., I bequeath 500*l.* ; and in case of death of either, their portions to go to the surviving sisters above mentioned." C. died in the lifetime of the testator :—Held, that her 500*l.* survived to M., A., and B., and that Sarah was not included in the words, "the surviving sisters above mentioned." *White* v. *Wakley*, 26 Beav. 23 ; 28 L. J., Ch. 79.

Under devise of personal residue to relations in such proportion as testator had given other part of his fortune, pecuniary legatees only are entitled, and not a devisee of real estate. *Adair* v. *Maitland*, 7 Bro. P. C. 587 ; 3 Ves. 231.

A general gift of the corpus of a fund to the children of A., described as her children, after a previous gift of the interest to her for the maintenance of her children, W. and R. :—Held, to be confined to the two before named, and not to include after-born children. *Connor, In re*, 2 Jo. & Lat. 456 ; 8 Ir. Eq. R. 401.

A testatrix gave a sum of money in trust for "my nephew and nieces." She had numerous nephews and nieces, but in a former part of the will she had mentioned by name four nieces and one nephew :—Held, that all the nephews and nieces were entitled to a share of the money. *Lever, In re*, 18 W. R. 35.

Residuary bequest to the testator's nephew and nieces per stirpes equally for their lives, and after the death of either that share of the principal to be paid equally to and among the children of such of the said nephews and nieces as should die ; and if any die without leaving any child or children, that share to go to and among the survivors or survivor of them in

manner aforesaid. Upon the death of one without a child, that share goes to the survivors for their respective lives only, and will pass to their children respectively with the original shares; but upon the death of the last survivor without a child, his shares both original and accrued are undisposed of, notwithstanding another has left a child. *Milsom* v. *Awdry*, 5 Ves. 465; 5 R. R. 102.

Reference to what Part of Antecedent Expression.]—Testator having directed transfer of 3 per cent. consols, three months after his decease, gave several other legacies of stock "as aforesaid." Those words upon construction referred to description of stock, not to the time of the transfer. *Sibley* v. *Perry*, 7 Ves. 522; 6 R. R. 183.

Testator gave certain leasehold houses in trust for A., absolutely for her separate use, and other leasehold houses in trust for B. for her separate use, for her life, and after her decease for her children; if none, to fall into the residue; and he gave the residue in trust for A. and B., to be divided between them, share and share alike, and to be paid and applied in like manner, for their use and benefit, as the rents and profits of the leasehold premises hereinbefore settled upon them, and their receipts to be a sufficient discharge: the reference in the residuary clause is not to the interests of A. and B. in the houses, but to the provision that they shall take for their separate use; therefore they take the residue absolutely. *Shanley* v. *Baker*, 4 Ves. 732.

By will a testator gave a legacy "equally between my brothers and sisters now living"; and he directed that their shares should not lapse by their deaths in his lifetime, but should go to their executors. By a codicil of the same date he bequeathed another legacy, "between my brothers and sisters, in like manner as I have directed by my will":—Held, that the class mentioned in the codicil was not the same as that in the will; that the "manner" referred to the mode in which the class was to take, and not to the class itself; and consequently that the representatives of a sister who predeceased the testator took no interest in the second legacy. *Wilder, In re*, 27 Beav. 418.

The testator bequeathed 5,000*l.* to his wife for life, and after her decease to his nephew absolutely; but if the nephew should die in the lifetime of his wife, then he directed his executors to divide the same amongst the children of the nephew; and in case the nephew should die without leaving lawful issue, then to pay the same unto and equally between his two nieces, Louisa and Georgiana, for their separate use; and in case one or both of the nieces should die in the lifetime of the wife, then to pay and divide the share of the niece so dying unto and equally between her children as tenants in common; and the testator bequeathed all moneys in the public funds of which he should die possessed upon trust for his wife for her life, and after her death for the benefit of his nieces Louisa and Georgiana, in manner thereinbefore directed of and concerning the sum of 5,000*l.*, and he gave all the residue, except moneys in funds, to his wife absolutely. One of the nieces died in the lifetime of the wife, leaving children:—Held, that the gift of the 5,000*l.* to the children of the nieces could not be regarded as a part or modification of the gift to the mother, but was in fact a substitutionary gift, to arise on a distinct event; that the reference to the bequest of the 5,000*l.* in the residuary gift of the moneys in the funds by the words "in manner hereinbefore directed" might refer to the manner of taking as tenants in common or for their separate use; that the children of the niece did not, therefore, by virtue of the reference, take any interest in the residue of the moneys in the funds; and that, as to such moneys, so far as related to the share of the deceased niece, there was an intestacy. *Lumley* v. *Robbins*, 10 Hare, 621; 1 Eq. R. 129; 22 L. J., Ch. 869; 17 Jur. 410; 1 W. R. 285.

—— **Whether Reference to Will includes Codicil.**]—A. devised property to the children of B., in like manner as they were entitled under the will of B., deceased:—Held, that A. referred to the will and codicils together of B. A father, having eight children, devised his estate to six of them equally. Afterwards the wife's father devised another property unto her children, to be vested at the like times, with like benefit of survivorship, and provision for maintenance, and in like manner in all other respects, so far as the nature of the property and the difference of tenure would permit, as the children were entitled to the estate of their father, under the dispositions and limitations contained in his will:—Held, that the eight children participated in the second devise. *Pigott* v. *Wilder*, 26 Beav. 90.

Effect of Word "Said."]—A testator gave his freehold estate "and property, whether real or personal," to A. for life; and after her decease, he gave "all his said freehold estate and property" to B. and wife for life; and after their decease, he gave "all his said freehold property" to their children, "for an estate of inheritance in fee-simple," and in default he gave "his freehold estate and property" to C., "his heirs and assigns, in fee-simple." He charged his personal estate with some legacies, and he gave the residue of which he should die possessed, &c., to A.:—Held, that B. and his children took no interest in the personal estate, which belonged to A. *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; 21 L. J., Ch. 722.

A testator, having bequeathed a sum of money to his executors, in trust for his four grandchildren, Joseph, James, Lydia, and Mary, and the residue of his estate and effects, upon the happening of certain contingencies, unto his four grandchildren, devised his real estate, subject to a life interest, unto his grandson Joseph, charged and chargeable nevertheless with the payment thereout of 1,500*l.* apiece, unto each of the three brothers and sisters of Joseph, that was to say, James, Lydia, and Mary. And the testator proceeded as follows: "And I direct that if any of the children of my late son Joseph, being a son or sons, shall die under twenty-one, or if any of the children of my son Joseph, being a daughter or daughters, shall die under that age without being or having been married, then as well the original share or shares of the children so dying as the share or shares which by virtue of this proviso shall have survived or accrued to him, her, or them of and in the said sums of 1,500*l.* apiece, and of and in the rest and residue of my personal estate and effects, shall go, remain, and be to the other and others of the said children, and if more than one, in equal shares as tenants in common." The two grandchildren, Lydia and Mary, both died under twenty-one and unmarried:—Held, that the words "said children"

referred to the four grandchildren, and that James was entitled to one moiety only of the two sums of 1,500*l.* given to the grand-daughters. *Dickason* v. *Foster*, 4 L. T. 628.

Limitations by Reference with Words added.]—Trust by will as to a moiety of the share of the testator's married daughter, A., for her separate use to the end and that it may not be subject to the control, &c., of B., her present husband, or any other husband, remainder to her husband B. for life, remainder for all the children of A., and in case there shall not be any children of A., or all shall die before twenty-one, for the survivor of B. and A., his wife, his or her executors, &c., and, as to a moiety of each of the shares of each of his unmarried daughters, upon the like trusts, and under the like restrictions, as described concerning the share of A., so, and in such manner as, that the same may be secured for the benefit of his said daughters and their children, and not to be subject or liable to the control of any husband they may happen to marry; one of the then unmarried daughters having married and died without issue, her husband surviving is not entitled to any interest in the moiety the subject of the trust created by the will. *Judd* v. *Wyatt*, 11 Ves. 483.

A father devised his real estate to his sons, A., B., and C., as tenants in common, subject to charges in favour of his wife and daughters, and gave his personal estate to his children in equal shares. Many years after his death, but before the charges had been satisfied, A. made a will, giving all his property "unto my brothers B. and C. absolutely for their uses under the directions of the will of my father":—Held, that the use of the plural word "uses" and the reference to the directions of the father's will were not sufficient to vary the construction of the previous words of gift, and that B. and C. took as joint tenants. *Oliver* v. *White*, 4 De G. F. & J. 17; 31 L. J., Ch. 689; 6 L. T. 198; 10 W. R. 276.

A testator gave his residue to his grandchildren, the children of his son and daughter (A. and B.), living at his decease, with a gift over to his brothers and sisters, in case any died before attaining a vested interest. By a codicil he gave 4,000*l.*, the interest to be paid in equal moieties to A. and B. during their lives, and at their decease the 4,000*l.* to be for the benefit of his grandchildren, agreeably to the instructions contained in his will. A. died, living B.:—Held, that a moiety of the 4,000*l.* became, upon the death of A., divisible among his children. *Archer* v. *Legg*, 31 Beav. 187; 10 W. R. 703.

A testator gave all his real estate to trustees, to pay the income thereof to his mother for her life, and then to sell, and divide the proceeds into two moieties, the one moiety to the children of his sister S., and the other moiety to his sister M. or her children if she were then dead. He then gave all his personal estates, after payment of debts, &c., to his wife A. for life or widowhood; and from her decease or second marriage, to transfer the whole to such persons and in such manner as he had declared concerning his real estate, "payable on the decease of his mother." The widow married during the life of the mother:—Held, that the construction to be put on this was, that on the death or marriage of his widow the personal estate was to be distributed in the same manner as the real estate was to be distributed on the death of the mother. *Mountain* v. *Young*, 18 Jur. 769.

Legacy to A. for life, then to her children for maintenance, and to be equally divided among them on their arriving at twenty-one, followed by a legacy to B., "on the same conditions on his attaining the age of twenty-one." The legacy to B. construed in the same manner as the other, viz., for life only, &c. *Longdon* v. *Simson*, 12 Ves. 295.

A testatrix directed trustees to make an investment, and out of the dividends to pay annuities of 100*l.* each to his two nieces and his nephew for life, and the capital to their children respectively, and to apply 100*l.* a year in the maintenance of the children of Daniel, a deceased nephew, until twenty-one, when he gave them the capital fund producing this annuity. He bequeathed his residue to his two nieces and nephew and the children of Daniel, "in equal shares, in like manner as was thereinbefore mentioned with respect to the annual sums of 100*l.* bequeathed to them respectively":—Held, that the children of Daniel took one-fourth only of the residue. *Eames* v. *Anstee*, 33 Beav. 264.

By his will a testator devised his W. property to J. F. L. and declared that he was to hold it with other property for his life, and after his decease to the use of his first and other sons successively, one after another, in tail male, with several remainders over. He afterwards purchased the lands of D., and by codicil devised them to J. F. L., he paying any part of the purchase-money which remained unpaid, to hold it subject to the same entail as the W. property; and by another codicil dated six years afterwards, devised it to J. F. L. and "entailed it in him and his issue male":—Held, that J. F. L. took an estate in tail male in the lands of D. *Lowry* v. *Lowry*, 13 L. R., Ir. 317.

Where Reference incomplete — Intention of Testator.]—A testator by his will gave his residuary estate to trustees upon trust to divide it equally between his children, and by a codicil directed them to hold the sum of 2,000*l.*, part of the share of his daughter E., in trust for her for life, and after her death for her children, with an ultimate trust for the survivors or survivor of the testator's children, and the issue of such of them as should be then dead leaving issue: and the testator directed his trustees to hold the sum of 2,000*l.*, part of the share of his daughter C., in trust for her for life, and after her death "upon such and the like trusts as are hereinbefore declared of the sum of 2,000*l.*, secured for the benefit of my daughter E., as fully and effectually as if such trusts were here fully repeated," and the testator directed his trustees to hold the sum of 2,000*l.*, part of the share of his daughter L., "upon such and the like trusts as are hereinbefore declared of the two several sums of 2,000*l.*, and 2,000*l.* secured for the separate use and benefit of my daughters E. and C., as fully and effectually as if such trusts were here fully repeated." E. died leaving issue, and C. without having had any issue:—Held, that the 2,000*l.* forming part of the share of C. did not pass after her death upon the same trusts as E.'s 2,000*l.*, i.e., to the issue of E., but upon trusts corresponding to these, but having C.'s name substituted for E.'s, so that, in the events which had happened, it passed to the survivors of the testator's children, and the issue of such of them as were dead leaving issue. *Smith, In re, Bashford* v. *Chaplin*, 45 L. T. 246.

A testator bequeathed 20,000*l.* consols upon trust to pay the dividends to his wife for life, and after her death to B. (the wife of A.) for life for her separate use, and after the death of B. upon trust for the benefit of B.'s children. The testator's wife, who was his residuary legatee, survived him only two days, and by her will, after giving several legacies of 100*l.* each, bequeathed to A. and B. "the same amount and on the same trusts and conditions" as were "named" in her late husband's will. She directed her residuary estate to be divided into two moieties, whereof she gave one to A. and B. and their children, "on the same trusts as before alluded to." There was no other part of the testator's will to which the bequest in the testatrix's could be referred, except that above stated: —Held, that a legacy of 20,000*l.* consols passed by the wife's will on the same trusts as those above mentioned of the husband's will. *Stephens* v. *Powys*, 1 De G. & J. 24.

Testator bequeathed certain houses in trust for his grand-daughter Martha for her separate use for her life, and on her decease in trust to apply the rents for the maintenance of her children then living, and when they should all attain twenty-one, in trust to sell and divide the produce among them equally; and in case Martha should die without leaving issue, to divide the produce amongst such of the testator's grandchildren thereinafter named as should be living at her decease; and the testator, by three separate and subsequent clauses, bequeathed other houses in trust for his grand-daughters Charlotte, Sarah, and Harriett, for their separate use for their lives, and repeated after each clause, "and after her decease in trust for the issue of her body in the same manner and subject to the same conditions and limitations as hereinbefore expressed in the bequest to my grand-daughter Martha." In a subsequent part of his will he declared that, if all his said grand-daughters should die without leaving issue, all the houses mentioned in his will should fall into the residue of his estate. Charlotte died leaving issue; Harriett died without issue:—Held, that the houses bequeathed in trust for her went over to Martha and Sarah, as being the only grandchildren of the testator living at her death. *Doughty* v. *Saltwell*, 15 Sim. 640.

A testatrix gave certain estates on trust, as to a moiety, for E. for life, with remainder, if the trustees should think proper, in trust for E.'s husband for life; and as to the other moiety, on similar trusts for H. and her husband, and in certain events, which happened, upon the same trusts, in favour of E. and her issue, as were thereinbefore expressed concerning the other moiety. The trustees, after the death of E., declared that E.'s husband should have the income of both moieties for life:—Held, that he was entitled to the income of the moiety given to H. for life. *Ashburnham* v. *Ashburnham*, 13 Jur. 1111.

A testatrix, having by her will directed her trustees to stand possessed of a fifth of her residuary estate upon trust for a woman for life, and after her death for her children, directed them to stand possessed of three other fifth parts upon such trusts for three other women respectively as should correspond with the trusts thereinbefore declared concerning the fifth part or share of the first-mentioned woman:—Held, that the three women took only life interests, with remainder to their respective children, in the same manner as the first-mentioned woman and her children took. *Smith* v. *Greenhill*, 14 W. R. 912.

A testator gave an estate to his daughter E. for life, and after her death upon trusts to her children, and made similar dispositions of other estates in favour of his daughter A. and his sons J. and W. respectively and their respective children, and gave his residuary estate to E. and A. equally. By a codicil he gave the residue to his wife for life, and after her death between E., A., J., and W. equally, "precisely in the same way as the shares before given to them in my will": —Held, that the shares of the residue were not given absolutely by the codicil, but were subject to the limitations contained in the will as to the estates specifically devised. *Colshead, In re*, 2 De G. & J. 690.

Held, also, that, E. and W. having died without issue, their shares in the residue went to the personal representatives of E. and A., the absolute gift to E. and A. in the will remaining to that extent unaltered. *Ib.*

A testator gave his real and personal estate to trustees as to one-fourth to A. for life, and, after her decease, for her children, and, in default of children, for B., C., and D., and their issue, in the same manner as thereinafter directed respecting their original shares; as to one other fourth to B. for life, and, after his decease, for his children, and, in default of children, for A., C., and D., and their issue, in the same manner as directed respecting their original shares; as to one other fourth part for C. and her children by reference to the share of A., using the same referential expressions as are next given concerning the remaining share; and the fourth share he bequeathed for the benefit of D. and his children upon the trusts, and subject to the powers and authorities, and with the like remainders over in default of issue, and similar and in all respects corresponding with the trusts, powers, and authorities expressed and declared concerning the one-fourth share bequeathed in trust for B. and his children, as effectually as if the same trusts were there repeated. D. died unmarried:—Held, that the fourth share went over, upon the death of D. without issue, to the other three legatees: A., B., and C. *Surtees* v. *Hopkinson*, 36 L. J., Ch. 305; L. R. 4 Eq. 98; 16 L. T. 8; 15 W. R. 395.

—— **Whether Trusts to be the same or corresponding.**] — A testator gave property, including 2,700*l.* stock, to his wife for life, and after her decease as to 800*l.*, part of the stock, for his daughter Y. as therein mentioned, and after the decease of Y. for her children living at the time of her decease, equally. The testator subsequently gave 1,200*l.*, further part of the stock, for his daughter S., in similar terms to those used with respect to the gift of the 800*l.* stock to his daughter Y.; and, after the decease of his daughter S., to transfer the 1,200*l.* stock to all and every the children of his said last-mentioned daughter, at the same time and in the same manner as was thereinbefore mentioned with respect to the 800*l.* for the benefit of his daughter Y.:—Held, that a child of S. who predeceased her mother took no share in the fund. *Swift* v. *Swift*, 1 N. R. 353; 32 L. J., Ch. 479; 11 W. R. 334.

By a marriage settlement certain funds were settled upon certain usual trusts for the benefit of the husband and wife and their children, and it

contained a hotchpot clause. By the will of the wife's mother, made subsequently, a portion of her personal estate was bequeathed to the trustees to pay and transfer the same to the trustees of the settlement, to be held by them upon and for the same trusts and purposes as were therein expressed concerning the property thereby settled. On a summons taken out by the trustees of the settlement to ascertain the effect of this bequest, it was contended by parties to whom but small appointments under the settlement had been made that the bequest was to be treated as an accretion to the settlement, so as to make the hotchpot clause applicable by bringing into account the funds already appointed under the settlement :—Held, that, inasmuch as there was no context in the will importing that the use of the words "same trusts" implied an accretion of the settlement trust fund, the bequest must be deemed to be of an independent fund, to which the hotchpot clause in the settlement was not applicable. *North, In re, Meates* v. *Bishop*, 76 L. T. 186.

—— **Whether Interest given by Implication.**]—A father gave to his sons H. and J. 16,000*l.* upon special trust and confidence to invest and to pay the income of 8,000*l.*, part thereof, to his daughter A. for life for her separate use, and after her death to divide the 8,000*l.* amongst her children at twenty-one. He then directed that his sons should pay the income of the remaining 8,000*l.* to his daughter S. for life in the same manner in every respect and subject to the same control as he had directed as to his daughter A., it being his intention that his daughters' fortunes should not be subject to the debts of their husbands. He then gave to H. and J. 6,000*l.*, to invest and pay the income to his son S., and to divide the principal amongst his children. The sums were charged on real estate. There was power to apply the income for the maintenance and education of the daughters' and sons' children. The daughter S. died, leaving four children who had attained the age of twenty-one. The sum representing the 8,000*l.* had been paid into court :—Held, that by implication the four children were entitled to the fund. *Sweeting* v. *Prideaux*, 45 L. J., Ch. 378; 2 Ch. D. 413; 34 L. T. 240; 24 W. R. 776.

Gift to the sons and daughters of T., viz., A., B., F., and M., 100*l.* each, F. excepted, "as the interest of such share shall be paid to M. for life, then the said 100*l.* shall be given to F.'s children," then gift of residue "to A. for life, and after her decease I give to the sons and daughters of T. (except and excepted as aforesaid) all my remaining effects" :—Held, that the children of F. took no part of the residue. *West* v. *Laking*, 12 Jur. 129.

Testator bequeathed to G. two sums of stock, and, in case of his death in the testator's lifetime without issue, the two sums were to be equally divided amongst the testator's nieces thereinafter named, under the same conditions and restrictions as were thereinafter mentioned respecting the several bequests thereinafter to them respectively given. The testator then gave 12,000*l.* stock to trustees, upon trusts to pay the dividends (in thirds) to the testator's three nieces A., B., and C., for their lives, and after their respective deaths to transfer the capital (in thirds) to the children of the nieces, with limitations over in the nature of cross-remainders, in the event of any of the nieces dying without leaving children, with an ultimate limitation, in the event of all the nieces dying without leaving children, in favour of the residuary legatee, a stranger. G. died, without issue, in the testator's lifetime. The nieces had children :—Held, that the children took the same interest in the stock given to G. as they did in the 12,000*l.* consols. *Ross* v. *Ross*, 2 Coll. C. C. 269; 9 Jur. 795.

By a settlement trustees were to raise 2,000*l.* for A. for life, with remainder to her children, with powers for maintenance, advancement, "or otherwise," and in default of children the fund was given to C. A like sum was given to B. for life, with remainder to her children, with the like provision for their maintenance "and otherwise" as before expressed in respect to the 2,000*l.* given to A. and her children, and otherwise in like manner, to all intents and purposes, as if such trusts and provisions were there fully repeated :—Held, that this included the gift over to C., and that on the death of B. without children C. was entitled to the second 2,000*l.* *Shirley, In re*, 32 Beav. 394.

Reduplication of Charges.]—Where trusts of a fund are declared by way of reference to the trusts of a prior fund, such limitations ought not to be so construed as to multiply the charges which had been made on such prior fund. Where, therefore, A. bequeathed to trustees a considerable sum of money for B. during his life, after his decease in trust to raise portions of 5,000*l.* each for the younger children of B. as therein named, with gifts over, subject to these charges, and he also bequeathed one-fifth of his residuary personal estate upon the trusts before declared concerning the capital of which the dividends were given to B. for life, the residuary personal estate being of very considerable amount :—Held, that the children of B. were not entitled to double portions of 5,000*l.* each. *Boyd* v. *Boyd*, 2 N. R. 486; 9 L. T. 166.

A trust created by reference to other trusts ought not, generally speaking, to be so read as to create a duplication of charges. *Hindle* v. *Taylor*, 5 De G. M. & G. 577. And see *Sambourne* v. *Barry*, Ir. R. 11 Eq. 140.

By the will of E. B. an undivided moiety of freeholds and leaseholds is vested in trustees upon trust to sell and pay annuities and legacies, and after decease of S. L. (her sister) and of A. B. to divide the residue among certain parties. S. L. survived, and devised the other undivided moiety of the premises to the trustees of her sister's will, to hold them upon the same trusts, or such as should after her decease be subsisting, for the benefit of the same person and for the same purposes as were declared by her sister's will of and concerning the moiety of her sister in the premises :—Held, that the intention of S. L. was to add the produce of her moiety to her sister's personal estate, and that it was applicable in aid of payment of the annuities and legacies of E. B.'s will, and subject thereto belonged to E. B.'s residuary legatees. *Baskett* v. *Lodge*, 23 Beav. 138.

When an estate is devised by reference to the like limitations as are expressed in another instrument concerning another estate, the court will consider that the testator's intention was to make the second estate a supplemental provision to the first, and not to multiply charges or powers of charging. This construction is rendered more certain if the second estate is insufficient alone to bear an independent set of charges; or

if the will devising the second estate contains more than one devise, by reference to the same limitations. *Leigh* v. *Leigh*, 22 L. T. 837; 18 W. R. 991.

A father by his will made a series of specific devises upon trust for each of his children for life, with power for such child to appoint by will to his or her widow or surviving husband an annuity not exceeding one-third of the income of the property specifically devised to him or her for life; and he then gave his residuary real and personal estate upon and for the trusts and purposes, and with the same or the like powers, in favour of all his children, share and share alike, and their issue, as should correspond with those thereinbefore expressed and declared concerning the estates specifically devised:—Held, that each child had power to appoint by will an annuity not exceeding one-third of the total income arising from the specifically devised estate and the child's share of residue. Secus if the power had been to appoint an annuity of or not exceeding a fixed amount. *Cooper* v. *Macdonald*, 42 L. J., Ch. 533; L. R. 16 Eq. 258; 28 L. T. 693.

The gift of property subject to charges, to which it is already liable, does not create a new charge. It may be a recognition or confirmation of the charge already existing, but does not create a charge more extensive than what before existed, or was supposed to exist. *Doolan* v. *Smith*, 3 Jo. & Lat. 547; 9 Ir. Eq. R. 426.

By a marriage settlement, the lands of X. and Y. were, in case the wife survived her husband, charged with an "annuity or yearly rent-charge" of 50*l*., for the benefit of the wife during her life, provided the leases of the lands should so long continue; and it was provided, that if the husband should, at any time during his life, purchase or become seised of 20*l*. per annum, to be settled "as a jointure" on his wife, in addition to her above-mentioned rent-charge or sum of 50*l*. per annum, the trustees should pay him a certain sum out of the trust moneys. The mother of the husband, having power to appoint the lands of Z. amongst such of her sons as she should think fit, granted, with his consent, an annuity or yearly rent-charge of 20*l*., charged on said lands, to his wife for her life; and thereupon the trustees paid the trust money to the husband. The husband afterwards acquired the lands of Z., subject to the annuity of 20*l*.; and the lease of X. having expired, and that of Z. (which was vested in a third person) being about to expire, he made his will, whereby he devised all his real, freehold, and personal property to his son, "subject to my wife's jointure," and to a further sum of 70*l*. during her life, which he thereby charged on his entire property:—Held, that the 50*l*. per annum was not impliedly charged upon Z. by the will; and that whether the word "jointure" in the will referred to the 50*l*. per annum, or the 20*l*. per annum, the gift of his property, subject to his wife's jointure, did not create a charge upon it, but left it as it was, subject to the charges created by the prior instruments. *Ib.*

b. By Implication.

Principles.]—Necessary implication imports, not natural necessity, but so strong probability, that an intention to the contrary cannot be supposed. *Wilkinson* v. *Adam*, 1 V. & B. 466; 12 R. R. 255.

An estate by implication cannot be against the plain intent of the party expressed in his will. *Smith* v. *Clever*, 2 Vern. 60.

No estate raised by implication in a will can destroy an express estate. *Bamfield* v. *Popham*, 1 P. Wms. 54; Salk. 236; 2 Vern. 427; 2 Eq. Ca. Abr. 308, pl. 12.

Implication may arise from an elliptical form of expression, which necessarily involves and implies something else, or from a form of gift which cannot be rendered effectual, or a direction to do something, which direction cannot be obeyed without implying something else. *Parker* v. *Tootal*, 11 H. L. Cas. 143; 11 Jur. (N.S.) 185; 12 L. T. 89; 13 W. R. 442.

After a clear gift to a college of three presentations to a living, their interests cannot be extended by doubtful words. *Emmanuel College, Cambridge* v. *Norwich* (*Bishop*), 4 Bro. C. C. 481.

Implication from Particular Words—"With."]—A. gives by a codicil to B., during her natural life, his house in G., with all the household goods found therein at the time of his decease. The word "with" so conjoins the house and goods that the devisee can have no larger interest in the one than in the other. *Leeke* v. *Bennett*, 1 Atk. 470.

—— **From Particular Negative Expressions.**]—By a marriage settlement certain trust funds stood limited in trust for the wife for life, and after her death, in default of children, for such persons as A. (the wife) should by will appoint, and, in default of appointment, to her next of kin. The husband took no interest under the settlement. By her will A., after reciting the settlement, directed and appointed all such property so subject to her disposition as aforesaid, and from and after the decease of her said husband (but not to affect the income thereof during his life) in equal fifth parts unto and between her brother and four sisters therein named. At the date of the will the said brother and sisters were five out of six people who would have been entitled as the next of kin of A. if she had then died:—Held, that the husband of A. did not take any life estate by implication. *Woodhouse* v. *Spurgeon*, 52 L. J., Ch. 825; 49 L. T. 97; 32 W. R. 225.

Resulting trust for the heir; the only express devise being to convey to the devisor's son from and after his age of thirty, which he did not attain; and no devise by implication from a declaration, that he shall have no power over the estate until his age of thirty. *Nash* v. *Smith*, 17 Ves. 29.

Under a power for raising portions for younger children, an appointment by a charge, confined to the particular event of four or more, was not extended by implication from general words in a subsequent part of the deed, providing for the case of no appointment. *Mosley* v. *Mosley*, 5 Ves. 249.

—— **From Gift to A. after Death of B.—Realty.**]—A., a copyholder, devised his lands to S. (a stranger) for twenty years after the death of his wife to raise portions for his younger children. Per Lord Chancellor, where such a devise is made to the heir, there an estate shall arise to the wife by implication; but where it is devised to a stranger (as in this case) there in the meantime it shall descend to the heir. *Fawlkner* v. *Fawlkner*, 1 Vern. 22. A stranger is but fidei

commissarius, quoad the profits of that part of the real estate which are devised from him. Gilb. Eq. R. 270.

A devise of lands to the heir after the death of the wife, by necessary implication, gives an estate for life to the wife. Otherwise where the devise is to a stranger. *London (City)* v. *Garway*, 2 Vern. 571.

Devise after the death of the devisor's wife. If the devisee is heir, the wife takes for life by implication, otherwise not. *Upton* v. *Ferrers (Lord)*, 5 Ves. 806; 5 R. R. 167.

Devise to B. after the death of A. B. being the heir-at-law, a necessary implication for A. for life. *Dashwood* v. *Peyton*, 18 Ves. 40: 11 R. R. 145.

One, having a wife and four daughters, devises lands to one of his daughters after the death of his wife; this is a devise to the wife for life by implication, though the daughter was only one of the co-heirs. *Hutton* v. *Simpson*, 2 Vern. 723; Pre. Ch. 439. *S. C.* nom. *Simpson* v. *Hornby*, Gilb. Eq. R. 115, 120.

A testator, after making certain dispositions in favour of his wife and others, directed that from and after the decease of his wife without leaving issue of his marriage his trustee should stand possessed of all the undisposed-of residue of his real and personal estate in trust for his natural daughter for the term of her natural life, with further provision in case of her death or marriage. It appeared that there was no issue of the marriage, that the testator's widow was still living, and that the natural daughter was still unmarried:—Held, from an examination of the whole will, that, according to the intention therein appearing, the vesting in possession of the natural daughter's estate was not postponed till after the death of the widow. "From and after the decease of my said wife" must be construed as referring only to property in which the widow took an interest terminable at her death. *Rhodes* v. *Rhodes*, 51 L. J., P. C. 53; 7 App. Cas. 192; 46 L. T. 463; 30 W. R. 709—P. C.

Estate for life in lands by implication, rebutted by the party having a bequest for life in a particular part of them, and by the testator desiring she should not be turned out. *Boon* v. *Cornforth*, 2 Ves. Sen. 277.

Devise of land to the testator's second son for life, he or his heirs paying rent thereout to the eldest son for his life; and after the death of the second son and his wife, remainder to the first, &c., son of the second son. The wife of the second son had an estate for life by implication, by the opinion of Lord Chancellor Parker. *Willis* v. *Lucas*, 1 P. Wms. 472; 10 Mod. 416.

Construction of a will devising specific parts of the estate to certain persons for their lives, the residue, after the death of those persons, to others, some of whom were heirs-at-law; that the words "after the death," &c., meant only subject to the life estates, repelling the implication of an estate for life in the residue, if it could arise; and whether it could, where some of the devisees were not heirs, quære. *Dyer* v. *Dyer*, 19 Ves. 612; 1 Mer. 414.

Estate for life by implication in real and personal estate. *Cockshott* v. *Cockshott*, 2 Coll. C. C. 432; 15 L. J., Ch. 131; 10 Jur. 141.

Testator devised his estate to A. in case his daughter should die leaving no heirs of her body:—Held, a gift to the daughter for life, with contingent remainder to such heir of her body as should be living at the time of her death. *Read* v. *Snell*, 2 Atk. 646.

Devise of moiety to A. for life, and of other moiety to B.; and after A.'s death, fee to be conveyed to B. If B. dies before A., A. is not entitled to B.'s moiety by implication. *Aspinall* v. *Petrie*, 1 Sim. & S. 544; 2 L. J. (o.s.) Ch. 121; 24 R. R. 222.

A testator gave a house and furniture to A. and B., and after their death to C., together with his estate at N.:—Held, that the estate at N. did not vest in C. till after the death of A. and B., but descended in the meantime to the testator's heir-at-law. *Attwater* v. *Attwater*, 18 Beav. 330; 23 L. J., Ch. 692; 18 Jur. 50; 2 W. R. 81.

A testator gave his real and personal estate to his daughter for life, with remainder to his other children; but he directed that no division of the property should be made until the decease of his daughter and her husband, and of the survivor of them:—Held, that the husband took no interest by implication. *Barnet* v. *Barnet*, 29 Beav. 239.

Devise of real estate to W. R. W. and his heirs, upon trust to receive the rents and profits, and apply same in discharge of the testator's debts and legacies, and after payment thereof to convey a portion of said real estate to testator's brother R. W. for his life, and the residue thereof, and the part so devised to R. W., after his decease to such of the sons of W. R. W., the trustee, as should at his decease be his second son, for life, with remainder to the first and other sons of such second son in tail male; with remainder to the third, fourth, and other sons of W. R. W. successively, in strict settlement. Testator appointed W. R. W. his residuary legatee. The debts and legacies were all paid, and R. W. died in the lifetime of W. R. W.:—Held, that the heir-at-law of the testator was entitled to the rents and profits of the real estate until the death of W. R. W., as undisposed-of realty. *Wills* v. *Wills*, 1 Dr. & War. 439; 4 Ir. Eq. R. 531.

Testator being seised in fee of a house in the town of C., and of estates in the counties of H. and L., gave pecuniary legacies to his two sons (one of whom was his heir), and also to his two daughters M. and C. He then gave to his wife for her life the possession of his house, together with the use of his plate, furniture, &c., and the interest of his stock in the funds during her life, "save and except the clauses in favour of my daughters as already mentioned; at her decease, it is my will and pleasure that M. and C. shall divide equally between them, as residuary legatees, whatever I may die possessed of, except what is already mentioned in favour of others":—Held, that M. and C. took an estate in fee in remainder expectant on the death of the testator's widow in the house in C., and an estate in fee commencing on the widow's decease in the estates in H. and L., and that the widow did not take a life interest by implication in those estates, and that the heir took them by descent during her life. *Davenport* v. *Coltman*, 12 Sim. 588; 11 L. J., Ch. 262; 6 Jur. 381. And see *S. C.* at law, 9 M. & W. 481; 11 L. J., Ex. 114.

Children, by implication from will and codicil, the latter saying, that in case tenant for life had no children, gift over:—Held, entitled to legacy. *Rogers, Ex parte*, 2 Madd. 449; 17 R. R. 239.

The word "family" admits of a variety of applications, and the construction to be put upon it, in a particular will, must depend upon

the intention to be collected from the whole context of the will. Where a testator directed his business to be carried on by his wife and son for the mutual benefit of the family, and devised his property in trust, that, at his wife's decease, the whole of it, as well freehold as personal, should be equally divided among his children, it was held that the testator in the words "my family" intended to comprise his wife, and as to the testator's property devised after his wife's decease to his children, it was held upon the whole will, and what appeared to be the evident intention of the testator, that the wife took a life interest by implication as well in the real as in the personal estate. As to the effect of a devise to the heir and another person, or to the heir and other persons on the death of A., where there is no explanatory context, quære. *Blackwell* v. *Bull*, 1 Keen, 176; 5 L. J., Ch. 251.

A life estate in A. B. will not be implied from a gift on the death of A. B. to the testator's heir-at-law or next of kin along with other persons. A testator, who died in June, 1837, gave to trustees the whole of his property in trust for the payment of his debts, with full power to sell all or any part of his estates or to demise the same; and directed them out of the moneys produced or out of the rents to pay his testamentary expenses and debts, and then gave certain legacies, and directed that after the death of his wife, and after the payment of all debts and legacies, the whole residue of all his remaining property should be divided into twelve portions, three of which should be given "to the children" of his late aunt, Mrs. W., "equally among them, the descendants, if any, of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive," with similar gifts to the "children and descendants" of his other aunts; "and should there be no children or lawful descendants of any of his aunts remaining at the time the bequests should become payable, then the portions" were to fall into the residuary fund. The testator declared that it should not be incumbent on his executors to pay the legacies sooner than two years after his decease, nor to divide the residue amongst his relatives until two years after the death of his wife, and made provision for payment of an annuity of 700*l.* to which his wife was entitled under her marriage settlement. The wife died in 1876. The testator's co-heirs were certain of the children of the aunts, and his next of kin were certain children of the aunts. The children of the aunts were all dead, but many of them had left children and grandchildren:—Held, that the widow did not take a life estate by implication. *Ralph* v. *Carrick*, 48 L. J., Ch. 801; 11 Ch. D. 873; 40 L. T. 505—C. A. Affirming 25 W. R. 530.

—— **Personalty.**]—A testator, having brothers and sisters, and several nephews and nieces, and having given a legacy to one of his brothers, directed his residuary estate to be invested in government security, the interest to be paid for the maintenance of M. as long as she lived single and without a child; and, at her death, the money to come to his brothers' and sisters' children: M., although married, and having a child, is entitled to the interest for life, not to the principal. *Bird* v. *Hunsdon*, 2 Swan. 342; 1 Wils. Ch. 456; 19 R. R. 82.

Testator bequeathed one moiety of personal estate to his daughter for life, remainder to her children, and their children by way of substitution, absolutely; her other moiety he gave to his son for life, remainder to his son's children, and if he died without issue living at his death, then to the children of the daughter "in such shares and proportions and in such manner as was directed for the payment and division of their shares in the other moiety": the son died without issue:—Held, that the daughter took a life interest in the second moiety by implication. *Davies* v. *Hopkins*, 2 Beav. 276.

Estate for life in real estates and in personalty by implication. *Ramsden* v. *Hassard*, 3 Bro. C. C. 236. And see *Backwell* v. *Bull*, 1 Keen, 176; 5 L. J., Ch. 251.

Bequest, after the death of A., of 2,500*l.* as A. should appoint, with a gift over "of the same" in default, and to be paid with interest from A.'s death; A. appointed a part to B., and 1,630*l.* to other persons, and directed the said sums to be paid at the decease of B., except the one left to himself, which was to be payable at A.'s decease:—Held, that the interest on the 1,630*l.*, accruing between the deaths of A. and B., neither passed to the appointees of that sum, nor to B. by implication, but went over, as in default of appointment. *Henderson* v. *Constable*, 5 Beav. 297; 11 L. J., Ch. 332.

A testator willed that certain property should be vested in a manner most secure, and least liable to fluctuation or risk, and that 3,000*l.* should be at the will of his wife at her death; but the residue he willed his wife should distribute to his relations. He made his wife residuary legatee:—Held, that the distribution to the relations was not to take place until the wife's death, and the court inclined to the opinion that the wife took a life estate by implication; but held that, at all events, she was entitled for life under the residuary gift to her. *Hudleston* v. *Goulsbury*, 10 Beav. 547; 11 Jur. 464.

A will containing a devise of realty in trust for A. for life, remainder to B., his wife, for life, and after the death of the survivor, to sell and divide the proceeds equally among the children, whose shares were to be vested at twenty-one for sons, and twenty-one or marriage for daughters, with a proviso postponing payment in the event of any shares vesting in the lifetime of either tenant for life. The will also contained a bequest of stock, in trust to pay the dividends to A. for life, and on his death to divide the principal among his children equally, the shares to vest at the same time as were before provided as to the proceeds of the realty; and there was a proviso that in the event of there being no child of A. and B., or all the children dying before twenty-one, or, if daughters, before that age or marriage, the proceeds of the realty and the sum of stock should be divided equally among the members of a defined class of persons who should be living at the death of the survivor of A. and B., or A.'s children or child, as according to the trusts thereinbefore declared the case might require:—Held, that the last of these clauses must be read distributively, and that it did not give to B. by implication a life interest in the stock. *Drew* v. *Killick*, 1 De G. & Sm. 266; 11 Jur. 900.

A testator made a minutely specific provision for his wife for life; and directed that all his property at her death should be sold and divided between his children, "or such of them as shall be living at my decease, and the issue of such of my wife":—Held, that in a fund not described part of the estate, the widow did not take a life

estate by implication. *Stevens* v. *Hale*, 2 Dr. & Sm. 22; 6 L. T. 453; 10 W. R. 418.

A gift of personal estate to several children "after the death of A.," their mother, no estate being given during the life of A., raises an implied gift of a life estate in favour of A. *Cock* v. *Cock*, 28 L. T. 627; 21 W. R. 807.

After gifts to A., B., and C. there was a gift "after their decease" of that property, together with the residue:—Held, that "after their decease" meant "subject to the interests of A., B., and C.," and that these words did not postpone the immediate enjoyment of the general residue. *Lill* v. *Lill*, 23 Beav. 446; 5 W. R. 300. S. P., *Key* v. *Key*, 4 De G. M. & G. 73; 1 Eq. R. 82; 22 L. J., Ch. 641; 17 Jur. 769.

A bequest by a testator of the remainder of his personal property, after his wife's death to be equally divided among a class which could only then be ascertained by implication, entitles the wife to receive the interest of the property during her life. A testator, after giving an annuity and legacies to his wife, and an annuity to his father for his life and that of his (testator's) mother, left several legacies which he wished to be paid duty free after the death of his father and mother; after his wife's death he directed the remainder of his property to be equally divided among his brothers and sisters, if living; if dead, among his nephews and nieces:—Held, that the widow took a life estate by implication in the residue. *Humphreys* v. *Humphreys*, L. R. 4 Eq. 475; 14 L. T. 557; 15 W. R. 391.

A testator by giving his residuary personalty after the death of his wife to some only of his next of kin, does not give his wife a life interest therein by implication. *Springfield, In re, Chamberlain* v. *Springfield*, [1894] 3 Ch. 603; 8 R. 466.

Gift of residue to trustees to invest and pay the income to daughter T. "during the joint lives of herself and my two sons-in-law for her sole and separate use and benefit, and after the death of my sons-in-law, or either of them, I direct that their or his widow or widows shall be entitled to share and participate equally with my daughter T. in the income, so that the same shall be received and enjoyed by my daughters and the survivors or survivor of them during their or her lives or life for her sole and separate use and benefit." Upon the death of the last survivor, the capital to be divided amongst the grandchildren. T. died before the sons-in-law:—Held, that there was an intestacy of the income until the widowhood of the daughters. *Isaacson* v. *Van Goor*, 42 L. J., Ch. 193; 27 L. T. 752; 21 W. R. 156.

A testator gave a sum of stock in trust to pay the income to a married woman for life, and after her decease, if she should have children, in trust to pay the income to her husband for life, and after his decease in trust for the children equally; but if there should be no child (which was the case) then, after the decease of the husband and wife, in trust for other persons absolutely. The husband survived his wife:—Held, that he took a life interest by implication. *Blake, In re*, 36 L. J., Ch. 747; L. R. 3 Eq. 799; 16 L. T. 279.

By a marriage settlement certain trust funds stood limited in trust for the wife for life, and after her death, in default of children, for such persons as A. (the wife) should by will appoint, and, in default of appointment, to her next of kin. The husband took no interest under the settlement. By her will A., after reciting the settlement, directed and appointed all such property so subject to her disposition as aforesaid, and from and after the decease of her said husband (but not to affect the income thereof during his life), in equal fifth parts unto and between her brother and four sisters therein named. At the date of the will the said brother and sisters were five out of six people who would have been entitled as the next of kin of A. if she had then died:—Held, that the husband of A. did not take any life estate by implication. *Woodhouse* v. *Spurgeon*, 52 L. J., Ch. 825; 49 L. T. 97; 32 W. R. 225.

A testator bequeathed life annuities payable from his death, and he directed a fund to be set apart to secure them. He also gave one half of the residue of his personal estate to his widow absolutely, and the other half to parties for life, with remainders over. By a codicil he postponed the payment of the annuities until the death of the wife:—Held, first, that she did not by implication take the intermediate dividends of the fund set apart to answer the annuities:—Held, secondly, that such dividends, as between the tenants for life and those in remainder, constituted income, and not corpus. *Cranley* v. *Dixon*, 23 Beav. 512; 26 L. J., Ch. 529; 3 Jur. (N.S.) 531.

A testator gave a legacy to the mayor of Dublin for such objects as he should deem most deserving, and gave the residue of his property to his trustees for such objects as they should consider most deserving:—Held, that the legacies were not charitable, and not given to the mayor or the trustees for their own benefit, and therefore void. *Harris* v. *Du Pasquier*, 26 L. T. 689; 20 W. R. 668.

These gifts were to take effect after the death or marriage of the testator's wife:—Held, no life estate by implication to the widow. *Ib.*

A testator devised to A. all his real estate, including chattels real, in trust for B. and her heirs, for her sole and separate use. Provided that if B. should die under the age of twenty-one, and unmarried, he bequeathed all the property he should be possessed of or entitled to at his decease to A., his heirs, &c., for ever, subject to a life annuity; and he bequeathed a legacy of 500*l.* to A., whom he appointed his executor:—Held, that there was no gift by implication of the personal estate to B. *James* v. *Shannon*, Ir. R. 2 Eq. 118.

A testator bequeathed the residue of his personal estate, which he directed to be converted into money by his executors, and to be divided in sixths. He bequeathed the interest of five-sixths to W. L. for life, and after his death the principal to his children, and if he should have no children, the interest to A. C. for life and after her death the principal to her children; and if there should be no child of A. C., he bequeathed the five-sixths to the St. George family in different shares. He bequeathed the remaining one-sixth and the interest and dividends thereof, &c., after the decease of W. L., to the children of A. C., and if there should be no child of A. C., to the St. Georges in equal shares. There was no child of A. C.:—Held (1), that W. L. did not take an interest for life in the one-sixth by implication; (2) that the interest of the one-sixth went, during the life of W. L. to the St. George family. *Greene* v. *Flood*, 15 L. R., Ir. 450. See also *Ralph* v. *Carrick*, supra, col. 1417; *Ramsden* v. *Hassard*, 3 Bro. C. C. 236.

Gift over on Death implied from Gift over on other Events.]—Testator gave to trustees all his real and personal estate, upon trust to suffer his widow to receive the rents and dividends for her life, provided she kept his property in repair and insured the same against loss or damage by fire, and provided further that she remained a widow and did not cohabit with any other man; and in case she made default in repairing or insuring his said property, or married again, or cohabited with any other man, then, in either of the said cases, upon certain trusts in favour of his children or their issue. The widow died without having committed any of the acts or defaults of which her life estate was determinable:—Held, the gift over took effect on the determination of the prior estate by death as well as on the other events. *Cane, In re, Ruff* v. *Sivers*, 60 L. J., Ch. 36; 63 L. T. 746.

Implication of Absolute Interest—From Gift to A. until of Age.]—Bequest of stock to executors for the use of E. and A., or the longer liver, the dividends to be paid to their order during the lives of either of them, and then to the issue of A., if any; if not, the stock to be transferred in trust for J. till he comes of age. J. attained twenty-one, and died; then E., and lastly A., without issue. The representative of J. held entitled to the fund, and that the trust during the minority was only a mode of convenience. *Atkinson* v. *Paice*, 1 Bro. C. C. 92.

Legacy to trustees to be put out upon security, the interests to be paid to A., and in case she marry or die the interests to be paid to B., in trust for her till she come to the age of twenty-one years:—Held, that B. was absolutely entitled to the legacy. *Hale* v. *Beck*, 2 Eden, 229.

A testatrix having by will directed the trustees, who were also the executors of her will, to invest the residue of her property in the funds, left the interest to two nieces, to be paid to them half-yearly, and at their decease "the half-yearly dividends to be continued to their children till they came to the age of twenty-one." She then "constituted and appointed" the executors (nominatim) trustees for the nieces and their children. All the children of a deceased niece had attained twenty-one:—Held, that they were entitled absolutely to the moiety given to her for life. *Wilks* v. *Williams*, 2 J. & H. 125; 5 L. T. 445; 10 W. R. 55.

Devise of the residue of real and personal estate to executors for A., till he attain twenty-one, and then the trust to cease, passes the whole beneficial estate to A. *Peat* v. *Powell*, Ambl. 387; 1 Eden, 479.

J. S., after the devise of several parts of his real and personal estates to several persons, devises the interest and produce of the surplus of his real and personal estate to his grandchildren, until their age of twenty-one. This will pass the absolute right and property of the real and personal estate to the grandchildren after that age. *Newland* v. *Shephard*, 2 P. Wms. 194.

A testator gave his residue to his wife for her and her son's support, clothing, and education, until he should attain twenty-one. If he died under twenty-one, then he gave all the interest of his bank stock to his wife for life; after her death, he gave all his property to his daughter:—Held, that the son did not take any estate by implication on attaining twenty-one; but there was an intestacy. *Fitzhenry* v. *Bonner*, 2 Drew. 36; 2 Eq. R. 454; 2 W. R. 30.

—— **With Gift over on Death under Age.**]—Legacy to be paid on marriage with consent; and given over in case of death before twenty-five "or" such marriage with consent:—Held, that the legacy was only intended to go over in the event of death before twenty-five "and" such marriage with consent. *Malcolm* v. *O'Callaghan*, Coop. t. Brough. 73; 2 Madd. 349.

Leaseholds were bequeathed to executors in trust for A. and B., "for their use and benefit until A. is twenty-five years old, and in case A. and B. should die before A. attains twenty-five, then the leaseholds shall be equally divided between C., D., and E." A. attained twenty-five:—Held, that A. and B. became absolutely entitled in moieties to the leaseholds. *Gardiner* v. *Stevens*, 30 L. J., Ch. 199; 7 Jur. (N.S.) 307; 9 W. R. 138.

Devise to A. until he attained twenty-one, with devise to B. for life if A. died under twenty-one. The will then proceeded with a gift of the produce of the estate to a class of persons, such gift commencing with the word "likewise" with a capital letter. The will contained no stops. A. attained twenty-one. On the construction of the will:—Held, that the son having attained twenty-one, the gift to the nephews failed. *Paylor* v. *Pegg*, 24 Beav. 105.

A testator, after directing payment of his debts, funeral and testamentary expenses, gave to his daughter by a first marriage 500*l.*; he then gave to trustees all the residue of his estate and effects except articles specified, upon trust to permit his wife to receive the rents and profits for life, for the maintenance of herself and such children as he might have by her living at the time of his decease till twenty-one. He then gave to each of such children 500*l.*, to be paid to them as they respectively attained twenty-one; but in case of his wife's decease before they attained that age, the trustees to apply the interest of his estate and effects for their maintenance and education until they arrive at that age equally; but in case any of them died under twenty-one, that share to go equally among the survivors or survivor. There was then a specific gift to the wife, with a proviso that if she should marry again all the testator's estates and effects should be equally divided amongst his children by her in equal proportions as they should attain twenty-one, subject to maintenance in the meantime. The widow did not marry again, and on the questions what interest she and the children took under the will:—Held, that the gift to the daughter by the first marriage was intended to be all her provision, and that there was an absolute gift of the corpus of the residue to the children of the second marriage equally in any event, subject to the provision for the wife. *Tunaley* v. *Roch*, 5 W. R. 515.

A grandfather by his will, after reference to the provision thereinafter made for his grand-daughter, directed that, as to certain shares, until his grand-daughter attained the age of twenty-one, or should be married with consent, his executors should hold them upon trust to pay the dividends to his daughter; but when his grand-daughter should attain the age of twenty-one, or before upon marriage with consent, upon trust to pay the dividends to his daughter during her life, apart from her husband; and in case of her marriage with consent, then upon such marriage he gave to his executors such a sum of money as would with the value of the shares make up 2,500*l.*, upon trust to settle the same for the benefit and

provision of his daughter for her separate use, with power in such settlement for her to dispose of the same among her issue, or if no issue, a general power of disposition; and the will contained a gift over in the event of her dying under twenty-one and unmarried. She attained twenty-one, but was still unmarried:—Held, that she was not entitled absolutely, but took an interest for life, subject to any question that might arise on marriage. *Savage* v. *Tyers*, 41 L. J., Ch. 815; L. R. 7 Ch. 356; 20 W. R. 817.

—— **From Direction to divide "According to Value."**]—Testator by an ungrammatical will before the Wills Act, 1837, after giving his widow the rents of all the tenements and lands belonging to him during widowhood, to be afterwards divided into three equal parts according to value between his three sons, enumerated the particulars of his real estate, and proceeded: "My stock in trade, money, book debts, and what other effects not included in the above statement, to be equally divided between my two sons T. and W., and to pay all my lawful debts":—Held, that the words "according to value" did not amount to a direction to sell, and that the three sons in the first gift took for life only. *Milsome* v. *Long*, 3 Jur. (N.S.) 1073.

—— **From Appointment of Executor to be Guardian of Illegitimate Child.**]—A direction in a will that the testator's brother should be his executor, to arrange, dispose of, and settle his affairs, and the appointment of the brother to be the guardian of the testator's daughter, an only child, who was afterwards discovered to be illegitimate, does not amount by implication to a bequest of the personal estate in favour of the daughter. *Davis* v. *Davis*, 1 Russ. & M. 645; 1 L. J., Ch. 155.

—— **From particular Circumstances—Property the Subject of Gift—Lease accompanied by Loan of Money—Specific Devise of demised Premises.**]—A. made a lease for years of certain premises to B., containing a proviso that the rent thereby reserved was to be reduced on the exercise of an option given to B., his executors, administrators, and assigns, of purchasing it for 350*l.* A sum of 350*l.* was advanced by A. to B. to enable him to put buildings on the demised premises, in pursuance of a building covenant contained in the lease; and by deed of covenant of same date as the lease B. bound himself, his heirs and personal representatives, to pay off the 350*l.* in six years. In default of such payment there was a power of sale given to A. and his representatives, and it was provided that until this sum was paid the rent of the premises should be the original amount reserved by the lease. Many years afterwards A. by his will specifically devised the demised premises to his son G., and after certain other dispositions devised the residue of his property to trustees upon certain trusts. At the time of his death A. was the owner in fee of the demised premises. After A.'s death the person in whom the interest of B. was then vested paid the sum of 350*l.* to A.'s administratrix:—Held, that the sum of 350*l.* passed under the specific devise of the demised premises to G., and not under the devise of his residuary estate. *Duffield* v. *M'Master*, [1896] 1 Ir. R. 370.

—— **From ultimate Gift of Fund set apart for Payment of Insurance Premiums.**]—A testator gave to B. a moiety of the beneficial interest to arise by virtue of the policy he had effected on the life of his son in the P. office, and to C. the other moiety. And after giving various legacies, he directed his trustees to invest 500*l.* in consols, and out of the rents and income of his property, and the dividends of the consols, pay the annual premiums on the policy he had effected in the P. office, and also the premiums on a policy he had effected on his own life and the life of M. in the E. office, and when the continuance of the payment of the premiums should become unnecessary by the decease of his son and M., or otherwise, to apply the interest and dividends for the benefit of his son's wife and children until the youngest should attain twenty-one, and then to divide the principal equally between them. Also, to receive the money he should be entitled to upon the policy effected in the P. office for the joint benefit of B. and C.; and in case of the death of either without lawful issue, then to the survivor; and in case of both their deaths without lawful issue, then over. B. died an infant shortly after the testator's decease:—Held, that C. was absolutely entitled to the whole of the money secured by the policy in the P. office, and the son's wife and children to that effected in the E. office. *Noy* v. *Roworth*, 6 L. T. 676; 10 W. R. 510.

—— **From Proviso for Deduction of Advances to Child.**]—A testator had advanced by way of loan to the defendant, one of his children, a sum of 2,000*l.*, upon which sum interest was paid during the testator's lifetime. The testator, by his will, devised and bequeathed his property, both real and personal, to trustees on trust to permit his widow to receive the income actually produced by such property, however constituted or invested, during widowhood, and subject thereto on trust for his child, if only one, or all his children equally if more than one, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry. The will contained a proviso that any advances made by the testator to any child or to the husband of any child in his lifetime, together with interest on such advances, as charged against such child or her husband in his private memorandum book in his own handwriting, should, according to the amount thereof, be taken in full or in part satisfaction of his or her share in the testator's property, unless the testator should otherwise declare by writing under his hand. The sum advanced to the defendant was charged against him in the testator's memorandum book, and such book contained an entry as follows: "This is the memorandum book named in my will as containing the advances made by me to my children or their husbands to be taken in satisfaction of their respective shares in my estate":—Held (Cotton, L.J., dissenting), that the testator's widow was entitled to receive from the defendant during her life, as part of the annual income given to her by the will, interest on the said sum of 2,000*l.* *Limpus* v. *Arnold*, 54 L. J., Q. B. 85; 15 Q. B. D. 300; 33 W. R. 537—C. A.

—— **From Gift to A., and if he Dies without Issue, over.**]—Children, by implication from will and codicil, the latter saying, that in case tenant for life had no children, gift over:—Held, entitled to legacy. *Rogers, Ex parte*, 2 Madd. 449; 17 R. R. 239.

Bequest of an annuity to A. and B., and to the survivor for life; and if A. should have any "children," then to be equally divided between them; but if A. should die "without lawful issue," then to A. and his heirs for ever:—Held, that the children of A. took absolute interests in a perpetual annuity. *Robinson* v. *Hunt*, 4 Beav. 450.

Bequest of a share of testator's property to A. (not a child or issue of the testator), with a direction that if any legatee should die before the will took effect "without leaving any children legally to inherit," then his or her share should "lapse to the general fund." A. died in the testator's lifetime, leaving children who survived the testator:—Held, that A.'s children took by implication the share bequeathed to him. *M'Lean* v. *Simpson*, 19 L. R., Ir. 528.

Pecuniary legacies were given severally to A., B., C. and D. "during their natural lives," and in case of the demise of any of them "without legitimate issue," his proportion was to be divided among the survivors. A. died leaving children:—Held, that they did not take by implication, but that on A.'s death his legacy fell into the residue. *Ranelagh* v. *Ranelagh*, 12 Beav. 200; 19 L. J., Ch. 39.

A testator bequeathed a sum of money to his wife's nephew for life, and if he should die in the testator's lifetime without issue, then he gave the same to other parties. The nephew died in the lifetime of the testator, leaving issue:—Held, that such issue was not entitled by implication to the legacy. *Cooper* v. *Pitcher*, 4 Hare, 485; 16 L. J., Ch. 24; 9 Jur. 202.

Devise and bequest of residuary real and personal estate to the testator's son, and the heirs of his body for ever; and in case the son should die without children, the whole to be divided amongst the testator's surviving grandchildren, share and share alike. The son takes an estate tail in the freehold part of the property. *Abram* v. *Ward*, 6 Hare, 165; 16 L. J., Ch. 293; 11 Jur. 867.

Where there is an indefinite bequest to a parent, and if he dies without having or leaving children over, the children do not take by implication. Where there is a bequest to the parent for life, and if he die without having or leaving children over, the children are not entitled by implication. Where there is a bequest to a parent for life, and if he die without having or leaving children over, and there are matters in the will to raise an inference in favour of the children, the court is at liberty to take them in connection with the bequest, in the event of the parent dying without having or leaving issue, and to hold that the children are entitled by implication. A. bequeathed to each of his grandnephews, A. and B., an annuity for their lives; and in case of the death of either of them leaving issue, he directed that the annuity of him so dying should go to such issue if more than one, share and share alike, the share or shares of such child or children as should die under twenty-one or marriage to go to and be equally divided amongst the survivor and survivors of such issue during their respective natural lives; and if but one, the whole of annuity to go to such only child for life; and in case of the death of either A. or B. without lawful issue living at his death, that the annuity of him so dying should go to the survivor for his life; and in case of the death of both A. and B. without having issue or leaving such, and that such issue should die before the age of twenty-one, then, after the death of the survivor of such issue of A. and B., he directed that the said two annuities should sink into his residuary personal estate. A. died without issue:—Held, that there was a bequest by implication of A.'s annuity to the children. *Kinsella* v. *Caffrey*, 11 Ir. Ch. R. 154.

A testator devised a freehold house to his niece for her life for her separate use, and after her death, "she leaving no child or children," to her nephew, S. G. R. The residue of his real and personal estate he devised and bequeathed to his two nephews, S. G. R. and W. W. R. in equal shares. The niece died, leaving children:—Held, that the niece only took for life, and after her death the property passed under the residuary gift, and that the court could not imply a devise in fee-simple to the niece, or a devise in remainder to her children. *Scale* v. *Rawlins*, 61 L. J., Ch. 421; [1892] A. C. 342; 66 L. T. 542—H. L. (E.)

Devise in trust for A. for life, and after the decease of A., in trust to permit such one child of A., and the heirs of his or her body, to receive the rents as A. should appoint by deed or will, and in default of appointment to go to his eldest son and the heirs of his body; and in case there should be no son, to and amongst his daughters, and to the heirs of their bodies, share and share alike; and in default of such issue, in trust for B., C. and D. successively for their lives, with similar remainders respectively to them as to A.'s sons and daughters, with remainder over in fee, and a residuary devise to A. A. by will appointed to his eldest son, who died without issue in his lifetime:—Held, first, that A. took an estate tail in remainder, after the estate devised to his eldest son in default of appointment; and secondly, that the words "in case there shall be no son" did not give an estate by implication to the other sons of A. *Bell* v. *Bell*, 15 Ir. Ch. R. 517.

A. by will gave 2,000*l.* on trust for E. for life, with remainder as E. should appoint, and in default of such appointment for such persons as should be living at the death of E. and next of kindred of A.; and in case E. should die without issue living to attain twenty-one, then over. E. never executed the power of appointment, and died leaving one only child, who attained twenty-one:—Held, that there was no estate by implication in the issue of E. *Hayton's Trusts, In re*, 4 N. R. 55; 10 L. T. 336.

Bequest of residue of personal estate to trustees, upon trust for A.; but if he should die in the testatrix's lifetime, "without leaving any child or children him surviving," then in trust for B. absolutely:—Held, not to create a trust by implication for the children of A. on his death in the testatrix's lifetime; and semble, that it was a case of intestacy. *Lee* v. *Bush*, 2 De G. M. & G. 810; 22 L. J., Ch. 97; 16 Jur. 1057.

A bequest to A. for life, with a gift over, if he die without leaving issue, gives no interest by implication to the issue. A. gave his residue to his three children "for their natural lives, viz., they to have the interest during their natural lives, and if any die without leaving issue, in that case to return again for the benefit of his grandchildren":—Held, that the three children took during their joint lives and the life of survivors and survivor; and, secondly, that their children took no interest by implication, so that if the three children all died leaving

issue there would be an intestacy after the death of the survivor. *Neighbour* v. *Thurlow*, 28 Beav. 33.

A testator gave legacies to his children absolutely, and then gave the income of his residuary estate to his wife for her life, and directed that after her death the income should be divided equally among his said children during their respective lives, and after the death of all his children he directed the capital to be divided equally among all his grandchildren; provided, nevertheless, that in case of the death of any of his said children, leaving lawful issue, "the respective legacy, share, and interest" of the child or children so dying should immediately thereupon become vested in such his, her, or their issue respectively:—Held, that upon the death of a child leaving issue before the period of distribution, the income of that share of the residue of which the child had been tenant for life was payable until the period of distribution to the issue as joint tenants, and not to the surviving children of the testator. *Walmsley* v. *Foxhall*, 1 De G. J. & S. 605.

Bequest to W. of an annuity during his natural life, and in case W. should die without child or children, and from and after his death, then over:—Held, that W.'s children took no interest in this annuity. *Sparks* v. *Restal*, 24 Beav. 218.

B., after directing the payment of his general expenses, gave all his funded property in the Bank of England and certain other personal and real estate to his daughter S., she paying and receiving all his debts. The will proceeded as follows: "The said S. shall in no way dispose of any of the said funded property, but to hold the same for her natural life, and if she should die without issue the said landed property shall go to J. B. for his natural life. I will and direct that all the funded property shall go to my granddaughter W. and her heirs for ever; and I also will and direct that after the death of the said J. B. all the said landed property shall go to W., and her heirs for ever." On the question what interest S. took in the testator's funded property:—Held, semble, that the issue of S. took no gift by implication from the terms of the gift over, but W. took the funded property absolutely on the death of S. *Hovill, Ex parte, Banks' Trust, In re*, 2 K. & J. 387.

Where a testator directed the annual interest of his residue to be divided into as many shares as there were living children of T. and L., share and share alike, as they should come of age; and in case any one should die without children, his share to devolve on survivors successively, till the whole interest came into the hands of the grandchildren and great-grandchildren of T. and L.:—Held, that the children of T. living at his death were entitled to the income only, but that there was a gift by implication to these children absolutely, with a gift over of the share of any grandchild who had died without having had issue; not absolutely, but according to the gift of the original share. *Wetherell* v. *Wetherell*, 4 Giff. 51; 10 W. R. 818.

Bequest of residue to John L., but if he should die in the lifetime of the testatrix, without leaving children, then to Charles L.:—Held, that the children of John L. took nothing by implication. In such a case the same words receive the same construction in the case of a residue, as in that of a mere legacy. *Addison* v. *Bush*, 14 Beav. 459.

A testator directed that the interest of his estate should be divided half-yearly between four of his sons, and at the decease of either without lawful issue, such share to revert to the remainder then living, or their child or children:—Held, that each of the four sons took an absolute interest in his share, subject to be divested in case of his dying without leaving issue; and that there was no gift by implication to the children of any who might die leaving issue. *Dowling* v. *Dowling*, L. R. 1 Ch. 612; 12 Jur. (N.S.) 720; 15 L. T. 152; 14 W. R. 1003.

Devise of lands of gavelkind tenure to trustees, upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P. M. for life, and after his decease for the first son of P. M. for life, and after his decease for the first son of such first son and the heirs male of his body, and in default of such issue for every other son of P. M. successively, for the like interests and limitations; and in default of issue of the body of P. M., or in case of his not leaving any at his decease, for T. M. for life, and after his decease for T. G. M., the eldest son of T. M., for life, and after his decease for the first son of T. M., and the heirs male of his body, and in default of issue of the body of the said T. G. M. for every other son of T. M., successively, for the like estates and interests; and on failure of all such issue of the body of T. M., upon trust for him, his heirs and assigns, for ever; provided that if P. M., or T. M., or any of their issue, should become entitled to the Jodrell estate, then the trustees should stand seised of the devised premises, upon trust for the next person entitled thereto under his will, as if the person so succeeding to the Jodrell estate were dead. T. M. died after the date of the will, and the testator by a codicil declared that his trustees should stand seised of the devised estates upon trust for his wife for her life, and from and after her decease upon the trusts declared by his will, subject to the declaration therein contained with reference to the Jodrell estate:—Held, that P. M. took an estate for her life only; that T. G. M. took an estate for life in remainder after the life estate of P. M., contingent on P. M. not leaving any issue at his decease, and determinable on his becoming entitled to the Jodrell estate; that the eldest son of T. G. M. took a contingent remainder in tail, after the determination of the life estate of his father. *Monypenny* v. *Dering*, 7 Hare, 568; 14 Jur. 1083.

Gift to Children in Esse or En ventre — Implied Gift to Afterborn Children.] — One devises to his son then living, and if he dies under twenty-one, and testator's wife shall be enceinte at his death with other child or children, then to such at twenty-one; but if no such, then over to his nephews. Two children were born after the will, in the lifetime of the testator:—Held, to take under the devise. *White* v. *Barber*, Ambl. 701.

A bequest in favour of the testator's two children, then born (by name), and the child "of which his wife was then enceinte":—Held, on the context, to include, besides the above three, a fourth child, born three years after the date of the will. A testator in 1831 devised his copyhold messuages to trustees, upon trust to permit his wife to occupy one of them during the minority of his youngest child, and to apply the rents of the others to the maintenance, &c., of

his children, Thomas and John, "and the children or child of which his wife was then enceinte" during minority, making thereout a provision for his wife. The testator then provided for the advancement of his "said children," the division of the messuages among them at twenty-one, and for the benefit of survivorship among them. He also bequeathed his personal estate on the like trusts in favour of his "said children," and in all these cases he added the words "as well the children or child of which my wife is so enceinte as those already born"; but in several instances he simply used the words "said children," and in one instance omitted "said." In 1847 the testator made a codicil, disposing of freeholds and copyholds acquired since the date of the will on the same trusts, and confirming the will. The child of which the wife was enceinte was afterwards born, and subsequently, in 1835, a fourth child was born:—Held, that the fourth child was entitled to a share. *Goodfellow* v. *Goodfellow*, 2 Beav. 360; 18 Beav. 356.

Implication from Gift of Land to A. for Life, Remainder to Children without Words of Limitation, and in Default over.]—By will made before 1838, a testatrix, as to the estates wherewith it had pleased God to bless her, gave, devised, and disposed thereof in manner following, that was to say:—First, she gave and devised to A. and B., and their heirs, certain specified hereditaments of gavelkind tenure (not using the word "estate"), to hold the several premises, with their appurtenances, until A. and B., their heirs and assigns, to and for the several uses, estates, intents and purposes thereinafter expressed, limited, and declared of and concerning the same (that was to say), to the use of her grandson S. for his life, and from and after the determination of that estate, to the use and behoof of A. and B., and their heirs during the life of S., in trust to preserve the contingent uses and remainders thereinafter limited; and from and immediately after the decease of S., to the use of all and every of the child and children, if more than one, of his body lawfully begotten or to be begotten (without any words of inheritance), but if he should die without leaving such issue, then to the use and behoof of her grandson C. for his life. Then there were trusts to preserve contingent uses and remainders, and then the property was to go to the children of C. in precisely the same terms, without any words of inheritance; but if C. should die without leaving such issue, then to the use and behoof of the testatrix's three granddaughters D., E., and F., their heirs and assigns for ever, as tenants in common. These dispositions were followed by a devise of other lands to A. and B., to uses in favour first of C. and his children, and then of S. and his children in precisely the same terms mutatis mutandis. But beyond what is stated, there was no devise of real estate in the will. S. died leaving children who survived him, but there was no child either of S. or C. at the date of the will or of the testatrix's death:—Held, that the children of S. took only life estates in joint tenancy in the specified hereditaments, and that subject to such life estates the beneficial inheritance descended as undisposed of to the testatrix's gavelkind heirs, the gifts over to C. and his children, and to D., E., and F., their heirs and assigns, having failed by reason of S.'s death, leaving children. *Pollard, In re*, 2 N. R. 404; 3 De G. J. & S. 541; 32 L. J., Ch. 657; 8 L. T. 710; 11 W. R. 1083.

One of S.'s children mortgaged his interest in the property:—Held, that thereby the joint tenancy so far as it affected that share was severed, and the intestacy as to it after his death was accelerated. *Ib.*

—— **From Life Interest with Power of Appointment — Where Life Interest lapses.**]—A testator left 2,000*l.* to E., for her sole and separate use, free from the control of her husband, "and to be appropriated by her to and amongst her children in such shares as she shall think proper." E. having predeceased the testator, leaving children:—Held, that the legacy did not lapse, and that there was an implied gift of the capital sum to E.'s children. *Haly's Trusts, In re*, 23 L. R., Ir. 130—C. A.

—— **Where Power released.**]—Where a testator by his will gives his wife a life interest in certain property, and a power of appointing such property among a class, and subsequently makes her residuary legatee, the residuary gift is not such a gift over as will prevent the court from implying from the power a gift to the class, to take effect, even if no appointment is made by the wife:—Held, in such a case, upon the construction of the particular will, that the wife did not on releasing her life interest become absolutely entitled to the property which she had power to appoint. *Bull* v. *Vardy* (1 Ves. 270) distinguished. *Brierley, In re, Brierley* v. *Brierley*, 12 R. 55; 43 W. R. 36—C. A.

Executory Trust for Settlement on Daughter, her Husband and Children—Gift over shewing Intention to include Children of Future Marriage—Second Husband entitled to Life Interest.]—A testator bequeathed his personal estate upon trusts for his children equally, and directed that in case his daughter, M. A., or any future-born daughter, should marry during minority with, or after minority without, such consent as therein mentioned, the share of such daughter or daughters so marrying should be assigned to trustees in settlement "upon such respective marriages" for the benefit of such daughter or daughters so marrying for life, "and after her or their deceases for the use of her or their intended husband or husbands for his or their life or lives, and after their decease respectively," for the children of "such marriage or respective marriages," with a gift over in the event of a daughter dying "without leaving any issue her surviving." M. A., the only daughter of the testator, was twice married. On her first marriage, she being then an infant, a settlement of her share was made on herself, husband and children, containing no provisions in favour of the husband or children of a future marriage. On her second marriage a settlement of her share was made whereby a life interest was limited to her second husband in the event of his surviving her, which happened. She subsequently died without leaving issue her surviving:—Held, that the executory trust contained in the will authorised a settlement of a daughter's share on her for life with remainder to any husband she might leave for his life; and that the second husband of M. A. was accordingly entitled to a life interest in her share. *Nash, In re, Nash* v. *Allen*, 58 L. J., Ch. 754; 42 Ch. D. 54; 61 L. T. 193; 37 W. R. 646.

Implication of Gifts to Survivors.]—A bequest of the interest of the residue to the use of "A. and his wife for their lives," with remainder over :—Held, that the wife, who survived her husband, was entitled during their joint lives and the life of the survivor. *Moffatt* v. *Burnie*, 18 Beav. 211 ; 23 L. J., Ch. 591 ; 18 Jur. 32 ; 2 W. R. 83.

A testator gave a fund to trustees upon trust to pay the interest thereof unto and between B. and C. during their respective lives in equal shares ; and after the decease of B. and C. upon trust to pay, assign, and transfer the fund unto and between the children of B. and C. And if there should be no child or children of B. and C. living at the time of the death of C., then upon trust for other parties. B. died, leaving children :—Held, that C. took during his life the whole of the produce of the trust fund, and that at his death the principal was distributable among the children of B. and C. who should survive C. *Pearce* v. *Edmeades*, 3 Y. & C. 246 ; 8 L. J. Ex. Eq. 61 ; 3 Jur. 245.

Legacies are given to A., B., & C., to be paid at their respective marriages, and if any of them die, her legacy to go to the survivors. One of them dies unmarried. The survivors shall not receive her legacy before their respective marriages. *Moore* v. *Godfrey*, 2 Vern. 620.

A testator directed an annuity to be purchased for the life of his two sisters, to be equally divided between them : — Held, that the annuity was only to continue during the joint lives of the two sisters. *Grant* v. *Winbolt*, 23 L. J., Ch. 282 ; 2 W. R. 151.

The testator gave an annuity to A. for life, and the income of the residue to B. and C. "during their lives as tenants in common." The gift over to their respective children was only after the deaths of A., B., and C. ; and there was a provision for intermediate maintenance ; it was only on a contingent event, which never happened. B. died :—Held, that C. was not, by implication or otherwise, entitled to more than half of the income for life. *Drakeley's Estate, In re*, 19 Beav. 395 ; 2 W. R. 613.

Devise and bequest to A., and after her decease, leaving any child or children her surviving who should attain twenty-one, to pay her share "to her eldest child, his executors, administrators, and assigns," with a gift over in default of such child :—Held, that A.'s eldest child, who died in A.'s life, did not take, but that the second child, who survived her mother, was entitled. *Stevens* v. *Pyle*, 30 Beav. 284.

A gift of income to persons by name, though accompanied by words of severance, followed by a gift over after the death of the same persons, naming them, is clear evidence of intention that the subject of the gift should pass as a whole. *Draycott* v. *Wood*, 8 L. T. 304 ; 2 N. R. 55.

Where it is impossible to ascertain the donees nominatim, the same rule holds as to a gift to persons as a class. Therefore, in construing such a gift, the court will prefer to imply a clause of accruer, rather than to hold it as in joint tenancy, the latter being liable to severance, and therefore less proper to carry out the intention. *Ib.*

The words "during their joint and natural lives" in a settlement held to mean "during their lives and the life of each of them." *Smith* v. *Oakes*, 14 Sim. 122.

Bequest of the interest of the residuary personalty to the testator's wife for life, and from and after her death to B. D. for life, and from and after the death of the survivor of them the capital to W. absolutely, subject to the payment to A., B., and C. of 1,000*l.* each, which the testator gave to them, to be paid to each of them at the end of twelve months next after the decease of the survivor of his said wife and B. D. ; provided that if either of the said A., B., and C. should die "in the lifetime of my said wife and my said brother B. D." :—Held, that A.'s personal representative was entitled to her legacy, and that the gift over had not taken effect. *Day* v. *Day*, Kay, 703 ; 18 Jur. 1013 ; 2 W. R. 700.

Devise of 100*l.* to A. and B., viz., 50*l.* to A. and 50*l.* to B., payable at such a time, and if either die before the time then the 100*l.* to the survivor. The whole 100*l.* decreed to the survivor, notwithstanding the severing clause, which holds only in case both live to the time of payment. *Scoulding* v. *Green*, Pre. Ch. 37.

Bequest of personal estate, after the death of the tenant for life, in trust to pay equally between A. and B. ; but if "neither" should be then living to C. A. died in the lifetime of the testatrix. B. survived the tenant for life, and claimed the whole, either as surviving joint tenant, or under a gift to her by implication. The court rejected such claim, and :—Held, that the moiety intended for A. had lapsed, and belonged to the next of kin of the testatrix. *Baxter* v. *Losh*, 14 Beav. 612 ; 21 L. J., Ch. 55.

Bequest of personalty to trustees, in trust to pay the income to A. and B. for their lives, with provisions for the maintenance of their children, if any, and against alienation ; and after the decease and failure of issue of A. and B., the trustees were to continue the payments to any husband A. and B. might respectively have, during the life of such husband ; and after the decease of the respective husbands of the said A. and B., then the testatrix gave the whole of the said funds over to C. A. died without leaving a husband or issue :—Held, that B. did not take the whole for her life, but that C. took A.'s share immediately on her decease. *Ewington* v. *Fenn*, 16 Jur. 398.

A testator gave his residuary estate upon trust, in case he left no child him surviving, for his wife for life, if she should so long continue his widow : but if she should marry again to pay one-half of the dividends, and after her death to pay the whole to his brother and sister during their joint lives, equally to be divided, and after the decease of either of them the brother and sister to pay the same wholly to the survivor for life, and after the decease of "every of them," his wife, brother, and sister, he declared that the trust fund and the dividends were to be held in trust for the children of the brother :—Held, that a moiety of the income accruing due after the second marriage of the widow, and between the death of the survivor of the brother and sister, and that of the widow (who survived them), neither belonged to the widow nor was undisposed of, but belonged to the brother's only child. *Brown* v. *Jarvis*, 2 De G. F. & J. 168 ; 29 L. J., Ch. 595 ; 6 Jur. (N.S.) 789 ; 8 W. R. 644. And see *Swan* v. *Holmes*, 19 Beav. 471.

Bequest of a moiety of a residue to A. for life, and of the other moiety to B. for life, "and from and immediately after the decease of A. and B." to stand possessed "of all my personal estate" in trust for eight grandchildren. A. died, and B.

was living :—Held, that the moiety enjoyed by A. became immediately divisible amongst the grandchildren. *Sarel* v. *Sarel*, 23 Beav. 87.

A testator gives an annuity of 200*l.* to S. A. H. for life, and at her death 100*l.* of the same to be continued to such of her daughters as remained single during their lives, at the termination of which the same should revert to his children, their executors, administrators, and assigns. The annuity is paid to S. A. H., and on her death 100*l.* continued to her three unmarried daughters. One dies; and on the question whether the annuity of 100*l.* survived :—Held, that it did. *Smyth* v. *Smyth*, 3 W. R. 189.

J., referring to the fact that he possessed certain stock, requested payment to his brother of a net annual annuity, the residue to his sister, also the net interest or other stock to E. J.; each of the above three annuities to be enjoyed for their lives, with benefit of survivorship; and at the dissolution of those three persons, over absolutely. The testator then directed an accumulation to make up 100*l.* to pay the following annuities: to E. O. 20*l.* per annum, to C. T. 20*l.* per annum, to M. E. 20*l.* per annum, to T. T. 20*l.* per annum; the benefit of survivorship in these four annuities to devolve to E. O.; but in case of her not surviving, the benefit of survivorship to be derived by the three first-named legatees; and on the demise of all the annuitants, over as before. E. O. survived T. T. and died, and on the question whether her representatives were entitled to the two annuities to her and T. T. :—Held, that they were not, and that the annuities, being undisposed of, went to the next of kin. *Jernegan* v. *Baxter*, 2 W. R. 481.

A testator devises his property to be invested in the funds, and gives 100*l.* a year out of the interest to be paid yearly to the order of A., and the remainder of the interest to B. and C., during their lives, share and share alike; at the death of either, her share to go to A.; and then orders, that at the death of both B. and C. the property shall be drawn out of the funds, and remitted to a corporation to be applied to charitable purposes; the testator dies; then B. dies; and then A. :—Held, that A.'s representative was entitled to the 100*l.* a year, and B.'s moiety of the residue of the interest during the life of C. *Booth* v. *Garraway*, 2 L. J. (o.s.) Ch. 183.

B. bequeathed to his five daughters, naming them, 12,500*l.*, chargeable on his real and personal estate, the interest to be paid to them in equal shares during their lives, the principal to be invested for them or the survivors or survivor of them for their maintenance, to be free from the debts and control of their husbands, "the principal, after their deaths, in equal parts, to their surviving children, as they arrive at the age of twenty-one"; and he gave to his trustees the residue of his property. Two of the daughters died, one leaving two children :—Held, that the principal was to remain in its integrity until the death of the survivor of the five daughters, and on the death of such survivor the fund to be divided amongst the persons described as "surviving children," but that the time had not arrived to decide who were meant by those words. *Minton* v. *Minton*, 4 L. T. 696; 9 W. R. 586.

A. gave his residue to his three children "for their natural lives, viz., they to have the interest during their natural lives, and if any die without leaving issue, in that case to return again for the benefit of his grandchildren" :—Held, that the three children took during their joint lives and the life of the survivors and survivor. *Neighbour* v. *Thurlow*, 28 Beav. 33.

J. by his will gave to his daughters N. and S. the interest of 2,000*l.* consols, to be paid to them in equal shares for and during the term of their natural lives. By a codicil thereto the testator declared it to be his will, that after the decease of his daughters N. or S. the property for which they were to receive during their lives the interest, which was thereby to be for their sole and separate use, independent of any connections they might form, should become the joint property of the lawful heirs of his four children in equal shares :—Held, that each of the daughters N. and S. took the income of a moiety of 2,000*l.* for her life, and that on the death of one her moiety went over at once to the heirs of the children of the testator. The share of the heirs of the surviving daughter was carried to a separate account for such person as should be her heir at her death. *Hensley* v. *Wills*, 14 L. T. 162; 14 W. R. 422.

A testator gave to Mrs. R. and M. P. "each a moiety of the interest" of certain invested moneys, and also gave to Mrs. R. and M. P. "each a moiety of the rents" of his freehold estate, "and at the death of the last survivor" of them directed the investments and property to be sold, and the proceeds to be equally divided between his surviving nephews and nieces :—Held, that on the death of M. P. there was an intestacy as to one moiety of the interest and rents during the life of Mrs. R. *Rownd* v. *Pickett*, 47 L. J., Ch. 631; 26 W. R. 493.

A. bequeathed one-half of the interest of a sum to A. and B., and the other half to C. and D., during their natural lives, and after the death of A., B., C., and D. he bequeathed the principal to E., and he appointed residuary legatees. A. died, and then B., leaving C. and D. surviving :—Held, that no part of the principal or interest went to E. during the life of C. and D.; held, also, that the executors of B., and not the residuary legatees, were entitled to the interest of one-half during the lives of C. and D. *Gray* v. *Robinson*, 11 Ir. Ch. R. 295. See also *Alt* v. *Gregory*, *and other cases* ante, cols. 1378 to 1383.

Implication of Gift by Recital.]—If a testator recites that he has, in the first part of his will, given such an estate to A., that is a sufficient devise. *Yates* v. *Thomson*, 3 Cl. & F. 572.

Devise to the heir, after death of devisor's wife, a necessary implication that the wife should take for life; but no implication for her upon such a devise of another man's estate through the medium of election. No devise by implication from the mere recital of an erroneous conception of right. *Dashwood* v. *Peyton*, 18 Ves. 27; 11 R. R. 145.

Devise of lands, "which he has before given to A.," over to B. on a given event, is a devise by implication to A. *Bibin* v. *Walker*, Ambl. 661.

A. by will, taking notice that his natural son J. had disobliged him, declared thus: "I do hereby resolve not to give him more than 20*l.* per annum for life"; and he gave his estate to his legitimate son. Per cur., the words do not amount to a devise, and the bastard shall take nothing. *Holder* v. *Holder*, Vin. Abr. tit. Devise, (D. B.) pl. 8.

By a codicil a testator gave to A. B. "500*l.* in

addition to 1,500*l*. which he had before bequeathed to him." The testator had previously bequeathed two legacies only of 500*l*. and 500*l*. each :—Held, that by implication the legatee was entitled to 2,000*l*. *Jordan* v. *Fortescue*, 10 Beav. 259 ; 16 L. J., Ch. 332 ; 11 Jur. 549.

A testator devised all his real estate whatsoever and wheresoever to trustees upon certain trusts. He then recited that he left nothing to his nephews and nieces, because they would become entitled to property held by him under their grandfather's will upon his (the testator's) death without issue. He then bequeathed all his residuary personal estate. The testator was mistaken in supposing that the property referred to by him would devolve upon his nephews and nieces upon his death, it having descended upon the testator himself as the heir-at-law of his father :—Held, that under the circumstances he died intestate in respect to it. *Circuitt* v. *Perry*, 23 Beav. 275 ; 2 Jur. (N.S.) 1157.

A testator gives all the residue of his property to his executors on trust for the sole use and benefit of his daughter L. until she shall attain twenty-five ; and if she marries before that age, for the sole and separate use of L. and her husband ; but if she remains single or is a widow at twenty-five, she shall have power of disposing of the whole property by will. Should she die before twenty-five unmarried, or after that age intestate, then over. By a codicil the testator takes notice that he has left in trust all his property for the sole use and benefit of his daughter, and substitutes other parties for the executors before appointed. The testator left L. surviving, who had attained twenty-five, and was unmarried. On the question what estate L. took :—Held, that she took absolutely. *Grover* v. *Raper*, 5 W. R. 134.

A testator gave by will 3,000*l*. upon trust for A. and her children, and after the decease of A. without issue for the children of B. By a codicil of later date he recited that he had by his will given the 3,000*l*. to A. for life, with remainder to her children, and afterwards to B. for life, with remainder to his children ; and revoked the will as to 2,000*l*., part of the 3,000*l*., from and after the devise to A. and her children, and instead of giving the 2,000*l*. to B. and his children, bequeathed the same to C. :—Held, that the erroneous recital in the codicil, that the 3,000*l*. was given to B. for life, did not amount to a gift of an estate in the 1,000*l*., which remained unrevoked. By the will the testator had also given 2,000*l*. to B. for life, with a gift over on insolvency :—Held, that, if the codicil had been read as an implied gift of 1,000*l*. to B. for life, the gift over on insolvency would have attached to the 1,000*l*. as well as to the 2,000*l*. *Smith*, *In re*, 2 J. & H. 594.

A testator having devised his "fee-simple and other freehold property," in default of issue of his own, to N. for life, remainder to the sons of N. successively in tail, made a codicil as follows : "Having left in my will my fee estate and personal property to S. M. Nugent in case I had no family, I do not now revoke my bequests to him ; but as I have no children, and have lived very happily with my devoted wife, I will and bequeath to her an annuity of 200*l*. over and above her legal jointure, to be paid her by S. M. N. off my estate as long as she lives" :—Held, that the personal estate was undisposed of. *Nugent* v. *Nugent*, 8 Ir. Ch. R. 78.

The testator devised and bequeathed real and personal estate, after payment of debts on trusts (subject to the dower and thirds at common law of his wife), to receive and apply the rents, issues, and profits thereof, or the overplus thereof after deducting the dower and thirds of his said wife and the interest of moneys charged on his said real estate, for the maintenance of his children, and then on trust to sell and divide the moneys among his children :—Held, that this was not by implication a gift of an interest in the estate to the wife. *Adams* v. *Adams*, 1 Hare, 537 ; 11 L. J., Ch. 305 ; 6 Jur. 681.

A mere erroneous recital in a codicil of what the testator has given by his will does not operate to create a new gift, or to vary the disposition made by the will. *Adams* v. *Adams* (supra) explained. *Mackenzie* v. *Bradbury*, 6 N. R. 283 ; 33 Beav. 617 ; 34 L. J., Ch. 627 ; 11 Jur. (N.S.) 650.

Bequest by will of 1,000*l*. to the children of A., of whom W. was one. Recital in a codicil of a bequest of 1,000*l*. to W., with directions as to the time of payment and mode of application :—Held, first, not to create a new legacy ; held, secondly, not to enlarge the interest of W. in the original legacy. *Ib.*

A testator in his will ratifies a settlement, and recites that an annuity of 200*l*. is thereby secured to his wife, which was not the fact. He then bequeaths her another annuity of 400*l*., "in addition to the said annuity of 200*l*. secured to her by the settlement" :—Held, that this was merely a mistake in the recital, and did not constitute a bequest, in addition to the annuity of 400*l*., of so much as would make up the settled property 200*l*. a year. *Ralph* v. *Watson*, 9 L. J., Ch. 328.

Plate excepted by bequest of personal estate to wife, after her decease over, and recited to be hereinafter given to daughter, but not further noticed : undisposed of. *Frederick* v. *Hull*, 1 Ves. 396.

An erroneous recital in a will, that the lands of Blackacre (of which the testator was seised in fee farm) were settled on A. at the death of H., does not operate to give a life estate by implication to H. But it is sufficient to take those lands out of a general residuary devise, so that they descend upon the testator's heir-at-law. *Harris* v. *Harris*, Ir. R. 3 Eq. 610 ; 17 W. R. 790.

A testator, after bequeathing a farm to his eldest son, added, "I observe by my marriage settlement that the lands of K. and G. M'G. are settled upon him" (the testator's eldest son) "at my wife's death. I, therefore, consider these ample provision for him, and I do, therefore, bar him from any further participation in my property, save only the use or enjoyment of such part or parcel as my wife may in her judgment think fit to allow him during her life, but at her death I do strictly limit him as hereinbefore mentioned." After other devises and bequests, the testator, by the residuary clause, gave all the residue of his property to his wife, with power to apportion it. The lands of G. M'G. were not in fact settled on the testator's eldest son by his marriage settlement, or at all :—Held, that the son took those lands as heir-at-law of the testator, and that the wife did not take in them an estate for life by implication. *Ib.*

A testator, being entitled to a policy of assurance for 500*l*. on the joint lives of himself and his wife, bequeathed all his personal estate, "save and except the sum of 500*l*. payable at

my death under a policy of insurance to my wife, and to which she is absolutely entitled under the said policy," to trustees, upon trust for his wife for life, and for his children after her death :—Held, that the sum of 500*l.* payable under the policy was given by implication to the widow absolutely by the will. *Hall* v. *Lietch*, L. R. 9 Eq. 376 ; 23 L. T. 298 ; 18 W. R. 423.

A devise for life contained in a will cannot be enlarged by a recital in a codicil that such devise was in tail. *Arnold, In re*, 33 Beav. 163 ; 9 Jur. (N.S.) 1186 ; 9 L. T. 530 ; 12 W. R. 4.

Precatory words will not create a case for election, neither will the absence of the execution of a power upon an erroneous impression, stated in the will, that by its non-execution A. (a legatee) will divide the fund equally with B. *Langslow* v. *Langslow*, 21 Beav. 552 ; 25 L. J., Ch. 610 ; 2 Jur. (N.S.) 1057.

An erroneous recital in a will as to the effect of a settlement does not put the devisees to their election, whether they will take under the will or the settlement. *Box* v. *Barrett*, L. R. 3 Eq. 244 ; 15 W. R. 217.

Under a settlement the four daughters of a testator took equal shares, subject to his life interest. The testator by his will, recited that under the settlement his two daughters, A. and B. would become entitled, and that in making his will he had taken the same into consideration, and had not devised to them so large a share under his will as he otherwise should have done ; he then devised to A. and B. certain estates, and to his two other daughters, C. and D., other estates, of much greater value. The will did not purport to affect the settled property :—Held, that as the will did not purport to make any disposition of the settled property, and was only made under a mistaken impression, C. and D. were not put to their election. *Ib.*

A widow of a freeman of London who left children and died intestate was entitled to four-ninths of his personal estate, and having by deed assigned over her four-ninths for her separate use in case of marriage, and to such persons as she should appoint, and for want of such appointment then to her children ; the widow intending to marry a second husband, by another deed, to which the husband was a party, in consideration of the intended marriage, and of a settlement made on her by him, recites that if she did not dispose of her four-ninths, the husband would be entitled thereto, and then assigns it over to trustees, in trust for the intended husband, during their joint lives, subject to her control and disposal by writing ; after which she dies without disposing of it. Decreed, the second husband is as a purchaser, and the recital that he would be entitled to it if the wife should not dispose of it was a gift. *Poulson* v. *Wellington*, 2 P. Wms. 533.

A testator gave the interest of 2,000*l.* to G., and the residue of his estate to P., and then said "and failing G. and P. without children, one or other of them, the property hereby conveyed to them shall devolve on S." :—Held, that the words "property conveyed to them" did not confer by implication a life estate upon G. in the residue given to P. *Pursell* v. *Elder*, 13 L. T. 203.

A testatrix gave the residue of her property to A., and by a codicil reciting that gift, and that as life was uncertain A. might be removed before her, she in such case appointed B. and C. her residuary legatees. The testator made a second codicil as follows : "As the death of Mrs. W. (the mother of B. and C.) has taken place, and as her two children will ultimately become my residuary legatees, the 15*l.* she was to have I give to Mrs. H." :—Held, that A. was entitled to the residue. *Vaughan* v. *Foakes*, 1 Keen, 58.

A father bequeathed a legacy of 1,000*l.* to each of his sons. By a codicil he gave to his eldest son a sum of "300*l.* instead of a sum of 500*l.* which I have bequeathed to my other children." The will contained no such bequest to his other children :—Held, that the codicil was insensible, inoperative, and void for uncertainty. *Armit* v. *Hipkins*, 28 L. T. 222 ; 21 W. R. 475.

A testator gave to each of his three brothers and six sisters a legacy of 500*l.*, and other legacies to other relations of his, which, with the preceding legacies to his brothers and sisters, amounted to 6,100*l.* He then gave "the remainder of his property to his wife absolutely, except 4,100*l.*, of which she was only to have the use during her life, and which he wished to be divided among his relations to whom he had left legacies in the fore part of his will, in proportion to the legacies left above, which would just make their legacies double the first bequest" :—Held, that although there had been a mistake by the testator in computing the amount of the legacies given by him in the former part of his will, there was no such evidence of a clear intention on his part to double the amount of the preceding legacies as would justify the court in holding that the words "four thousand one hundred pounds" ought to be read "six thousand one hundred pounds." *Thompson* v. *Whitelock*, 28 L. J., Ch. 793 ; 5 Jur. (N.S.) 991 ; 7 W. R. 625.

The mere misrecital of a will by a codicil is inoperative, and will not modify the dispositions of the will ; but an erroneous recital of a will, coupled with or followed by a clear indication of the testator's intention to make some modified or different disposition, inconsistent with the dispositions of the will, is operative to modify or alter the earlier gifts. A testator by his will gave to his daughter (in events which happened) an estate tail in his real property, and an absolute estate in his personal property. By a codicil, after reciting that his daughter would take an estate for life in his property, with remainder to her issue, he directed that the life estate should be for her separate use, that she should have a power of appointing a life estate to any husband who should survive her, and that if she should have more than one son, and her eldest son should inherit property from other sources of a certain value, then her second son should succeed to the property given by the will, with certain gifts over :—Held, that the estates given by the will were modified by the codicil, and that the daughter was entitled to a life estate only in the real and personal property of the testator, with remainder by implication to her eldest son absolutely, subject to the appointment by her of a life estate in favour of a husband, and to a shifting use in favour of a second son. *Margitson, In re, Haggard* v. *Haggard*, 48 L. T. 172 ; 31 W. R. 257—C. A.

Mistake in the computation of a legacy rectified according to the intention, though contrary to the words. *Milner* v. *Milner*, 1 Ves. Sen. 106.

A testator gives to his wife an annuity of 100*l.* and the sum of 1,000*l.*, which he considers will, with the property which she is entitled to after

his death, make up an income of 2,500*l*. a year; in fact, those gifts make up her income only to 1,800*l*. a year. She is entitled to have the deficiency supplied out of his residuary estate. *Trevor* v. *Trevor*, 5 Russ. 24; 6 L. J. (o.s) Ch. 182; 29 R. R. 6.

A testatrix gave to A. an annuity of 40*l*., contingent on a certain event. She then gave A. a legacy of 30*l*. By a codicil she said, "And I increase the immediate annuity of 30*l*. left by my will to" A., "to an annuity of 50*l*." :—Held, that he took an annuity of 50*l*. in addition to the contingent annuity of 40*l*. *Ives* v. *Dodgson*, 39 L. J., Ch. 693; L. R. 9 Eq. 401; 23 L. T. 215.

A father directed his debts to be paid, "including a debt of 300*l*. owing from me to my daughter." He owed his daughter 150*l*. only :—Held, that she was not entitled to receive more than the 150*l*. *Wilson* v. *Morley*, 46 L. J., Ch. 790; 5 Ch. D. 776; 25 W. R. 690.

A will contained a bequest of 1,000*l*. on trusts, and of 5,000*l*. on trusts, and another bequest on trusts in which no sum was mentioned, but the language was continuous, and no actual blank was left. In another part of the will there was power to invest the said sum of 5,000*l*., and the said two sums of 1,000*l*. :—Held, that the latter clause was evidence that the testator intended a bequest of 1,000*l*. in the bequest in which no sum was named. *Edmunds* v. *Waugh*, 4 Drew. 275; 6 W. R. 589.

A testator, after reciting inaccurately that his wife was entitled for life to 39,000*l*. settled on his marriage, which he stated would, at 4 per cent., yield 1,560*l*., directed his trustees to add an annuity of 440*l*. to raise his wife's jointure to 2,000*l*. :—Held, that the widow was entitled to have her annuity made up to 2,000*l*. at all events. *Ouseley* v. *Anstruther*, 10 Beav. 459.

Bequest of 1,000*l*. to A., the interest of 2,000*l*. to B., and at his death to his children, the sum of 1,000*l*. to D., the sum of 1,000*l*. to B., in addition to 1,000*l*. before mentioned :— Held, that the former legacy to B. was of pounds sterling, and that the gift to his children was of an absolute interest in capital. *Mann* v. *Fuller*, Kay, 624; 2 Eq. R. 1085; 23 L. J., Ch. 543; 2 W. R. 510.

On construction of will :—Held, that the capital of the residue passed by implication, though the interest and dividends only were expressly given. *Phillips* v. *Chamberlaine*, 4 Ves. 51.

A sum of 20,000*l*. was bequeathed by a testator to A., his wife, who was also his residuary legatee, and after her death to B., wife of C., for life, for her sole and separate use, and after her death upon certain trusts for the benefit of their children (no interest being given to C.). A. by her will, after three legacies of 100*l*. each absolutely, gave to C. and his wife "the same amount and on the same trusts and conditions as are named in my late husband's will to C." One moiety of her residuary personal estate was also directed to be given to B. and C. and their children, "on the same trusts as before alluded to" :—Held, that the words "same amount" did not refer to the preceding gifts of 100*l*., and that notwithstanding the mistaken reference to the testator's will as containing any gift to C., the 20,000*l*. passed by A.'s will on the same trusts as were contained in the testator's will. *Stephens* v. *Powys*, 1 De G. & J. 24.

Legacies out of a specific fund, given over in case of lapse or death of the legatees, before the fund shall be realised, not extended by a subsequent recital of the fund as "willed to" those legatees over. The surplus therefore passed under the residuary clause. *Smith* v. *Fitzgerald*, 3 V. & B. 2; 13 R. R. 129.

A testator gave by will 3,000*l*. upon trust for A. and her children, and after the decease of A. without issue for the children of B. By a codicil of later date he recited that he had by his will given the 3,000*l*. to A. for life, with remainder to her children; and afterwards to B. for life, with remainder to his children; and revoked the will as to 2,000*l*., part of the 3,000*l*., from and after the devise to A. and her children, and instead of giving the 2,000*l*. to B. and his children, bequeathed the same to C. :—Held, that the erroneous recital in the codicil, that the 3,000*l*. was given to B. for life, did not amount to a gift of a life estate in the 1,000*l*., which remained unrevoked. By the will the testator had also given 2,000*l*. to B. for life, with a gift over on insolvency :—Held, that if the codicil had been read as an implied gift of 1,000*l*. to B. for life, the gift over on insolvency would have attached to the 1,000*l*. as well as to the 2,000*l*. *Smith, In re*, 2 J. & H. 594.

A testatrix directed a sum which she said she owed to A. and B. on her promissory note, and her other debts, to be paid. She directed the residue of her estate to be applied towards establishing a school in connection with a certain chapel for the time being, and "to pay the same over to the treasurer for the time being of such school, now or hereafter to be built." The testatrix did not in fact owe the money to A. and B. : —Held, whether there was a valid debt or not on the promissory note to A. and B. was a question of law; but if there was no debt, it was good as a legacy. *Longstaff* v. *Rennison*, 1 Drew. 28; 21 L. J., Ch. 622; 16 Jur. 559.

See also *Wilson* v. *Piggott*, 2 Ves. 351.

Equitable Estate whether Co-extensive with Legal Estate.]—Devise to trustees and their heirs, "upon trust for the use and benefit of" A., B. and C. (without words of limitation) :—Held, that A., B. and C. took in fee. Devise to trustees in fee, upon trust for the use and benefit of A., B. and C., the rents to be paid for their maintenance and education, "or to the survivors or survivor of them, share and share alike" : —Held, that they took equitable estates in fee as joint tenants. *Moore* v. *Cleghorn*, 10 Beav. 423. Affirmed 17 L. J., Ch. 400; 12 Jur. 591.

A testatrix devised to trustees and their heirs her copyhold dwelling-house, garden, and ground, together with the furniture and effects therein; and also the ten cottages and two new cottages built by her, with their appurtenances at L., upon trust to pay the rents of the said hereditaments to her niece S. S., the wife of G. S., or to permit and suffer her to use and occupy the said hereditaments during her life, to the intent that the same hereditaments and the rents, issues, and profits thereof might be for her separate use; and after her decease to G. S. for his life, and after his decease to stand possessed of the same hereditaments in trust for such of the testatrix's nephews and nieces, or grandnephews and grandnieces, as S. S. should appoint; and in default of appointment upon trust to sell and dispose of the said hereditaments and premises, the produce of such sale to constitute part of her

residuary personal estate :—Held, that the furniture and effects did not pass to S. S., but belonged to the residuary legatees. *Stubbs* v. *Sargon*, 2 Keen, 255 ; 6 L. J., Ch. 254. Affirmed 3 Myl. & Cr. 507 ; 7 L. J., Ch. 95 ; 2 Jur. 150.

A. by his will devised all his real and personal estate to trustees upon trust as to the real estate, to repair and let the same, &c., and upon further trust, notwithstanding any limitation of uses or trusts thereinbefore mentioned, at their discretion to sell and convey the same ; and as to the money to arise upon such sales, upon trust to add the same to his personal estate, to constitute a part thereof, and directed his trustees, when J. C. should arrive at the age of twenty-four years, to convey, assign, &c., to J. C. all the legal estate and interest in all his freehold, copyhold, and leasehold messuages, lands, &c., and all other his real and personal estate and effects not thereinbefore devised and bequeathed, &c. :—Held, that J. C. took the produce of the mixed fund of the real and personal estate of testator, and that rents of real estate till J. C. attained twenty-four did not result to heir-at-law of testator as undisposed of, but passed to J. C. as part of fund given in trust. *Ackers* v. *Phipps*, 9 Bligh (N.S.) 430 ; 3 Cl. & F. 655.

A testator gave real and personal estate to his daughter A. and to two other persons, upon trust to permit A. to receive the rents and interest for life for her separate use, and after her decease in trust to convey to her heirs, executors, &c. ; but in case A. should marry and have no children, then the property to belong to D. ; or in case of his decease before A., then to his children :—Held, that A. took an absolute equitable estate, with an executory gift over to D. and his children ; and D. having died in the lifetime of A., leaving no children :—Held, that A. was absolutely entitled to the property. *Jackson* v. *Noble*, 2 Keen, 590 ; 7 L. J., Ch. 133 ; 2 Jur. 251.

Conveyance of real estate to a trustee in fee in trust for one for life, and afterwards to her children equally. There being no limitation to their heirs :—Held, that the children took for life. *Holliday* v. *Overton*, 14 Beav. 467 ; 21 L. J., Ch. 769 ; 16 Jur. 346.

A testator gave all his real and personal estate in trust to divide the income, rents, interest, and profits equally amongst his children by name, or such other as he might have at his death, or en ventre sa mère, providing as to the payment to daughters half-yearly, and to their separate use, and the issue of any dying in his lifetime leaving issue, if not, their shares to the survivors ; and in case any of his children and their issues should die "in the lifetime of any husband or wife with whom his children" should have intermarried, he gave their shares to his then surviving children, and the issue of such as should be then dead, it being his will that none of his sons' wives or daughters' husbands "should become heirs to their children's property," and that none of his children should sell any part of his estates. Some of the testator's children having died without issue in his lifetime :—Held, that each of the surviving children took the share of his real property, not for life only, but in fee, and of his personalty absolutely. *Hodson* v. *Ball*, 14 Sim. 558 ; 9 Jur. 407.

Real estates were limited in remainder in trust for the next of kin of a married woman, as if she had not been married :—Held, that the next of kin took life estates only. *Lucas* v. *Brandreth*, 28 Beav. 273 ; 6 Jur. (N.S.) 945.

A testator, by will in 1826, gave real and personal estate to trustees in fee, in trust for his four nieces, M., B., S., and J., for their respective lives, as tenants in common ; and on the death of any of them, then in trust as to the share of her so dying, to stand possessed of and interested in such share for the child or children of such of them as should have died ; and if any of them should die without issue, then he directed the share or shares of her or them so dying to go to the survivor or survivors of them and their heirs, and to be conveyed to them and their heirs accordingly. B. and J. died leaving children. M. died a spinster. S. was a spinster and over sixty :—Held, first, that the equitable fee was given to the children of the nieces, and secondly, that, seeing that S. was past the age of child-bearing, she was entitled to her own one-fourth share in fee, under the gift over to the survivor of the nieces. *Maden* v. *Taylor*, 45 L. J., Ch. 569.

A testator devised freehold property to trustees, their executors and assigns, in trust as to three freehold houses for the sole benefit of his two daughters E. and S., either to live in or let for their joint benefit ; and should either of his daughters die and leave no children or child, then either one of the houses, at the option of the survivor, to be sold, and the produce divided between the survivor and such of the testator's sons as should be living ; but if either of his daughters should marry and have a child or children, then such child or children to have the mother's share of the rents and profits of the three houses after the mother's decease. On the death of one daughter without children one of the houses was sold, according to the direction in the will. The other daughter then died without children :—Held, that the gift for the sole benefit of the two daughters of the testator gave them an estate commensurate with the estate in fee given to the trustees, and made them joint tenants in fee subject to executory gifts over in the event of their dying leaving issue ; and that, this event not having happened, the joint tenancy in fee was unaffected, and the devisee of the survivor was entitled to the two unsold houses. *Yarrow* v. *Knightley*, 47 L. J., Ch. 874 ; 8 Ch. D. 736 ; 39 L. T. 238 ; 26 W. R. 704—C. A.

A testator being seised of lands under leases for lives renewable for ever, in 1824 devised all his freehold leases and interest whatsoever to trustees, and the heirs of the survivor of them, in trust, after payment of the head rents, to apply the clear yearly rents to and amongst his three daughters during their respective lives, in equal shares and proportions, for their sole and separate use ; and in case any or either of his daughters should happen to die leaving lawful issue, then in trust, as to the share and proportion of such daughter so dying, to and for the use of such issue as she should by deed or will appoint, and in default of such appointment to the use of such issue equally, share and share alike ; and if any of his daughters died without issue, he directed that her share of the rents should go to and be paid to the survivors or survivor of them for the increase of her and their respective shares, to their separate use, and go to their lawful issue, subject to the like power of appointment among such issue ; and in case of the death of all his daughters without leaving lawful issue, then in

trust to pay the rents to his nephew during his life; and after the death of his nephew, in case he should happen to die leaving lawful issue, in trust, as to one-half of his freehold and leasehold interests, to the use of the children of his sister in equal shares, and to their lawful issue; and in case his nephew should happen to die without issue, then, as to the whole of his freehold and leasehold interests, to the use of the said children of his sister in equal shares, and to their lawful issue; and in case they should be then dead, then, as to the whole, in trust for the issue of his nephew; and in case of the deaths of his nephew and the children of his sister without issue, in trust to assign over the freehold and leasehold interests to his own right heirs; and a power was given to the trustees to lease from time to time as they should remain seised and possessed by virtue of the trusts in the will contained, with the consent of the person or persons then entitled:—Held, first, that the legal estate was devised to the trustees during the existence of the entire series of limitations, and, secondly, that the daughters of the testator took equitable estates in quasi tail in their respective shares. *Sherwin* v. *Kenny*, 16 Ir. Ch. R. 138.

A. devised his real and personal estate to trustees and their heirs, to sell, if expedient, and invest in consols, and permit his wife, durante viduitate, to receive the rents and dividends, and from and after her death or second marriage to divide the residue of his estate and effects between his children [without words of inheritance]:—Held, that (subject to the wife's interest) the children took the real estate absolutely. *Tatham* v. *Vernon*, 29 Beav. 604; 7 Jur. (N.S.) 815; 4 L. T. 531; 9 W. R. 822. See also *Pollard, In re*, supra, col. 1429.

Deduction from Interest of Remainderman implied from Direction as to Prior Life Interest.]—A testator bequeathed to A. a share of the income of his personal estate, and directed that after A.'s death the share to which he would if then living be entitled should be paid to his wife E. In a subsequent part of the will the testator, after reciting that A. was indebted to him for a sum advanced to him, directed that the sum advanced should be retained by his executors out of the share of A. in the income. A. having survived the testator and died before the sum was fully paid off:—Held, that the executors were to retain the balance out of the income bequeathed to E. *Knight* v. *Sterry*, 18 Jur. 928.

Substituted Legacies when subject to Limitations of Original Legacies.]—A legacy substituted for another shall be raised out of the same fund, and subject to the same conditions. Testator created a term for debts and legacies, and gave 1,000*l.* to his niece, to be paid immediately after his decease if she should be then married; if not, the interest of the said legacy to be paid her for life, to be calculated and paid to the day of her death or marriage; if she should die unmarried, the legacy to lapse for the benefit of the estate; and by codicil he gave her 200*l.* in addition to what he had given her by the will:—Held, that the additional legacy is to be raised out of the same fund, and subject to the same conditions; and the legatee having married after the testator's death, is entitled. *Crowder* v. *Clowes*, 2 Ves. 449.

A bequest by a codicil of 1,000*l.*, instead of 1,500*l.* given by the will, is subject to the same limitations and restrictions which affected the 1,500*l.* *Prescott* v. *Edmunds*, 4 L. J. (O.S.) Ch. 111.

A testatrix, by her will, dated in 1832, directed the trustees of a fund over which she had a power of appointment to hold 1,000*l.*, part thereof, on trust for her daughter E. for her separate use for life, with remainder to her husband, with remainder to her children, and, in default of children, as therein mentioned, among the other children of the testatrix. She then gave other similar portions (1,000*l.* each) of the same fund on similar trusts for her two other married daughters, H. and F., and their husbands and families. Afterwards, H. and her husband becoming involved, the testatrix advanced them 1,000*l.* out of her own moneys, taking their joint receipt for the same, and an acknowledgment that it was in discharge of the above legacy. Afterwards, by a codicil referring to the will, and to this payment and acknowledgment, the testatrix desired the acknowledgment to be cancelled; and then expressing a fear of a deficiency of the trust fund, directed 1,000*l.* to be paid to F. and 1,000*l.* to E., without any express directions as to the settlement of these sums:—Held, that the sums given to E. and F. in the codicil must be taken to have been given with the like restrictions, &c., as the similar amounts given to E. and F. in the will. *Fenton* v. *Farington*, 2 Jur. (N.S.) 1120.

Where testator by will devised residue to daughters as tenants in common, and afterwards made a codicil for an express purpose, but redevised the residue to daughters, omitting words of severance, the codicil was construed by will, and they take as tenants in common. *Mathews* v. *Bowman*, 3 Anstr. 727.

By his will a testator gave 20,000*l.* to his daughter for life, with remainder to her children, to be vested at twenty-one or death under that age leaving issue. By a codicil, "instead of the 20,000*l.*," he gave 15,000*l.* to his daughter for life, with remainder to her children, "or the survivors":—Held, that the gift by the codicil was not substitutional so as to make the limitations of it similar to those in the will, and therefore that children who died after attaining twenty-one in the life of the daughter were excluded as against the surviving children. *Haley* v. *Bannister*, 23 Beav. 336.

A testator bequeathed a legacy to trustees for his son for life, with remainder to his children. Subsequently, by a codicil, reciting that he had given a legacy for the benefit of his son and his family, he revoked the legacy, and in lieu thereof made his son one of his residuary legatees:—Held, that the son was entitled to the share of the residue absolutely. *Hargreaves* v. *Pennington*, 34 L. J., Ch. 180; 10 Jur. (N.S.) 834; 12 W. R. 1047.

A testator by his will gave two-thirds of his residue to his eldest son, with a gift over in case he died under twenty-five and unmarried, and he gave the remaining one-third to his second son upon similar terms. By a codicil he revoked so much of his will as related to the distribution of his residue, and gave to his second son 20,000*l.* sterling in lieu of his one-third of the residue, and he appointed his eldest son residuary legatee:—Held, that the gift of the 20,000*l.* was absolute, and not subject to the same liabilities as the one-third of the residue. *Alexander* v *Alexander*,

5 Beav. 518. And see *Donnellan* v. *O'Neill*, Ir. R. 5 Eq. 523.

A testator bequeathed to A. B. an annuity of 150*l.* half-yearly for her separate use; afterwards, on hearing that she was married (as she was at the time of the original bequest), he wrote on the margin of the will opposite the above passage, "now Mrs. C. D., one hundred guineas per annum, in quarterly payments," which he signed. The two handwritings were proved separately:—Held, nevertheless, that the annuity of one hundred guineas was in substitution for the other, and that this was given to her separate use. *Martin* v. *Drinkwater*, 2 Beav. 215; 9 L. J., Ch. 247.

A testator by his will gives 3,000*l.* to his brother for life, with remainders to his wife and children, and 6,000*l.* to his sister B. for life, with remainders to her husband and children, and then, after two small bequests, the residue of his personal estate and effects to his sister C. absolutely. Afterwards, by a codicil, entitled by him a codicil to his will, he leaves to his brother an equal share of his effects with his sisters, subject to similar limitations with those of the 3,000*l.*, and then adds, "my sister B. to have an equal share with my sister C." He makes a second codicil, repeating the two small bequests above mentioned in the same terms in which they were given by his will, and appointing a third executor to act with the two others named in the will:—Held, that the effect of the codicils was only to equalise the shares of his brother and sisters, and that the substitutional share of B. remained subject to the same limitations for the benefit of her children which were declared concerning the 6,000*l.* given her by the will. *Cookson* v. *Hancock*, 1 Keen, 817. Affirmed, 2 Myl. & Cr. 611; 6 L. J., Ch. 56.

A wife appointed 5,000*l.* to her daughter, but if she had a fortune of 25,000*l.* (over which the husband had a power of appointment), then she desired the 5,000*l.* to be divided between her son and daughter, desiring that her husband should have a life interest therein:—Held, that the husband took a life estate, at all events. *Darby* v. *Darby*, 18 Beav. 412.

Testator by his will gave an annuity of 300*l.* a year to his grand-daughter A., and after her death he directed that the said sum should be raised and paid among her children as she should appoint, and in default of appointment in equal shares during their respective lives; and he gave to his grand-daughter E. a like annuity, to be paid to her and her children in the same manner as the annuity thereinbefore given to his grand-daughter A. By a codicil he revoked the devises of the several annuities, and instead thereof gave to each of his grand-daughters A. and E. an annuity of 150*l.*, to be payable in the same manner as the annuities of 300*l.*:—Held (Rigby, L.J., dissenting), that the substitution of the smaller annuities extended to the interests of the children of the grand-daughters. *Freme's Estate, In re, Freme* v. *Hall*, 64 L. J., Ch. 862; [1895] 2 Ch. 778; 73 L. T. 366; 44 W. R. 164—C. A.

Limitations when Implied in case of Cumulative Legacies.]—An additional legacy is subject to all the conditions attached to the previous legacy, unless there are express words to the contrary.

A testator gave his wife an annuity during her widowhood. Eleven years afterwards he made a codicil, and thereby, after reciting that he had made too small a provision for his wife, he gave her, in addition to all other provisions, an annuity of 800*l.* for her life, for her sole and separate use. After his death the widow married again:—Held, that the gift in the codicil was not subject to the condition of widowhood, and that, therefore, she was not deprived of it by her second marriage. *May* v. *May*, 19 W. R. 432.

A bequest by will of an annuity to a married woman for life, for her separate use; by codicil, a legacy of 300*l.*, "in addition" to that in the will; by a second codicil, a bequest of furniture and money in the house to the same legatee, "for her own use and purposes":—Held, that the 300*l.* must follow the trusts of the annuity; but not so the legacy in the second codicil. *Warwick* v. *Hawkins*, 5 De G. & Sm. 481; 21 L. J., Ch. 796; 16 Jur. 902.

A testator by his will gave a legacy to his daughter for life, for her separate use, with remainder to her children. By a codicil, headed as "instructions to his solicitor," to add to his will, he gave another legacy "to his daughter and children for their sole use and benefit, &c., &c.," and one-third of the residue "to his daughter and children for their sole use and benefit":—Held, that the daughter took a life interest in the gifts by the codicil. *Cator* v. *Cator*, 14 Beav. 463.

Bequest of 1,000*l.* to A., the interest of 2,000*l.* to B., and at his death to his children, the sum of 1,000*l.* to D., the sum of 1,000*l.* to B., in addition to 1,000*l.* before mentioned:—Held, that the former legacy to B. was of pounds sterling, and that the gift to his children was of an absolute interest in capital; held, also, that the reference to the former legacy in the latter gift to B. did not diminish the previous legacy, and that the latter legacy was given to B. absolutely, and not to him for life, and then to his children. Legacies given "in addition to" previous gifts to the same person only partake of the same incidents where the former gifts are absolute or defeasible; but the doctrine has never been extended so far as to alter an absolute gift of the latter legacy into a gift to the legatee for life, and after his death to other persons. *Mann* v. *Fuller*, Kay, 624; 2 Eq. R. 1085; 23 L. J., Ch. 543; 2 W. R. 510.

Where testator by his will gave annuities to his sister A. and other females, which he declared by a general clause were for their separate use, and by a codicil gave "to each of his sisters 100*l.* a year in addition to the legacies given by the will":—Held, in the case of A., that the annuity given to her by the codicil was also for her separate use. *Day* v. *Croft*, 4 Beav. 561.

After a legacy in stock in 4 per cent. consols bank annuities, a legacy to same persons of an additional sum of 200*l.* was to be paid out of the 4 per cents., and was held pecuniary. *Deane* v. *Test*, 9 Ves. 146; 1 Smith, 112.

When a life interest in a legacy is given by will with limitations over, and by codicil another legacy is given to the same legatee, in addition to the former legacy, the legacy given by the codicil is not primâ facie subject to the same limitations as the legacy given by the will. *Hill* v. *Jones*, 37 L. J., Ch. 465—L.C.

A father bequeathed to his daughter an annuity, and also, in case she did not marry before the age of twenty-eight, a legacy of

1,000*l.* By a codicil on the same paper, he gave her "furthermore 5,000*l.* upon the terms hereinbefore mentioned." A suitor of the daughter wrote to the testator after the date of his will, and before she attained twenty-eight, proposing to marry her, in answer to which the testator stated what provision he meant to make for her in his lifetime, but did not mention the above-intended testamentary dispositions. He added, that the marriage had his qualified consent, but that he must hear from his daughter before he made it absolute. The daughter wrote to the testator, expressing her consent, to which, being very ill, he replied that he could not appoint a time to attend to business. He shortly afterwards died, without making any further communication on the subject, and subsequently the marriage took place before the daughter attained twenty-eight:—Held, that the 5,000*l.* was subject to the same condition as the 1,000*l.* *Yonge* v. *Furse*, 8 De G. M. & G. 756; 26 L. J., Ch. 352; 3 Jur. (N.S.) 603; 5 W. R. 394.

By his will, a testator devised and bequeathed his real and personal estate to trustees, upon trust to invest 2,000*l.*, and stand possessed of 1,000*l.* upon trust for his daughter Mary and her family, and upon trust to pay the interest of the other 1,000*l.* to his son John for his life or solvency; and after his death, insolvency, or bankruptcy, in trust for his wife for life, and afterwards to divide the capital among her children and issue; and in default, as therein mentioned. The testator then directed that, subject to the 2,000*l.*, the trustees should stand possessed of the residue of his estate and effects, in trust for all and every his child and children, in equal shares, and the several heirs of their respective bodies ("except as to John and his children and their issue, whose share, in consequence of the 1,000*l.* set apart for him and them as aforesaid, shall be rated at 1,000*l.* less than the share of any other of my children"); and in case there should be a failure of issue of any of such children, then, as to the share or shares of him, her, or them whose issue should so fail, to the use of the other or others of them, as tenants in common, and the several heirs of their respective bodies; and in case there should be a failure of issue of all such children, then to the use of such one child, and the heirs of his or her body. The testator left Mary and John his only children, and died seised and possessed of both freehold and leasehold estates:—Held, that the exception in the parenthesis did not alter the gift of the share of the residue to John, so as to make it liable to the same trusts as of the 1,000*l.* *Green* v. *Green*, 3 De G. & S. M. 480; 18 L. J., Ch. 465; 14 Jur. 74.

Testator gives 24,000*l.* upon trust, as to 6,000*l.* to pay the interest to S. B. (his niece) during her life, and after her decease the principal among her children; if she should die without issue, over. He declares similar trusts as to three other sums of 6,000*l.* (making the remainder of the 24,000*l.*) for his three other nieces and their children. Proviso, that in case any of his said nieces should marry without such consent as therein prescribed, each, &c., so marrying should forfeit the interest of her 6,000*l.*, and all other sums to which she might be entitled under his will, and the respective sums of 6,000*l.*, and all such other sums, &c., should fall into his residue; and he gives the residue in trust for his two nephews and their children; in case of the death of either without issue, his moiety to go over to, and be divided among, his said nieces. Afterwards, by codicil, he gives to each of his nieces 2,000*l.* in addition, "subject to the same powers, provisoes, directions, and limitations, as are contained in the will respecting the sums of 6,000*l.*" S. B., who was of age at the date of the will, marries without the consent required:—Held, a forfeiture extending not only to the future interest of her 6,000*l.*, but to the capital, and also to the 2,000*l.* given by the codicil, and to a fund set apart to answer an annuity to which S. B. would otherwise have been entitled on the death of the annuitant. Whether the forfeiture would also extend to her share of the residue in the event of the contingency upon which it is given over to the testator's niece, quære. *Lloyd* v. *Branton*, 3 Mer. 108; 17 R. R. 33.

A testator appointed 10,000*l.* each to his younger children, and all the residue to his eldest son; and he directed the income of the whole, until the youngest should attain twenty-one, to be applied in the maintenance of the minors. In the event of a younger child dying under twenty-one, he appointed his share to the eldest son, "in addition to the residue":—Held, that the share of a younger child who died under twenty-one was not payable to the eldest until the youngest child attained twenty-one. *Duffield* v. *Currie*, 29 Beav. 284.

A testator gave the interest of his residuary estate to his mother for life, and afterwards one-half of the interest to his brother and one-half to his sister. Upon the death of the sister the capital was to go to her children, if any, and if not to his brother. Upon the death of his brother the capital was to go to his children. The sister died without children:—Held, that the children of the brother took no interest in her moiety. *Tatnall* v. *Tatnall*, 10 Beav. 509.

A testatrix directs that her trustees (who were also her executors) should, within a year after her decease, pay to the several persons named in a schedule to her will the sums set opposite to their respective names, as vested and transmissible interests; in a subsequent clause she gives 3,000*l.* to the trustees, upon trust to invest the same, and pay it to A. on her attaining twenty-one, with a proviso that it should fall into the residue if A. died under twenty-one. By the schedule to her will she gives to her executors 600*l.* in trust for A., in addition to the 3,000*l.* given by the will:—Held, that the legacy of 600*l.* was not affected by the contingency to which the 3,000*l.* was subject, but vested immediately. *Tilbury* v. *Wakeford*, 5 L. J. (O.S.) Ch. 73.

Gift of a share "in addition":—Held, under the circumstances, not liable to the same contingency as the original share. A testator devised an estate to A. and B. successively for life, and, after their deaths, to sell and divide the produce between his grandchildren who should be living at the decease of the survivor of A. and B., except his grandsons E. and J., neither of whom was to receive anything; and he directed that the shares which would be otherwise payable to them should be paid to his grand-daughter S., "in addition to her own share." E. and J. survived the tenants for life, but S. predeceased them:—Held, that the two shares passed to the representatives of S. *King*

v. *Tootel*, 25 Beav. 23. And see *More's Trust, In re*, ante, col. 968.

—— **In Case of Accruing Shares.**]—A testatrix gave 4,000*l.* to trustees, in trust, to pay two annuities of 60*l.* and 30*l.*, and to pay the residue and remainder of the said interest and dividends to her nieces, M. A. P. and H. P., with gifts over in favour of the children of those nieces; but if either niece died without issue before both the annuitants were dead, then the whole 4,000*l.* was, on the decease of the last surviving annuitant, to be paid and transferred to the survivor of the two nieces; and the testatrix declared that the respective legacies, by her will, given to the two nieces, should not lapse in the event of either of them dying without issue in the lifetime of the annuitant:—Held, first, that, on the decease of one of the annuitants, her annuity accrued for the benefit of the two nieces, and not for the general residuary legatee; secondly, that, under the circumstances, one niece having died without issue in the lifetime of one of the annuitants, the surviving niece took the share of the niece so dying absolutely, and not for life only, with limitations over for the benefit of her children, like the limitations declared of her own original share, on the ground that there was a new gift to the surviving niece; and that in general a new unqualified gift will not be made subject to the restrictions imposed on a prior gift in the will. *Boodle* v. *Partington*, 16 Jur. 606.

Exoneration from Legacy Duty, when Implied in Case of Substituted and Cumulative Legacies.]—*See* LEGACY DUTY, sub tit. REVENUE.

Disinherison of Heir-at-Law, when implied.]—An heir-at-law may be disinherited by words of necessary implication. *Gurly* v. *Gurly*, 8 Cl. & F. 763. Affirming 2 Dr. & Wal. 463.

An heir-at-law is not to be disinherited unless by express words; and unless it be distinctly pointed out to whom the estate is to go it devolves upon him. *Salter* v. *Cavanagh*, 1 Dr. & Wal. 668.

Where there is uncertainty in a will whether property has been devised or bequeathed from the heir-at-law or next of kin, the proper course is to allow the property to go as the law directs in cases of intestacy. It is not enough to shew that a testator did not intend to die intestate; it must be shewn distinctly that some person has been substituted for the heir. It is a rule of law that the heir-at-law is not to be disinherited unless by express words or necessary implication. *Hall* v. *Warren*, 7 Jur. (N.S.) 1089; 5 L. T. 190; 10 W. R. 66. S. P., *Boutell* v. *Mohun*, Pre. Ch. 381; *Johnson* v. *Telford*, 1 Russ. & M. 244; 8 L. J. (O.S.) Ch. 94; *Kellet* v. *Kellet*, 1 Ball & B. 541; 3 Dow, P. C. 248; *Berry* v. *Usher*, 11 Ves. 92.

It is a rule in equity to give the turn of the scale in favour of an heir, and the court always inclines in his favour, and will allow artificial reasoning to prevent his being disinherited. *Crabtree* v. *Bramble*, 3 Atk. 689. *Parsons* v. *Freeman*, id. 747.

An heir is not to be disinherited, unless by express words or necessary implication, and the same rule holds with respect to an heir of customary lands. *Gascoigne* v. *Barker*, 3 Atk. 8. *London (City)* v. *Garway*, 2 Vern. 571.

4. CONDITIONS.

See CONDITION.

5. VALIDITY.

a. Remoteness.

See PERPETUITY.

b. Uncertainty.

Principles.]—A bequest will not be held void for uncertainty, although the meaning be not absolutely certain, if the court can arrive at a reasonable degree of certainty. *Adams* v. *Jones*, 9 Hare, 485; 21 L. J., Ch. 352; 16 Jur. 159.

The court will not adopt an intestacy for uncertainty accept in the last resort. *Bernasconi* v. *Atkinson*, 10 Hare, 345; 17 Jur. 128; 1 W. R. 152. *Minshull* v. *Minshull*, 1 Atk. 412.

To make a will void for uncertainty, it is not enough that the dispositions in it are so absurd and irrational that it is difficult to believe they could have been intended by the testator; but it must be incapable of any clear meaning. *Mason* v. *Robinson*, 2 Sim. & S. 295.

Under an extremely obscurely worded will, the real estate was held to have descended, and the personal estate to be applied, as if the testator had died intestate. *Jackson* v. *Craig*, 20 L. J., Ch. 204; 15 Jur. 811.

Every word in construction of will is to have effect, if not inconsistent with general intention, which is to control. If two parts are inconsistent, the latter prevails. If a meaning can be collected, but it is wholly doubtful in what manner it is to take effect, it is void for uncertainty. *Constantine* v. *Constantine*, 6 Ves. 100.

Uncertainty as to Purpose.]—A testator gave to his executors beneficially, in equal proportions, all his property which he might not dispose of, subject to his debts and any bequests which he might afterwards make. He afterwards made a codicil in these words: "In a codicil to my will I gave to the Corporation of Gloucester 14,000*l.* In this I wish my executors would give 60,000*l.* more to them for the same purpose as I have before named. I would also give my friends (several were named with large legacies), and I confirm all other bequests, and give the rest of my property to their executors for their own interest." No other codicil was produced:—Held (affirming a decree of the court of chancery on a bill filed by the Corporation of Gloucester claiming the two legacies), that the purpose of both the legacies must be held to be the same, and that both failed for uncertainty of the purpose. *Gloucester Corporation* v. *Osborn*, 1 H. L. Cas. 272. Affirming 3 Hare, 131; 13 L. J., Ch. 54; 7 Jur. 1125.

—— **As to Condition.**]—A husband devised and bequeathed all his property, consisting of premises held in fee, and leaseholds for years, together with other personal property, to his wife, "on the condition that my wife shall retire immediately after my death into a convent of her own choice." There was no gift over:—Held, that this was a condition subsequent, and void for uncertainty. *Duddy* v. *Gresham*, 2 L. R., Ir. 442—C. A. Reversing 39 L. T. 48.

—— **As to Limitations.**]—A gift "of the upper storey of four specific houses or shops, to be occupied by the several members and descendants of K. T. C., and L. K. W., as already proposed," i.e. as the context shewed, as a family house for the use of two separate families, is void for uncertainty, and as denoting an intention to create a perpetuity. *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381.

Testator gave his bank stock to trustees, in trust for F. B. for life, and his funded property to the same trustees, in trust for W. R. E. for life, and after his death, in trust for his issue; and he directed the trustees, after the decease of F. B., to pay the dividends of his bank stock to W. R. E. for life, and after his decease to apply the dividends and capital for the benefit of the children or child of W. R. E., in such manner as he had directed respecting his funded property; and should W. R. E. die without issue, male or female, of his body lawfully begotten, then he directed the trustees to apply his funded property and bank stock for such charitable or other purposes as they should think fit, without being accountable to any person; and he gave the residue of his personal estate and effects, wines, pictures, plate, books, and furniture, to W. R. E.:—Held, that the ultimate trust of the funded property and bank stock was not too remote, but was void for uncertainty, and that the residuary clause was general. *Ellis* v. *Selby*, 7 Sim. 352; 4 L. J., Ch. 69. Affirmed, 1 Myl. & Cr. 286; 5 L. J., Ch. 214.

E. by deed conveyed several sums of money, secured by mortgages, amounting to 60,000*l*., to trustees in trust, to be laid out in the purchase of lands to the use of himself for life, remainder as to sums to the amount of 28,000*l*. to his wife for life, remainder to his son R. for life, with several remainders over, remainder to J. in fee; and as to sums amounting to 23,000*l*. to R. for life, with several intermediate remainders, remainder to J. in fee; and as to one particular mortgage of 8,500*l*. and some leasehold estates to secure annuities, the surplus to R. with power of revocation. By his will he gave the leasehold estates and the mortgage of 8,500*l*., together with another mortgage of 6,700*l*., in trust to secure the annuities, the surplus, interest, or rents of the lands purchased to be paid to R. for life, and to be settled in the same manner as his other estates: first, these mortgages are to be considered as real estate; secondly, it being uncertain which of the limitations they were to follow, they are disposed of and passed to R. as heir-at-law, and from him to his general devisee, E., who having died intestate as to the real estate, they go to the heir-at-law, D. *Leslie* v. *Devonshire* (*Duke*), 2 Bro. C. C. 189.

Bequest of share of residue to K. and G., "but in case K. shall die before he shall actually have received the whole of his share and without leaving issue living at his decease, then, and in such case, and whether the same shall have become due and payable or not, such part or parts as he shall not have actually received to be paid to G." K. died unmarried, without having received any share of the residue:—Held, that the gift over was not void for uncertainty, but took effect. *Johnson* v. *Crook*, 48 L. J., Ch. 777; 12 Ch. D. 639; 41 L. T. 400; 28 W. R. 12.

A testator devised his estate to trustees to pay the rents to his widow during her life, and after her decease to his four children equally; and after the decease of any of his children leaving issue, then he gave to such issue the share of his or her parent in the rents until the decease of his last surviving child, when he directed that his estate should be sold and the proceeds divided amongst the issue of his children equally; the children of each of his sons and daughters to receive one-fourth part. And in case any of his children should die without leaving issue, then he gave the share of such of them unto the survivors or survivor of them, and the issue of such of them as should have died leaving issue. Two of the children died unmarried, and it was contended on behalf of the issue of the last surviving child, that there was an intestacy as to these two shares:—Held, that there was no intestacy. *Booth*, *In re*, 10 L. T. 327.

A testator (passing over his heir-at-law, the son of his deceased elder brother) gave 1,000*l*. to the testator's father for life, and after his death to be continued to the testator's younger brother, and proceeded thus: "and after his death to be continued to my next nearest heir, and so on. This property is not meant to be disposed of by any of the family":—Held, that the ultimate limitation was void for uncertainty. *Thomason* v. *Moses*, 5 Beav. 77; 6 Jur. 403. And see *Horsfield* v. *Ashton*, 2 Jur. (N.S.) 193; 1 W. R. 259.

Order in which property devolved under the limitations in an ungrammatical will to the issue male and female of persons to whom estates for life were given. *Peyton* v. *Hughes*, 7 Jur. 311.

Testator, having by will given the residue to his wife, made a codicil, by which, instead of the general residue, "he gave to her 10,000*l*., to be invested in the names of trustees, the interest to be paid to her for life, and then to his daughter, and his house, furniture, plate, wines, &c., at K. R., in short, the whole of his property at his decease, except carriages and horses and his gold repeater; and it was his further wish that she might continue in either house (but not to change) and have the use of the same for life, wines, spirits, included":—Held, that the codicil, except so far as it cut down the residuary gift to the wife to 10,000*l*., was void for uncertainty. *Baker* v. *Newton*, 2 Beav. 112; 8 L. J., Ch. 306; 3 Jur. 649.

A testator devised land to A. "for his life and the life of his heir":—Held, that the devise was legally valid, and that the effect was to give to the devisee an estate during his own life and the life of the person who should be ascertained to be his heir at the time of his death. *Amos*, *In re*, *Carrier* v. *Price*, [1891] 3 Ch. 159; 65 L. T. 69; 39 W. R. 550.

—— **As to Persons.**]—Devise to the descendants of S., now living in or about S., or hereafter living anywhere else:—Held, good. *Crossley* v. *Clare*, Ambl. 397.

Devise in trust for a son of the testator's nephew, A., at the age of twenty-four; if he have no son, to A., son of the testator's great-nephew, B.; but if neither have a son then to a son of the testator's great-niece's daughter, taking his name; whoever should take, not to be put in possession of any of the testator's effects until twenty-four, nor the executors to give up their trust till a proper entail be made to the male heir by him; is an executory trust in tail for an only son of A. in ventre at the testator's death, and not void for uncertainty, nor too remote. *Blackburne* v. *Stables*, 2 V. & B. 367; 13 R. R. 120.

A testator, who had long resided in India, gave a legacy "to J. P., who resided at A. when I left

England, or to his heirs, executors, administrators, or assigns." J. P. died in the testator's lifetime:—Held, that the bequest was void for uncertainty. *Waite* v. *Templer*, 2 Sim. 524; 29 R. R. 161.

The testatrix gave certain freehold and leasehold premises to trustees, in trust, after the decease of M. I., to dispose of and divide the same unto and amongst her partners, who should be in co-partnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her trustees should think fit:—Held, that this was a good devise to the persons to whom it was ascertained that the testator had disposed of her business in her lifetime. *Stubbs* v. *Surgon*, 2 Keen, 255. Affirmed, 3 Myl. & Cr. 507; 7 L. J., Ch. 95; 2 Jur. 150.

A testator devised a freehold estate to A. for life, and after his death he devised the same to be equally divided into four parts, between one child of A., one child of B., one child of C., and one child of D., for them to receive the rents, and divide the money between them; and it was his desire that his estate should never be sold out of the family; and, provided that A., B., C. and D. should never have any lawful children, the testator's desire was that their parts should go to their next of kin. At the time of making the will, and of the death of the testator, B. only had a child, namely, a daughter; but after the testator's death B. had a son: at the death of A. there were children, both sons and daughters, of A., C., and D.:—Held, that the gift to "one child" was not void for uncertainty. *Powell* v. *Davies*, 1 Beav. 532; 3 Jur. 389.

A testator devised certain estates in remainder to "a son of my nephew J. W., his heirs and assigns." J. W. had three sons, the two elder of whom died infants and unmarried:—Held, that the eldest son of J. W. took an estate in fee-simple in remainder in the estates. *Ashburner* v. *Wilson*, 19 L. J., Ch. 330; 14 Jur. 497.

A testator having in the commencement of his will appointed his daughter to act in concert with his son to be guardian and executrix, added, "I also appoint and desire in this my last will and testament, that my son to be my executor and residuary legatee do jointly with my daughter, my executrix, who is to act independent of her husband, and be guardian to the children":—Held, that the son alone was entitled to the residue. *Langley* v. *Thomas*, 6 De G. M. & G. 645; 3 Jur (N.S.) 345; 5 W. R. 219.

—— **Where Class to be ascertained at some Future Time.**]—A testator bequeathed leaseholds in Church Street, having sixty years unexpired, and as to which there was no obligation on the part of the lessor to renew, to A. for life, with remainder to the children she should leave, and in default to R. He bequeathed to trustees other leaseholds upon trust, to accumulate the rents until the leases of the Church Street property "should become nearly expired," and then to apply such part thereof as should be necessary in the renewal of the Church Street property "for the benefit of the respective persons to whom he had before by his will given the same," and the residue, after answering the purpose aforesaid, he gave to his residuary legatees. The testator died before the Thellusson Act came into operation:—Held, that the trust for accumulation and renewal was void for remoteness and uncertainty. *Curtis* v. *Lukin*, 5 Beav. 147; 11 L. J., Ch. 380; 6 Jur. 721.

A testator bequeathed five leasehold houses, having about fifty-four years to run, to his daughter for life, with remainder to her children; and after the expiration of any of the leases, he directed his trustees to convey to his daughter and her children one or more of the five freehold houses of equal annual value, or as near as could be, to the expired leasehold:—Held, that the decree was neither invalid for remoteness nor uncertainty. *Wood* v. *Drew*, 33 Beav. 610.

A testator directed a general accumulation of his real and personal estates during the lives of his three sons, grandsons, and the issue of such grandsons who should be living at his death; and that his personal estate should be laid out in the purchase of real estates, and that his trustees should stand seised thereof, and of all other his real estate, upon trust, during the lives aforesaid, to receive the rents and profits, and from time to time "to lay out and invest the money to arise from such rents and profits in such purchases as he had thereinbefore directed to be made with his personal estate, and should from time to time collect and receive, and lay out and invest, the rents and profits" of such real estate "in the manner thereinbefore directed with respect to the rents and profits of the hereditaments originally purchased." He also directed that the trustees should from time to time cut down such timber as should be upon the lands devised and directed to be purchased as should be fit to be cut down, and should sell and dispose of the same, and should lay out and invest the money arising by such sales in such purchases as thereinbefore directed to be made with regard to his personal estate, and the rents and profits of his real estate. And he further empowered his trustees, "until a convenient purchase or convenient purchases could be made, to permit such part of his personal estate as was then invested in the funds, or consisted of securities for money, to remain in such funds or upon such securities, and to invest or place out the money to arise from such part of his personal estate as should not at his decease consist of money, and from the rents and profits of the hereditaments to be purchased, or from the sale of the timber, in the government funds or real security, and from time to time to sell and call in the same, and again invest the same as his trustees should think proper, until a convenient purchase could be found, or until a sufficient sum should be accumulated to make a proper purchase." And after the death of the survivor of the persons during whose lives the accumulations were to be made, the testator directed a partition to be made by his trustees of his estates, and the whole thereof to be divided into three lots of equal value, or as near thereto as possible, and that the premises contained in one of such allotments should be conveyed to the use of "the eldest male lineal descendant then living" of each of his three sons, with remainders over:—Held, that the devise was not void for uncertainty; also, that the question of uncertainty had not been disposed of in any previous decision upon this the Thellusson will. *Thellusson* v. *Rendlesham (Lord)*, 7 H. L. Cas. 429; 28 L. J., Ch. 948; 5 Jur. (N.S.) 1031; 7 W. R. 563.

A testator left all his property upon trust for A. for life, and from and after his death to pay

the same to any niece or female relative of A., provided she marries a person of the name of B., residing in the county of T., and who has been born and reared a Roman Catholic; but the said bequest is not to vest in the niece or female relative of A. so marrying a B. until five years after the death of A.:—Held, to be void for remoteness, and, on appeal, to be void for uncertainty. *Smithwick* v. *Hayden*, 19 L. R., Ir. 490—C. A.

—— **"Friends" construed "Kindred entitled on Intestacy."**]—A testator devised freehold lands to his wife for life, provided she remained unmarried, and directed that on her death or marriage the lands should revert to his friends, and be their property. With the exception of a few nominal legacies, he bequeathed to his wife all his personal and chattel property absolutely, and appointed her sole residuary legatee:—Held, upon the construction of the will, that the words "my friends" were capable of meaning the testator's kindred who would have taken his interest in the lands but for the interposed devise to his wife; that the devise over, on the death or marriage of the wife, was not void for uncertainty; and that upon her death the testator's heir-at-law became entitled under the devise. *Coogan* v. *Hayden*, 4 L. R., Ir. 585.

—— **Gift "to A. or B."**]—Bequest to A. or B. void for uncertainty; if discretionary in C., it is good. *Longmore* v. *Broom*, 7 Ves. 128.

Testator directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews, George and Charles, and the principal to be applied either in binding them apprentices at the age of fourteen, or to be reserved till they attained twenty-one, to commence business. "In the event of George and Charles (both or either of them) being settled before this will comes in force, I provide that the next boy (James or Henry) have the benefit, and so on." George and Charles survived the testatrix, but died under twenty-one:—Held, that James and Henry were entitled to the residue. *Prestwidge* v. *Groombridge*, 6 Sim. 171.

—— **Where Object Charitable.**]—A testator, by deed-poll, duly inrolled in chancery, conveyed to trustees a piece of land and cottages for the purpose of an hospital for ten aged or infirm poor persons, preference being given to particular parishes. By his will, made in 1882, he charged his copyhold and freehold estates with his debts and funeral expenses and legacies, and gave the residue of his personal property to the trustees of the deed-poll upon trust to build an hospital on the site of the premises conveyed by the deed-poll, and to employ the income of the remainder in insurance and repairs, and paying 18*l.* or more to each of the ten poor inmates, and the ultimate balance (if any) to aged and deserving poor of either sex as out-of-door pensioners. The testator died within twelve months from the execution of the deed-poll, which therefore became void under the statute of mortmain. Upon further consideration in an administration action:—Held, that the ultimate gift of the balance of the dividends failed for uncertainty, and that the legacies must be paid out of the proceeds of the real estate, and the debts and funeral expenses in the first instance out of the personalty. *Taylor, In re, Martin* v. *Freeman*, 58 L. T. 538.

A direction was given by a testator to the commissioners of charitable donations and bequest, to apply the balance of the interest, on a sum bequeathed to them, for the benefit and maintenance, and to enable the families of his late workmen at B., or their children, to become apprenticed, or to emigrate abroad:—Held, that the attempt to construe the bequest as a gift to individuals failed for uncertainty. *Cullimore's Trusts, In re*, 27 L. R., Ir. 18. And see *Charitable Donations Commissioners* v. *Deey*, ante, col. 803.

And see Cases, sub CHARITABLE LEGACIES, post.

—— **Parol Evidence, when Admitted.**]—Parol evidence admitted to ascertain the person the testator intended should take a legacy. *Hodgson* v. *Hitch*, Pre. Ch. 229.

Parol evidence may be received in case of uncertain description of a person in a will. *Edge* v. *Salisbury*, Ambl. 71; 1 Ves. Sen. 230.

Collateral proof may be allowed to make certain a person or thing described in a will. *Caldicot* v. *Hodgson*, 2 Vern. 593.

Devise to "Mr. N., kinsman of Mr. E. N., if the house of lords will allow his right to be Lord Viscount N.; but if their lordships do not confirm the title to him, then over," good. The devisor having in his mind the notion of an individual, the court will search for the person that conforms to the description given. And as to the condition, devise to one who is suing for a certain estate in case he fails in that suit, and if he succeeds over, has been held good. *Fingal (Earl)* v. *Blake*, 2 Moll. 50.

Uncertainty as to Property the Subject of Gift.]—Testamentary papers in this form: "I leave and bequeath to all my grandchildren, and share and share alike;" and, "further, I appoint F. H. and F. E. my trustees for all my grandchildren and nieces": are void for uncertainty, and pass no interest in the real estate. *Mohun* v. *Mohun*, 1 Swanst. 201; 1 Wils. Ch. 151; 18 R. R. 58.

One bequeaths to her grandchild A. some of her best linen; this void for the uncertainty, yet the court recommended it to the executor to give some of the best linen to the legatee A. Bequest of such of the best linen as the executor should think fit, or as the legatee should choose, had been held good. *Peck* v. *Halsey*, 2 P. Wms. 389.

A statuary bequeathed articles used in his business by their technical names, some of which were very obscurely written. Reference directed to ascertain what was meant, the master taking to his assistance persons skilled in writing, and acquainted with articles used by statuaries. *Goblet* v. *Beechy*, 3 Sim. 24; 9 L. J. (O.S.) Ch. 200. *But see* 2 Russ. & M. 624.

Testator first gave all his property to trustees upon certain trusts, and secondly directed that the trustees, from the commencement of the fifth year from the date of his decease, should set apart annually 10 per cent. upon the gross income of his estate to be invested as additional capital in some good and valid medium of profit or interest, in order that the new income derived from that might go to increase the benefits intended by the former. He then proceeded to dispose of the remaining income:—Held, that no partial intestacy was created by the direction as to the 10 per cent., but that the dispositions of the bulk of his property were to be treated as if it did not exist. *Thompson* v. *Thompson*, 1 Coll. C. C. 398; 8 Jur. 839.

A testator made a bequest in the following words: "I give to my executors the sum of 1,000*l.*, upon trust to be invested in the funds of the Bank of England, during the lives of the survivor or survivors of them, for the widows of J. S. and T. D., to be divided between them, share and share alike." The testator appointed two executors of his will. One of the widows died in the testator's lifetime; the other widow survived the testator, and received the interest of the 1,000*l.* during her life:—Held, upon the death of the surviving widow, that the bequest was void for uncertainty, and belonged therefore to the residuary legatee. *Hoffman* v. *Hankey*, 3 Myl. & K. 376.

Testator devised all his real estates (except the hereditaments thereinafter particularly devised) to trustees on certain trusts. In a subsequent part of his will he devised his farm in A., in the possession of T. H., to T. R. He had two farms in A., both of which were in the possession of T. H., but at different rents, and known by different names. There being no evidence to shew with certainty which of the two farms the testator meant to devise to T. R., the court held the exception to be inoperative, and that both the farms passed by the general devise to the trustees. *Blundell* v. *Gladstone*, 14 Sim. 83; 8 Jur. 301. But see *S. C.*, 3 Mac. & G. 692.

A testator gave to each of his four daughters a house and garden in the village of R., if they should feel inclined to reside there, and directed the house or houses to be built at the expense of his executors. A house was built:—Held, that the clause was not void for uncertainty, and if there had been uncertainty, the executors had determined it by building the house. *Edwards* v. *Jones*, 35 Beav. 474; 14 W. R. 815.

A., having a cotton manufactory and other property situate at H. and W., and a freehold estate at B. unconnected with his manufactory, by his will gave to trustees all his freehold estates at B., and all his freehold and leasehold property at H. and W., and all his real and personal estate and effects, upon trust to carry on the manufactory, for which purpose he authorised them to retain as much ready money as a capital in the business as by them might be considered necessary; and he directed that at the end of every twelve months, provided his daughters L. and E. were living, the profits, if any, and the surplus income from the H. and W. estates, after paying annuities charged thereon, and retaining a sufficient capital to carry on the manufactory, should be equally divided between his two daughters L. and E.; but if the trustees were not inclined to carry on the business, they were to let the premises, and the reserved capital was to be equally divided between L. and E., and also the surplus rents of H. and W. The testator then gave estate B. to his daughter E. for life, remainder to her issue, share and share alike, remainder to L. for life, remainder to her issue; and if L. should die without issue, and E. should leave issue, such issue was to have the whole of the estates in B., H. and W., and all other his real and personal estate and effects; and if both L. and E. should die without leaving issue, "then the whole of the rents, profits, and interests of all my estates, real and personal, situate in B., W. and H., to be paid to R. H." The trustees carried on the manufactory, retaining a very large sum for capital. L. and E. both died without leaving issue:—Held, affirming the decision of Wood, V.-C., that the daughters took absolutely all the testator's personal estate not retained by the trustees for capital; but that what was so retained was to be considered as annexed to, or as passing with, the H. and W. estates to R. H. *Horsfield* v. *Ashton*, 2 Jur. (N.S.) 193; 1 W. R. 259.

Testator bequeathed to his wife the interest and dividends of such stock as should be standing in his name at his decease during her life, and he directed that at her decease one moiety of such stock, "subject to, and after deducting such premium or sum of money as should be necessary for the renewal of the crown lease of the leasehold messuages which he purchased of Sir H. T., in case he should not have renewed such in his lifetime," should go to his five children. In a subsequent part of the will he gave to his son G. all his leasehold houses, which he purchased of Sir H. T., to hold to his said son and his executors, &c., for the then existing term or terms therein, and "all benefit of renewal aforesaid," for his and their own use and benefit. At the time of the widow's death the lease was subsisting unrenewed:—Held, that there was a gift to the son out of the consols of a sum of money sufficient to effect the renewal of the lease. *Rickards* v. *Rickards*, 2 Y. & C. C. C. 419; 7 Jur. 715. Affirmed, 13 L. J., Ch. 344.

Where testator devised all his houses at S. to trustees, to convey to his daughter M. such one as she might choose, and to convey all the others to his daughter C., and M. died in his lifetime:—Held, that the gift in favour of C. had failed. *Boyce* v. *Boyce*, 16 Sim. 476.

A testatrix gave such of her jewels as should at her death be deposited in her jewel-box at Rundell & Bridge's to persons whose names would be found written on a paper contained in the box, and bequeathed the rest of her jewels to A. B.; two years before her death she became the subject of a commission of lunacy, and no jewel-box was then, or at the date of her will, or at her death, deposited at Rundell & Bridge's, nor was there any written paper designating who were to take the jewels: the intended gift of the jewels wholly fails. *Jerningham* v. *Herbert*, 4 Russ. 388; Tam. 103.

Gift of the residue of a fund after the application of an undefined amount to a void charity is void for uncertainty. *Att.-Gen.* v. *Hinxman*, 2 J. & W. 277; 22 R. R. 119.

—— **As to Amount.**]—A testator directed his trustees to invest his residuary estate, and suffer the interest to accumulate until the principal together with the accumulation of interest should amount to "3,000*l.* or thereabouts," and then to place out the same at interest, and pay the interest equally among certain legatees, in equal shares, during their lives and the life of the survivor; and in case any of them should die leaving lawful issue, the issue were to be entitled to the same share in the interest to which their parents would, if living, have been entitled; and immediately after the decease of the survivor of the legatees specifically named, then upon trust to pay the 3,000*l.* or thereabouts equally among the lawful issue of the legatees to whom the testator gave the same; but in case any of them should happen to be then dead leaving lawful issue, such issue were to be entitled to the share to which the parent or parents of such issue would, if living, have been entitled:—Held, that the gift was not void on the ground of the uncertainty arising from the words "or there-

abouts." *Oddie* v. *Brown*, 4 De G. & J. 179; 28 L. J., Ch. 542; 5 Jur. (N.S.) 635; 7 W. R. 472.

A direction to build "a suitable, durable, and handsome monument": — Held, not void for uncertainty in the amount that might be required for the purpose. *Mitford* v. *Reynolds*, 1 Ph. 185; 12 L. J., Ch. 40.

A request by a testator that a handsome gratuity should be given to each of his executors is void for uncertainty. *Jubber* v. *Jubber*, 9 Sim. 503.

One devises to two of his sisters 400*l.* apiece, and to his third sister what his executors should think fit. The court decreed the third sister should have 400*l.* also, and be made equal to her two other sisters, if the estate would hold out. *Wareham* v. *Brown*, 2 Vern. 153.

Where 300*l.* or 400*l.* per annum is directed to be purchased, the court will take it in the largest sense, and construe it to be 400*l.* per annum. *Seale* v. *Seale*, 1 P. Wms. 290; Pre. Ch. 421; Gilb. Eq. R. 105.

Testatrix gave to each of the in-brothers and in-sisters for the time being resident in the several hospitals of and in the vicinity of Canterbury whose yearly income should not exceed 25*l.* augmentation or yearly increase of 5*l.* for ever: —Held, that the bequest was void for uncertainty, principally on the ground that the amount of the fund to be appropriated to answer the bequest was not specified by the testatrix and could not be determined. *Flint* v. *Warren*, 15 Sim. 626; 16 L. J., Ch. 441; 11 Jur. 665.

A testator bequeathed "fifty shares in the York Union Banking Company," to be held upon certain trusts. At the date of the will the company was registered and incorporated as an unlimited company under the companies acts, and the testator held seventy shares therein of the nominal value of 100*l.* each. Between the dates of his will and his death, the company was registered as a limited company under the same style, except that the word "limited" was added, and each 100*l.* share was converted into two shares of the nominal value of 60*l.*, and 140 of these new shares were allotted to the testator in substitution for his seventy shares of 100*l.* each:—Held, that the bequest was not specific, but general, that it was in effect a gift of such a sum as at the death of the testator should be the value of fifty shares of 100*l.* each in the unlimited company, and that as, by reason of events of which the testator was aware, it had become impossible to determine such value, the bequest failed. *Gray, In re, Dresser* v. *Gray*, 56 L. J., Ch. 975; 36 Ch. D. 205; 57 L. T. 132; 35 W. R. 795.

Upon a question as to the amount of a legacy from a doubt as to a figure, an issue was directed instead of a reference to the master. *Norman* v. *Morrell*, 4 Ves. 769; 4 R. R. 347.

—— **As to Interest given to Donee.**]—*See* PRECATORY TRUSTS, post, col. 1467.

See also Cases, sub tit. MISTAKE, ante, col. 683.

6. TRUSTS.

a. Secret Trusts and Promises made to Testator.

What is a Good Declaration of Trust.]—Devise of 1,500*l.* to A. and B. for such uses as testator had declared to them, and by them not to be disclosed. A., in the life of B., writes a letter disclosing the trust. This is a good declaration of the trust. *Crooke* v. *Brooking*, 2 Vern. 106.

A. having made his will, and his wife executrix, and the son prevails with the mother to get his father to make a new will, and that he might be made an executor, and promises to be a trustee for his mother, trust decreed. *Thynn* v. *Thynn*, 1 Vern. 296.

Circumstances under which a parol trust of real estate will be enforced. *Donohoe* v. *Conraky*, 2 Jo. & Lat. 688; 8 Ir. Eq. R. 679.

Communication to and Acceptance by Trustee.]—Where on the face of a will there is nothing to shew that any trust or purpose was intended by the testator other than a gift of the whole beneficial interest to the legatee, the plaintiffs, in order to succeed in setting the bequest aside, must prove by evidence a trust expressed, or such engagement, by words or by silence, as will authorise the court to say that the legatee undertook to do that which the law prevented the testator from imposing upon her—an express trust to devote the residue to an illegal charitable purpose. Where the evidence, parol and documentary, merely proves the wishes and intentions of the testator, and that he refrained by instruction and premeditation from declaring any trust, or imposing any obligation, or exacting any promise for their fulfilment from the legatee, and also that the legatee was, from the impulses of her own mind and disposition, bent on fulfilling the testator's wishes and intentions if she had the power, it falls short of what is required to establish the existence of any secret or honorary trust the performance of which could be compelled on the footing of the breach of a promise or engagement which would have been binding on the conscience. Where a gift is in terms absolute, but accompanied with an expression of wishes in favour of another object, and a confidence in the honour and justice of the legatee, unless the language is so express as to be in terms imperative, and to exclude all option or discretion, it cannot bind the legatee or create a trust. *Lomax* v. *Ripley*, 3 Sm. & Giff. 48; 24 L. J., Ch. 254; 1 Jur. (N.S.) 272; 3 Eq. R. 301; 3 W. R. 269.

W., shortly before his death, informed the wife of F. that he had conferred great benefits upon them by his will, and begged the wife to make a provision of 300*l.* per annum for N., which she promised to do:—Held, that the property which the wife took under the will, and of which F., jure mariti, was in the possession and enjoyment, was fixed with a secret trust in favour of N. *Norris* v. *Frazer*, L. R. 15 Eq. 318; 21 W. R. 434.

A testatrix having executed a will and three codicils, made a fourth codicil as follows:—"I do hereby bequeath to J. B. (to whom I have willed my landed property) also all my personalty, such as cash, furniture, &c., to be applied as I have requested him to do." The wishes of the testatrix as communicated to J. B. appeared fully from his affidavit in the action, and in part from a memorandum drawn up by him (but not signed by the testatrix) immediately before the execution of the codicil, and it also appeared thereby that the testatrix did not intend to alter her previous dispositions, except for the purpose of giving effect to her wishes as stated to J. B.:—Held, that the court would give effect to the trust intended to be reposed by the testatrix in J. B., and that he held as trustee for the objects

specified in the will and three codicils, subject to the alterations contained in the new dispositions shewn by his affidavit. Held, also, that the words, "cash, furniture, &c.," were not sufficient to cut down the general expression, "all my personalty"; and that, therefore, the fourth codicil extended to and comprised the whole personal estate of the testatrix. Held, further, that, assuming that effect could not have been given to the trust reposed in J. B., the will and three codicils would nevertheless have remained in operation, since the fourth codicil would in that case have been executed for the purpose of creating new interests which failed. Held, also, that, one of the witnesses to the codicil being interested under the parol trust, such interest failed. *Fleetwood, In re, Sidgreaves* v. *Brewer*, 49 L. J., Ch. 514; 15 Ch. D. 594; 29 W. R. 45.

A person gave his real and personal estate to trustees, on trust to sell the same, and, after payment of his debts, to pay the same, and he gave and bequeathed the same to I. (to whom he was engaged to be married) "absolutely, trusting she would carry out his wishes with regard to the same, with which she was fully acquainted." Shortly before the date of his will the testator had verbally expressed to I. his wish that she should make certain gifts out of the property to be bequeathed to her, and she had afterwards written down his wishes for her own use, but not in the testator's presence:—Held, that I. took the property beneficially, but subject in part to the wishes which the testator had expressed to her, and as to which she had bound herself. *Irvine* v. *Sullivan*, 38 L. J., Ch. 635; L. R. 8 Eq. 673; 17 W. R. 1083.

A certain estate was devised by will to one for life, remainder in tail male. By an unattested codicil, some annuities were directed to be paid by whoever inherited such estate. A general demurrer to a bill, which prayed payment of an annuity and arrears, was allowed. *Middlebrook* v. *Bromley*, 2 N. R. 224; 9 Jur. (N.S.) 614; 11 W. R. 712.

If A. devise all her personal estate to B., to be disposed of as B. shall think fit, and add by parol, "You may if you please give 100*l.* to my niece," B., on a bill, in the answer to which the parol declaration is admitted, shall be decreed to pay the 100*l.* to the niece. *Nab* v. *Nab*, 10 Mod. 404.

If a legatee promises a testator, that in consideration of a disposition in her favour she will do an act in favour of a third person, she who undertook to do the act must perform it. *Drakeford* v. *Wilks*, 3 Atk. 539.

Testator gave his real and personal estate to his wife absolutely, "having a perfect confidence she will act up to those views which I have communicated to her in the ultimate disposition of my property after her decease." After the death of the wife intestate, a bill was filed by two natural children of the testator against his heir and next of kin, and also against his wife's heir and administrator, alleging that testator, at time of making will, desired his wife to give the whole of his property after her death to the plaintiffs, and that she promised and undertook so to do:—Held, that if the plaintiffs had proved that allegation, a trust would have been created as to the whole of the property in favour of the plaintiffs. *Podmore* v. *Gunning*, 7 Sim. 644; 5 L. J., Ch. 266.

A testator bequeaths to A. and B. in trust for certain purposes which the will states to have been fully explained to them; on the same day a paper writing is signed by A. and B., in which they declare that the bequest is upon trust for six persons, whose names are stated, and after their signature some lines are added in the handwriting of the testator, by which a seventh person (an unborn child) is admitted to a share of the legacy; upon a bill filed by one of the six persons named in the body of the paper writing, the court recognised the paper writing as a valid declaration of trust, though it had not been proved as a testamentary paper. *Smith* v. *Attersoll*, 1 Russ. 266; 25 R. R. 41.

Bequest of 200*l.* to A. and B. "to spend as I" (the testatrix) "shall, by word of mouth, direct during my lifetime." The testatrix verbally informed A. that she wished to leave "something to J., and something to the Lord's work," and suggested C. and D. as persons to whom she proposed to give the last-mentioned bequest. After the testatrix's death A. found a letter in her handwriting, which, after reciting the bequest in the will of the 200*l.*, proceeded as follows:—"I would ask you to give or send 100*l.* to J.; the second hundred I wish sent for the Lord's work, 50*l.* to C. and 50*l.* to D.; I would ask them to lay it out":—Held, that no valid trust was created affecting any portion of the 200*l.* *King's Estate, In re*, 21 L. R., Ir. 273.

A testator, by his will, made in August, 1890, devised and bequeathed all his residuary real and personal estate whatsoever to his wife, her heirs, executors, and administrators respectively, "well knowing she will religiously carry out what she knows to be my wishes in the disposal of it." The testator's wife stated that up to July, 1890, the testator's intentions, as known to her from his conversations, as to the disposal of his furniture, pictures, plate, &c., appeared to fluctuate, but that after that date the impression left on her mind was that it was his intention to dispossess his eldest son of whatever he could keep from him. An undated memorandum in the testator's writing was produced, in which it was stated that he wished to leave his furniture, pictures, and plate to his wife and two younger children. The testator never made any statement to his wife as to the disposition of his unsettled real estate or his other personal property:—Held, that the wife took the residuary real and personal estate absolutely for her own benefit. *Briggs* v. *Penny* (post, col. 1468) distinguished. *Clancarty* v. *Clancarty*, 31 L. R., Ir. 530—C. A.

A., on his death-bed, sent for B., and told him that he had made his will, leaving all to B.; and that the will would be found in his desk, and a letter with it. The will and letter were found in the place indicated, and by the will the testator's property was left absolutely to B. The letter, which was addressed to B., commenced in the following terms:—"Seeing so much litigation and quarrelling arise in consequence of property being left in many hands, to prevent same in my own case I have thought it best to invest the whole of mine in your hands, as you will see by the inclosed will; and, well knowing you will carry out my intentions to the best of your ability, I now state them." The letter then contained a number of pecuniary gifts, including a gift of an annuity of 10*l.* per annum to X., and continued: "After arranging for the due payment of the foregoing in whatever manner you may think best, I wish the remainder of my

property to go to yourself and to my brothers in equal proportions, and to be sold or not as you may consider best for the benefit of all parties. I do not wish you to act strictly to the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would, if living, and as the parties are deserving; and, as it is not my wish that you should say anything about this document, there cannot be any fault found with you by any of the parties should you not act in strict accordance with it." To the letter was annexed a postscript, in which A. stated that he felt that he "might not be justified in making more bequests, lest the property should not turn out so as to leave a sufficient surplus after paying them"; and the postscript concluded in these words: "Having written the foregoing in a hasty manner, and perhaps in such a way as you may not clearly understand it, I leave it to yourself to carry out the intentions as you may think best; and should the property not yield sufficient at first to pay the annuities and leave a good surplus, you can defer as many of them as you find least deserving, and can best afford to wait until the outer park becomes more productive":—Held, that the letter did not contain a trust in favour of X. that could be enforced in a court of equity. *M'Cormick* v. *Grogan*, Ir. R. 1 Eq. 313; L. R. 4 H. L. 82; 17 W. R. 961.

Where Trust accepted, but Terms not communicated during Life of Testator.]—A testator gave a policy of assurance to two trustees, "to hold the same upon uses appointed by letter signed by them and myself." No such letter existed at the date of the will, but the testator had previously asked the trustees, who had consented, to accept the bequest for the benefit of persons and objects then named by the testator. Long after the date of his will, the testator wrote a letter, addressed to his executors, stating that he had, by his will, left the policy to the two trustees, to be delivered up to them for the purposes they had agreed to carry out. At the same time the testator signed an unattested memorandum, declaring the trusts on which the trustees were to hold the policy given to them by his will. The trustees retained the letter and the memorandum until after the testator's death. Upon a claim by one of the persons beneficially interested under the memorandum against the executors and trustees:—Held, that the testator could not prospectively create for himself a power to dispose of property by an instrument not duly executed as a will; and that the letter would not operate as a gift inter vivos, and that the trustees held the proceeds of the policy in trust for the residuary legatees under the testator's will. *Johnson* v. *Ball*, 5 De G. & Sm. 85; 21 L. J., Ch. 210; 16 Jur. 538.

A testator gave certain legacies to A. M. by his will, and by a codicil bequeathed to him a stud of horses and 10,000*l.*, in terms importing an absolute gift, which the testator declared to be "in addition to all the benefits given to him by my will." But by a letter addressed to, and duly received and answered by, A. M., the testator stated that he had left a letter with his solicitor expressing a wish that the 10,000*l.*, which he described as left for that purpose, should be settled on H. M. and F. M. for their joint use in the event of their intermarrying. No such letter was left with his solicitor or any one else:—Held, that parol evidence as to the intentions of the testator was not admissible; held, also, that the sum of 10,000*l.* was bequeathed upon trust, and that A. M. could not in any event take it beneficially. *Baillie* v. *Wallace*, 17 W. R. 221.

A. B. instructed his solicitor to prepare for him a will leaving all his property to the solicitor himself absolutely, but to be held and disposed of by him according to written directions to be subsequently given, and a will was prepared and executed accordingly, under which the solicitor was universal legatee and sole executor. No such directions were, however, given to the solicitor by the testator in his lifetime, but after his death an unattested paper was found by which the testator stated his wish that X. Y. should have all his property except a small sum of money which he gave to the solicitor. The solicitor claimed no beneficial interest in the testator's property except to the extent of his legacy, and claimed to hold the rest of the property as trustee for X. Y.:—Held, that, as the testator had not in his own lifetime communicated to the solicitor the object of the trust, no valid trust in favour of X. Y. had been constituted, and accordingly that the solicitor held the property as trustee for the next of kin of the testator. *Boyes, In re, Boyes* v. *Carritt*, 53 L. J., Ch. 654; 26 Ch. D. 531; 50 L. T. 581; 32 W. R. 630.

Evidence of Communication.] — A testator having declared, by parol, to his residuary legatee, certain trusts, to which he wished 2,000*l.* to be applied, afterwards made a codicil, stating that he had instructed the residuary legatee as to the disposition of his property:—Held, that the parol trusts could be enforced against the personal representative of the residuary legatee. *Att.-Gen.* v. *Dillon*, 13 Ir. Ch. R. 127.

—— **Parol Evidence when Admitted.**]—Parol evidence is admissible to prove that a legacy has been bequeathed upon a secret trust, entirely or partially undisclosed upon the face of the will, when, at or before the execution of the will, the trust has been communicated by the testator to the legatee and has been accepted by the latter. A will directed a pecuniary legacy to be disposed of by the legatee in a manner of which he alone should be cognisant, and as contained in a memorandum which the testator should leave with him. It was proved by parol evidence that, before the execution of the will, the testator had verbally informed the legatee that he intended to bequeath the legacy in trust for a person whom he then named, and that the legatee had consented to accept the legacy for this purpose, and had promised the testator to carry out his wishes respecting it. The residuary legatees of the testator having claimed the benefit of the legacy:—Held, that a valid trust for the person named by the testator had attached to the bequest. *Riordan* v. *Banon*, Ir. R. 10 Eq. 469.

A testator, who died in 1879, by his will dated in the same year gave his residuary real and personal property to his executors on trust to convert and pay the proceeds of such conversion "to my friends A. and B. in equal shares, and I bequeath the said proceeds to the said A. and B., their executors, administrators, and assigns, absolutely, in the full confidence that they will carry out my wishes in respect thereof." Both

A. and B. survived the testator, but were dead when the action to administer his estate was begun :—Held, that parol evidence of a conversation, in which the testator told the witness that he had communicated his wish to benefit a charity to one of the legatees, was inadmissible: —Held, therefore, that A. and B. took an absolute interest in the legacy free from any trust for charity ; and that the legacy was payable to their representatives in moieties. *Downing's Estate, In re*, 60 L. T. 140.

A testator who died in January, 1885, by his will dated in December, 1884, bequeathed to his friends A. and B., the sum of 500*l.* free of legacy duty to be raised and be paid out of his pure personalty, "relying, but not by way of trust, upon their applying the said sum in or towards the object or objects privately communicated to them" by him. The executors objected to pay over the bequest, on the ground that there was a secret trust, and that such trust appeared to be an illegal one. The legatee accordingly applied to the court to order payment of the legacy. The executors tendered affidavits to shew that the bequest was upon a trust. The legatees objected that the court could not go beyond the terms of the will :—Held, that the evidence was admissible. *Russell* v. *Jackson* (10 Hare, 204) followed. *Spencer's Will, In re*, 57 L. T. 519—C. A.

Parol admitted of declaration of devisee to prove she was only trustee. *Strode* v. *Winchester*, Dick. 397.

Though there can be no parol declaration of a trust since 29 Car. 2, yet parol evidence is proper in avoidance of fraud. *Hutchins* v. *Lee*, 1 Atk. 448.

Effect of Partial Execution of Trust—Statute of Frauds.]—A., by will, gave lands to S., and having afterwards purchased other lands, he on his death-bed desired B., his heir-at-law, not to hinder S. from enjoying the new purchased lands, though he had not by any writing declared the trust for S. B. suffered S. to enjoy the lands eleven years, and then pretended he thought the after-purchased lands had passed by the will :—Decreed, that this was out of the statute of frauds, and that B. letting S. enjoy it so long was an execution of the trust, and though no express fraud was proved against B. (as in *Lester* v. *Foxcroft*, Colles's P. C. 108), yet the possession for eleven years was a strong presumption that he suffered it in execution of the testator's declaration. *Harris* v. *Horwell*, Gilb. Eq. R. 11.

Right of Trustee to Legal Estate.]—A devise of land to A. upon the face of the will for his own benefit, but really upon a secret trust assented to by him for a charity, vests the legal estate in A., subject only to a resulting trust for the testator's real representative. Therefore, where a testator devised his residuary real estate to trustees upon a secret agreed trust for a charity, and his heir-at-law was not known :—Held, as between the crown and persons claiming under the surviving trustee, that the legal estate was well devised, and that the former could therefore establish no claim by escheat. The court considered itself bound, by the 25 & 26 Vict. c. 42, to decide the question as to the legal effect of the devise, and accordingly made a declaration as to the legal right, dismissed the attorney-general from the suit, and directed inquiries as to the heir. *Sweeting* v. *Sweeting*, 3 N. R. 240 ; 33 L. J., Ch. 211 ; 10 Jur. (N.S.) 31 ; 9 L. T. 783 ; 12 W. R. 239.

Where Object of Trust Fails.]—Where a testatrix left the residue of her property, including large real estate, to joint tenants, and the evidence shewed that the joint devisees, though not legally trustees, considered themselves under a moral obligation to apply the property to charitable purposes according to the wish of the testatrix :—Held, that the joint devisees were trustees for the heir-at-law and next of kin of the testatrix. *Jones* v. *Badley*, L. R. 3 Ch. 362 ; 19 L. T. 106 ; 16 W. R. 713.

Where Bequest prevented by Promise made to Testator.]—Where a son promised to pay his father's legacies, if he would forbear to alter his will, such promise shall be enforced. *Chamberlaine* v. *Chamberlaine*, 2 Free. C. C. 34.

Semble, it is said to be the constant course of the court to make decrees upon promises of this nature. *Ib.*

Provision by will increased, upon evidence of the testator's request to the executor and residuary legatee, and his promise, upon which the testator refused to make a new will, and said he would leave it to the generosity of the executor. *Barrow* v. *Greenough*, 3 Ves. 152.

Devise to L., in consideration of her promise to give, &c., is a trust. *Clifton* v. *Lambe*, Ambl. 519.

Under certain circumstances verbal promises will bind men in equity to the performance of them ; as where a son promised his father to pay his sister's portions, if he would not by will direct timber to be felled to raise them. *Dutton* v. *Poole*, 1 Vent. 318.

Relief granted on fraud, in not performing a promise, relying on which, the testator forbore to bequeath. *Chamberlain* v. *Agar*, 2 V. & B. 262.

Discovery compelled where devise was obtained, or prevented by undertaking of devisee or heir, to do certain acts in favour of individuals, and relief upon the ground of fraud. *Stickland* v. *Aldridge*, 9 Ves. 519 ; 7 R. R. 292.

Executor promised his testator to pay plaintiff 100*l.* legacy, and said he need not put it in his will ; after the testator's death, he said he would not pay it :—Decree for payment out of assets. *Reech* v. *Kennigate*, Ambl. 67. *S. C.*, nom. *Reech* v. *Kennegal*, 1 Ves. 123 ; 1 Wils. Ch. 227.

A copyholder by his will intending to give the greatest part of his estate to his godson, and the other part to his wife, the wife persuades him to nominate her to the whole, and that she would give the godson the part designed for him ; decreed against the wife notwithstanding the statute of frauds and perjuries. *Devenish* v. *Baines*, Pre. Ch. 4.

A. devises land to his brother, and makes him executor, and wills, that out of the personal estate, and half a year's rent of his personal estate, he should pay his legacies, and give an annuity to his nephew to maintain him at college. It being proved that the brother promised the testator to pay the annuity, otherwise he would have charged his real estate therewith, decreed the real estate to be charged with the annuity. *Oldham* v. *Litchfield*, 2 Vern. 506 ; 2 Free. C. C. 284.

—— **Evidence of Contract.**]—A sister, in a writing addressed to her brother, after stating, "As you have kindly promised, if I do not make a will, my wishes shall be fulfilled," expressed her wish that A. and others should have the same therein specified. She died intestate, and the brother inherited her property. There was some evidence of the brother's having seen the writing in her life, and of his having afterwards expressed an intention to carry his sister's wishes into effect, but he died without having done so:—Held, that there was not sufficient evidence of a contract on the part of the brother to enable the court to enforce the performance of the sister's wishes. *Chester* v. *Urwick*, 23 Beav. 407.

Where Bequest Revoked in Consequence of Fraudulent Misrepresentations to Testator—Jurisdiction to affix Trust.—Whether, where A., a residuary legatee, by artful and fraudulent misrepresentations to the testator of the character of B., induces the testator to revoke a legacy given to B., the benefit of which revocation results to A., this court has jurisdiction to affix a trust on A. in favour of B. to the extent of the fruit of the fraud possessed by A., or whether the matter belongs exclusively to the ecclesiastical court; and, secondly, whether such trust can be declared after a sentence of the ecclesiastical court, in which the question of undue influence was in issue, quære:—Held, in the affirmative by the Master of the Rolls, and in the negative by the Lord Chancellor. The parties thereupon appealed to the house of lords. *Allen* v. *M'Pherson*, 1 Ph. 133; 12 L. J., Ch. 97; 7 Jur. 49. Affirmed, 1 H. L. Cas. 191; 11 Jur. 785.

Will refraining from Exercise of Power—Effect of Notice and Acquiescence on Rights of Parties interested.]—A., by a voluntary deed, assigned all the personal estate which he was then, or might at any time afterwards, be possessed of or entitled to, upon trust to pay the interest, &c., to himself for life, and after his decease to such persons as he should appoint by will, for their lives, and subject thereto, to pay the principal to his next of kin who would be living at his decease, his, her, or their executors, &c. Soon afterwards the testator, by his will, gave some legacies, and gave the residue to the persons by name who were his next of kin at the execution of the deed, and at his death; upon whose bill, claiming under the deed, an account of the trust estate received by the trustees, and of the personal estate, &c., and to set aside the legacies, it was held that the power was not executed by the will; but one of the plaintiffs being clearly affected with notice, and acquiescence in the plan of giving the legacies, instead of executing the power, the cause was ordered to stand over, with liberty to file a bill to establish the legacies; the court inclining, in case the other plaintiff could be affected with notice, at all events to apply the interest of the personal estate, during the life of the legatees, in payment of the legacies; they were afterwards paid under a compromise. *Griffin* v. *Nanson*, 4 Ves. 343.

b. Precatory Trusts.

General Principles—Certainty Necessary.]—When a testator expresses a desire as to the disposition of property, and the objects to which he refers are certain, the desire so expressed amounts to a command. *Cary* v. *Cary*, 2 Sch. & Lef. 189.

It seems that any words of a testator intimating a request, wish, desire, recommendation &c., are sufficient to create a trust; provided there be certainty of the gift and of the object to be benefited thereby. *Harding* v. *Glyn*, 1 Atk. 469, n.

Bequest in will will raise a trust, if the objects and property are described with such certainty that the court can execute it; but otherwise the devisee takes absolutely. *Eade* v. *Eade*, 5 Madd. 119; 21 R. R. 284.

It seems that any words of a testator intimating a "request, wish, desire, recommendation," &c., are sufficient to create a trust, provided there be certainty of the gift and of the object to be benefited thereby. *Brest* v. *Offley*, 1 Ch. Rep. 246. *Pary* v. *Juxon*, 3 Ch. Rep. 38.

Words of desire will raise a trust where the property and object are certain. *Pierson* v. *Garnet*, 2 Bro. C. C. 38; Pre. Ch. 201. And see *S. C.*, id. 226.

Words of recommendation or precatory, or expressing hope, &c., if the objects and subject are certain, are imperative and create a trust. *Paul* v. *Compton*, 8 Ves. 380; 7 R. R. 81.

Words of recommendation are not considered imperative unless the objects and subjects are certain. *Moggridge* v. *Thackwell*, 7 Ves. 85; 13 Ves. 416; 6 R. R. 76.

No trust arises on words of request or recommendation, unless the objects and subjects are certain. *Morice* v. *Durham* (*Bishop*), 10 Ves. 536; 7 R. R. 232.

Precatory words held imperative where the object and subject are certain. *Dashwood* v. *Peyton*, 18 Ves. 41; 11 R. R. 145.

Recommendation in a will, where the object and subject are certain, amounts to trust. *Forbes* v. *Ball*, 3 Mer. 664.

Words accompanying a gift or bequest expressive of confidence, or belief, or desire, or hope, that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions—first, that they are so used as to exclude all option or discretion in a party who is to act as to his being according to them or not; secondly, the subject must be certain; and, thirdly, the object expressed must not be too vague or indefinite to be enforced. Vagueness in the object will unquestionably furnish reason for holding that no trust was intended, yet this may be countervailed by other considerations, which shew that a trust was intended, while, at the same time, such trust is not sufficiently certain and definite to be valid and effectual. *Briggs* v. *Penny*, 3 Mac. & G. 546; 21 L. J., Ch. 265, at p. 273; 16 Jur. 93. Affirming 3 De G. & Sm. 525.

The maxim, that when words expressive of hope, desire, or request are used by a testator, there must be a certain subject and a certain object to create a trust, explained. The court having to consider whether the precatory words are mere words of recommendation, or whether they amount to an imperative direction creating a trust, if it finds an uncertainty in reference to the subject given, or the object to be benefited, infers that the words are used, not to create a trust, but as mere words of recommendation. But if the court finds that a definite object was absolutely intended, although that object may

from circumstances not be ascertainable, and in that sense uncertain, in such a case a trust is the clear result, and the donee, as such, takes no beneficial interest. By will, under a power, a married woman appointed "13,000*l.* to go as follows: that is to say, the whole to my husband absolutely; but it is my request to him, that after reserving for his own absolute use and benefit 2,000*l.*, and applying all the interest to his own use and benefit during his natural life, he will make such disposition of the remainder, by deed, will, or settlement, as he may deem most desirable to carry out my wishes, often expressed to him by word." She had not, in fact, expressed her wishes:—Held, that as to the 11,000*l.*, a trust was intended, and that though the object was not ascertainable, the husband was excluded from taking any beneficial interest. If in such a case the testatrix had declared by word that "her own relatives, of different degrees, or some of them, should be benefited," such a description would be too indefinite to raise a trust for a particular class. Such a declaration could not be imported into the will for the purpose of giving a beneficial interest to the husband. The will contained also the following residuary clause: "As to all and singular other my property," she gave the same to her husband:—Held, that thereby the 11,000*l.* passed to the husband. *Bernard* v. *Minshull*. Johns. 276; 28 L. J., Ch. 649; 5 Jur. (N.S.) 931.

Where property is given absolutely, with a recommendation as to its disposal in favour of others, in such terms as ought to be construed imperative, and the objects of recommendation are certain:—Held, to create a trust in their favour; but if the terms are such as that the words are not to be intended as imperative, or if the donee have a discretionary power, as to withdrawing the benefit from the objects, or if they are not clearly ascertained, no trust is created: where, therefore, a party, who acquired by suffering a recovery a fee of settled family estates, devised the same, with limitations, in favour of the male line, and, after several legacies to dependants, declared his trust in the liberality of his successors to reward any other of his servants and tenants, according to their deserts, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family:—Held, that the terms were not sufficiently imperative, nor the subjects to be effected, nor the interests to be enjoyed, sufficiently defined to create a trust for the male line, and that the devisee took the estates unfettered by any trusts in their favour. The principles of construction as to words of recommendation considered in the judgment. *Knight* v. *Knight*, 3 Beav. 148; 9 L. J., Ch. 354; 4 Jur. 839. Affirmed sub nom. *Knight* v. *Boughton*, 11 Cl. & F. 513; 8 Jur. 923. See *Dorchester* (*Lord*) v. *Effingham* (*Earl*), 3 Beav. 180, n.

Where in a document there is, first, an absolute gift to a particular individual, and then a subsequent clause containing words of belief, desire, or hope, that a particular application shall be made of such bequest, the court will refuse to establish a precatory trust unless the words of the subsequent clause are clear, definite and imperative. Testator made his will as follows: "I bequeath to my wife all my land in K."; and other property, "to be held by her for her own and all my children's use and benefit. But I leave it entirely in her power to fix the portion that each of my children is to get out of my property," and appointed his wife executrix:—Held, that the will must be read as containing a direct gift to testator's wife and children, and not as imposing a precatory trust on her; that the power to determine the children's shares negatived the idea of a joint tenancy, but did not cut down the absolute gift to the wife and children; that the wife was under the will a trustee of the lands for herself and her children with a large discretionary power of determining what should be the children's portions when their shares came, if ever, to be allotted; and that therefore the cause shewn should be allowed. *Byrne's Estate, In re*, 29 L. R., Ir. 250—C. A.

—— **Doctrine not to be Extended.**]—The doctrine of precatory trusts is not to be extended, and, in considering whether precatory words create a trust, the court will not look only to particular expressions, but see whether on the whole will the testator's intention was to create a trust, and regard will be had to any embarrassment and difficulty which would arise from a trust. *Diggles, In re, Gregory* v. *Edmondson*, infra.

—— **Presence of Precatory Words does not necessarily negative Trust.**]—Where a devise is made in terms which do not necessarily amount to an absolute gift, so that, though not technically accurate, they may fairly be considered to create a trust, such a construction is not negatived by the presence of precatory words. *Godfrey* v. *Godfrey*, 2 N. R. 16; 8 L. T. 200; 11 W. R. 554.

Such a devise does not come within that class of cases in which it is sought to construe words of absolute gift as creating a trust, by reason of the addition of precatory words. *Ib.*

A testator expressed his wish that property bequeathed to his wife should be used as to her seemed best for her own and her children's welfare:—Held, on demurrer, that the widow was not absolutely entitled. *Ib.*

—— **Duration of Trust.**]—A bequest on trust for the testator's wife for life for her use and benefit and for the maintenance and education of his children constitutes a trust for the maintenance and education of the children even as against the trustee in bankruptcy of the widow, and such trust does not terminate as regards maintenance, nor necessarily as regards education, upon the attainment of majority or marriage of the children. *Booth, In re, Booth* v. *Booth*, 63 L. J., Ch. 560; [1894] 2 Ch. 282; 8 R. 256; 42 W. R. 613.

Where Uncertainty as to Object of Trust.]—Bequest to A. B., "trusting she would use it" to indefinite purposes, creates no trust for those purposes. *Curtis* v. *Rippon*, 5 Madd. 434; 21 R. R. 327.

A devise to A. for life, with liberty to leave the same to whom she thought most deserving of it, recommending to her to have a due regard to the testatrix's mother's relations, is not mandatory as to the objects of the appointment. *Randal* v. *Hearle*, 1 Anstr. 124.

Words of confidence, desire, or request, in order to raise a trust, not only attach on a precise subject of property, but also descirbe with precision the objects of bounty. In this case, a bequest of leaseholds to a brother, "hoping

he will continue them in the family," was held insufficient. *Harland* v. *Trigg*, 1 Bro. C. C. 142.

Testator by his will gave certain shares of freehold and leasehold houses to his wife, for her sole use and benefit, begging and requesting, that at her death she would give and bequeath the same in such shares as she should think proper, and unto such members of her own family as she should think most deserving of the same. He gave all his moneys in the funds, and all the money he might be entitled to, for her sole use and benefit, begging and requesting that at her death she would give and bequeath what should be remaining, in such sums as she should think proper, until such members of her own and his family as she should think most deserving, and were entitled to the same. He made a codicil, by which he gave in terms his residuary estate to his wife:—Held, that both as to the freehold and leasehold property and the moneys, there was no trust, but the wife took absolutely. *Green* v. *Marsden*, 1 Drew. 646; 1 Eq. R. 437; 22 L. J., Ch. 1092; 1 W. R. 511.

A testator, having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her, and not doubting that she would consider, his near relations, as he would have done if he had survived her:—Held, that there was no trust for the next of kin, but that the wife took the residue absolutely. *Sale* v. *Moore*, 1 Sim. 534.

A. M. devised certain estates to his nephew R. M., and his heirs, "not entertaining the least doubt but that he will in due time, and upon the first proper occasion, take care not only to have the said estates, so devised to him by me, but my paternal estates, settled in such manner, that the said estates may continue in the male line of our family, and in our name and blood." At the death of the testator there were seven persons of the male line of his family, and of his name and blood alive, one of whom was the plaintiff's paternal grandfather, who was descended from the paternal great-grandfather of the testator:—Held, that the objects were sufficiently defined and certain to enable the court to execute the trusts created by the words of recommendation in the will, and that the court in executing the trusts might go into the ascending line, and was not confined to the descendants of the father of the testator; a general demurrer to the bill for want of equity was therefore overruled. *Malone* v. *O'Connor*, Ll. & G. t. Plunk. 465.

A testator bequeaths to "his only son 60*l.* a year for ever, also to provide for the two daughters of H. E., and the remainder of his property to the two children of S. A.":—Held, that, under these words, the two daughters of H. E. do not take any benefit. *Abraham* v. *Alman*, 1 Russ. 509; 25 R. R. 125.

Testator gave all his property to his son, his heirs, executors, administrators, and assigns, for his and their own use and benefit, "well knowing that he would discharge the trusts the testator reposed in him, by remembering his (the testator's) sons and daughters":—Held, that no trust was created, by reason of the vagueness of the words. *Bardswell* v. *Bardswell*, 9 Sim. 319; 7 L. J., Ch. 268.

A testator gave whatsoever property or effects he might die possessed of, after his debts were paid, or might become entitled to, to his wife, and appointed her sole executrix of his will; "and my reason for so doing is the constant abuse of trustees which I daily witness among men; at the same time trusting she will, from the love she bears to me and our dear children, so husband and take care of what property there may be for their good; and should she marry again, then I wish she may convey to trustees, in the most secure manner possible, what property she may then possess, for the benefit of the children, as they may severally need or deserve, taking justice and affection for her guide"; and at the conclusion of his will, he gave the capital of his business to his wife, trusting that she would deal justly and properly to and by all their children:—Held, that no trust was created for the children. *Pope* v. *Pope*, 10 Sim. 1.

Testator, after reciting that he was desirous of making a suitable provision for his wife as well as for his daughter and grandchild, in order to mark his unbounded confidence in his wife, and his belief that she would be actuated by the most maternal regard towards his child, gave her all his property for her own use, benefit, and disposal absolutely, implicitly relying on her attachment to his daughter and grandchild. He then directed his executors to sell his property, and to invest the proceeds in government or real securities in his wife's name alone, or jointly with his executors (with power to change the securities), "to hold the same unto my wife for her own absolute use, benefit, and disposal: and whereas I have hereby manifested abundant proof of entire confidence in my said dear wife by thus giving her the sovereign control over the whole of my property for her sole use and benefit, which she will duly appreciate accordingly; but in so doing I nevertheless earnestly conjure her, under the advice of my executors, to proceed forthwith to make ample provision, by deed or will, for our only child and grandchild." The will concluded with a power to the wife, who was executrix, and to the executors, to retain their expenses out of the testator's estate:—Held, that no trust was created by the will in favour of either the daughter or grand-daughter. *Winch* v. *Brutton*, 14 Sim. 372; 8 Jur. 1086.

A testator devised and bequeathed his real and personal estate to his widow, "to and for her own use and benefit absolutely, having full confidence in her sufficient and judicious provision for my dear children":—Held, that there was no trust in favour of the children. *Fox* v. *Fox*, 27 Beav. 301.

Under a bequest by a husband of "all my property and effects, whatsoever and wheresoever, unto my dear wife (trusting that she will do justice to any children we may have) for her own absolute use and benefit," she is entitled to the property absolutely. *Ellis* v. *Ellis*, 44 L. J., Ch. 225; 31 L. T. 875; 23 W. R. 382.

A testator gave all his real and personal property to his widow, her heirs, &c., "absolutely and for ever, in the full assurance and confident hope" that she would bring up, educate, and provide for his children, as it would have been his intention if living:—Held, also, that though the words "full assurance and confident hope" would create a precatory trust, yet the trusts were too obscure to carry into effect, and that the widow took absolutely. *Macnab* v. *Whitbread*, 17 Beav. 299; 1 W. R. 473.

A testator gave all the residue of his property to his wife, "her heirs and assigns, for ever, being fully satisfied that she would dispose of it, by will or otherwise, in a fair and equitable

manner, to their united relatives, bearing in mind that his relatives were generally in better circumstances than hers" :—Held, that no precatory trust was created. *Reeves* v. *Baker*, 18 Beav. 372; 2 Eq. R. 476; 23 L. J., Ch. 599; 18 Jur. 588; 2 W. R. 354.

Testator in India gives all his estates and effects to A. in England, in trust, and directs his property to be remitted to him; and, after several legacies, he gives A. 800*l.*, and requests him, as soon as the property is remitted, to lay out the same in the funds or other securities, which shall appear most advantageous for those who shall be benefited by it hereafter. The 800*l.* is a benefited legacy, not in trust. *Wadley* v. *North*, 3 Ves. 364.

A husband gave, devised, and bequeathed all his real and personal estate and effects whatsoever "unto and to the absolute use of my dear wife, her heirs, executors, administrators, and assigns, in full confidence that she will do what is right as to the absolute disposal thereof between my children, either in her lifetime or by her will after her decease." The construction of this gift was submitted to the court by all the beneficiaries, and a declaration was asked as to the respective rights of the testator's widow and children. The widow was in possession of the property which formed the subject of the gift, and all the children were sui juris. The court, under the above circumstances, refused to make any further declaration than that the widow was lawfully in possession, and made no order as to costs. *Smith* v. *Gibson*, 25 L. T. 559; 20 W. R. 88.

A testator bequeaths the whole of his property to Lady C., the wife of his elder brother, "for her to manage and appropriate in the best manner for the welfare of her family." He then mentions that he makes this disposition on account of the exceedingly embarrassed circumstances of his elder brother, which might leave nothing for his family; to obviate which the testator adds, that all his property is to be placed in trustees' hands, for Lady C.'s sole and separate use :—Held, that there was no trust for the children of the elder brother; and that Lady C. was entitled to the fund absolutely. *Crawfurd* v. *Crawfurd*, 3 L. J. (O.S.) Ch. 105.

A. gave two-thirds of his residuary property to his wife, to be at her sole and entire disposal, for the maintenance of herself and such child or children as he might leave; and as to the other one-third he bequeathed it to his wife, "being well assured that she will husband the means that may be left to her by me with every prudence and care, for the sake of herself and any children that I may leave by her" :—Held, that as to the one-third, the widow took it absolutely; and as to the two-thirds, that she took a life interest only coupled with a trust for the maintenance of an only child, a married daughter, if she should ever require to be maintained by her. *Scott* v. *Key*, 35 Beav. 291; 6 N. R. 349; 11 Jur. (N.S.) 819; 13 W. R. 1030.

A will in these words: "I give and bequeath all my property of what kind soever that I may die possessed of to my dearly-beloved wife, well knowing her sense of justice and love to her family, and feeling perfect confidence that she will manage same to the best advantage for the benefit of her children," does not create a precatory trust for the children, but the wife takes all the property absolutely. *Greene* v. *Greene*, 3 Ir. Eq. R. 90; 17 W. R. 487.

A testator gave all his real and personal estate to his wife and her heirs absolutely, "relying on her doing what is right" :—Held, that the words were too vague to create a trust, and that the wife took the property absolutely. *Crockford, In re*, 21 L. T. 85; 17 W. R. 1004.

An aunt gave all her personal estate to trustees upon trust, after payment of her funeral and testamentary expenses, debts, and legacies, to hold the residue "in trust for such of my nieces A. and B. as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." The nieces both survived the testatrix :—Held, that they took the residue for their own benefit. *Stead* v. *Mellor*, 46 L. J., Ch. 880; 5 Ch. D. 225; 36 L. T. 498; 25 W. R. 508.

A husband left his real and personal property to his wife for her life, with power to dispose of all the property, both real and personal, as she might judge best and wisest, he relying with confidence on her discretion, and that she would make such a distribution or disposal of it as would thoroughly accord with his wishes on the subject, with all of which she was perfectly acquainted. There was some evidence of the testator having communicated some wishes to his wife, but none as to what they were :—Held, that the terms of the gift to the wife did not amount to a precatory trust, and that she took the property, both real and personal, absolutely. *Reid* v. *Atkinson*, Ir. R. 5 Eq. 373.

Where Uncertainty as to Property the Subject of Alleged Trust.]—Devise to testator's wife, "not doubting she will give what shall be left to my grandchildren," not sufficiently certain to raise a trust. For such purpose, the objects must not only be defined, but the subject of property precisely ascertained, so as to be incapable of diminution by the party. *Wynne* v. *Hawkins*, 1 Bro. C. C. 179.

No trust under words of recommendation and confidence applied to an uncertain subject; as what shall be left after the death of a person to whom the property is given in the first instance. *Forbes* v. *Ball*, 3 Mer. 437.

A testator bequeaths to his wife the residue of his estate, requesting that she would at her death leave three legacies of 200*l.* each to three persons, whom he describes, and that she would leave the remainder of her property to his two nephews, in such proportions as she thought proper :—Held, that, subject to the three legacies, the widow was entitled to the residue absolutely, and that no trust as to any portion of it was raised in favour of the nephews. *Eade* v. *Eade*, 4 L. J. (O.S.) Ch. 44.

R., by will, gave all the remainder of her property to H., his heirs and assigns, for ever, as she had full confidence that, if he should die without issue, he would, after providing for his widow during her life, leave the bulk of her residuary estate to four parties named. H.'s wife being dead, he left all his property to trustees, to convert and hold the same, after payment of debts and legacies, in trust for the objects named in R.'s will and six others. On the question whether H. took the property clothed with a precatory trust :—Held, that he did not, but took the absolute interest, the word "bulk" applying to a portion only, and not being a certain fixed subject. *Palmer* v. *Simmonds*, 2 Drew. 221; 2 W. R. 313.

A husband gave his wife the whole of his real

and personal property for her sole use and benefit, and continued, "It is my wish that whatever property my wife might possess at her death be equally divided between my children": —Held, that this was not a gift coupled with a trust, and that the widow took an absolute interest in the property. *Parnall* v. *Parnall*, 9 Ch. D. 96; 26 W. R. 851.

A testatrix left all her property to M., "to be disposed of by him as to him might appear just, having every confidence he would act fairly and in accordance with her wishes." In a conversation between the testatrix and M., previously to the date of the will, she said to him she would wish him to give some of her property to the plaintiffs, but without specifying any particular portion:—Held, that no trust binding upon M. was created by the will. *Creagh* v. *Murphy*, Ir. R. 7 Eq. 182.

A testator gave to his widow the whole of his real and personal property, "feeling confident that she will act justly to our children in dividing the same when no longer required by her":—Held, that the widow took an absolute interest, and that the doctrine of precatory trusts did not apply. *Mussoorie Bank* v. *Raynor*, 51 L. J., P. C. 72; 7 App. Cas. 321; 46 L. T. 633; 31 W. R. 17.

Testator bequeathed 10,000*l.* to his daughter A., the wife of B., recommending her and her husband to settle it, together with such sum of money as the husband should choose, upon A. and her children:—Held, that a trust was created, the uncertainty of the addition not affecting the primary sum, and that the benefit to the children did not fail by the death of A. in the lifetime of the testator. *Ford* v. *Fowler*, 3 Beav. 146; 9 L. J., Ch. 352; 4 Jur. 958.

A. bequeathed to his two sons all his property, real and personal, to have and to hold the same in the most absolute manner; and he declared it to be his will and intention that his sons should, at their discretion and according to their own judgment, allocate to the other members of his family, being his lawfully begotten children, such portions of the property and goods, be the same more or less, as to them should seem fit and suitable; and he appointed his sons his executors:—Held, coupling the will with an admission in the petition by the sons of the testator's intention, that a trust had been created, and that the sons were trustees for the other children of the testator, as to the entire property of the testator, both real and personal. *Gray* v. *Gray*, 11 Ir. Ch. R. 218.

A testator, by will, gave the residue of his personal estate to trustees, upon trust to his wife for life; and after her death, for his nephew R. absolutely. After his death, a letter in his own handwriting, but without date, was found among his papers, addressed to R., and he therein, after requesting that it might be accepted in explanation of his will, lest there should be anything not fully explanatory of his intention in the terms of such will, expressed a wish that his property, at the death of his wife, "should be R.'s." He also expressed a wish that R. should educate some one nephew as a physician, and bequeath to such nephew all, or the greater part, of the property bequeathed to R. by the testator, adding that he wished finally to benefit such nephew as R. might select as his successor. This letter was admitted to probate. The testator died, leaving his wife and R. surviving. R. by will gave the property bequeathed to him by the testator to his (R.'s) brothers and sisters:—Held, that although the letter addressed to R. was a distinct testamentary instrument, it was recommendatory only to, and not obligatory on, R., and that it was not sufficiently definite to destroy the effect of the absolute gift to R. contained in the will. *Pinkhard's Trust, In re*, 27 L. J., Ch. 422; 4 Jur. (N.S.) 1041—L.JJ.

Testator gave the residue of his personal estate to his wife, desiring her to provide for his daughter, A., out of the same, as long as she, his wife, should live, and, at her decease, to dispose of what shall be left among his children, in such manner as she shall judge most proper. This is not an absolute trust for the children after the death of the wife. *Pushman* v. *Filliter*, 3 Ves. 7.

No trust, under words of recommendation and confidence, applied to an uncertain subject, as what shall be left after the death of a person to whom the property is given in the first instance. *Tibbits* v. *Tibbits*, 19 Ves. 656; Jac. 317; 23 R. R. 79.

B. A. by will gave five shares of freeholds and leaseholds which belonged to him, to his wife for her sole use, begging and requesting that at her death she would give the same in such shares as she should think proper to such members of her family as she should think most deserving of the same; with a like gift of all moneys, adding the words "what shall be remaining." The widow having left the mass of her property to a stranger —on the question whether there was an implied trust:—Held, that there was not; the words "share" and "sole use" shewing that the beneficial interest was given, and the request only applied to what might remain. *Green* v. *Marsden*, 1 Eq. R. 437; 1 Drew. 646; 22 L. J., Ch. 1092; 1 W. R. 511.

A gift of the yearly interest, dividends, proceeds, and profits, to arise from the shares of the testator in a pottery, shipbuilding yard, shipping trust moneys, effects, and premises, to his wife for her life, for the maintenance, education, and support of herself and his children, and subject to some bequests and trusts for the advancement of the children, a bequest of the residue to the children equally; and the testator particularly recommended, desired, and directed his wife, at his decease, by will or otherwise, to divide or dispose of what money or property she might have saved from the yearly income thereinbefore given to her, amongst all his children in equal shares:—Held, that the attempted disposition of the savings of the widow was in the nature of a precatory gift; but, the widow having taken a beneficial interest, and being empowered to spend the whole, there was no certainty of the subject of the gift, and no trust created of the savings in favour of the children; and that the same, therefore, belonged to the estate of the widow. *Cowman* v. *Harrison*, 10 Hare, 234; 22 L. J., Ch. 993; 17 Jur. 313; 1 W. R. 96.

Particular Words — Principle.]—Whether a testator uses terms expressive of his desire, hope, request, &c., or words of command, direction, &c., it is the same thing; in either case he intimates or expresses what his will is, and that ought to be observed, and to prevail. *Bute (Earl)* v. *Stuart*, 1 Bro. P. C. 485.

A court of equity will look at the circumstances existing at the date of a will, and, if necessary, construe words importing a trust as an expression of hope or confidence. *Quayle* v. *Davidson*, 12 Moore, P. C. 268; 3 L. T. 362; 7 W. R. 164.

If property be given by will absolutely and without restriction, the court will not lightly impose upon it a trust upon mere words of recommendation or confidence. *Lawless* v. *Shaw*, Ll. & G. t. Sugd. 164.

"**Assurance and Confidence.**"]—A testator gave all his property to his wife, her heirs, executors, administrators, and assigns for ever; in full assurance and confidence that she would bring up his children in the fear of God, and educate and provide for them as it would have been his intention to do if it had pleased God to spare his life:—Held, to be an absolute gift to the wife. *Macnab* v. *Whitbread*, 17 Beav. 299; 1 W. R. 473.

"**Beg.**"]—A testator having stated in his will that he had four shares in the National Bank, and an insurance policy, a bond and half an annuity, gave the bank shares to his sister S., as a trustee for his niece; and having disposed of the other property already mentioned, he bequeathed the "remainder of those effects (all my just debts being paid), if any remain," to his sister, adding, "and I beg she will apportion between the above-named [naming four of his legatees], and as my nephew, John Corbett, has a less secure position in life than his brothers, to him such portion or portions as she shall see fit. I would also wish that she should have power to give some small amounts for charity, especially to L.'s family," &c.:—Held, that his sister took the residue as a trustee for the persons named, and not beneficially. *Corbet* v. *Corbet*, Ir. R. 7 Eq. 456.

"**In the full Belief.**"]—A husband, by his will, gave all his property to his wife absolutely for her own sole and separate use, in the full belief that she would so dispose thereof by deed, will, or otherwise, that at her death the whole might be equally divided between his children, share and share alike:—Held, that a precatory trust was created in favour of the children. *Fordham* v. *Speight*, 23 W. R. 782.

"**Confidence.**"]—Devise to wife "in confidence" that she will leave, &c., to testator's son, not relievable. *Anon.*, Cary, 22.

Devise and bequest of real and leasehold estates to the devisor's widow and her heirs for ever, "in fullest confidence that after her decease she will devise the property to my family":—Held, an estate for life only, with remainder in trust for the devisor's heir as persona designata. *Wright* v. *Atkyns*, 17 Ves. 255; 19 Ves. 299; G. Cooper, 111; 1 V. & B. 313; Turn. & R. 143; 13 R. R. 199.

A testator devised and bequeathed his residuary real and personal estate to his widow "absolutely in the fullest confidence that she" would carry out his wishes in certain particulars—namely, that she would pay the premiums on a policy for 1,000*l.* on her own life, and that she would by her will leave the moneys payable under such policy, and also the moneys payable under a policy for 300*l.* on the testator's life, to his daughter. The policy for 1,000*l.* was the property of the widow; that for 300*l.* belonged to the testator:—Held (Rigby, L.J., dissenting), that the language of the testator was not sufficient to create trusts of the policies in favour of the daughter after the widow's death, or to impose a condition on her, and therefore that she was not, on account of the benefits given to her by the will, put to her election to carry out the wishes of the testator as to the 1,000*l.* policy belonging to her. *Wright* v. *Atkyns* (supra) and *Lambe* v. *Eames* (infra, col. 1489) discussed. *Williams, In re, Williams* v. *Williams*, 66 L. J., Ch. 485; [1897] 2 Ch. 12; 76 L. T. 600; 45 W. R. 519—C. A.

Bequest of all testator's property real and personal to his wife, her heirs, executors, &c., absolutely, for ever, "entertaining as I do, the most entire and implicit confidence that my said dear wife will during her life appropriate the same or the interest thereof with maternal discretion, prudence, and economy, as well towards the maintenance, support, and liberal education of our dear children, as towards the maintenance of herself; and that she will bequeath so much and such part of my said estate and property hereby devised to her as may be by her judicious management preserved for our family unto and equally between and amongst all and every our dear child and children already born, and who may hereafter be born, that shall be living at the time of her decease, and the lawful issue of such of the said children as shall be then dead, in equal shares, but so that the issue of any of the said children who shall have died in the lifetime of my said wife shall only receive in equal proportions, if more than one, the share to which their, his, or her deceased parent would, if living, have been entitled; and if there should be but one such child, or the issue of but one such child, then living, then I should wish the whole to be paid and transferred to such one child, or his or her issue":—Held, that the wife was not absolutely entitled for her own use; that the child of a child dead at the date of the will took a share; but that a grandchild who died in the lifetime of the widow did not. *Smith* v. *Smith*, 2 Jur. (N.S.) 967.

See also cases sub **Trust and Confidence**, infra, col. 1484.

"**Under the firm Conviction.**"]—A testator leaves all his property, real and personal, to his wife, "under the firm conviction that she will dispose of and manage the same for the benefit of our children." On the question what estate the wife took:—Held, that she took nothing but an estate in trust for the children. Semble, where an estate is left to a wife for the benefit of children, there must be words of beneficial enjoyment to confer any estate upon her for her own benefit. *Barnes* v. *Grant*, 26 L. J., Ch. 92; 2 Jur. (N.S.) 1127; 5 W. R. 14.

"**Desire.**"]—A clause in a will, appointing A. residuary legatee, with the desire that the residuary estate shall be afterwards left by her, in her own and the testator's name, to charitable purposes, does not raise a trust, but operates as an absolute gift. *M'Culloch* v. *M'Culloch*, 1 N. R. 535; 11 W. R. 504.

A testator devised all his real estates to his son, in fee, and it was his earnest wish, and he particularly requested his son to keep the devised estates, and all other real estates to which he might become entitled, and not to sell, alien, or dispose of the same, except by way of exchange, or for re-investing the value in the purchase of other estates; and in case his son should die without leaving issue male, it was his (the testator's) anxious desire that he would so settle and devise the same that they might continue in the

name of the testator :—Held, that this did not create a valid precatory trust, and that the son was absolute owner in fee-simple of the estates. *Hood* v. *Oglander*, 34 Beav. 513 ; 6 N. R. 57 ; 34 L. J., Ch. 528 ; 11 Jur. (N.S.) 498 ; 12 L. T. 626 ; 13 W. R. 705.

A testatrix gave all her property real and personal to her daughter, "her heirs and assigns ; and it is my desire that she allows to A. G. an annuity of 25*l.* during her life, and that A. G. shall, if she desire it, have the use of such portions of my household furniture as may not be required by my daughter." The daughter and her husband were appointed executors :—Held, that no trust or obligation to pay the annuity was imposed upon the daughter, but that there was only a request to the daughter, not binding her in law, to make that provision for A. G. *Diggles, In re, Gregory* v. *Edmondson*, 39 Ch. D. 253 ; 59 L. T. 884—C. A.

"Not Doubting."]—Devise, not doubting but she will give, &c., is a trust. *Massey* v. *Sherman*, Ambl. 520.

Devise to a nephew in fee, "not doubting, in case he should have no child, but that he will dispose and give my said real estate to the female descendants of my sister, in such part or parts and manner as he shall think fit, in preference to any descendant on his own female line" ; a trust in the event described for the sister's children. *Parsons* v. *Baker*, 18 Ves. 476 ; 11 R. R. 237.

"They are hereby Enjoined."]—Bequest as follows : "I give to my brother, in trust for my sisters, M., C. and H., 4,000*l.*, . . . on condition that they will support M. M. ; at the demise of either or any of the above, the survivors or survivor to receive the increased income produced thereby. They are hereby enjoined to take care of my nephew J., as may seem best in the future" :—Held, that the sisters took absolutely as joint tenants ; and that there was no precatory or other trust in favour of the nephew. *Moore, In re, Moore* v. *Roche*, 55 L. J., Ch. 418 ; 54 L. T. 231 ; 34 W. R. 343.

Words of Entreaty.]—Words of entreaty in will :—Held, to raise a trust on construction. *Prevost* v. *Clarke*, 2 Madd. 458.

—— **Of Expectation.**]—Words of expectation in a will, not amounting to recommendation, will not create a trust. *Lechmere* v. *Levie*, 2 Myl. & K. 197.

"In order that she might provide for."]—A testator left all his property to his wife, in trust for the uses thereafter mentioned. He then bequeathed certain pecuniary legacies, and stated that it was his will that his youngest son P. should live and reside with his mother, and be attentive to her, and directed by her in order that she might by deed or by her last will and testament provide for him in such a manner as to her might seem most expedient and proper ; and he appointed and nominated his said wife his residuary legatee and trustee of his will, in order that she might direct and govern his said children and assist to arrange all matters between them ; and previous to her death—provided that she did not marry again—that she might dispose of the residue of his property to and amongst his said children and provide for his son P. as she might think expedient ; and he directed that if she married again she should cease to be trustee, and receive the sum of 100*l.* only ; and that in such case his son E. should act as trustee in her stead. He nominated his son E. and his wife executor and executrix :—Held, that the testator's wife took the residue absolutely, and that there was no precatory trust in favour of P. *Morrin* v. *Morrin*, 19 L. R., Ir. 37.

"Well Knowing that she will."]—The testatrix by her will, after giving among other legacies a sum of 3,000*l.* to S. P. and a like sum of 3,000*l.* in addition for the trouble she would have in acting as executrix, bequeathed all her residuary personal estate and effects unto the said S. P., "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes." The testatrix appointed S. P. sole executrix of her will :—Held, that S. P. did not take the residue for her own benefit, but that the words of the bequest created a trust. *Briggs* v. *Penny*, 3 Macn. & G. 546 ; 21 L. J., Ch. 265 ; 16 Jur. 93.

"Recommend."]—A recommendation by a testator to his son to continue his nephews in the occupation of their farms as heretofore, and so long as they continue to manage the same in a good and husband-like manner, and to duly pay their rents, is imperative ; the son decreed to elect, either to continue them as tenants or to make them a compensation for the value of the tenancy out of the property given him by the testator. *Tibbits* v. *Tibbits*, Jac. 317 ; 19 Ves. 656 ; 23 R. R. 79.

Trust raised under a recommendation by will to a legatee to dispose of her legacy among certain persons after her death. *Malim* v. *Keighley*, 2 Ves. 529 ; 2 R. R. 229.

Bequest to A. for life, with power on her marriage, to appoint the interest to her husband for life, and a recommendation to dispose of the principal after her own death, and the determination of the preceding trusts, among the children of B. The recommendation being held an absolute trust, it is a vested interest in all the children, subject to be divested by appointment ; and there being no appointment, children born after the death of the testator, and those who died in the life of A., are entitled with the rest. *Malim* v. *Barker*, 3 Ves. 150.

A., by will, devises all his estates to his eldest son in tail male, with remainders over ; part of the property consisted of an estate in Jamaica, and, therefore, the testator added the following clause : "And I recommend to my executors, that all sugars, rum, and other plantation produce that is sent to the port of London be consigned to the house of C. E. & Co. until such time as any of my sons shall set up in the business of a sugar factor ; then my desire is, that the consignment may pass through his or their hands." C., a natural son of the testator's, set up the business of a sugar factor during the minority of the devisee, and accordingly got the consignments. Upon the devisee's coming of age, C. accounted with him, but insisted on being entitled to his commission, not only upon the produce which he had actually sold, but also upon the produce which had been consigned to him, but was not then arrived in the port of London : —Held, that the words of the above clause were not imperative, or amounted to words of bequest in favour of C., but were recommendatory only : —Held, also, that C. was entitled to a commission

only upon what he had actually sold, and not upon what was only consigned, but not delivered to him. Decretal order of chancery confirmed. *Beckford* v. *Beckford*, 4 Bro. P. C. 38.

Testatrix willed that, after payment of her legacies, the whole of her property should be given to her sister Mary, to be hers independently of any husband; and earnestly recommended her to take such measures as she might deem best for making it sure, that whatever she might inherit might go at her decease to her children:—Held, that the children, on their mother's death, were entitled to the property as joint tenants absolutely. *Cholmondeley* v. *Cholmondeley*, 14 Sim. 590.

Words of recommendation in a will held not to amount to a trust. *Payne, Ex parte, G. W. Ry. Act, In re*, 2 Y. & C. 636; 7 L. J., Ex. Eq. 1; 1 Jur. 818.

C., having two sons, and being engaged in the sugar trade, devised his sugar houses, &c., to his eldest son; nevertheless, in case his eldest son should die without a son or sons of his body, then he recommended him to give and devise the sugar houses, &c., to his brother, the testator's second son. The eldest son died without issue male, leaving a daughter, and without devising to his brother:—Held, not a trust for the brother, but a mere recommendation. *Cunliffe* v. *Cunliffe*, Ambl. 586.

A testator, after giving to his daughter an absolute power of appointment, by will, over certain property, recommended, though he did not absolutely enjoin, his said daughter to distribute the same at her decease amongst her daughters in equal shares:—Held, that these words were merely precatory. *Young* v. *Martin*, 2 Y. & C. C. C. 582; 7 Jur. 1147.

Testator gave to his wife all his personal estate, relying, that if she should marry again, she would secure whatever she should possess under his will for her separate use; and he recommended her to give by her will what he should die possessed of under his will to certain persons named:—Held, that wife's executor was trustee for whole property possessed by her under the will for those persons named. *Horwood* v. *West*, 1 Sim. & S. 387; 1 L. J. (O.S.), Ch. 201; 24 R. R. 199.

A testator bequeathed a legacy to his daughter A., and recommended her and her husband to settle that legacy, together with such a sum of money belonging to the husband as he should choose, for the benefit of the testator's daughter and her children. The testator's daughter died in his lifetime:—Held, that a trust was created as to the legacy for the benefit of the children, and that they were entitled to it in equal shares, and that the benefit to the children did not fail by the death of A. in the lifetime of the testator. *Ford* v. *Fowler*, 3 Beav. 146; 9 L. J., Ch. 352; 4 Jur. 958.

A. devises K. Lodge and other real estates to trustees, in trust in aid of his personal estate, and then to convey to B. in fee; and by a codicil recommended B., if he chooses to keep the house and demesne of M., that he should in twelve months make over K. Lodge to plaintiff. A. died in 1797, and the trustees sold no part of the real estate, nor was it necessary to resort to it. B. entered on the real estate, and resided at M., and died seised in 1799, having devised K. Lodge to the defendant, who entered and continued seised ever since. On a bill filed in 1828 it was held that the words of the codicil were mandatory, but that, as they only raised an implied trust, the plaintiff was barred by adverse possession since 1879. *Kingston* (*Lord*) v. *Lorton* (*Lord*), 2 Hog. 166.

A testator by his will gave all his estate to his wife, A., for her life; and after her death as to 2,000*l.*, part thereof, he gave the same to be disposed of by her will in such manner as she should think proper; but recommended her to dispose of one half to her relations, and the other half to such of his relations as she should think proper. A., by will, disposed of the 2,000*l.* among various persons, some of whom did not belong to either of the classes mentioned in the will:—Held, that the word "recommended" did not create a binding trust, and that A. had the power of disposing of the fund in any way that she pleased. *Johnson* v. *Rowlands*, 2 De G. & Sm. 356; 17 L. J., Ch. 438; 12 Jur. 769.

Testator devised all his real estate to his sister for life, remainder to her children as she should appoint; for want of appointment, to all her children and their heirs, as tenants in common. His sister having two daughters, by a codicil, declared to be a codicil to his will, not then at hand, he gave one of them an annuity; and directing his annuities to be paid out of his 3 per cent. stock, he charged them on his real estate in case of a deficiency, and directing the residue of his personal estate to be invested in freehold lands and hereditaments, he recommended to his sister to settle and convey, or join with her husband in settling and conveying, all his estates and property which she might derive from him after his decease, to the use of her two daughters for life, in such parts, shares, and proportions as she should approve, with remainder to their respective issue and cross remainders, and the usual powers and clauses in strict settlement. The testator's sister died in his life, and her two daughters were his co-heiresses. Some real estates were purchased between the executions of the will and codicil. As to the real estate the will is not revoked, but is republished by the codicil; and the two nieces are entitled to all the real estates, and to those directed to be purchased, as tenants in common in fee. *Meggison* v. *Moore*, 2 Ves. 630.

The testator gave his wife 4,000*l.* "to be used for her own and the children's benefit, as she shall in her judgment and conscience think fit, being convinced that it will be disposed of conscientiously and properly by her for the purposes mentioned; at the same time recommending her not to diminish the principal, but to vest it in government or freehold securities":—Held, that this was a gift to the wife for life, to be employed, in such manner as she should think fit, for the benefit of herself and the children, she fairly and honestly exercising that discretion; and that, subject to such life estate, the children took an interest in the capital. *Hart* v. *Tribe*, 18 Beav. 215; 23 L. J., Ch. 462; 2 W. R. 239.

Recommendation—Words amounting only to.]—A testator, by his will, devised his residuary real estates to trustees, in trust for certain tenants for life, with remainder to D. F. for life, with remainder in trust for the sons of D. F., as tenants in common in tail male, with cross remainders and remainder over; and he directed his residuary personal estates to be laid out in the purchase of land, to be settled to the same uses. By a testamentary paper of the same date as the

will, and headed, "Memorandum, alias directions to my executors," he directed, as to his residuary personal estate, that his executors should apply for an estate of an uncle of the testator, as an investment, "for the use and behoof of D. F.," and if not attainable, to inquire if any part of a certain other estate was to be disposed of. Neither of the specified properties could be obtained on fair terms as an investment:—Held, that D. F. did not take any further interest under the codicil than under the will, and that the testator thereby either meant to express merely a recommendation to his trustees as to the mode of laying out his residuary personalty, or expressed no intention on which the court could act. *Fitch* v. *Friend*, 2 De G. & Sm. 405; and see *Quayle* v. *Davidson*, infra.

"Request."]—A bequest of personalty to "A. and B., to be divided equally, with a request to A. that, should he die without lawful issue, the property which I bequeath him shall revert back to the sons of B., provided they are prudent and well-conducted":—Held, that these words were not merely precatory, but sufficiently imperative to create a trust in favour of the sons of B. *O'Bierne, In re*, 1 Jo. & Lat. 352; 7 Ir. Eq. R. 171.

A testator duly appointed a fund in favour of objects of the power absolutely, and he also bequeathed to them his own property, "especially requesting them" to leave the appointed fund to persons not objects of the power:—Held, that this did not raise a case for election; held, also, that the result would have been different, if there had been a different appointment of the subject of the power to strangers. *Blacket* v. *Lamb*, 14 Beav. 482; 21 L. J., Ch. 46; 16 Jur. 142.

A father gave his real and personal estate to his son, appointing him his executor, "in trust for the payment, execution, and discharging the intentions and devises thereinafter made, and to which my property, real and personal, so devised, is hereby made subject." The testator then made several bequests, and gave the residue of his real and personal estate to the son after payment of his debts, "requesting him that if he should not find an opportunity to dispose of my freehold estate at Winterborne Whitchurch greatly to his advantage, and for the benefit of his family, that the said estate should belong after him to his eldest son":—Held, that no trust was created of this estate in favour of the son's family or his eldest son, but that the son took it absolutely. *House* v. *House*, 31 L. T. 427; 23 W. R. 22.

"Require and Entreat."]—Codicil requiring and entreating the executor, who was also residuary legatee, by will or deed to settle and secure 500*l.* to be paid at his decease; the testator declaring that he had omitted to express it in his will, not doubting that the executor will readily comply with the request; a trust by way of legacy out of the assets, not a condition enforced independently of them. *Taylor* v. *George*, 2 V. & B. 378.

"In Trust for."]—A testator devised real estate, consisting of a farm, to his wife for life, and after her death to D., "in trust for his son being brought up to work the farm," with a gift over in the event of D. having no male issue. D. had no male issue at the date of the will, but had a son born after the testator's death:—Held, that, under the will, D.'s son did not take any beneficial interest in the real estate, the words "in trust for his son being brought up to work the farm" being a mere recommendation or expression of hope or confidence that his eldest or only son should be brought up to work the farm. *Quayle* v. *Davidson*, supra.

"Trusting that."]—A testator bequeathed stock to A. B., trusting that he would preserve the same, so that after his decease it might go to his four children, or such of them as should survive him:—Held, to create a trust in favour of the survivor of the children after the decease of A. B. *Baker* v. *Mosley*, 12 Jur. 740.

A person gave his real and personal estate to trustees, on trust to sell the same, and after payment of his debts to pay the same, and he gave and bequeathed the same to I. (to whom he was engaged to be married) "absolutely, trusting she would carry out his wishes with regard to the same, with which she was fully acquainted." Shortly before the date of his will the testator had verbally expressed to I. his wish that she should make certain gifts out of the property to be bequeathed to her, and she had afterwards written down his wishes for her own use, but not in the testator's presence:—Held, that I. took the property beneficially, but subject in part to the wishes which the testator had expressed to her, and as to which she had bound herself. *Irvine* v. *Sullivan*, 38 L. J., Ch. 635; L. R. 8 Eq. 673; 17 W. R. 1083.

"In Trust and Confidence that."]—A testator devised his estates to his son and his heirs male, "in the fullest trust and confidence" that he would not do, nor permit to be done, "any act, in law or otherwise," to defeat the thereinafter-declared trusts and limitations of the estates, but that, on the contrary, he would do all in his power to effectuate them. He then declared how the estates were to go if the son died without issue of his body lawfully begotten, specifically devising one fourth portion to D. The son having entered into possession of the devised estates, suffered a recovery:—Held, that the words of the will did not create a trust, and that the entail was barred by the recovery. *Dawkins* v. *Penrhyn* (*Lord*), 48 L. J., Ch. 304; 4 App. Cas. 51; 39 L. T. 583; 27 W. R. 173—H. L. (E.)

Testator devised a copyhold estate to his wife, upon trust to sell and invest the money in the funds, and gave and bequeathed the interests and dividends to her use. He also gave and bequeathed to her all his effects, whatsoever and wheresoever, for her maintenance, upon full trust and confidence in her justice and equity that at her decease she would make a proper distribution of what effects might be left in money, goods, or otherwise, to his children, accounting what they had already received in money or effects as part of their shares. The widow, executrix:—Held, entitled to the produce of the copyhold estate for life only, with a resulting trust as to the capital for the heir. The widow entitled to the absolute interest in the personal estate. *Wilson* v. *Major*, 11 Ves. 205.

Testator, by his will, gave "all my property, of whatever description, whether in possession,

reversion, remainder, or expectancy, or what I may be possessed of at the time of my death; and give and bequeath the same, and every part thereof, unto my dear wife, Jane, her executors, administrators, and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children." The court gave an opinion that there was no trust created for the children; but declining to make a positive declaration to that effect:—Held, that it would be right to order the residuary personal estate to be transferred and paid to the widow, and decreed accordingly. *Webb* v. *Wools*, 2 Sim. (N.S.) 267; 21 L. J., Ch. 625.

"**Will and Desire.**"]—The words "I desire," or "I will," in a will, amount to an express devise. If a devise is to A. for life, directing him at his death to give it to B., that amounts to a devise of the use of it only to A. for life, remainder to B. *Eeles* v. *England*, 2 Vern. 467; Pre. Ch. 200.

A. by will gives 300*l.* to B., and declares her will and desire that he should give the 300*l.* to his daughter at his death, or sooner, if there be occasion for her advancement. B. dies eight days before A.; and the daughter dies at sixteen, unmarried. The 300*l.* decreed to the administrator of the daughter. *S. C.*, 2 Vern. 466; Pre. Ch. 200.

There can be no constructive trust but where the intent of testator is apparent. "Willing and desiring G. to sell," &c., are more properly words of injunction than trust. *Hill* v. *London (Bishop)*, 1 Atk. 619.

Testator expressing his will and desire that one-third of the principal of his estate and effects be left entirely to the disposal of his wife among such of her relations as she may think proper after the death of his sisters, a trust for her next of kin at the time of her death, having made no disposition. *Birch* v. *Wade*, 3 V. & B. 198; 13 R. R. 181.

"I give to A. 500*l.*, and it is my will and desire that A. may dispose of the same amongst her relations, as she by will may think proper":—Held, a trust for the relations of A., and the 500*l.* well bequeathed by the will of A. to her sister and her sister's children, though made without reference to the will of the first testator. *Forbes* v. *Ball*, 3 Mer. 437.

A., after bequeathing leaseholds to his wife for the remainder of his interest therein, bequeathed all other his personal estate to his wife for her use and benefit, she maintaining the children who were at his death under twenty-one, and paying his debts; and he declared it to be his will, that although he had given the whole of his property to his wife, yet it was his desire that if his children conducted themselves to her approbation, she should leave such property equally amongst all of them. Three of the children who survived the testator died in the lifetime of the widow, who by her will bequeathed her property to trustees, in trust to invest 200*l.* for one daughter; and as to the residue, in trust for the four surviving children:—Held, that the bequest by the testator to his widow was not absolute, but that the obligation amounted to a trust; and that the bequest by the widow in favour of the four surviving children was a good exercise of the discretion given to her. *Bonser* v. *Kinnear*, 2 Giff. 195; 6 Jur. (N.S.) 882.

"**Wish.**"]—A. devised to his wife his house at G., and declared it to be "his earnest wish that his sister should reside at G., with his wife, during her life":—Held, that there was not any trust created in favour of the sister. *Graves* v. *Graves*, 13 Ir. Ch. R. 182.

A testatrix, after bequeathing property to her two sons, proceeded thus: "But I most earnestly wish that my said sons may give or settle their respective shares on their respective daughters, in preference to their sons." Quære, whether these words were imperative or merely precatory. *Young* v. *Martin*, supra.

A bequest in terms absolute of 2,000*l.* apiece to two persons, followed by the words, "And I wish them to bequeath the same equally between the families of my nephew, S. O., and my dear niece, Mrs. P., in such mode as they shall consider right":—Held, to be an absolute gift, and not to confer merely an interest for life with a precatory trust superadded. *Hamilton, In re, Trench* v. *Hamilton*, 64 L. J., Ch. 799; [1895] 2 Ch. 370; 12 R. 355; 72 L. T. 748; 43 W. R. 577.

"**Wish and Bequest.**"]—Where a testator gave his real estates, and also his residuary property, to his wife for life, with remainder to an infant great-nephew for life, a statement in the will that it was his particular wish and bequest that his wife and the infant's grandfather would superintend and take care of the infant's education, so as to fit him for any respectable profession or employment, was:—Held, under the circumstances and upon the effect of the whole instrument, to charge the maintenance and education of the infant upon the interest taken by the testator's widow under the will. *Foley* v. *Parry*, 2 Myl. & K. 138; Coop. t. Brough. 219. Affirmed, 5 Sim. 138.

"**Wish and Desire.**"]—Property was assigned to trustees, upon trust, after the death of the settlor, in the meantime, and until his eldest son should attain twenty-one, to pay the rents to the settlor's wife, to be applied by her for and towards the maintenance of herself and all the then present and future-born children of the settlor; and the settlor declared, that if and when his eldest son should attain twenty-one, the trust property should be in trust for such eldest son, but so that the wish and desire of the settlor thereby declared, that the then present and future-born children of the settlor and his wife should participate with him in the same, should be particularly observed:—Held, that a valid trust was created in favour of the younger children to participate, and that it was not void for uncertainty. *Liddard* v. *Liddard*, 29 L. J., Ch. 619; 6 Jur. (N.S.) 439; 2 L. T. 200.

A testator gave all his property to trustees, and declared that he had made no provision for his grand-daughter K. H., because her deceased father had, in his lifetime, received more than his other children would become entitled to under his will. He then declared trusts of an equal share of his property for each of his surviving children for their lives, with remainders to their children. He then made a codicil as follows: "My wish, my dear daughters, is that you do give my dear grand-daughter, K. H., 1,000*l.*, and that you will be kind to E. J.; and it is my desire that you do give her some part of my table-linen and sheeting. This is my last wish." By a subsequent codicil he made some alteration in

the bequest made by his will in favour of one of his daughters, and, subject thereto, confirmed his will:—Held, that the second codicil confirmed the first, as being part of the will, and that the concluding sentence of the first codicil was sufficient to create a bequest of the 1,000*l.* to K. H., and that as the articles specifically given by it to E. J. passed by the will to the trustees, and not to the daughters, so the 1,000*l.* was to be paid, not by the daughters out of their life interests, but by the trustees out of the testator's general personal estate. *Hinxman* v. *Poynder*, 5 Sim. 546.

"I Would have divided."]—A testator had a power to appoint the produce of a policy on his life amongst his children, by writing or will. By will he bequeathed all his personal estate to his daughter F. By a contemporaneous writing, unattested, and headed "Memorandum," he gave directions to F. as to his property, and said: "The money from the Equitable Insurance Office I would have equally divided between my daughters F. G. and A.," and it also expressed his wish that his two sons should have certain interests out of his own property:—Held, that the words "I would have" were imperative, and not mere instructions to F.; held, also, that F., who was not shewn to have obtained the benefits under the will on the faith of any promise to distribute the testator's property according to the memorandum, was not bound to do so. *Proby* v. *Landor*, 28 Beav. 504; 30 L. J., Ch. 593; 6 Jur. (N.S.) 1278; 9 W. R. 47.

Precatory Words where Explained by Context.]—A husband bequeathed all his furniture, &c., and other property to his wife, and for her "to do justice to those relations on my side such as she thinks worthy of remuneration, but under no restriction to any stated property, but quite at liberty to give and distribute what and to who" she "may please":—Held, that no precatory trust was created. *Bond, In re, Cole* v. *Hawes*, 46 L. J., Ch. 488; 4 Ch. D. 238; 25 W. R. 95.

A testatrix, after directing legacies in certain events to fall into the residue, bequeathed specified articles "and other personal effects" to A. and B., in confidence that they would distribute and dispose of them as she by memorandum or otherwise might direct, and appointed A. and B. her executors. By a codicil, she directed her "executors and residuary legatees" to vary certain bequests, and empowered them to postpone legacies, the interest in the meantime "to form part of my residuary estate," and gave a legacy to "A., one of my executors and residuary legatees." By a second codicil, she gave a life interest to a legatee in a sum which, under the former dispositions, would have fallen into the residue, and stated that the alteration would make but little difference, as the sum would ultimately fall into the residue. After authorising the executors to postpone the payment of legacies, and giving other directions, the codicil concluded thus: "These wishes written by myself, and only concerning the interest of my executors, will, I feel sure, be quite sufficient for them to fulfil all herein mentioned, but will perhaps be more correct if I sign my name in the presence of two witnesses, who are also in the presence of each other":—Held, that, on the will alone, the executors would have taken the residue, subject to a trust for the next of kin; but that the word "confidence" in the will admitted of explanation, and was explained by the codicils not to amount to a binding trust. *Shepherd* v. *Nottidge*, 2 John. & H. 766.

After a devise to his daughter in fee, followed by a direction to keep the gardens, &c., in repair, a testator added, that in case his daughter married he strongly recommended her to execute a settlement, of which the will went on to prescribe the terms:—Held, upon unopposed petition, that the daughter, who was not married, could not convey the fee. *Payne, Ex parte, G. W. Ry., In re*, 2 Y. & C. 636; 7 L. J., Ex. Eq. 1; 1 Jur. 818.

A testator gave all his property to his wife, trusting that she would use it for the spiritual and temporal good of herself and children, remembering always the church and poor:—Held, that the wife took absolutely. *Curtis* v. *Rippon*, 5 Madd. 434; 21 R. R. 327.

A testator, after certain bequests to his widow, gave the residue of his estate to his father "for his own use and benefit, and at his discretion for the further use and benefit" of his (the testator's) daughter, who was then a minor and his only child:—Held, that, under this clause, the father took the residue as trustee for himself and the testator's daughter as joint tenants, with a discretion in the father as to the application of the daughter's share during her minority. *Atkinson* v. *Atkinson*, 62 L. T. 735.

A testator, by his will, gave all his real and personal property to his wife, "to enjoy the same in the fullest and most unconstrained manner, subject, nevertheless, to the following provisions." These were legacies to relations of himself and of his wife; and he expressed his desire that his wife should make her will, and in such manner as that the whole property should be divided among her relations before mentioned, in such proportions as she might think they deserved. The testator then gave certain directions in case his wife should be unable to make a will, and then said, "But it is my express will that the precatory clause or power lastly provided for is not to do away with, or in any the least to deprive my said wife from exercising the entire right and will over my said property, should she be enabled to carry it into effect in the way I have before left it to her, or in any other most agreeable to herself." The testator's widow made her will, giving legacies to her relations, but died intestate as to the residue of her estate:—Held, that the testator's property vested absolutely in his widow, and, so far as the same was undisposed of by her will, belonged to her next of kin. *Huskisson* v. *Bridge*, 4 De G. & Sm. 245; 20 L. J., Ch. 209; 15 Jur. 738.

A bequest "of all my property to my husband, hoping that he will leave it after his death to my son, if he is worthy of it," accompanied by the following explanation: "My reason for leaving all I have to dispose of to my husband, and in his entire power, is, that my son is already certain of a fortune, and that I cannot now feel any certainty what sort of a character he may become. I therefore leave it to my husband, in whose honour, justice, and parental affection I have the fullest confidence. If my son dies before my husband, though I leave all without reservation to my dear husband to dispose of as he thinks fit, yet should my son leave any children, I do not doubt it will go to them from him, knowing his steady principles and

clear judgment of right and wrong, and his sense of justice," does not create a trust. *Eaton* v. *Watts*, L. R. 4 Eq. 151; 16 L. T. 311.

Words of recommendation or desire in a will will not raise a trust, if such construction would conflict with other provisions of more definite and positive import in the same instrument; but the court will give such effect to them as may not be inconsistent with those provisions. *Knott* v. *Cottee*, 2 Ph. 192.

Testator, after giving his real and personal estates to his wife in fee, said that he had so given the same to her unfettered and unlimited, in full confidence that, in her future disposition thereof, she would distinguish the heirs of his late father, by devising the whole of his estate, together and entire, to such of his father's heirs as she might think best deserved her preference:—Held, that no trust was created. *Meredith* v. *Heneage*, 1 Sim. 542; 27 R. R. 243.

Testator bequeathed the whole of his property to his wife for her life, and directed that upon her death one-third should devolve upon his daughter, and that the other two-thirds should be at the sole and entire disposal of his wife, trusting that, should she not marry and have other children, her affection for their daughter will induce her to make the daughter her principal heir. The widow died unmarried:—Held, that she took an absolute interest in the two-thirds under the will. *Hoy* v. *Master*, 6 Sim. 568.

Testator gave to his wife all her jewels, trinkets, &c., which he added might be finally appropriated as she pleased, with the sum of 4,000*l.* in money, but which sum he recommended her to divide amongst certain persons in certain shares:—Held, by the vice-chancellor, that a trust was created in favour of those persons, to take effect after the wife's death; the Lord Chancellor, however, held the contrary, on appeal. *White* v. *Briggs*, 2 Ph. 583; 15 Sim. 300; 15 L. J., Ch. 182; 9 Jur. 1083.

A husband devised a freehold house to his wife, and all his personal property to be at her will and disposal in any way she might think best for the benefit of herself and family:—Held, that the widow took the fee simple of the house unfettered by any trust, and that she was absolutely entitled to the personalty. *Lambe* v. *Eames*, 40 L. J., Ch. 447; L. R. 6 Ch. 597; 25 L. T. 175; 19 W. R. 659.

A husband gave all his real and personal estate to his wife "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so":—Held, that she took absolutely. *Hutchinson and Tenant, In re*, 8 Ch. D. 540; 39 L. T. 86; 26 W. R. 904.

A testator gave and devised all his real and personal estate unto and to the absolute use of his wife, her heirs, executors, administrators and assigns, in "full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease":—Held, that under these words the widow took an absolute interest in the property, unfettered by any trust in favour of the children. *Lambe* v. *Eames* (supra), *Hutchinson and Tenant, In re* (supra), *Curnick* v. *Tucker* (L. R. 17 Eq. 320), and *Le Marchant* v. *Le Marchant* (L. R. 18 Eq. 414) commented on. *Adams and Kensington Vestry, In re, Adams, In re*, 52 L. J., Ch. 758; 24 Ch. D. 199; 48 L. T. 958; 32 W. R. 120.

—— **Interpretation of Trust for "Children."**]—Where a precatory trust has been created by will in favour of "children," simpliciter, the trustee may, in executing the trust, limit the shares of daughters to their separate use. *Willis* v. *Kymer*, 47 L. J., Ch. 90; 7 Ch. D. 181; 38 L. T. 207.

Parol Gift with Precatory Words—Effect on Testamentary Disposition by Donee.]—The owner of certain jewels presented them to her daughter-in-law on her marriage with the donor's son, who was heir-presumptive to a title. The donee's account of the manner in which the gift was made was as follows: "When I married she gave them to me for life, with the request that at my death they might be left as heirlooms." The donee by will left the jewels to the owner of the title for life, and after his death to each and every of the persons who should in turn succeed to the title and dignity severally and successively as they should in turn succeed to such title and dignity:—Held, that the original gift was an absolute gift; that the words of a bequest did not create a precatory trust, and were not intended to fetter the donee's disposition of the jewels in the least degree, but were a mere indication of the manner in which the donor thought that the donee might best dispose of them; and that the donee had therefore power to dispose of them in the manner directed by her will, or in any other manner she might think fit. *Hill (Viscount)* v. *Hill (Dowager Viscountess)*, 66 L. J., Q. B. 329; [1897] 1 Q. B. 483; 76 L. T. 103; 45 W. R. 371—C. A.

c. Resulting Trusts.

Where Gift not exhausted by Objects of Trust.]—A gift of residuary real and personal estate to an executor, "to enable him to carry into effect the purposes of the will":—Held, on demurrer, to create a trust:—Held, also, that the objects of the trust not exhausting the gift, there was a resulting trust in favour of the heir-at-law of the surplus realty. *Cary* v. *Cary* (2 Sch. & Lef. 189) commented on. *Barrs* v. *Fewkes*, 3 N. R. 704; 33 L. J., Ch. 484; 10 Jur. (N.S.) 466; 10 L. T. 232; 12 W. R. 666. And see *S. C.*, 6 N. R. 355; 34 L. J., Ch. 522; 11 Jur. (N.S.) 669; 12 L. T. 727; 13 W. R. 987.

Trust to pay Debts where Debts discharged in Lifetime of Testator.]—A testator's will contained the following clause: "I give and bequeath to my brother E. whatsoever real estate I may die possessed of, wheresoever situate, on trust nevertheless to pay thereout the sum of 800*l.* due from me to the trustees under the marriage settlement of S., and the sum of 300*l.* due from me to B., and also on trust to pay to each of my sisters M. and C. and to my brother A., as long as they respectively live, the sum of 50*l.* every year." The will contained a bequest of the personalty to E. and A. and certain of his sisters, and appointed E. executor thereof:—Held, that the word "thereout" and the words "and also on trust" were sufficient to shew that the gift to E. was not for the purposes thereafter expressed, but only subject to such trusts as were expressed. *King* v. *Denison* (1 V. & B. 261) explained. *Croome* v. *Croome*, 61 L. T. 814; 87 L. T. Jour. 201—H. L. (E.)

Where Legatees Disclaim.]—By an agreement between H. and R. certain shares in a limited

bank, which were the property of H., but standing in the names of H. and R., were to be held for H. for life, with remainder to R., for life, with remainder to such charities as H. should by will appoint. H. died in 1878, having appointed the shares among certain charities, subject to R.'s life interest. R. died in 1884. A winding-up order having been made against the bank, the executors of both H. and R. were informed that a call would be made against them on the shares. All the charities had disclaimed. The executor of R. brought an action against H.'s executors, one of whom was also H.'s residuary legatee, claiming indemnity in respect of the liability on the shares:—Held, that, on the disclaimer by the charities, there was a resulting trust of the shares in favour of H.'s estate, and that H.'s residuary legatee was bound to indemnify R.'s executor. *Hobbs* v. *Wayet*, 36 Ch. D. 256; 57 L. T. 225; 36 W. R. 273.

7. Powers of Appointment.

See sub tit. Powers.

8. Options and Rights of Choice or Pre-emption.

Right of Selection.]—If a testator, dying solvent, bequeaths to A. a given number of articles, forming part of a stock of articles of the same description, as, for instance, if he has twenty horses in his stable, and bequeaths to A. six of them, A. has the right of selection. A testator was possessed of fifty original shares, and seventy other after-purchased shares. He gave thirty whole shares to trustees, upon trust, for a married woman for her separate use for life, and thirty whole shares to another party. He declared that the legacies should not be deemed specific, so as to be capable of ademption. On the seventy shares all the calls had not been paid, but on the fifty the whole had been paid. The railway company raised new shares, and offered the same ratably to the registered proprietors. The executors accepted sixty, and paid the deposit on them in respect of the thirty shares first bequeathed:—Held, that the bequests were specific, and that the income of the shares from the testator's death belonged to the legatees; that the legatees were entitled to the new shares in respect of the shares bequeathed to them, subject to the payment of the future calls; that the legatees were entitled to select, and the executors not entitled to appropriate the shares to be taken by the legatees; that the original and purchased shares must, with respect to the liability of the testator and his estate to pay the calls thereon, be considered identical; and that, therefore, his estate was liable to pay the calls on both sets of shares. *Jacques* v. *Chambers*, 2 Coll. C. C. 435; 15 L. J., Ch. 225; 16 L. J., Ch. 243; 11 Jur. 295.

A testatrix bequeathed the shares in a company as follows: fifteen to J., and six to B., E. and A. respectively. The remaining shares she left to M. She possessed seventy-four shares in the company, viz. thirty-seven shares fully paid up, and thirty-seven new shares not fully paid up, and she was in the habit of speaking of the whole as thirty-seven shares only. The new shares had been allotted, by way of bonus, in respect of the old ones, but they were distinguished in the company's books by separate and distinct numbers, and were transferable separately from the old shares:—Held, that the four specific legatees took only single shares, and not a new share with each old one, but that they had a right to select the fully paid up shares as the best. M., therefore, was entitled to the residue of the old shares and all the new ones. *Millard* v. *Bailey*, 35 L. J., Ch. 312; L. R. 1 Eq. 378; 13 L. T. 751; 14 W. R. 385.

Testator, who was possessed of three leasehold houses in K. Street, bequeathed "two houses in K. Street" in trust for P. for life, and then to form part of his residuary gift. The will contained no other references to the testator's houses in K. Street:—Held, that two of the houses passed under the gift, and that P. was entitled to elect which he would take. *Tapley* v. *Eagleton*, 12 Ch. D. 683; 28 W. R. 239.

—— **Second Election ultra vires.**]—A widow devised an acre of land, which was "to be selected by" the devisee, to a clergyman absolutely, and devised all her other real estate to the trustees of her will to convert it into money. By a letter to the clergyman, dated the day her will was executed, but not intended to be, and not, in fact, delivered to him until after her death, she said that it would be gratifying to her memory if he of his own free will would dedicate the acre of land as a site for a church. He did select an acre for that purpose, but subsequently entered into an arrangement with the trustees of her will, whereby the trustees sold the acre so selected, and granted him permission to select another acre in lieu. The clergyman died without having selected another acre:—Held, that the permission to make a second selection was ultra vires, and that the purchase-money produced by the acre originally selected belonged to the personal representatives of the clergyman absolutely. *Littledale* v. *Bickersteth*, 24 W. R. 507.

—— **Right to Select the Whole.**]—Testator gave all his household furniture, wearing apparel, books, plate, wines, pictures, statues, china, horses, carriages, in short everything in his house and elsewhere, together with all his other property, to trustees in trust to sell all his household property as aforesaid, except such articles whatsoever they might be as his wife might desire to retain for her own use, which he thereby empowered her to appropriate for her own use:—Held, an absolute gift to the wife of the whole or any of the articles enumerated, whether articles of use or ornament, which she might select. *Kennedy* v. *Kennedy*, 10 Hare, 438; 1 W. R. 177.

Gift by a testator of his plate to trustees upon trust to permit his widow "to have and appropriate absolutely to herself such parts thereof as she should signify in writing her desire to possess":—Held, that the widow was entitled to the whole of the plate. *Arthur* v. *Mackinnon*, 48 L. J., Ch. 534; 11 Ch. D. 385; 27 W. R. 704.

Where Gift to Several—Apportionment not Implied.]—Testator gave to his son, in case he should live to attain twenty-one, such part of his real estate as his son should choose, but not exceeding the yearly value of 350*l.*, and to his daughter such part of his real estate as should remain after his son should have made his choice; or of the whole of his real estate in case his son should not live to choose his part, as she should choose, but not exceeding the yearly value of 360*l.*:—Held, that the son was entitled to priority of choice, on attaining twenty-one,

and that there was to be no apportionment, although he might not leave for the daughter lands of the yearly value of 360*l.* *Weigall* v. *Brome*, 6 Sim. 99.

—— **Right of Heir-at-Law to Priority of Choice.**]—D. being seised in fee of two freehold closes of land in R., by his will devised to his son John one freehold close of land in R., and to his son George one freehold close of land in R. John was the testator's heir-at-law. After the death of the testator, John and George tossed up for choice, and George won :—Held, that the devise to John was not void for uncertainty, and that the case was one for election :—Held, also, that party first named in the will being also the heir-at-law was the person who had the right to elect. *Duckmanton* v. *Duckmanton*, 5 H. & N. 219 ; 29 L. J., Ex. 132.

Right of Election between Alternative Gifts.] —Bequest of 500*l.*, or an annuity of 25*l.* for life : —Held, not to give the option to the legatee, but to the parties interested in the property subject to the annuity. *Wilson* v. *Wilson*, 1 De G. & Sm. 152 ; 11 Jur. 793.

Legacy in lieu of things expressed, shall not put the party to his election as to another benefit, though it may be contrary to an intent that he should take both. *East* v. *Cooke*, 2 Ves. Sen. 30.

A testator, being entitled to two leasehold houses situate at P. and at R., directed his trustees to allow his wife to occupy his house at P. or at R., as she should elect, for her life, without payment of any rent :—Held, first, that the widow must elect between the two houses, and could not enjoy both :—Held, secondly, that she was entitled to be indemnified out of the testator's estate against the rent and covenants to which the house she might select was liable. *Harby* v. *Moore*, 6 Jur. (N.S.) 883.

Election where Gift of Onerous Property.]—Where a testator makes several bequests to a devisee, one of which is clogged with a burden created by the testator, it is a question of the intention of the testator, to be gathered from the will, whether the devisee must elect to take all or none of the gifts in the will, or whether he may accept the beneficial gifts, and repudiate that which is burdensome. There is no rule that a person to whom a testator has made two distinct gifts, one of which is subject to a burden created by the testator, is bound to accept both or neither of these gifts. In such circumstances the question is one of intention, to be gathered from the will. A testator bequeathed a legacy to A., and devised freeholds to A. and his wife for their lives, with remainder over, and after several intervening gifts bequeathed leasehold premises to A. :—Held, that A. might take the legacy and the freeholds, and repudiate the bequest of the leasehold. *Warren* v. *Rudall*, *Godfrey*, *Ex parte*, *Hall* v. *Warren*, 1 J. & H. 1 ; 29 L. J., Ch. 543 ; 6 Jur. (N.S.) 641 ; 8 W. R. 331.

The legatee of a house, held by the testator on a lease at a reserved rent, higher than it could be let for after his death, cannot reject the gift of the lease, and retain an annuity under the will, but must take the benefit cum onere. *Talbot* v. *Radnor* (*Earl*), 3 Myl. & K. 252.

K. devised estates to his son D., charged with a legacy of 1,000*l.* to his daughter M. ; and by a codicil he bequeathed all his shares in a company unto all his sons and daughters equally, and directed that all calls and payments to be made and become due after his decease should be borne and paid by them in equal shares. M. and her husband gave notice to the executors that they declined to accept the legacy of the shares, and they refused to take a transfer of them. Subsequently calls were made upon the executors, and D. paid them ; and he refused to pay the legacy without deducting the calls thereupon, and without the husband of M. taking a transfer of the shares, and giving an undertaking to pay all future calls. On a bill by M. by her next friend : —Held, that she was entitled to the legacy without deduction, and that she had a right to disclaim the legacy of the shares. *Long* v. *Kent*, 6 N. R. 354; 11 Jur. (N.S.) 724; 12 L. T. 794; 13 W. R. 961.

Shares in a company were given, together with other property, and were onerous :—Held, that the legatees might repudiate the shares, and take the rest of the gift. *Aston* v. *Wood*, 43 L. J., Ch. 715 ; 31 L. T. 293.

Bequest of six leasehold villas to one for life, and by a subsequent codicil reciting his death, bequest of the same to another, together with any other house testator might build on an adjoining space of ground, "together with the ornamental park I am now forming opposite that cottage and villas," for his life :—Held, that the legatee could not take the villas without the park, of which the tenure was onerous. *Green* v. *Britten*, 42 L. J., Ch. 187 ; 27 L. T. 811.

When by a will two distinct legacies are bequeathed to the same person, one of them being onerous and the other beneficial, primâ facie the legatee is entitled to disclaim the onerous legacy and to take the other. If, however, onerous property and beneficial property are included in the same gift, primâ facie the legatee cannot disclaim the onerous and accept the beneficial ; he must take the whole gift or none of it. But this primâ facie rule may be rebutted if the will manifests a sufficient intention of the testator to the contrary. *Green* v. *Britten* (supra) followed. *Guthrie* v. *Walrond*, 52 L. J., Ch. 165 ; 22 Ch. D. 573 ; 47 L. T. 614 ; 31 W. R. 285.

A testator devised and bequeathed a freehold house and the furniture and effects therein on trust for A. and B. for life. The house was subject to a mortgage for more than its value :— Held, that A. and B. were entitled to the use of the furniture without keeping down the interest on the mortgage. *Syer* v. *Gladstone*, 30 Ch. D. 614 ; 34 W. R. 565.

A testatrix gave "all my real and personal estate" to trustees "upon trust at their discretion to sell all such parts thereof as shall not consist of money," and out of the produce to pay her debts and funeral and testamentary expenses, and invest the residue, "and shall stand possessed of such real and personal estate, moneys, and securities" upon trust "to pay the rents, interest, and dividends and annual produce thereof" to T. during her life, with a clause of forfeiture on alienation, and after the decease of T. the testatrix devised and bequeathed the same to other persons. At her death she was entitled in fee to the P. estate which was unincumbered. Some time after her death a remainder in fee to which she was entitled in the B. estate, which was subject to mortgages made by prior owners and was out of repair, fell into possession, and its income was only sufficient to pay the interest on the mortgages. The trustees took out a summons

for directions as to interest and repairs. The tenant for life contended that she could disclaim the B. estate:—Held, that as the P. and B. estates were not specially mentioned, but only formed parts of one gift in general terms, T. could not accept one and refuse the other. *Guthrie* v. *Walrond* (supra) and *Syer* v. *Gladstone* (supra) distinguished. *Hotchkys, In re, Freke* v. *Calmady*, 55 L. J., Ch. 546; 32 Ch. D. 408; 55 L. T. 110; 34 W. R. 569—C. A.

—— **By Court for Lunatic.**]—Where it is necessary for a lunatic to elect under a will as in this case, giving first a personal legacy, and afterwards in same will a real estate, with a charge upon it, the court has power to elect for him; and if the court chooses the real estate, it will continue the charge paid off as a lien on it for the lunatic's next of kin. *Marriott, In re*, 2 Moll. 516.

Right of Election to take Property on Condition.]—A testator authorised his executors, in case A. and B. should elect to carry on his business, to permit them to do so, without any payment for goodwill, upon their giving their security for their stock in trade, or such part as they should require. Shortly after his death, A. and B. gave the executors notice that they elected to take to the business:—Held, that there was a specific bequest of the business to A. and B.; that upon payment of the value of the stock in trade, and making provision for the testator's death, they were entitled to the goodwill and stock in trade of the business from the time of their election. *Fryer* v. *Ward*, 31 Beav. 602; 32 L. J., Ch. 433; 9 Jur. (N.S.) 164; 11 W. R. 104.

Gift Over of Stock in Trade—No Election where prior Gift not subject to Condition.]—A testator having three sons, A., B. and C., devised certain property to A., and other leasehold property, together with all the stock in trade which should be in the premises to B. and C. as tenants in common, and in case his said sons or either of them should die without leaving lawful issue him surviving, he directed that the share of such son so dying, in the premises and in the stock in trade which should be therein at the time of such decease, should go and be divided, share and share alike, between such of his said sons as should be then living as tenants in common. B. and C. carried on the trade after the testator's death; and B. died without issue leaving A. and C. surviving:—Held, that no case of election arose, there being no condition attached to the bequest, that the stock on the premises, at the death of either of the sons, should be subject to the bequest. A., therefore, was only entitled to a moiety of the stock in trade at the testator's death. *Thornton* v. *Thornton*, 11 Ir. Ch. R. 474.

Election inferred from Dealings with Property.]—W. P. by will directed his trustees as soon as conveniently might be after his death to divide his residuary real estate into lots, or set a value upon such lots, and give a copy of such particulars of division and valuation to the testator's son; and if, within six months after delivery of such copy, the son should give notice in writing under his hand of his desire to relinquish all or any part of such real estate, his estate in the part relinquished was to cease and become vested in the trustees upon certain trusts; the effect of which was, out of the relinquished estates, and by a charge on the other, to put all the testator's children on an equality. Provided that if the son shall neglect to give "such notice," or "by some notice or other writing," to consent to hold all on the terms thereinbefore mentioned within the time thereinbefore mentioned, then, and so soon as such neglect or refusal should have happened, the estate of the son in all was to shift to the trustees as before, the testator's wish being to give to each of his children or their representatives one-fifth share of his property, and subject to these provisions the testator devised the said estates to his trustees for 500 years, remainder to his son in fee. No allotment or valuation was ever made by the trustees, nor any notice given by the son; but he entered into possession of the estates, and accounted for the rents of the trustees of the father's estate until his death 5½ years after his father:—Held, that the son had waived his right to have the estate first valued; and had elected to take the whole subject to the charge for the benefit of the other children. *Godwin* v. *Coulson*, 17 Jur. 795; 1 W. R. 485.

A testator gave all his interest in certain leasehold farms mentioned in his will, and all the stock of every description thereon, and also all moneys due to him, to his son, subject nevertheless to the payment of all his debts, funeral and testamentary expenses. The testator's son continued in possession and receipt of the profits of the farms for about three years, when the leases of the farms and the stock thereon were disposed of. The testator's estate was very involved, and the liabilities to be discharged by the son, under the terms of the will, and as a condition of his accepting the bequest, greatly exceeded the value of the bequest:—Held, that the son must be deemed to have elected to accept the bequest contained in the will, subject to the payment of debts, funeral and testamentary expenses; but he was not personally liable to pay the same. *Cowley, In re, Souch* v. *Cowley*, 53 L. T. 494.

Option to Purchase.]—A testatrix, who carried on the business of a brewer, gave to M. a right of pre-emption of "all her brewery, &c.," at one-fourth less than its value. The testatrix held a number of public-houses in connection with the brewery, the tenants of which were bound to take their beer from the testatrix:—Held, that the right of pre-emption extended to these public-houses. *Waite* v. *Morland*, 12 Jur. (N.S.) 763; 14 L. T. 649; 14 W. R. 746.

A testator, by his will, gave all his real and personal estate to be enjoyed by his widow for life, and after her death, to be sold, and the proceeds to be divided among his ten children equally. He directed that one of his sons should have a right of pre-emption, for 450*l.*, of a particular parcel of garden land, part of the real estate. After the death of the testator, and before that of the widow, the parcel of garden land was purchased by a railway company, under their compulsory powers; the compensation money paid therefor, when freed from incumbrance, being represented, at the death of his widow, by the sum of 882*l.* 18*s.* 2*d.*, standing in court:—Held, that the testator's son, to whom the right of pre-emption was given, was entitled to the compensation money, subject to the deduction of the price fixed by the testator. *Cant's Estate, In re*, 4 De G. & J. 503; 28 L. J., Ch. 641; 5 Jur. (N.S.) 829; 7 W. R. 624.

A testator, by his will, directed that his son H. should have the option of purchasing the goodwill, &c., of his business, the purchase-money to form part of the residuary estate. The testator died in 1835, and H., who, from 1820, had managed the business, and resided solely on the premises as apparent owner, claimed it as an advancement, and alleged a parol agreement between him and the testator in 1825, and, as proof thereof, gave in evidence declarations of the testator, about that time, to his neighbours, that he had set up H. in business, and had asked their custom for him:—Held, that as there was no direct transfer or proof of change of possession, the parol declarations of the testator could not countervail his solemn declaration expressed by his will. *Sharpe* v. *Sharpe*, 10 L. J., Ex. Eq. 2.

—— **Lands subject to Incumbrances.**]—There is no rule of law that the donee of a right of pre-emption of lands at a fixed price, conferred on him by will, and duly exercised, necessarily takes the lands as a devisee, subject to incumbrances. *Given* v. *Massey*, 31 L. R., Ir. 126.

—— **Principle of Valuation.**] — Option to purchase at a valuation; valuation must not only be made according to the letter of the will, but must be fair and adequate. Option must be declared before valuation. Goodwill an element in the value of a reversionary interest in a public-house. *Edwards* v. *Edwards*, 1 Jur. 654.

A right of pre-emption given by will, whether at a price expressed, or to be fixed by the trustees, will be executed; the construction in the latter case being a reasonable price to be ascertained by reference to the master. But to pass such right to the heir or devisee, the intention to accept the offer must appear by some act, or at least by will. *Radnor* (*Earl*) v. *Shafto*, 11 Ves. 448; 8 R. R. 198.

—— **Time for Exercising.**]—A., having five daughters, devises lands in trust to convey to eldest, in case she should pay 6,000*l.* among her four sisters, and if not he gives the like pre-emption to each of his daughters. Equity will not enlarge the time. *Master* v. *Willoughby*, 2 Bro. P. C. 244.

Devise of lands to trustees in fee, in trust to pay debts and legacies, and after these paid, then to sell, and if any of the testator's name would buy it, such person to have it for 200*l.* less than the value. One of the testator's name brings a bill for this pre-emption, but delays bringing it until twenty-five years after testator's death. Bill dismissed. *Huckstep* v. *Mathews*, 1 Vern. 362.

A., seised in fee, devised lands to his daughter and her heirs; and his mind was, that if his son paid to her 50*l.*, then his son should have the land; the money was not paid at the day, and the daughter sold the land, but decreed against the vendee on the son's paying the money; but the court took it to be but in the nature of a security. *Bland* v. *Middleton*, 2 Ch. Cas. 1.

Testator devised a house to trustees, upon trust to permit his son, at any time within three months after his decease, to become the purchaser thereof, at a certain price, and to convey the same accordingly; but should the son not complete the purchase within three months, then the trustees were to sell the same by auction within twelve months from the testator's death. The son, who was himself a trustee, within two months declared verbally to his co-trustees his intention to purchase, but the trustees did not deliver the title-deeds to the solicitor who was to prepare the conveyance until the last day of the three months, and no conveyance was made, nor was any part of the purchase-money paid within the three months:—Held, that the right of pre-emption was gone. *Dawson* v. *Dawson*, 8 Sim. 346.

A person having under a will a right of pre-emption of an estate for a given sum, provided he signified to the trustees, within one month of the testator's death, his option to purchase, and paid the purchase-money afterwards within two months, duly signified his option to the trustees, and applied to their solicitor for an abstract of title. The solicitor acknowledged this application, and promised to take an opportunity of seeing his clients thereon. But no abstract was furnished; and hearing nothing further, the donee of the right of pre-emption allowed the two months to expire without paying his purchase-money or taking any further step in the matter:—Held, that the trustees were not under any obligation to furnish an abstract, and the purchase-money not having been paid within the two months, the right of pre-emption was lost, the rule being that such a right must be strictly complied with. *Brooke* v. *Garrod*, 3 K. & J. 608. Affirmed, 2 De G. & J. 62; 27 L. J., Ch. 226; 6 W. R. 194.

A testator directed his trustees to give to A. the option of purchasing his Lancashire estates at the price mentioned in his conveyance, but the offer was to be considered declined unless accepted within a month from the offer being made:—Held, that no valid offer was made until the price had been stated to A. *Lilford* (*Lord*) v. *Keck*, 30 Beav. 295.

A testatrix appointed lands to the use of her husband for life, with remainder to trustees in fee, with a power to her son to purchase, upon his giving notice to the trustees, within twelve months after the death of the tenant for life. The testatrix having survived her husband more than twelve months:—Held, that the true construction of the condition was, that the notice should be given within the stated period after the estate became vested in the trustees, and that the right of pre-emption was subsisting. *Evans* v. *Stratford*, 2 H. & M. 142; 10 Jur. (N.S.) 861; 10 L. T. 713.

A testator devised real estates to trustees for sale, and directed that his eldest son should have an option of purchase at a price to be fixed by arbitration, and that the time allowed for such option should be two months, within which time he should enter into such an agreement for the completion of the purchase as the arbitrators should direct or approve of. The arbitrators made their award on the 5th May, and delivered it to the family solicitor, who acted for all parties. On the 7th May the solicitor sent by post, to the eldest son, a letter containing an extract from the award. On the 16th June the son wrote to the solicitor, accepting the terms, but the formal agreement for purchase was not signed until the 6th July:—Held, that the time began to run when the award was communicated to the son, and not when the award was made, and the agreement, therefore, had been entered into within the time allowed by the will. *Austin* v. *Tawney*, 36 L. J., Ch. 339; L. R. 2 Ch. 143; 15 W. R. 463.

—— **Time from which Interest Runs.**]—The testator directed that if his eldest son elected to take his business he should be debited with the estimated value thereof in the division of his residuary estate. He gave the residue to trustees upon trust to convert, pay annuities, and accumulate the surplus income till his youngest child attained twenty-one, when the funds were to be divided between the children and the issue of deceased children as tenants in common per stirpes. The trustees had power to make advances to the children, such sums to be taken in part satisfaction of their shares of the trust premises. There was no tenant for life under the will. The eldest son took the business and the second son received advances. The period of distribution had arrived:—Held, that on the true construction of the will the eldest son was not liable till the period of distribution to pay interest on the value of the business:—Held, further (Rigby, L.J., dissentiente), that there was nothing in the will to shew that the testator intended his children to take equal shares in the whole of his estate, and that the second son was not liable till the period of distribution to pay interest on his advances. *Dallmeyer, In re, Dallmeyer* v. *Dallmeyer*, 65 L. J., Ch. 201; [1896] 1 Ch. 372; 73 L. T. 671; 44 W. R. 375—C. A.

—— **Right of Donee to call for Title.**]—A testatrix devised real estate to trustees, in trust for her husband for life; and she authorised and directed them to sell the property absolutely to her husband for a certain sum, to be applied for the purposes of her will, provided her husband declared his acceptance of the proposal within a year after her death. Semble, the right of pre-emption to the husband was a gift, and therefore the trustees were not bound to make out, nor were they entitled to the costs of making out, title to the husband out of the assets of the testatrix, to the prejudice of the persons entitled to the residue. *Davison and Torrens, In re*, 17 Ir. Ch. R. 7.

—— **Enforcing Option.**]—A. wills that B. shall sell his land to C.; C. shall compel B., by subpœna. *Anon.*, Cary, 14.

—— **By Executor of Donee.**]—A testator bequeathed four leasehold houses to A. B. and C. D., in trust for his wife for life, and after her death he bequeathed the same to A. B., subject and on condition that he should grant an under-lease to C. D. for all the term wanting eleven days, at 5*l.* a year rent, of two of the houses, containing covenants similar to those contained in the original lease. The original rent of each of these two houses was 18*l.* 7*s.* 6*d.* C. D. died in the lifetime of the widow, and on her death his executor claimed an under-lease:—Held, that the gift was not personal to C. D., and was not lost by his death in the lifetime of the widow; and that his executor was entitled to an under-lease according to the requisitions of the will. *Taylor* v. *Cooper*, 10 Jur. 1078.

—— **Against Executor and Residuary Legatee.**]—A testator devised to each of his four daughters a house and garden at G., to be built at the expense of his executors. A daughter, M., requiring the house, one was built with a garden by D., the executor, who was also residuary legatee and devisee:—Held, after the death of D., that the gift was not void, and that M. was entitled to the house and garden. *Edwards* v. *Jones*, 35 Beav. 474; 14 W. R. 815.

9. Legacies, whether General, Specific or Demonstrative.

General Principles.]—If it be doubtful on the words of a will whether a specific or general legacy is given, the rule of the court is to lean to the construction which makes the legacy general; but this rule does not involve the proposition that the court is to address itself to the construction of a will with any prepossession one way or the other. *Sayer* v. *Sayer*, 7 Hare, 377; 13 Jur. 402. And see *Kirby* v. *Potter*, 4 Ves. 478.

The court leans against considering legacies specific. *Ellis* v. *Walker*, Ambl. 310.

Legacy of the money due on a note, held specific upon the intention; but the inclination of the court is against specific legacy, and to hold it a general legacy with reference only to the security as the fund first to be applied to it. *Chaworth* v. *Beech*, 4 Ves. 555.

The word "my" alone is not enough to make a legacy specific, unless a particular fund is referred to. *Parrott* v. *Worsford*, 1 J. & W. 594; 21 R. R. 248.

A bequest of a sum of money in a bag, &c., is a specific legacy, and shall not abate with pecuniary legacies. *Lawson* v. *Stitch*, 1 Atk. 507.

Whether a whole or part of a debt due to the estate is given as a legacy, it is equally specific, and consequently a distinct tree and a distinct fruit; but if given out of the great tree of the estate, there is no ground to sever a branch from it in favour of a general legatee. *Heath* v. *Perry*, 3 Atk. 304.

Where a man devised such a quantity of corn, or number of sheep generally, it is a devise of quantity only. *Jeffreys* v. *Jeffreys*, 3 Atk. 121.

Legacy general, notwithstanding an appropriation of part of the property. *Raymond* v. *Broadbelt*, 5 Ves. 199.

Legacies are not specific without something marking the specific thing, as, the description of "my stock," &c., a mere direction to transfer, and that so much capital be kept in the same public fund, is not sufficient. *Sibley* v. *Perry*, 7 Ves. 522; 6 R. R. 183.

Bequest of personal estate not held specific merely from being combined with a devise of land. *Howe* v. *Dartmouth* (*Earl*), 7 Ves. 137; 6 R. R. 96.

Bequest, by codicil, that dividends only of legacies which had been bequeathed by will, should not be paid to legatees, and that the legacies should not be paid to them, leaving the principal not further disposed of, is equivalent to gift of the corpus, and is a gift of the principal. *Richards* v. *Richards*, 9 Price, 219; 23 R. R. 665.

Legacy of 1,500*l.* to be laid out in land shall be taken as land, but if a deficiency of assets then not specific, but shall contribute in proportion. Specific legacy is what vests by assent of executor. *Hinton* v. *Pinke*, 1 P. Wms. 539.

Specific Legacy—Definition of.]—A specific legacy is something which a testator identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state

and condition indicated by that description separates in favour of a particular legatee from the general mass of his personal estate. *Robertson* v. *Broadbent*, 53 L. J., Ch. 266; 8 App. Cas. 812; 50 L. T. 243; 32 W. R. 205—H. L. (E.)

A legacy of stock out of stock is specific, but money out of stock is not, but demonstrative. A specific legacy is not liable to abate; a demonstrative legacy is. A specific legacy is liable to ademption; a demonstrative is not. A specific legacy carries with it the dividend from the death of the testator; a demonstrative legacy does not. A general legacy may be given to a specific legatee, although expressed to be "in addition to" the specific legacy. *Mullins* v. *Smith*, 1 Dr. & Sm. 204; 8 W. R. 739.

A specific devise or bequest is a devise or bequest by a description which identifies a particular subject then existing as intended to pass to the donee in specie either directly or indirectly. A father devised three properties to his three sons respectively for life, with remainder in fee to their respective children, and in case of the death of either of them without issue between the others "in the same manner as the estates devised were limited to them respectively," subject to the proviso that if either died leaving a widow, but no children, the widow should have an estate for life in the premises "so specifically devised" to her husband:—Held, that the devise to such widow attached, not only to the property originally devised to her husband, but also to property coming to him under the contingent limitations. *Giles* v. *Melsom*, 42 L. J., C. P. 122; L. R. 6 H. L. 24; 28 L. T. 789; 21 W. R. 417.

The mere gift of a sum of money in consols or stock without more is not a specific gift, even though the testator at the date of his will or death has the identical sum in consols or stock; something more is required to shew that he intended the particular property to pass; but although this is the general rule, it will yield to a contrary intention if it can be gathered in a legal way from the instrument itself and the surrounding circumstances of the testator. *Burke* v. *Doyle*, [1897] 1 Ir. R. 479.

The fact that the testator has the particular stock or shares specified in the will, and the fact that the particular legacies occur in the middle of a series of specific gifts, are circumstances to be taken into consideration in deciding whether the legacies are specific or not. *Ib.*

Legacy whether General or Specific—Money Debts and Securities.]—Testator reciting that he is possessed of a certain sum in navy bills, bequeaths it. This is a specific legacy, and shall pass only such navy bills as he possessed at his death. *Pitt* v. *Camelford* (*Lord*), 3 Bro. C. C. 160.

Legacy to A. of 12,000*l.*, and to B. 4,000*l.*, the latter sum directed to be paid out of money in the hands of the testator's agent. At the time of testator's death, there was a sufficient fund in the agent's hands to answer this legacy; but the general assets did not extend to the payment of both. Legatee of the 4,000*l.* held entitled to be paid by priority. *Acton* v. *Acton*, 1 Mer. 178.

Bequest of a note for 500*l.* "in the hands of F." when F. had laid it out in stock unknown to testatrix; though the bequest of the note is specific, the legatee shall have the stock in which it is invested. *Drinkwater* v. *Falconer*, 2 Ves. Sen. 652.

A testatrix having, under her marriage settlement, a power, in default of issue, to appoint by her will a sum of 2,200*l.*, she, by her will, after reciting the power, proceeded thus: "and I give and bequeath several legacies," some to persons absolutely, and others to persons for life, and after their decease to their children or other persons by substitution, amounting, in the whole, to the precise sum of 2,200*l.*; and as to all such real estates as she had power to dispose of, under her marriage settlement or the will of her husband, she expressed her desire that the same should descend to and vest in her daughter, by the preferable title of descent; and, subject as aforesaid, she bequeathed the residue of her personal estate to her said daughter:—Held, that the legacies were not general legacies, payable out of her general personal estate, but were intended to be given by the testatrix under a mistaken notion, that the execution of the power was not restricted to the event of her dying without issue. *Walker* v. *Laxton*, 1 Y. & J. 557.

Testator bequeathed 7,000*l.* secured on mortgage of an estate to W., belonging to R. T. The 7,000*l.* and interest were received after the date of the will by the testator's agent on his account, and immediately afterwards 6,000*l.*, part of it, was invested on another mortgage, and the remainder was paid into a bank in which the testator had no other moneys, but was afterwards drawn out by a person to whom the testator had given a cheque for the amount:—Held, that the legacy was specific, and, notwithstanding the 6,000*l.* remained due on the second mortgage at the testator's death, that the legacy was wholly adeemed. *Gardner* v. *Hatton*, 6 Sim. 93.

Testator gave to his sister the interest of 300*l.* upon bond for life; and after her decease to her daughter, the interest due upon the said bond at her death, with the principal. The legacy is specific, and there being among other bonds one of the exact amount, it was held to refer to that, though an insolvent security, and the interest in arrear before the death of the testator. *Innes* v. *Johnson*, 4 Ves. 568.

One partner, by will, gives to the other 2,000*l.* which appears to be due to him on the last settlement, in trust, &c., if he did not draw it out of trade:—Held, these last words made it a specific bequest; without them it would not have been specific. *Ellis* v. *Walker*, Ambl. 309.

A testator, after stating that, "as for his worldly goods and chattels, he bequeathed them as follows," gave certain pecuniary legacies to his sons and daughter, and then bequeathed to his daughter "all things in the house remaining," of whatever kind, and "all moneys both in the house and out of it." There was no other gift of his residuary estate. He had some moneys both in the house and out of it at his death. He had also consols standing in his name, and some shares in a benefit building society:—Held, that the bequest of "moneys" was specific, and that it did not carry the consols, the shares in the building society, or the residuary personal estate. *Collins* v. *Collins*, 40 L. J., Ch. 541; L. R. 12 Eq. 455; 24 L. T. 780; 19 W. R. 971.

A testator said, "I leave my wife 200*l.* to dispose of as she may think proper, and the interest of the residue of my property, viz. the

sum of 454*l.* 9*s.* 9*d.*, for life." He subsequently stated that he had 200*l.* in the savings bank, and 454*l.* 9*s.* 9*d.* and 30*l.* in addition in another bank. His property consisted of the 454*l.* 9*s.* 9*d.*, and 30*l.* and some furniture, and there was in the savings bank a sum of 200*l.* in his wife's name, being part of her separate estate:—Held, that this latter sum was the 200*l.* referred to in the will. *Hesketh* v. *Magennis*, 27 Beav. 395.

Legacy of 50*l.* for a ring is not specific; therefore it shall carry interest like other pecuniary legacies. *Apreece* v. *Apreece*, 1 V. & B. 364.

Testator having a sum of 500*l.* secured by mortgage, bequeathed to defendant 500*l.*, to continue at interest on such securities as he should leave at his death, or to be put out on government securities, at the election of his executors. There being a deficiency of assets:—Held, that the 500*l.* legacy was not so specific as that it should not abate with the pecuniary legacies. *Lawson* v. *Stitch*, 1 Atk. 507.

Bank annuities, directed by will to be purchased out of personal estate, to be considered as pecuniary, not specific, legacies. *Gibbons* v. *Hills*, Dick. 324.

A direction to invest so much money as will produce a certain amount of stock:—Held, to be a pecuniary legacy. *Edwards* v. *Hall*, 11 Hare, 23; 22 L. J., Ch. 1078. Affirmed, 25 L. J., Ch. 82; 1 Jur. (N.S.) 1189; 4 W. R. 111—L.JJ.

A testatrix, by a codicil, after reciting that she had in the Bank of Ireland money not theretofore disposed of, bequeathed the said sum to trustees to pay certain legacies. She had no money in the Bank of Ireland, but she had government stock sufficient to pay the legacies:—Held, first, that the legacies were payable out of the general assets; and, secondly, that they were payable in equal priority with other legacies bequeathed by the will and prior codicils. *Reilly* v. *Stoney*, 16 Ir. Ch. R. 295.

A testator bequeathed "1,000*l.*, now in the Royal Bank," and charged his house property with the payment of such of his legacies as were not made payable out of some special fund. At the date of the will he had no money in the Royal Bank, but he had shares in the capital stock of that bank of the value of nearly 1,000*l.*, and he purchased other shares afterwards:—Held, that the legacy was payable out of the shares. *Conly* v. *Greene*, Ir. R. 5 Eq. 430.

Construction of will where specific legacies were given out of a specific debt. *Smith* v. *Fitzgerald*, 3 V. & B. 2; 13 R. R. 129.

Legacies to be paid out of a specific security, which failed:—Held, general upon the circumstances. *Roberts* v. *Pocock*, 4 Ves. 150.

A legacy of so much of a specific fund, and in case of failure of that fund, the deficiency out of another specific fund, held a specific legacy, and not general or pecuniary; and that therefore legatee was entitled from testator's death. *Fontaine* v. *Tyler*, 9 Price, 94.

A legacy of 1,000*l.*, "being part of the moneys received by J. from my debtor A. G., but not remitted to me," is specific. *Nelson* v. *Carter*, 5 Sim. 530.

Upon the construction of a will:—Held, that certain legacies of stock and of money on mortgages, bonds, &c., were specific. *Evans* v. *Jones*, 2 Coll. C. C. 516.

Where a testator directs a specific sum to be sold, and a certain sum out of the sale moneys to be paid to A., and the residue to B., each of the legacies is specific, and the legatees are entitled to share the income of the fund from the testator's death between them in proportion to the values of their respective legacies at that time. *Jefferys, In re*, 35 L. J., Ch. 426.

The testator bequeathed a leasehold public-house upon trust for sale, and out of the proceeds of such sale, and the rents and profits until sale, he gave a legacy to X. Y., and as to the residue of such proceeds, and rents and profits, and all other the residue of his real and personal estate, he gave the same to his two daughters:—Held, that the gift of the residue of the proceeds of the sale of the public-house was not specific, but that such residue formed part of the general residuary estate of the testator. *Green, In re, Baldock* v. *Green*, 58 L. J., Ch. 157; 40 Ch. D. 610; 60 L. T. 225; 37 W. R. 300.

—— **Stocks and Shares.**]—Legacies of stock are specific or general legacies according to the intent of testator from the will, and the circumstance whether he meant to confine it to the stock he then had. *Avelyn* v. *Ward*, 1 Ves. Sen. 425.

Bequest of "400*l.* East India bonds," under the circumstances, not specific, but a legacy of quantity to be made good out of the general assets, the testatrix having repeatedly in this bequest omitted the word "my," which she had used in other bequests clearly specific, and having only one East India bond at her death. Bequest of South Sea stock in parcels to a larger amount than testatrix was possessed of held specific, the bequest of the last parcel being called "the remaining South Sea stock standing in her name." These legatees must abate in proportion. *Sleech* v. *Thorington*, 2 Ves. Sen. 560.

Legacies are not specific without something marking the specific thing, as the description of "my stock," &c., a mere direction to transfer, and that so much capital be kept in the same public fund, is not sufficient. *Sibley* v. *Perry*, 7 Ves. 522; 6 R. R. 183.

A testator, amongst various specific bequests, gave "1,500*l.* of my Egyptian 9 per cent. bonds" to H., and "500*l.* Egyptian 9 per cent." bonds to L. Before his death he sold his Egyptian 9 per cent. bonds, and purchased with the proceeds Khedive 7 per cent. bonds:—Held, that the gift of "my" Egyptian bonds was specific and adeemed, but that the gift of Egyptian bonds to L. was not specific, and not adeemed. *Macdonald* v. *Irvine*, 47 L. J., Ch. 494; 8 Ch. D. 101; 38 L. T. 155; 26 W. R. 381.

R. devised 5,000*l.* South Sea annuities to A., and 5,000*l.* South Sea annuities to P. The testator had only 5,000*l.* in this stock. Declared, that these should be considered as legacies of quantity and number, and other 5,000*l.* were ordered to be purchased out of the testator's personal estate. *Purse* v. *Snaplin*, 1 Atk. 414.

One devises the sum of 6,000*l.* South Sea stock to J. S., and the testator has but 5,360*l.* No more than the 5,360*l.* shall pass, and the rest of the testator's personal estate not be obliged to make it up 6,000*l.* But it might be otherwise if the testator had no stock at all. *Ashton* v. *Ashton*, 3 P. Wms. 384; Cas. t. Talb. 152.

Legacy of 200*l.* 4 per cent. consols bank annuities held not specific. The general assets, therefore, are liable to make up the deficiency of the fund. *Wilson* v. *Brownsmith*, 9 Ves. 180.

One devises the sum of 2,000*l.* South Sea stock; at the time of making his will he had just 2,000*l.* South Sea stock; he afterwards sold

1,500*l.* of it, and three-fourths of the residue was turned into annuities by act of parliament:—Held, the bequest was not specific nor adeemed. *Bronsdon* v. *Winter*, Ambl. 57.

A bequest of certain quantity of stock will not be held specific from the circumstance of the testator having that exact quantity at the time of the bequest. *Id.* 59.

Testator willed that his wife should receive the interest of "all the property I possess in the public funds for her life":—Held, that the wife was entitled to receive the income of all the property which the testator had in the funds at the date of his will, and in its then state of investment, notwithstanding it consisted of long annuities. *Cockran* v. *Cockran*, 14 Sim. 248; 8 Jur. 679.

A testator by her will bequeathed funded property sufficient to pay an annuity of 50*l.* to A. for life, and after A.'s death she bequeathed the fund to other persons; and after giving various pecuniary legacies, she bequeathed to B. the whole of the remainder of her (the testatrix's) dividends during her life; and after B.'s decease she bequeathed 1,000*l.* stock to C., and other sums of stock to other persons. The testatrix died shortly after the date of her will, entitled to 606*l.* long annuities, but to no other stock:—Held, that the bequest to B. during her life, of the whole of the remainder of the dividends of the testatrix, was specific, and that C. and the other legatees in remainder after B.'s death were not entitled to have the long annuities converted into bank annuities; though being a decreasing fund, the legacies might altogether fail. *Vincent* v. *Newcombe*, Younge, 599.

A testator, before making his will, transferred two sums of 4 per cents. and 5 per cents., which were then the whole of his funded property, into the joint names of himself and his wife. By his will he bequeathed all his funded property or estate of what kind soever, to trustees, in trust for his wife for life, and after her decease, in trust (amongst other things) to pay certain legacies of 4 per cent. stock, amounting, within 50*l.*, to the stock of that description which he had so transferred; and he gave the residue of his estate to A. and B. He afterwards purchased further sums of 5 per cents. in the names of himself and his wife, and died in her lifetime, having no stock except that beforementioned, exclusive of which, his property was not sufficient to pay his legacies:—Held, that the wife, on her husband's death, became absolutely entitled to the stock; and that the bequest of the testator's funded property was not sufficiently specific to make her elect between the stock and the benefits which she took, under the will, in certain parts of the testator's property. *Dummer* v. *Pitcher*, 2 Myl. & K. 262; Coop. t. Brough. 257. Affirming 5 Sim. 35.

A testator gave to his wife F. the interest of all his property in the public funds during her life, the principal being placed in the names of the undermentioned trustees for that purpose, and he also gave to his wife all his other property which he might be possessed of at his decease, after paying his funeral expenses and debts, part of his funded property being applied for that purpose if necessary. On the death of his wife, he gave to his daughter J. 200*l.* stock 3 per cent. reduced annuities, and to two other persons 50*l.* 3 per cent. reduced annuities respectively, and to his son the residue of his property after paying those legacies. And he appointed two other persons his executors and trustees. At the date of his will the testator had 700*l.* 3 per cent. reduced annuities, but he afterwards sold out that stock, and invested part of the produce on mortgage:—Held, that the gift to F. of the interest of the testator's property in the funds was specific, and was consequently adeemed by the sale of the stock, but that the other legacies were general, and that F. took only a life interest in the testator's residuary estate. *Hayes* v. *Hayes*, 1 Keen, 97; 5 L. J., Ch. 243.

A testatrix bequeathed and appointed 1,800*l.* consols, and 300*l.* long annuities, and all moneys over which she had the power of appointment under a particular deed, and all the residue of her personal estate, upon certain trusts:—Held, that the gift of the consols and long annuities was specific. *Kampf* v. *Jones*, 2 Keen, 756; 7 L. J., Ch. 63; 1 Jur. 814.

Testator bequeathed, amongst other stock legacies, 30,000*l.* consols to the provost and fellows of Queen's College, to be by them expended, within three years after his death, in the purchase of such books for the use of, and to be added to, the library of the college, as the provost and fellows for the time being should in their discretion think fit; and in a subsequent paragraph he directed that, if at his decease he should not have a sufficiency of stock standing in his name to answer the several stock legacies aforesaid, his executor should purchase and make up the deficiency out of his residuary estate. The stock standing in the testator's name at his death was sufficient to answer the bequest to the college:—Held, that that bequest was specific. *Queen's College* v. *Sutton*, 12 Sim. 521; 11 L. J., Ch. 198; 6 Jur. 906.

A testator was possessed of fifty original shares, and seventy other after-purchased shares. He gave thirty whole shares to trustees, upon trust, for a married woman for her separate use for life, and thirty whole shares to another party. He declared that the legacies should not be deemed specific, so as to be capable of ademption. On the seventy shares all the calls had not been paid, but on the fifty the whole had been paid. The railway company raised new shares, and offered the same ratably to the registered proprietors. The executors accepted sixty, and paid the deposit on them in respect of the thirty shares first bequeathed:—Held, that the bequests were specific, and that the income of the shares from the testator's death belonged to the legatees; that the legatees were entitled to the new shares in respect of the shares bequeathed to them, subject to the payment of the future calls; that the legatees were entitled to select, and the executors not entitled to appropriate the shares to be taken by the legatees; that the original and purchased shares must, with respect to the liability of the testator and his estate to pay the calls thereon, be considered identical; and that, therefore, his estate was liable to pay the calls on both sets of shares. *Jacques* v. *Chambers*, 2 Coll. C. C. 435; 16 L. J., Ch. 243; 11 Jur. 295.

Testatrix gives to the minister, &c., of A. 5*l.* per annum bank long annuities; to the minister, &c., of B. 5*l.* per annum like bank annuities; to the treasurer of C. and D. 100*l.* long annuity stock each; to the governors of E. 100*l.* long annuity stock; and "30*l.* per annum, further part of my bank long annuities," upon trust, to apply the interest to and for the use of L. D., till she

attains twenty-one, and then to transfer "the said 30*l.* per annum bank long annuities" to the said L. D. She then gives to W. C. 150*l.* bank long annuities stock, and 10*l.* per annum, "further part of my long annuities," in trust for H. G. By a codicil, reciting, "whereas I may have made a wrong calculation of the value of my fortune in the funds at the time of my decease," she directs, in case of deficiency, it may be deducted out of the residue, as she would have all her legacies paid to the full. The testatrix, at the time of her death, possessed only 385*l.* long annuities, and her personal estate was insufficient to pay her debts. Upon a question, whether the treasurer of C. was entitled to a legacy of 100*l.* long annuity stock, or only to 100*l.* to be raised by the sale of stock to that amount:—Held, that it was not a specific gift of so much stock, but a pecuniary legacy. *Att.-Gen.* v. *Grote*, 2 Russ. & M. 699. Reversing 3 Mer. 316; 17 R. R. 91.

Testator reciting that he has 1,500*l.* 5 per cents., gives it to A., and then gives to B. all other his stock, that he might be possessed of at his death. The latter bequest is not specific, but is liable to debts, in preference to the former. *Parrott* v. *Worsfold*, 1 J. & W. 594; 21 R. R. 248.

Legacy of "all my stock that I may be possessed of at my decease," not specific. *Id.* 601.

A testatrix, by a codicil, gave to A. and M. "50*l.* each of bank long annuities, now standing in my name." At the date of the codicil, and at her death she possessed long annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock. Evidence as to the state and value of the testatrix's property in the funds at those respective times was admitted, and in the effect of that evidence, and the language of the testamentary papers, taken together, the bequests to A. and M. were held not to be specific but pecuniary. *Boys* v. *Williams*, 2 Russ. & M. 689. Reversing 3 Sim. 563.

A testatrix, having 115*l.* long annuities standing in her name at her death, of which 65*l.* life annuities had been purchased for her by T., bequeathed her residuary estate to trustees to be invested or continued by them in the public funds, or at interest, the stocks, funds, or securities to be varied at discretion, in trust to pay certain annuities out of the interest, dividends, &c., and subject thereto to pay the said trust moneys, stocks, funds, and securities to S., for life, and subject thereto she gave all the residue of her estate to the trustees absolutely. By a codicil she gave all the money funded by T. in her name in the long annuities (which she mentioned to be 50*l.* per annum) to C., after S.'s death:—Held, that 50*l.* of the long annuities were specifically bequeathed to C. *D'Aglie* v. *Fryer*, 12 Sim. 1.

Bequest to an hopsital of 3,400*l.* in the 3 per cents., the dividends to be divided among four widows; this is a pecuniary, not a specific legacy. *Peterborough* v. *Mortlock*, 1 Bro. C. C. 565.

Legacies of new South Sea annuities declared to be pecuniary, not specific, though the testator had more of that stock than sufficient to pay them. *Simmons* v. *Vallance*, 4 Bro. C. C. 345.

Legacies of stock given by a married woman by her will, executed in pursuance of a power:—Held, notwithstanding the stock was misdescribed, to be specific, and the costs of a suit instituted by the executrices, who were also the residuary legatees of the testatrix, for the purpose of having the trusts administered, directed to be borne ratably by the specific legacies. *Warren* v. *Postlethwaite*, 2 Coll. C. C. 116; 9 Jur. 721.

Testatrix by her will gave 15,000*l.* reduced annuities, "part of a larger sum standing in my name," to S. J., and 3,500*l.* like annuities, "being further part of such annuities standing in my name," to J. L. By her second codicil, after reciting that by her will she had bequeathed 15,000*l.* reduced annuities standing in her name to S. J., and that she was desirous of making a further provision for J. W., another legatee, she revoked the bequest to S. J., so far as related to the sum of 6,000*l.*, "part of the said sum of 15,000*l.* reduced annuities," and directed her executors, as soon as conveniently might be after her death to transfer to J. W. "the said sum of 6,000*l.* reduced annuities," and after further reciting that by her will she had bequeathed 3,500*l.* "like reduced annuities" to J. L., and that she was desirous of increasing such bequest, she thereby revoked the last-mentioned bequest, and in lieu of it gave 4,500*l.* "like reduced annuities" to J. L. By her third codicil she, in order that J. W. might have the full benefit of the bequest of 6,000*l.* reduced annuities given to him by her second codicil, directed that such legacy should not be subject to any deduction for legacy duty or other charges, and that the same should be transferred to him before and in preference to any other legacies and bequests given by her out of or as part of her reduced annuities. The testatrix had 21,300*l.* reduced annuities standing in her name at the date of her will. At the date of her second codicil that sum was reduced to 18,000*l.* like annuities. At the date of her third codicil it was reduced to 16,000*l.* like annuities:—Held, that the legacy of 4,500*l.* "like reduced annuities," given by the second codicil to J. L., was not a specific but a general legacy, and that J. W. was entitled to have 6,000*l.* reduced annuities transferred to him out of the 16,000*l.* like annuities, without any deduction or abatement whatsoever. *Johnson* v. *Johnson*, 14 Sim. 313; 8 Jur. 1038.

A legacy of *l.*, 3 per cent. consolidated bank annuities, to be retained and appropriated, or purchased by my executors out of my personal estate, is not specific. *Rogers* v. *Clarke*, C. P. Cooper, 376.

Testator bequeathed as many of his canal shares as he should leave children him surviving, one share for each child; at the date of his will, he had eight shares and seven children; at his death, ten shares and eleven children:—Held, that the bequest was specific. *Miller* v. *Little*, 2 Beav. 259.

Where a testator possessed of canal shares (declared by the act to be personalty), at the date of his will gave five to A., five to B., and the like number to C., but there was nothing to mark any particular shares, and at his death he had ceased to hold any:—Held, that the legacies were not specific, but general, and the legatees entitled to such a sum of money as would suffice to purchase the number of shares so given. *Robinson* v. *Addison*, 2 Beav. 515; 9 L. J., Ch. 369; 4 Jur. 647.

Testator bequeathed the sum of 4,000*l.* capital stock in the 3 per cent. consols, or in whatever

of the government funds the same should be found invested :—Held, that this was a specific legacy, and that the executor having paid one dividend on the stock, which became due within a year after the testator's death, to the residuary legatee, must refund to the specific legatee. *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478 ; 11 L. J., Ch. 230 ; 6 Jur. 386.

A testator gave all his money in hand and at his bankers to his trustees, to be added to his new 3*l.* per cents., which 3*l.* per cents. and five Devon Great Consols he desired might be equally divided between his grand-daughters ; and he gave to his trustees 600 West Basset shares, 600 Wheal Agar shares, and five Devon Great Consols, to divide between his grandsons ; the remaining Wheal Agar shares he might hold at the time of his decease, as well as any other property, he desired might be added to the 3*l.* per cents. for the benefit of his grand-daughters. He at the time of his death was possessed of ten Devon Great consols, 600 Wheal Bassets, and 1304 Wheal Agar shares :—Held, that the bequests were specific. *Hill* v. *Hill*, 11 Jur. (N.S.) 806 ; 12 L. T. 797.

A testator gave a legacy of 500*l.* 3*l.* per cent. consols, or other stock into which the same might be converted, or in case he should not be possessed of such stock he gave a legacy of as much sterling money as that amount of stock would have been worth at his death, and by a subsequent clause the testator gave another legacy of like stock to the same person, "in addition to the legacy already given," to be raised out of the proceeds of his residuary estate : —Held, that the first legacy, there being sufficient stock to answer it, was specific, but that the second legacy, though expressed to be a substitute for the first legacy, was general. *Mullins* v. *Smith*, 1 Dr. & Sm. 204 ; 8 W. R. 739.

A testatrix bequeathed a large amount of stock legacies, declaring that by the word stock she meant government stocks, or stock or shares in public companies, to which she might be entitled. She had various such stocks and shares :—Held, that the gifts were specific, and that the legatees were entitled to a proportionate share of each of such stocks and shares. *Measure* v. *Carleton*, 30 Beav. 538.

A testator gave freehold property and 2,400*l.* of his preferential stock of a railway company in trust for his niece A. for life ; remainder to her children. A. like bequest of copyholds and stock to two other nieces for life, with remainder to their children. The preferential stock at the time of the testator's death did not amount to 2,400*l.* He had, however, other stocks and railway debentures :—Held, that the niece A. could not elect to have the 2,400*l.* made up from the other stocks, and that as the whole of the stocks were given in trust for the three nieces, the whole of the stock should be divided into thirds. *Shey* v. *Barber*, 18 L. T. 145.

A testatrix bequeathed the income of 300*l.*, invested by her in the General Steam Navigation Company, and also the income of 200*l.*, to a lady for life, and after her death desired that the principal sum of 500*l.* should be divided amongst the children of the legatee, and declared that in case her personal estate should prove insufficient for the payment of her legacies and annuities the deficiency should be made up out of certain real estate, and she bequeathed the residue of her personal estate to certain persons. By a codicil, the testatrix gave all her personal estate to another person :—Held, that the gift of the 300*l.* was specific and revoked by the codicil, but that the 200*l.* remained charged on the real estate. *Kermode* v. *Macdonald*, 37 L. J., Ch. 879 ; L. R. 3 Ch. 584 ; 19 L. T. 179 ; 17 W. R. 4.

A testator gave to his trustees 700*l.* 3*l.* per cent. consolidated bank annuities, "part of a larger sum of like annuities standing in my name," upon trust to pay a weekly sum to J. He also bequeathed various other sums for the benefit of some of his children, designating the sums as "3*l.* per cent. consolidated bank annuities further part of the said larger sum," and bequeathed to others of his children various legacies of "like annuities, further part of such larger sum." The legacies amounted to a sum far beyond the amount of 3 per cent. consols possessed by the testator at the date of his will and death, but he had at the date of his will and death, besides 3 per cent. consols, a large amount of "new 3 per cent. annuities," and "3 per cent. reduced annuities" :—Held, that the legacies were not specific. *Bumpus* v. *Bumpus*, 29 L. T. 800.

A testator gave a legacy of "all those my 7,000 dollars or the produce thereof," to B. The testator was possessed, at the date of his will and death, of 6,800 dollars in United States 5.20 government bonds, but of nothing else in any way answering the description of the gift. The bonds were sold by the executors and produced 7,863 dollars :—Held, that the gift was specific and was represented by the 6,800 dollars in United States 5.20 bonds, to the produce of which B. was therefore entitled. *Palin* v. *Brookes*, 26 W. R. 876.

A gift by will in the words, "I give to my dear sister A. the interest of 4,500*l.* money in the funds for her absolute use and benefit" ; followed by specific gifts to the same legatee and the words "and at her death to M., the funded property to H." The testatrix had, at the date of her will, an absolute interest in about 4,000*l.* consols in the names of trustees :—Held, a specific gift of the 4,000*l.* consols for the benefit of the sister for life, with a gift over to H. absolutely. *Page* v. *Young*, L. R. 19 Eq. 501 ; 23 W. R. 479.

A testator bequeathed "fifty shares in the York Union Banking Company," to be held upon certain trusts. At the date of the will the company was registered and incorporated as an unlimited company under the companies acts, and the testator held seventy shares therein of the nominal value of 100*l.* each. Between the dates of his will and his death, the company was registered as a limited company under the same style, except that the word "limited" was added, and each 100*l.* share was converted into two shares of the nominal value of 60*l.*, and 140 of these new shares were allotted to the testator in substitution for his seventy shares of 100*l.* each :—Held, that the bequest was not specific. *Gray, In re, Dresser* v. *Gray*, 56 L. J., Ch. 975 ; 36 Ch. D. 205 ; 57 L. T. 132 ; 35 W. R. 795.

Where a testator had bequeathed "debenture stock or shares" in two companies, neither of which had issued any such stock or shares :— Held, that upon the construction of the whole will debentures in such companies owned by the testator were meant, and that the gift was, therefore, a specific and not a general legacy. *Nottage, In re, Jones* v. *Palmer*, 64 L. J., Ch. 695 ; [1895] 2 Ch. 657 ; 12 R. 571 ; 73 L. T. 265 ; 44 W. R. 22—C. A.

By marriage settlement a wife had, in the event of her dying in her husband's lifetime, a power of appointment by will over the property therein comprised, which in the event of her surviving him became hers absolutely. At the date of the wife's death the property comprised in the marriage settlement included consols and reduced and new 3 per cents.; her separate property comprised consols. By her will the wife, after reciting the settlement, gave and appointed everything she had power to dispose of to trustees, and then gave a number of stock legacies in the form, "I direct my trustees to stand possessed of 1,000*l.* consols upon trust to pay the dividends to A. for life, and after his death to transfer the same sum of consols to his children"; and in the form, "I direct my trustees to transfer 1,500*l.* consols to B." The new 3 per cents. so given amounted to exactly, and the reduced 3 per cents. to very nearly, the amount of those stocks subject to the settlement. The amount of consols so given was more than that subject to the settlement, but less than the amounts subject to the settlement and belonging to her separate estate taken together. The will contained a residuary gift: —Held, that all the legacies were specific, that those of new and reduced 3 per cents. failed, and those of consols could only be paid pro tanto out of the consols belonging to the testatrix's separate estate. *Young, In re, Trye* v. *Sullivan*, 52 L. T. 754.

—— **Legacies connected with Land.**]—Pecuniary legacy directed to be paid by sale of an estate, which testator had contracted to purchase, is payable out of the testator's general assets, if contract cannot be completed. *Fowler* v. *Willoughby*, 2 Sim. & S. 354; 4 L. J. (O.S.) Ch. 72; 25 R. R. 219.

Devise in trust to sell, but not for less than 10,000*l.*, and to pay several sums amounting to 7,300*l.*, and the overplus moneys arising from the sale to A.:—Held, a specific legacy of 10,000*l.*, and the sale producing less, A. and the others to abate; legacies to charity void by the statute 9 Geo. 2, c. 36, fell into the general residue. *Page* v. *Leapingwell*, 18 Ves. 463; 11 R. R. 234.

A testator gave a number of legacies, adding, "I guarantee my estates at C. for the payment of the above legacies"; and, in the subsequent part of his will, he gave many other legacies. The first class of legacies are not specific, and, failing the estates at C., are to be borne by the general personal estate. *Willox* v. *Rhodes*, 2 Russ. 452.

Testator, by his will, after devising his messuage, dwelling-house, and hereditaments, situate at W., and all other his real estate, to a trustee, upon the trusts and to the uses therein mentioned, directed, and empowered, authorised the trustee and his heirs to raise, by sale of the timber and other trees growing on his estate of W., the sum of 1,000*l.*, which, and also the principal sum of 1,000*l.* due to him from A., he gave and bequeathed to the plaintiff, to be paid to him when he should attain the age of twenty-four years, but without interest in the meantime. And after giving various pecuniary legacies, the testator gave and bequeathed all the residue and remainder of his personal estate subject to the payment of his legacies, debts, funeral, and testamentary expenses, to his two nieces (who, under the limitations in the will of the real estate, also took estates pur autre vie in the rents and profits of the testator's estate at W.), equally to be divided between them, share and share alike:—Held, that the 1,000*l.* directed to be raised out of the timber constituted a specific legacy, and that the deficiency of the timber, if any, for payment of the legacy, would not be supplied out of the personal estate. *Dickin* v. *Barker*, 14 L. J., Ch. 22; 8 Jur. 1098.

Testatrix bequeathed an annuity of 100*l.* to her niece for life, and charged the same upon the leasehold property in Wimpole Street, and all and every her residuary personal estate and effects whatsoever, save and except her leasehold premises at R.:—Held, that this was a demonstrative legacy. *Livesay* v. *Redfern*, 2 Y. & C. 90; 6 L. J., Ex. Eq. 35.

Legacy whether Specific or Demonstrative.]—Legacy of 1,000*l.* out of my reduced bank annuities, held pecuniary, the court leaning against holding a legacy specific, unless clearly intended. The court would not take into consideration evidence of the value of the stock at the date of the codicil by which the legacy was given, nor an erasure of a legacy to the same person by will, but decided upon the words of the codicil. *Kirby* v. *Potter*, 4 Ves. 748; 4 R. R. 342.

Legacy of my stock, or in my stock, or part of my stock, will make a legacy specific. *Id.* 750.

After a legacy of stock in 4 per cent. consols bank annuities, a legacy to same persons of "an additional sum of 200*l.* more, to be paid out of the 4 per cents." &c., was held pecuniary. *Deane* v. *Test*, 9 Ves. 146; 1 Smith, 112.

A pecuniary legacy, given with a particular security, is a demonstrative legacy. Such a legacy does not fail by the failure of the security upon which it is given. *Fowler* v. *Willoughby*, 2 Sim. & S. 354; 4 L. J. (O.S.) Ch. 72; 52 R. R. 219.

Legacy "of 5,000*l.* sterling, or 50,000*l.* current rupees," afterwards described as "now vested in" the East India Company's bonds, and sometimes mentioned as the said sum of 5,000*l.* sterling, held not specific, but general as a demonstrative legacy, with a fund pointed out; a construction to be favoured for a natural child, the will also giving one legacy clearly specific, viz. the sum of 33,480*l.*, "which said sum is in two bills" described as then lying for acceptance. *Gillaume* v. *Adderley*, 15 Ves. 384.

Testatrix bequeathed an annuity of 100*l.* to her niece for life, and charged the same upon her leasehold property in Wimpole Street, and all and every her residuary personal estate and effects whatsoever, save and except her leasehold premises at R.:—Held, that this was a demonstrative legacy. *Livesay* v. *Redfern*, 2 Y. & C. 90; 6 L. J., Ex. Eq. 35.

A legacy of so much of a specific fund, and in case of failure of that fund, the deficiency out of another specific fund:—Held, a specific legacy, and not general or pecuniary, and that therefore legatee was entitled from testator's death. *Fontaine* v. *Tyler*, 9 Price, 94.

Bequest of 10,000*l.* sterling, "being my share of the capital now engaged in the banking business," &c.:—Held, to be a demonstrative, and not a specific legacy. *Sparrow* v. *Josselyn*, 16 Beav. 135.

A lady, who had gone through the ceremony of marriage with the widower of her deceased sister, gave certain legacies, which she desired

her supposed husband to pay out of certain property belonging to her which she believed had passed to him upon marriage. The lady survived the husband:—Held, that they were demonstrative legacies, and payable out of the testatrix's estate. *Jones* v. *Southall*, 32 Beav. 31; 1 N. R. 152; 32 L. J., Ch. 130; 9 Jur. (N.S.) 93; 8 L. T. 103; 11 W. R. 247.

H., by will, gave certain annuities, and directed that they should be paid by his trustees out of the rents of his real estate. He then devised his real estates to trustees, out of the rents and income to pay the annuities, and subject thereto upon other trusts. H. died, and the rents and income of his real estates were insufficient to satisfy the annuities:—Held, that the gift was not specific, but demonstrative, and that the deficiency must be paid out of the capital of the residuary personal estate. *Paget* v. *Huish*, 32 L. J., Ch. 468; 9 Jur. (N.S.) 906; 2 N. R. 104; 8 L. T. 445; 11 W. R. 636.

A testator bequeathed to C. the full amount of whatever sum H. might be indebted to C. at the testator's decease. The testator added, "And it is my positive will that the amount required for the payment of the same, whatever it may be, be taken out of the amount of that share to which H. becomes entitled by a life interest under my will." The share of H. proved insufficient to pay the debt:—Held, that this was not a demonstrative legacy to C., and that his debt could only be satisfied out of the assets so far as the share of H. therein would extend. *Coard* v. *Holderness*, 22 Beav. 391.

A testatrix bequeathed various legacies to be paid out of a reversionary personal estate upon the death of the tenant for life; by her codicil she directed that they should be paid, in common with the other legacies named in her will, immediately after her death:—Held, that the legacies were demonstrative. *Williams* v. *Hughes*, 24 Beav. 474; 27 L. J., Ch. 218; 4 Jur. (N.S.) 42; 6 W. R. 94.

W., by will, after desiring that his executor and partner H. might be allowed a year for converting his (the testator's) "proportion of capital, invested in the business he was then carrying on with H.," into cash, and that such cash might be paid over as realised (with the exception of special bequests thereinafter mentioned) to the charity commissioners to be invested, desired that all shares of which he might die possessed might be transferred into the names of the charity commissioners, without being sold; the interest to be paid by them to certain persons for life. W. then directed, that after the death of the persons named sufficient of the property so invested by the commissioners should be converted by them, and paid over to a number of charities, naming the sum to be given to each; and he then requested his executors would pay, as soon as conveniently might be after his decease, "out of the capital employed in the business," to the persons mentioned, certain sums (naming twenty-two legatees, and sums amounting together to about 700*l.*). At the date of his will, W. was in partnership with H., but before his death the business failed, and a composition was paid, mainly by the testator, at whose death the partnership assets were outstanding, and his proportion of capital consisted of half of the assets, after deducting the debts, one of which was a large debt due to himself:—Held, that the twenty-two legacies, directed to be paid as soon as conveniently might be after W.'s decease, were demonstrative, and not specific, and that if the particular fund failed, the deficiency was payable out of the general personal estate not specially given, and that the words "capital invested in the business" comprised all that was coming to the testator from his partner's estate, inclusive of the debt. *Bevan* v. *Att.-Gen.*, 4 Giff. 361; 9 Jur. (N.S.) 1099; 9 L. T. 221.

A testator being entitled to real and personal estate absolutely, and having a power of appointment over certain settled personal estate in favour of his children, gave by his will pecuniary legacies to the children, and then appointed the settled property subject to and charged with the legacies to his children. He also bequeathed and devised his residuary personal and his real estate, subject to the payment of the legacies given by his will:—Held, that the legacies given to the children were in the nature of demonstrative legacies, and that the settled property was primarily applicable for the payment of them. *Disney* v. *Crosse*, L. R. 2 Eq. 592.

A testatrix appointed property to trustees to sell all the property except certain real estate, and to hold the proceeds to pay the legacies thereinafter given, and to pay an annuity to A. for life, and subject thereto for B. and her children, and after B.'s death without children to sell the real estate not before sold, and out of the proceeds to pay A., his executors, administrators, and assigns, a legacy in lieu of the annuity, and to hold the residue for all the children of C. and the issue of such as should be then dead, equally to be divided between such children and issue, share and share alike, but so that such issue should take such share only as their respective parents would, if living, have been entitled to. A. died in the lifetime of B., who had no children:—Held, that in the events which had happened the legacy to A. was payable; that it was a demonstrative legacy; and that the issue of the deceased children of C. took as tenants in common. *Hodges* v. *Grant*, 36 L. J., Ch. 935; L. R. 4 Eq. 140; 15 W. R. 607.

A testatrix, after reciting that she was entitled to two sums of 4,000*l.* and 6,000*l.* under her father's will, and directing certain legacies, amounting to 4,900*l.*, to be paid out of the 4,000*l.* and out of her other personal estate except the 6,000*l.*, directed "the following legacies and bequests to be paid out of the said sum of 6,000*l.*," and thereupon gave and bequeathed further legacies amounting to 5,800*l.* She declared that all the bequests of her will should be free of legacy duty, which was to be paid out of her residuary estate, and bequeathed the residue to the persons therein named after payment of all debts, expenses, and bequests. After her death it was found that she had only a life interest in the 6,000*l.*:—Held, that the legacies directed to be paid thereout were demonstrative, and not specific. *Cunliffe* v. *Cunliffe*, 23 W. R. 724.

Testator gave two sums of 2,442*l.* and 5,000*l.* to his three nieces, the last of which sums was a debt due to him; and he directed, that if he received any part of it in his lifetime, it was to be repaid out of an estate to be sold. The testator received the 5,000*l.* in his lifetime:—Held, not a specific, but a demonstrative legacy; and the primary estate having failed, the personal estate was liable. *Colville* v. *Middleton*, 3 Beav. 570; 4 Jur. 1197.

A testatrix, domiciled in Jamaica, gave legacies in Jamaica currency to J. C., H. C. and M. C.,

persons also domiciled in that island, and desired them to be paid out of money due to him on certain bonds, which the will specified. At his death, which happened in Scotland, in 1790, no such bonds were to be found; but J. C. was then indebted to his estate upon other bonds in a sum which exceeded the value of his legacy, and which, a year after the testator's death, including interest, was equal to the amount of the penalties. In 1794 actions were brought in Jamaica upon these bonds by the testator's personal representative there, and judgments recovered against J. C. for the full penalties and costs; but no attempt was made to levy execution upon the judgments, and they remained unsatisfied. About the time of the testator's death the legatees came to England, and never returned to Jamaica, nor did any of them set up a claim to their legacies prior to the year 1817. In the year 1818 H. C. and M. C. resigned their respective legacies to the plaintiff, who was the personal representative of J. C., the other legatee, and he, in the year 1821, when administration was for the first time taken out to the testator's estate in England, filed the bill for the purpose of enforcing payment:—Held, that the legacies were demonstrative only, and were not to be considered as having been adeemed; that, as they were payable out of assets in this country, their value was to be computed according to the standard par of exchange between Jamaica and British currency, and not according to the actual rate at the time of payment; that J. C. must be considered as having been paid his legacy by retaining the amount out of the bond debts, and that that amount was to be deducted first from the interest, and then pro tanto from the principal due from him upon the bonds, as at the end of a year after the death of the testator; and interest was then to be calculated on the balance till the amount equalled the sum for which the judgments were recovered, and no further; that such retainer and set-off could not be allowed in respect of the legacies which the plaintiff claimed only as assignee; and that the assigned legacies, under the circumstances, and after the lapse of twenty-seven years without demand, ought to be presumed to have been satisfied. *Campbell* v. *Graham*, 1 Russ. & M. 453; 9 L. J. (O.S.) Ch. 234.

A bequest of 5,000*l.* consols, with a direction, that, if the testatrix should not have sufficient stock to answer the legacy, her executors should, out of her residuary estate, purchase enough to make up the deficiency:—Held, to create a specific, and not a merely demonstrative legacy. *Townsend* v. *Martin*, 7 Hare, 471.

C. directed his trustees to set apart in their names 1,666*l.* 13*s.* 4*d.* consols, and in case he should not have so much, then he directed the trustees to purchase the same, and hold it upon certain trusts. By a codicil C. directed his trustees, in case at the time of his decease he should not have so much consols as he had bequeathed, to purchase the deficiency out of the rents and profits of his freehold and leasehold estates. At the date of his will C. had only 100*l.* consols; he subsequently purchased more, and sold the whole before the date of his first codicil, two days before the date of which he purchased 2,000*l.* imperial annuities, which he further increased, and then reduced. At the period of his death C. had 1,000*l.* imperial annuities:—Held, that the legacy of the consols was not specific, but that it was a demonstrative legacy, for the payment of which C. had demonstrated the rents and profits of his freehold and leasehold estates. *Bessant* v. *Noble*, 2 Jur. (N.S.) 461.

A. bequeathed 2,000*l.* long annuities standing in her name in the books of the governor and company of the Bank of England. At the date of her will, and at her death, she was possessed of 300*l.* long annuities only, but she had other personal estate of considerable value:—Held (affirming 6 Jur. (N.S.) 1046; 8 W. R. 631), the bequest was a specific, and not a demonstrative, legacy, and fails as to the deficiency. *Ward, In re, Gordon* v. *Duff*, 3 De G. F. & J. 662; 7 Jur. (N.S.) 746; 9 W. R. 643.

A testator bequeathed the dividends on his American bonds, "which should be due to him at the time of his decease," upon trust for payment of certain arrears of allowances to his daughters. In his lifetime the dividends on these bonds having fallen into arrear, part of the arrears was capitalised, and bonds issued for the amount, and delivered to the trustees of a separation deed executed by the testator, though it did not appear that he was himself aware of the capitalisation:—Held, that he must be taken to have been aware of the capitalisation, and therefore that the capitalised bonds did not pass as dividends due to him at the time of his death, but that only the uncapitalised dividends passed, and that the legacy was specific, and not demonstrative. *Ricketts* v. *Harling*, 23 L. T. 760.

A testator, reciting that he was entitled, after the death of his sister, to 5,602*l.* consols, bequeathed to his son 2,000*l.* consols, part thereof, or a sum equal thereto, to be transferred or paid to him when the same should be received by his executors. After the date of his will his sister died, and he received the 5,602*l.* consols, which he sold out and mixed with his other moneys. He afterwards confirmed his will by a codicil, but died without having any sum of consols:—Held, that the legacy was specific; and that, the particular fund, part of which was given to the son, being no longer in existence, the legacy failed. *Oliver* v. *Oliver*, 40 L. J., Ch. 189; L. R. 11 Eq. 506; 24 L. T. 350; 19 W. R. 432.

A wife, who had a power of appointment over a fund invested in government stock, by her will gave legacies of specified sums of the fund:—Held, that the legacies were specific, and carried interest from her death. *Davies* v. *Fowler*, 43 L. J., Ch. 90; L. R. 16 Eq. 308; 29 L. T. 285.

A testatrix having, at the date of her will, 3,000*l.* 5 per cent. debenture bonds of the East India loan, bequeathed "the sum of 3,000*l.* invested in Indian security." The bonds were paid off by the Indian Government during her lifetime:—Held, that the legacy was demonstrative, and not specific, and not liable to ademption. *Mytton* v. *Mytton*, 44 L. J., Ch. 18; L. R. 19 Eq. 30; 31 L. T. 328; 23 W. R. 477.

A gift by will of "800*l.* invested in 2½ consols" was held to be a specific, and not a demonstrative, legacy, having regard to the other dispositions associated with it in the will, which were all specific or in the nature of specific bequests. *Mytton* v. *Mytton* (supra) discussed. *Pratt, In re, Pratt* v. *Pratt*, 63 L. J., Ch. 484; [1894] 1 Ch. 491; 8 R. 601; 70 L. T. 489.

A testator, after making various dispositions of parts of his estate, appointed S., his executor, to "execute the disposal of all his personal property and effects by sale at auction, the proceeds of which he gave to his two youngest nieces in London or elsewhere"; and the residuary clause

was, "The rest of my property in consols, after all my just debts and funeral expenses are paid, and what is found on my person and in the house, I give and bequeath" to five charities (naming them) "free of legacy duty":—Held, that the gift of the consols was specific, subject to his debts and funeral expenses; also that the bequest to the nieces was residuary. *Foæn* v. *Foæn*, 10 L. T. 290; 2 N. R. 452.

A gift of an annuity for the life of the donee, payable out of the testator's long annuities, and which he afterwards directed to be secured on his stock of long annuities:—Held, to be a general legacy, with a specific fund pointed out for its payment, and a sufficient portion of long annuities was directed to be sold out to answer the annuity. *Fryer* v. *Buttar*, 8 Sim. 442.

A legacy given in the following terms, "I give to A. B. the sum of 100*l.*, which said sum is owing to me by bond from her father":—Held, to be specific, and not demonstrative. *Davies* v. *Morgan*, 1 Beav. 400; 3 Jur. 284.

A legacy of 10,000*l.* consols, "now standing in my name":—Held, from the context of the will, not to be specific. *Auther* v. *Auther*, 13 Sim. 422; 7 Jur. 410.

A testator bequeathed to M. "the sum of 42,000*l.* new 3 per cents., more or less, at the time of my death," to B. "the sum of 42,000*l.*, more or less, at the time of my death, to be the Brazilian 5 per cent. stock," "and to L. the sum of 42,000*l.* Russian 5 per cent. stock." At the testator's death, there were no stocks answering to any of these descriptions. The testator had sold the new 3 per cents., and the Brazilian and Russian stocks had been converted by the respective governments:—Held, that the two former bequests were specific, and that the legacies therefore failed, but that the bequest of Russian stock was not specific and was to be treated as a legacy of 42,000*l.* payable out of such stock. *Tyler, In re, Tyler* v. *Tyler*, 65 L. T. 367.

M. S., by her will dated in 1865, directed the trustees thereof to stand possessed of the sum of 1,500*l.*, then invested in the Bombay, Baroda, and Central India Railway Company, upon trust for her brother, who had then disappeared, for life, if he should present himself to the trustees within five years after her death; and after the five years or the decease of her brother, whichever should first happen, she bequeathed the sum of 500*l.*, part of the Bombay, Baroda, and Central India Railway shares, to the trustees of a charity for the benefit thereof. M. S. was at the date of her will possessed of about 1,900*l.* in the railway, but at the date of her death in 1881 she was possessed of no property therein, and the brother had not appeared:—Held, that the legacy to the charity was a specific, and not a demonstrative, legacy, and that the investment out of which it was given having ceased to exist, the legacy was not payable to the charity out of the testatrix's general estate. *Sayer, In re, McClellan* v. *Clark*, 53 L. J., Ch. 832; 50 L. T. 616.

Legacy whether Specific or Residuary.]—A gift by a husband to his wife of "all my personal property, all sums of money which I may possess or may be owing to me at the time of my decease, together with all the furniture, farming implements," and other things in the family mansion, is not specific. *Fairer* v. *Park*, 45 L. J., Ch. 760; 3 Ch. D. 309; 35 L. T. 27.

When a testator gives his property generally by words such as "all my property," or "all that I have power over," and then proceeds to enumerate particulars, the subsequent enumeration of particulars does not cut down the effect of the general words, even when the particulars enumerated constitute only an insignificant portion, and not the principal part, of the testator's property. Therefore, where a testatrix made a holograph will in these words: "I do bequeath to A. all that I have power over, namely, plate, linen, china, pictures, jewellery, lace, the half of all valued to be given to H.; the servants in the house who have been a year with me to receive 10*l.*, and the clothes divided between them, also all kitchen utensils," and the articles enumerated formed an insignificant part of her property:—Held, that the bequest was not restricted to the articles specifically enumerated, but that it passed the whole of the real and personal estate of the testatrix. *King* v. *George*, 46 L. J., Ch. 670; 5 Ch. D. 627; 36 L. T. 759; 25 W. R. 638—C. A.

A testator by his will, after directing his executors to pay all his just debts and funeral and testamentary expenses, and giving pecuniary legacies to individuals and to charities, gave all his personal estate and effects of which he should die possessed, and which should not consist of money or securities for money, to E. absolutely; and he gave and devised all the rest, residue, and remainder of his estate, both real and personal, to his executors upon certain trusts; all the legacies to be free of legacy duty; the legacies for charitable purposes to be paid exclusively out of such part of his personal estate as might lawfully be appropriated to such purposes, and preferably to any other payment thereout:—Held, that the legacy to E. was not specific, and not exempt from the payment of the pecuniary legacies. *Robertson* v. *Broadbent*, supra, col. 1501.

Residuary disposition of all the testator's real and personal estate in Jamaica, in trust, to be remitted to England, was held specific, and not to include a debt originally upon bond and judgment in Jamaica, and afterwards further secured by bond and judgment in England, under which it was received, and being considered undisposed of, was applied, in the first instance, to the debts, &c. *Nisbett* v. *Murray*, 5 Ves. 149; 5 R. R. 6.

Held, as against a claim by pecuniary legatees to marshal, that where there was a gift of all property, freehold, copyhold, and leasehold, at particular places and elsewhere in the county of Somerset, and all other real and personal estates whatsoever (testator not having, as it appeared, and the court observed, any real or leasehold property except in Somersetshire), the gift was specific, and not liable to be marshalled either as to leasehold or other property. *Symons* v. *James*, 2 Y. & C. C. C. 301.

One devises to his wife all his personal estate at W.: this is a specific legacy, and to be preferred to pecuniary legacies in case of deficiency of assets; all the testator's personal estate that was at W. at his death shall pass, though not there at the making the will. *Sayer* v. *Sayer*, 2 Vern. 688; Pre. Ch. 392; Gilb. Ex. R. 87.

A bequest of "all my household furniture, implements of trade, cattle, sheep, and all the rest and residue of my moneys, securities for money, and personal estate, whatsoever and wheresoever, not hereinbefore disposed of," is a residuary bequest. *Taylor* v. *Taylor*, 6 Sim. 646.

A testator gave various annuities for lives, with bequests over of them, and charged them

upon his freehold and leasehold estates. He gave all his real and personal property to trustees in trust to pay the rents of his freehold, copyhold, and leasehold estates; and the interest of all his stock in the public funds, with the interest of all mortgages, annuities, and other securities of which he might die possessed, to his son for life, with a disposition in favour of the son's children, and after his death without any (which happened) the testator gave his freehold, leasehold, and copyhold estates to one daughter and her issue, and all his funded property and other personal estate to another daughter and her issue:—Held, that the gift of the leasehold estates to the one daughter was specific, but that the gift of the funded property to the other was not, and that the latter was consequently chargeable with the annuities, in priority to the former. Held, also, that in case of insufficiency the freeholds and leaseholds specifically devised and bequeathed must contribute ratably to the payment of the annuities. Held, also, that, for the purpose of this contribution, the values of the freeholds and leaseholds must be taken at the death of the testator, and not at the death of the tenant for life. *Fielding* v. *Preston*, 1 De G. & J. 438; 5 W. R. 851.

A testator gave his freehold and copyhold estates at H. and his leaseholds at C. and K., and all other his freehold, copyhold, and leasehold estates, and all the residue of his personal estate and effects, upon trust for his wife for life, and after her death for his four children, in equal shares, absolutely. The testator had no other leaseholds than those at C. and K.:—Held, that the gift of the leaseholds was specific. Report of *Fielding* v. *Preston* (supra) questioned. *Cook* v. *Drew*, 2 N. R. 437.

A testatrix, after making two specific bequests of sums in the long annuities, gave the residue of her property, all she did or might possess in the funds, copy or leasehold estates, to her sisters during their lives, and at the decease of both to be divided equally between her cousins. The testatrix's estate, after satisfying the specific bequests, consisted in part of 150*l.* per annum in the long annuities:—Held, that the sisters were entitled to receive the dividends accruing on the long annuities as a specific legacy. *Bethune* v. *Kennedy*, 1 Myl. & Cr. 114.

Where in a residuary gift specific property is bequeathed, the bequest may, nevertheless, be specific as to that particular property, though general as to the rest. A testator bequeathed his consols to A., and directed his executors to sell all such parts of his estate and effects as should not consist of ready money or money in the funds, and "to stand possessed of the moneys to arise thereby, with such ready money and the money he might have in the long annuities, upon trust" for A., B. and C.:—Held, that the long annuities were specifically bequeathed, and not liable to contribute towards the payment of general legacies. *Mills* v. *Brown*, 21 Beav. 1.

A daughter, who was entitled to two-thirds of her father's residuary estate, after payment thereout of his debts and other charges, died before his estate was completely administered. By her will she specifically bequeathed her estate, term, and interest in certain leaseholds forming part of her father's residuary estate to T. Most of her father's debts and charges had been before her death satisfied out of other parts of the estate, and the leaseholds were sold subsequently by her father's executors:—Held, that the legacy was specific, and that T. was entitled to two-thirds of the proceeds of the sale of the leaseholds free from all liability to contribute to the debts and charges of the testatrix's father. *Tootal, In re, Hankin* v. *Kilburn*, 24 L. T. 904; 20 W. R. 257.

A testator bequeathed specifically his household furniture, carriages, horses, and cattle. He also specifically bequeathed several of his books, and a painting and a bust, and he bequeathed "the remainder of his books and paintings, together with the residue of his property, of every nature and description":—Held, that the bequest of the "remainder of his books and paintings" was specific. *Langdale* v. *Esmonde*, Ir. R. 4 Eq. 576.

By deed and by will two funds of 37,914*l.* and 800*l.* consols were settled, with powers of varying investments, upon trusts for the nephews and nieces of H., subject to a power in H. of exclusive appointment among them. H. made and revoked a series of appointments, and ultimately, by a deed-poll in November, 1870 (at which time the fund had been reduced to 27,170*l.* consols and 8,000*l.* cash), H., after reciting a desire to revoke the subsisting appointment of the two funds, and to appoint the same amongst his nephews and nieces named, in the shares and proportions and in manner expressed, in pursuance of that desire appointed that the trustees should stand possessed of the two funds, "or other the stocks, funds, and securities" of which the same then consisted, or thereafter should or might consist, or upon which the same or any part thereof was then or thereafter should or might be invested, upon trust as to 7,000*l.* consols, part of the 37,914*l.* and 800*l.* consols, or other the stocks, funds, or securities of which the same might consist, for his nephew absolutely. H. then appointed in like manner further sums (making an aggregate of 37,000*l.* consols) in trust for the four nieces and nephew named; and the residue of the two several sums of consols or other the stocks, funds, or securities, in trust for his niece C. The trust funds at the death of H. were insufficient to pay the 37,000*l.* consols:—Held, that the gift to C. was residuary, and not specific, and that it failed altogether. *De Lisle* v. *Hodges*, L. R. 17 Eq. 440.

B. by voluntary settlement vested 600*l.* in trustees to pay the interest to herself for life, and after her decease, as to principal and income, for such of her issue as she should by deed or will appoint. By her will expressed to be made in execution of this power, she directed her trustees to call in the funds, and after payment of her debts and funeral and testamentary expenses, pay to her two daughters 75*l.* each, and the residue to S. to invest the same and apply the interest for the benefit of her granddaughter until she should attain seventeen, and then she directed S. to pay to her daughters a further sum of 100*l.* each and apply the interest of the residue for the benefit of her granddaughter until she should attain twenty-one, and then the principal to her absolutely. The legacies of 75*l.* each were paid to the two daughters, who subsequently sold four-fifths of their 100*l.* legacies to L., and afterwards the remaining one-fifth to C. By payment of costs the fund became reduced to 121*l.*, which L. claimed to receive in priority to C.:—Held, that the gift to the grand-daughter was the gift of the residue, and not of any specific sum; also, that L. and C. were entitled to the fund pari passu. *Harley* v. *Moon*, 1 Dr. & Sm. 623; 31 L. J., Ch. 140; 7 Jur. (N.S.) 1127; 6 L. T. 411; 10 W. R. 146.

A testator bequeathed the money to be received under a policy of assurance on his life, which, at the date of the bequest, would have amounted to 6,416*l.*, to trustees to invest it in government securities, and pay the income to his wife for life, and after her death, to pay thereout two sums of 2,000*l.* which he agreed to settle on his daughters; and he gave 1,000*l.*, part of the residue of the money, to A.; 1,000*l.* to B.; and "416*l.* residue and remainder of the moneys to be received under the policy after payment of the four several sums of 2,000*l.*, 2,000*l.*, 1,000*l.*, and 1,000*l.*, with any future additions that may be made on the policy," to C. The sum of 6,532*l.* was received under the policy, and invested in reduced 3 per cents., at 94. At the death of the widow the price of the stock had fallen to 89:—Held, that the legacy to C. was a specific legacy of 6,532*l.*; and consequently, that the legacies to A., B. and C. must abate ratably. *Walpole* v. *Apthorpe*, L. R. 4 Eq. 37; 15 W. R. 632.

A married woman having a testamentary power of appointment over a settled sum of stock by her will appointed the stock, "or the stocks or funds which might at her death represent such trust funds," to certain legatees: and not having exhausted the whole of the stock, appointed the residue to trustees upon trust to sell and divide the proceeds, after payment thereout of her debts and funeral and testamentary expenses, between her nephews and nieces:—Held, that the legacies were specific not general; and that the gift of the residue was also specific, but that the probate duty was chargeable exclusively on the residue. *Davies* v. *Fowler*, 43 L. J., Ch. 90; L. R. 16 Eq. 308; 29 L. T. 285.

A wife by a codicil, reciting that by her will she had bequeathed her residuary personalty to her husband's family, but that a sum of 12,000*l.* out of such residuary estate was derived from her husband, bequeathed it to his family in six shares of 2,000*l.* each upon the same trusts as were declared of her residuary personalty and the income thereof:—Held, that sums of 2,000*l.* were residuary bequests. *Webb* v. *Pollock*, 20 W. R. 796.

Testatrix gave nine legacies of 1,000*l.* each, part of 14,500*l.* South Sea annuities, and as to the residue of the said fund, and all other her personal estate, including such of the said legacies as should lapse by death before they should be transferable, upon trust to convert into money such part of the residuary personal estate as shall not consist of South Sea annuities, and invest such money with any money belonging to her at her decease in said fund of South Sea annuities, and from time to time invest the dividends, &c., of all such South Sea annuities as shall constitute her residuary personal estate in the said fund, till the youngest of the said legatees shall or would, if living, have attained twenty-one, and then to transfer the whole of such South Sea annuities to said nine legatees equally, with such survivorship as the original shares. The nine legacies of 1,000*l.* each only are specific; the remainder of the South Sea annuities is part of the general personal estate. *Richardson* v. *Brown*, 4 Ves. 177.

A husband gave legacies to his trustees and to his wife, and then gave to his trustees copyhold and leasehold property, and all the stocks, funds, and securities and all sums of money in his house or at his bankers or elsewhere at the time of his death, and also all debts or sums of money and securities for money owing to him, upon trust to pay to his wife in addition to the legacies and bequests therein given an annuity, and subject to the annuity gave this property to two children equally. He then gave several other specific bequests and gave the residue of his property to trustees upon trust for his wife, but subject to the payment of debts, legacies, and other charges:—Held, that the gift of copyhold and leasehold properties, and of stocks, funds, securities, and debts was specific, and that as there was no residuary estate out of which to pay the legacies they must fail. *Roffey, In re, Roffey* v. *Early*, 42 L. J., Ch. 472; 28 L. T. 617; 21 W. R. 646.

A bequest to a hospital of "all other of any personal estate which I can by law bequeath to such an institution," is specific. *Shephard* v. *Beetham*, 46 L. J., Ch. 763; 6 Ch. D. 597; 25 W. R. 764.

A testator directed his executors to apply 500*l.* for the support and education of his nephew, whose education for holy orders he directed to be under the control of certain persons named, and that, if any part of the sum should remain after providing for such support and education, such residue should be applied for certain religious purposes:—Held, that this was not a general legacy. *Lee's Trusts, In re*, Ir. R. 10 Eq. 157.

A testator by his will directed his executor to transfer any money that he might have in bank stock at his death into the executor's name, and pay the income to his wife for life, or until she should marry again, and if she should marry again that she should thereupon forfeit her life interest in the fund, and that the whole of the bank stock should, upon his wife's second marriage, be distributed as follows: 1,000*l.* to be retained by the said executor, and applied by him in having masses offered for the repose of testator's soul, and the residue to be distributed among such Roman Catholic charities in Dublin as his executor, in his absolute discretion, might think fit; but if his wife did not marry again, the testator directed that at her death his executor should retain a sum of 2,000*l.* out of the bank stock, and apply the same as he saw fit in having such number of masses as he approved of offered up for the repose of testator's soul, and for the repose of the soul of his wife; and that the residue of the bank stock which should remain after providing for such masses as aforesaid, should be divided in five equal parts, and paid to the treasurers of five different charitable institutions named in his will, and the testator appointed R., his executor, his residuary legatee. The testator died leaving his wife surviving. She never married again, and survived R. R. survived the testator, and died without having applied any portions of the bank stock in having masses said; and by his will he bequeathed all the property he derived in reversion or otherwise under the testator's will:—Held, that the gift of the residue of the bank stocks, after providing for such masses was a specific gift of the portion of bank stock remaining after taking 2,000*l.* out of it; that the testator's widow not having married again, and having survived R., the gift of 2,000*l.* failed, the event upon which it was given never having arisen; and that the legacy of 2,000*l.* fell into the general residue, and therefore passed to R. under the residuary bequest in the testator's will. *Fee* v. *M'Manus*, 15 L. R., Ir. 31—C. A.

Specific Gift—Amount.]—A testator bequeathed to his son, W. H., and his daughter, S. Y., all his shares in the B. and E. railway, and all his right, title, and interest therein and thereto. The shares in question were 100*l.* shares, of which 70*l.* had been called up, and the testator had paid the remaining 30*l.* per share in advance, under the provisions of the act of parliament authorising the railway :—Held, that the specific legatees were entitled not only to the 70*l.* paid up, but also to the money paid in advance. *Tanner* v. *Tanner*, 5 Railw. Cas. 184 ; 17 L. J., Ch. 115 ; 12 Jur. 87.

A. devised to his wife the dividends of 4,000*l.* bank stock for life, and on her decease to be transferred, and the produce thereof, 500*l.*, he gave to the plaintiff, the other to be divided among the defendants ; the plaintiff is entitled only to 500*l.*, not to 500*l.* stock. *Longdale* v. *Bovey*, 2 Anstr. 570.

Testatrix gave to trustees 1,500*l.* and certain Danish bonds, which she described thus : "My four Danish bonds, one of them for the sum of 485*l.*, another of them for the sum of 1,004*l.*, another of them for the sum of 1,315*l.*, and the other of them for the sum of 716*l.*, making the whole, together with the said sum 1,500*l.*, the sum of 5,020*l.*" She had not any Danish bonds for the specified amounts, but she had a mass of Danish bonds which, before making her will, she had received in exchange for other Danish bonds bequeathed to her by her husband, comprising four lots purchased by him at four several periods for sums corresponding with those specified in the bequest :—Held, it appearing that none of such bonds had been sold by the testatrix, that the bequest was a specific bequest of so much of her Danish bonds as was received by her in exchange for the bonds purchased by her husband with the specified sums. *Goodlad* v. *Burnett*, 1 K. & J. 341.

—— **After-acquired Stock.**]—Testatrix, reciting that she was possessed of 12,000*l.* 3 per cent. consolidated bank annuities standing in her name, gave and bequeathed the same, or so much of such bank annuities as should be standing in her name at her death. At the date of her will, and at her death, she had nearly 15,000*l.* in that fund, besides other stock. The excess beyond the sum mentioned did not pass. *Hotham* v. *Sutton*, 15 Ves. 319 ; 10 R. R. 83.

—— **After-acquired Freeholds.**]—A testator, by a codicil executed in 1867, devised to the defendant "all those three freehold cottages . . . and premises thereunto belonging which I have lately purchased." At that date he owned, as tenant in common with his brother, a share in a piece of garden-land adjoining one of the cottages, which he occupied as his residence from 1870 until his death in 1883. In 1875 the testator's brother devised to him his share in the garden-land, which the testator thenceforward occupied with his residence :—Held, that the garden-land did not pass under the devise in the codicil. *Cave* v. *Harris*, 57 L. J., Ch. 62 ; 57 L. T. 768 ; 36 W. R. 182.

—— **Subsequent Contract to Purchase.**]—A. devised to G. for life, "my cottage and all my land at S.," subject to the stipulation (among others) that the plantations, heather, and furze be all preserved "in their present state," and devised "all other my freehold manor, messuages, lands, and real estate whatsoever and wheresoever" to trustees upon trust for sale. At the date of his will A. had a small cottage with twenty-two acres of rough land held with it, and he subsequently contracted to purchase from G. a house of considerable size with gardens and land comprising ten acres closely adjoining the cottage and land. The contract was not completed at his death :—Held, that a contrary intention within the meaning of the 24th section of the wills act was not shewn with sufficient clearness, but that, construing the will as if it had been made on the day of the testator's death, having regard to the circumstances at that date, and to the residuary devise, the specific devise more aptly referred to the cottage and rough land, and did not carry the after-acquired property. *Portal and Lamb, In re*, 54 L. J., Ch. 1012 ; 30 Ch. D. 50 ; 53 L. T. 650 ; 33 W. R. 859 —C. A.

The words "all my land at S." would, if used alone, have been sufficient to carry the after-acquired land with the house standing upon it ; but upon the authority of *Ewer* v. *Hayden* (Cro. Eliz. 476, 658), by force of the context the word "land" must be taken as confined to lands in contradistinction from buildings. *Ib.*

Effect of s. 24 of Wills Act.]—Semble, per Lindley, L. J. : Sect. 24 of the wills act, which provides that a will shall speak as to the real and personal estate comprised in it (i.e. the will) from the day of the testator's death, leaves open the question whether a particular property passes by the specific or the residuary devise. *Ib.*

A gift of "all my shares and stock" in a will made since the Wills Act (7 Will. 4 & 1 Vict. c. 26) is a specific gift. Such a gift in a will made before the act would have been a specific gift of all the shares and stock possessed by the testator at the date of his will, and the effect of the act is to import into the gift all the stock and shares acquired by the testator before his death. A gift of "all my stock in the Midland Railway Company" is specific. A testator by his will, dated in 1869, made a bequest of "all my shares or stock in the Midland Railway Company" to trustees upon certain trusts. He was at the date of his will entitled to 1,000*l.* stock in that company. In February, 1871, he transferred the stock into the names of certain bankers to secure an advance made by them to A., who gave the testator an undertaking that the stock should be retransferred within three months. The testator died in 1872, and after his death the bankers sold the stock (which had never been retransferred) and applied the proceeds in reduction of the debt due from A. Under orders made in a suit to administer the testator's estate, A. transferred 500*l.* Midland Railway stock into court, but was unable to make any further transfer :—Held, that the trustees of the bequest were entitled to the stock so transferred into court, and not the residuary legatee. *Bothamley* v. *Sherson*, 44 L. J., Ch. 589 ; L. R. 20 Eq. 304 ; 33 L. T. 150 ; 23 W. R. 848.

Parol Evidence.]—A legacy of "100*l.* long annuities stock" :—Held, upon the context of the will, and the evidence of the state of the funded property, to be pecuniary and not specific. *Att.-Gen.* v. *Grote*, 2 Russ. & M. 699. Reversing 3 Mer. 316 ; 17 R. R. 91.

"Legacy of 100*l.* out of my reduced bank annuities" held pecuniary, the court leaning against holding a legacy specific, unless clearly intended; the court will not take into consideration evidence of the value of the stock at the date of the codicil, by which the legacy was given, nor an erasure of a legacy to the same person by the will, but decided upon the words of the codicil. *Kirby* v. *Potter*, 4 Ves. 748; 4 R. R. 342.

A testatrix by a codicil gave to A. and M. "50*l.* each of bank long annuities now standing in my name." At the date of the codicil, and at her death, she possessed long annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock. Evidence as to the state and value of the testatrix's property in the funds at those respective times was admitted, and on the effect of that evidence, and the language of the testamentary papers, taken together, the bequests to A. and M. were held not to be specific but pecuniary. *Boys* v. *Williams*, 2 Russ. & M. 689. Reversing 3 Sim. 563.

A testatrix was the owner of four debentures of the Spanish government, each of which had impressed upon it the words "Capital, 1,000*l.*," and purported to secure to the holder 50*l.* per annum in perpetuity, but redeemable on payment of "55*l.* per cent. on the nominal amount." By her will she bequeathed thus: The sum of 2,000*l.* Spanish bonds or coupons now belonging to me, and all dividends which shall be due to me thereon at the time of my decease":—Held, that two only of the debentures passed, and that parol evidence of declarations of the testatrix as to her intention was inadmissible:—Held, also, semble, that where there is a specific bequest, parol evidence is admissible to shew what property there is answering to the description of it; but that, if on that evidence it appears that there was property correctly answering the description, no evidence can be adduced to shew that it was intended to apply to other property. *Horwood* v. *Griffith*, 4 De G. M. & G. 700; 23 L. J., Ch. 465; 3 Eq. R. 158; 2 W. R. 71.

10. Cumulative Legacies.

Where Two Gifts by same Instrument.]—Where two legacies of different amount are given by the same will to the same person, the legacies are to be considered cumulative unless a contrary intention appears in the will. *Brennan* v. *Moran*, 16 Ir. Ch. R. 126.

A larger legacy being given after a less to the same legatee in the same will, the legatee decreed to take both. *Curry* v. *Pile*, 2 Bro. C. C. 225.

Two equal legacies in the same will, and to the same legatee, only one shall pass. Residue to six grandchildren, the name of one repeated, that of another omitted, all of them shall take. *Garth* v. *Meyrick*, 1 Bro. C. C. 30.

A testatrix gave the sum of 100*l.*, to be paid to her brother, C. T., immediately after the decease of her husband, and in default of issue of their marriage, and in a subsequent part of her will, she gave 100*l.* to the same brother, and concluded her will, by directing that legacies, to which no time of payment was affixed, should be paid within three months after the death of her husband:—Held, that the testatrix intended only to give a single legacy of 100*l.* to C. T. *Manning* v. *Thesiger*, 3 Myl. & K. 29; 4 L. J., Ch. 285.

Testator, having 7,300*l.* stock, bequeathed to his nephew J. C. 200*l.* stock, part of the aforesaid 7,300*l.*, in order that he might be effectually enabled to resist by law any attempt to deprive him of the little property which he and his connections possessed in Crookhaven; and in order the better to deter any person from attempting the same, he requested that 200*l.* of the above-named stock should be placed in the National Bank of Ireland, subject to the control of the said J. C. and the testator's niece M., should it be found necessary to call for or remove it from the bank, to defend any attempt that might be made to dispossess them. On no other account was the said 200*l.* stock to be removed from the National Bank; but the interest of the same might nevertheless be drawn for the use and benefit of the said J. C.; the principal to continue in the bank for ten years after the testator's death, at the expiration of which term it might be withdrawn for the benefit of his family, provided no threat or information of a claim was made against the property. The property was recovered by law against J. C. in the testator's lifetime, and the testator paid the costs of the action:—Held, that J. C. was entitled to two legacies of 200*l.* stock each absolutely. *Inglefield* v. *Coghlan*, 2 Coll. C. C. 247.

Bequest of 500*l.* each to the four children of his niece, A. B., nominatim, followed by a like gift to each of the children "that may be born" to any nephew or niece:—Held, not to include a fifth child of A. B., born at the date of, but not named, in the will; held, also, on the same will, by Sir John Leach, that a child born after the testator's death was not entitled, and, by Sir J. L. Knight-Bruce, that the four children did not take cumulative legacies. *Early* v. *Middleton*, 14 Beav. 453; 15 Jur. 867.

Testator, by codicil, gave legacies of 500*l.* each to A., B., C., and D., who, from the other parts of the codicil, and from the will, appeared to be grandchildren of his brother Henry. He added, "Item, I direct my executor to pay out of my personal estate the sum of 500*l.* apiece to each child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to them on his or her attaining the age of twenty-one." At the date of the codicil, and at the testator's death, there were to his knowledge living several grandchildren of his brothers, besides A., B., C. and D., and various children of the brothers of the testator, and the testator was survived by one at least of his brothers:—Held, that A., B., C. and D. were not entitled to double legacies. *Early* v. *Benbow*, 2 Coll. C. C. 342; 15 L. J., Ch. 169; 10 Jur. 169.

A testator directed his trustees to convert his personal estate and to stand possessed of the proceeds on certain trusts, "on trust to pay 2,000*l.* to each of his sons who should attain twenty-one, and on further trust to set apart and pay over 200*l.* to each of his sons on their attaining twenty-one." He also directed his trustees to divide the residue, "after full payment and setting aside of the sums directed to be paid and set aside":—Held, that each son on attaining twenty-one, was entitled to two legacies of 2,000*l.* each. *Burkinshaw* v. *Hodge*, 22 W. R. 484.

J. D., on his daughter's marriage, covenanted that in case he should depart this life in the lifetime of his said daughter, he would bequeath

to the trustee for the time being of her marriage settlement the sum of 5,000*l.*, to be held upon the trusts of the settlement. The daughter died first, and after her death J. D. made his will, and thereby bequeathed to the trustee for the time being of the settlement the sum of 4,000*l.* to be held upon the trusts of the settlement, this bequest being expressed to be in pursuance of the covenant in the settlement. Then followed a devise and bequest of the testator's residuary estate, a direction to pay debts, and, among other legacies to his children, a legacy of 4,000*l.* in trust for the children of the daughter above mentioned on attaining the age of twenty-one:—Held (1), that the testator's estate was not liable under the covenant in the settlement; (2) that the trustee for the time being of the settlement was entitled to the first sum of 4,000*l.*, notwithstanding that it was expressed to be bequeathed in pursuance of the covenant which was already inoperative at the date of the will; (3) that the two gifts of 4,000*l.* in the will were independent gifts, and that the daughter's children were entitled both to the second gift of 4,000*l.* and to the beneficial interest of the first gift of that amount. *Dyke, In re, Dyke* v. *Dyke*, 44 L. T. 568.

A testator by his will gave to each of two daughters the sum of 1,000*l.*, as and when they should respectively attain the age of twenty-five years or be married with the consent of his executors: but in case either should die under the age of twenty-five years or marry without consent, he directed that the legacy to such one should, after such decease of them respectively or their respectively marrying without consent, fall into the residue of his estate. By the same will he directed the sum of 1,000*l.* to be invested, as and when each of the same daughters should respectively attain twenty-five, to be settled upon trust for them respectively for life, with remainder to their respective children, with a proviso that, if either should die without leaving issue, the trustees of the will should stand possessed of the last-mentioned trust property, in trust for the survivor, upon the trusts of her original bequest: — Held, that the legacies directed to be settled were cumulative upon, and not substitutionary for, the legacies of the same amount previously given, but that they were respectively contingent upon the daughters respectively attaining twenty-five years of age; and therefore that the daughter who attained twenty-five, and had issue, did not take any interest in the legacy directed to be settled upon the other daughter, who died without issue, and without having attained twenty-five. *Thompson* v. *Teulon*, 22 L. J., Ch. 243; 1 W. R. 97.

—— **By different Instruments—General Principles.**]—Where two legacies are bequeathed to the same person by different testamentary instruments, e.g. one by the will, the other by the codicil, or where they are given by different codicils and both are given simpliciter, the court, in the absence of intrinsic evidence to the contrary, considers the legacies as cumulative. *Brennan* v. *Moran*, 6 Ir. Ch. R. 126.

In construing one legacy to be a satisfaction for another, regard must be always had to the particular circumstances, limitations, and funds out of which the two several legacies are to arise. *Heather* v. *Rider*, 1 Atk. 426.

Upon the question whether a legacy is cumulative or substitutional, the object of the court will be to ascertain the testator's intention, which can only be done by a close and critical examination of the language used in the testamentary instruments:—Held, upon the language of the codicil in this case, that a bequest contained in the codicil was in addition to the one given in the will. *Guy* v. *Sharp*, 1 Myl. & K. 589; Coop. t. Brough. 80.

Where a testator makes distinct gifts by distinct codicils, the presumption is, that the subsequent gifts are additional, and that the testator when he made the last had not forgotten the former, and did not mean to make the last either in vain, or in substitution for the former, but this presumption may be strengthened or rebutted by any circumstances, which by just inference and presumption may enable the court to ascertain the real intention of the testator. The nature of the legacies and the extent of interest in them which is given, are very material circumstances, but the court also regards the situation of the testator with respect to the persons for whom he is making provision, and the other directions which he may have given. *Robley* v. *Robley*, 2 Beav. 95; 3 Jur. 694.

Where a testator makes several gifts to a stranger by different instruments, the presumption is that such gifts are cumulative; and the circumstance of difference in their character or amount, or of a further motive or reason assigned upon the instrument, tends to strengthen the presumption. Circumstances in which one testamentary instrument is held to be in substitution for or a mere repetition of another. *Suisse* v. *Lowther* (*Lord*), 2 Hare, 424. Affirmed, 12 L. J., Ch. 315; 7 Jur. 407.

Where testator, in each of two testamentary instruments, gives a legacy simpliciter to the same person, court will presume both to be meant for him. And it is indifferent whether second legacy is of same amount, or less or larger than first. But where the same motive is attached to each, and the amounts are similar, it is taken to mean one legacy, but the double coincidence must occur. *Hurst* v. *Beach*, 5 Madd. 358; 21 R. R. 304.

Two legacies of equal sums being given to the same person, the one by the will, the other by the codicil, the legatee shall take both. In this case the rule in favour of the benefits being accumulative, as given by different instruments, was supported by particular expressions of kindness towards the legatee. *Ridges* v. *Morrison*, 1 Bro. C. C. 389.

Where legacies are given by different instruments (whether will or codicil, or two codicils) to the same persons, they will, in general, be accumulative. *Foy* v. *Foy*, 1 Cox, 163; 1 Bro. C. C. 393, n.

Pecuniary legacies are given by will, and afterwards greater legacies to the same persons by codicil; these no satisfaction for the legacies in the will, but the legatees to have both, because the codicil is part of the will. *Masters* v. *Masters*, 1 P. Wms. 423.

Legacies held cumulative — 1. The same legacy given by different instruments shall be cumulative. 2. Probate being granted as of a will and codicil, is conclusive as to the fact of their being distinct instruments. *Baillie* v. *Butterfield*, 1 Cox, 392.

Doctrine of the court in the construction of testamentary papers containing repeated legacies to the same objects, where the questions are, whether the instruments are intended to be either

wholly or in part additional, or substituted one for another, and whether particular legacies contained in such instruments are substitutional or cumulative. *Lee* v. *Pain*, 4 Hare, 201. And see *S. C.*, 14 L. J., Ch. 346; 9 Jur. 127, 247.

Legacies by different instruments to the same legatee simpliciter are cumulative unless the plain effect of the separate gifts is contradicted by the construction of the latter instruments, or by presumption of law. *Id.* 216.

The right to repeated legacies in such cases does not depend upon a legal presumption, but is founded on the construction and effect of the instruments; and no extrinsic evidence is admissible to prove that the legatee was intended to take one legacy only. If the right of the legatee to legacies repeated in different instruments depended upon a legal presumption only, evidence would be admissible to rebut it. *Ib.*

The right of a legatee under the general rule of construction as to several legacies bequeathed by different instruments is not repelled by circumstances which only raise a mere balance of argument that the legacies are substitutional. In such a case the pecuniary legatees, and not the residuary legatees, are entitled to the benefit of the doubt which the form of the bequests has created. *Id.* 236.

The repetition in the later instrument of some legacies, and not of others, implies that a benefit is intended in the case of the former legatees greater than in the case of the latter. The circumstance that the different legacies carry interest from different dates, or whatever else distinguishes the two legacies, is favourable to the claim of the legatee to both. *Id.* 222.

Legacies to strangers differ from legacies to children in that in the former case there is no relative measure of the bounty of the testator, and no ground for presuming that, as to them, every separate instrument is not to have a separate operation. *Id.* 224.

The legatee will take two legacies by different instruments, unless substitution be evidently intended from the character of the second instrument, or the expressions used, or the same sum be twice given and the same motive expressed in both instruments. *Wray* v. *Field*, 6 Madd. 300.

—— **Presumed Intention to give Cumulative Legacies.**]—A testator bequeathed as follows: "To M. C. B., besides Austrian metalliques for 104,000 florins, I give 5,000*l.*" By a subsequent codicil he bequeathed as follows: "Whereas I have, by indorsement on two little parcels containing 104 Austrian bonds of 1,000 florins each, given them to M. C. B., I confirm the said disposition, and add to it 20,000*l.*": —Held, first, that the testator, as to the Austrian securities, referred to the same subject-matter; and the testator not possessing such securities at his death, that the gift of them failed; and, secondly, that the gifts of the two sums of 5,000*l.* and 20,000*l.* (though both were connected with the gift of the same Austrian securities) were cumulative, and not substitutional. *Hertford* (*Marquis*) v. *Lowther* (*Lord*), *Berchtoldt's* (*Countess*) *Case*, 7 Beav. 107; 13 L. J., Ch. 41; 7 Jur. 1098. Affirmed, on appeal by Lord Chancellor, 11th February, 1845.

Testator gave the interest of 50,000*l.* to his wife for life, and directed that, after her death, 10,000*l.* should be set apart out of that sum in aid of his residuary estate, and he directed that the interest of the moneys arising from the sale and conversion of his real and personal estate not specifically devised and bequeathed, and also of the 10,000*l.*, should be paid to A. for life. By a codicil, the testator bequeathed to A. the legacy or sum of 10,000*l.*, to be paid to him "out of my residuary estate": —Held, that the sum of 10,000*l.* given by the codicil was distinct from the sum of 10,000*l.* given by the will. *Forbes* v. *Lawrence*, 1 Coll. C. C. 495.

A testator gave to E. 200*l.* and appointed him to be his executor; and declared that, if his (the testator's) son should not recover from his then mental malady, then he gave E. 200*l.* E. did not prove the will: —Held, that he was entitled to both legacies. *Wildes* v. *Davies*, 22 L. J., Ch. 495; 1 W. R. 253.

A testator, by will, bequeathed 4,000*l.* in trust after the death of his daughter C., who was then unmarried, for her children, to be paid, if the children were under twenty-one and unmarried at her death, to such of them as were sons at their ages of twenty-one, or sooner if the trustees should think fit, and to such of them as were daughters at their ages of twenty-one years, or days of marriage; but if, after C.'s decease, the children should all die under twenty-one, and unmarried, then in trust for C.'s next of kin in consanguinity. C. married and died, leaving R., her only son, an infant. After her death, the testator, by a codicil, bequeathed to his grandson R. 6,000*l.*, payable when he should attain the age of twenty-one years, and directed his executor to spend any sum not exceeding 250*l.* a year in the maintenance and education of R.: —Held, that the legacy of 6,000*l.* was not a substitution for the legacy of 4,000*l.*, and that R. was entitled to both legacies. *Wray* v. *Field*, 2 Russ. 257; 26 R. R. 61.

—— **Presumption Rebutted by Internal Evidence of Intended Substitution.**]—Where a legacy is given in each of two different instruments, the testator must, primâ facie, be understood to have meant to give to two separate legacies; but there may be circumstances to rebut presumption. A testator gave by his will "to my natural or reputed daughter, M. S., 2,000*l.*, for her own sole and separate use, the interest thereof, at 5 per cent., to be expended on her education," and intrusted the care and charge of her to his brother. In a codicil executed five years afterwards, he said, "I add 3,000*l.* to the 2,000*l.* to which M. S. is entitled under my will, by which she becomes entitled to 5,000*l.*" In about a year afterwards, and about ten days before his death, he made a further codicil, in which he said, "Not having time to alter my will, and to guard against any risk, I hereby charge the whole of my estates and property in the funds with the sum of 20,000*l.* for my daughter, M. D.," in this instance giving her his own name, as if she was a legitimate daughter: —Held, affirming the decree of the court below, that there were circumstances here to rebut the primâ facie presumption in favour of the last legacy being treated as additional, and that it was only in substitution for the sums previously given. *Russell* v. *Dickson*, 4 H. L. Cas. 293; 17 Jur. 307. Affirming 2 Dr. & War. 133; 1 Con. & L. 284; 4 Ir. Eq. R. 339.

The rule that legacies to the same persons by different instruments shall be accumulative repelled by internal evidence, and the circumstance that all the legatees by the first instrument

were legatees in the second, except those who were dead or had quitted the testator's service. *Barclay* v. *Wainwright*, 3 Ves. 462 ; 9 R. R. 245.

If a testator by will gives 2,000*l.* a year by way of jointure to any woman he might marry, and after marriage, by codicil, gives his wife the same jointure, she cannot claim both. *Osborne* v. *Leeds* (*Duke*), 5 Ves. 382 ; 5 R. R. 74.

A claim of double legacies by two instruments, a will and a codicil, repelled by the internal evidence and circumstances. Whether parol evidence of the intention of the testator can be read originally in opposition to a claim of double legacies, quære. *Id.* 369.

Legacies to the same persons by distinct instruments accumulative ; subject to be repelled by internal evidence, as where the same sum is given for the same cause. Whether by the mere equality of amount, quære. *Benyon* v. *Benyon*, 17 Ves. 34 ; 11 R. R. 121.

A testator, having, at the time of making his will, 2,000*l.* 3 per cent. consols, but not mentioning that fact in his will, directed his executors to invest, out of his residuary estate, a sufficient sum in the 3 per cent. consols to produce an annual income of 279*l.* 8*s.*, which he bequeathed to his wife for life, and, after her death, he bequeathed 2,000*l.* stock, part of the fund to be so purchased, to five trustees, upon trust, out of the dividends, and out of the rents of certain leasehold tenements, to pay to poor decayed tradesmen and poor women, residents of Aylesbury, a sum of 5*l.* each per annum ; and if there was a surplus of the dividends, to pay such surplus among those poor men and women as the trustees should think proper. He afterwards sold out the 2,000*l.* 3 per cents., and by a codicil, reciting that he had sold out "the 2,000*l.* stock, as mentioned in his will," and bought long annuities with the proceeds, he bequeathed the dividends of those annuities to his wife for life, and, after her death, he bequeathed the annuities to the five trustees above referred to, upon trust, out of the dividends and out of the rents of the leaseholds before referred to, to pay to poor decayed tradesmen and poor women, natives and residents of Aylesbury, a sum of 5*l.* each per annum ; and that if there was a surplus of the dividends, to pay to six poor men and six women the sum of 7*l.*, instead of 5*l.* each :—Held, that the bequests contained in the codicil were in substitution of the benefits given by the will, and were not cumulative. *Att.-Gen.* v. *George*, 12 L. J., Ch. 165 ; 7 Jur. 141. Reversing 8 Sim. 138.

By the first codicil testator gave to his illegitimate children an annuity of 100*l.* each and a sum of 1,000*l.*, with a power to certain trustees to advance 250*l.* out of it. The second codicil related to other matters. By the third codicil having, as he said, republished the first two (in the first of which he had, as it afterwards appeared, introduced the name of Phillis), he proceeded to appoint two persons, different from the trustees of the first codicil, to be guardians and trustees of Phillis and any other natural child he might have ; and he gave to Phillis a specific debt of 1,546*l.*, and two further sums of 1,000*l.* and 4,000*l.* respectively. The fourth codicil did not affect the question. By the fifth codicil, testator having then another natural daughter, Sybil, and having, as he said, purchased other estates, declared that they should be subject to the terms of his last will, with the further proviso that they should be charged with two sums of 5,000*l.* to be paid to the trustees of the third codicil, in trust for his two daughters, to be devested on death before twenty-one, or marriage. By the sixth codicil, the testator, having then a third daughter, confirmed his will and the second and fifth codicils ; and after reciting that he had by one or both of the said codicils provided for his daughter Phillis, he gave the same provision to his two other daughters :—Held, that the legacies were not cumulative, and that the provisions made by the fifth codicil alone remained in force. *Robley* v. *Robley*, supra, col. 1528.

Legacies nearly similar given to the same persons by different instruments, legatees not entitled to both. *Moggridge* v. *Thackwell*, 1 Ves. J. 464 ; 3 Bro. C. C. 517 ; 2 R. R. 140. Affirmed, 13 Ves. 416 ; 6 R. R. 76.

Legacies to the same persons by different instruments generally presumed additional, unless contrary intent appears, of which simple repetition, if exact, is sufficient proof. *Id.* 472.

Where, looking to the whole contents of the two instruments, the testator's intent might be inferred that an annuity given by the codicil was intended to be only a substitute for the two others, the court, on error, held that the bequests were not cumulative. *Hemming* v. *Gurney*, 1 Dow, (N.S.) 35 ; 1 Bligh (N.S.) 479.

Equal sums given to the same person by a will and codicil held, from the character and objects of the latter, to be substitutional, and not accumulative, although the legacy given by the codicil was only conditional. *Fraser* v. *Byng*, 1 Russ. & M. 90. And see *Allen* v. *Callow*, 3 Ves. 289 ; *Tuckey* v. *Henderson*, infra ; *Gillespie* v. *Alexander*, 2 Sim. & S. 145 ; 3 L. J. (O.S.) Ch. 52.

—— **Partial Similarity Insufficient to Rebut Presumption.**] — A testator, by codicil, gave legacies of various amounts to nine legatees, and a year's wages to every one of his servants. He afterwards made a second codicil, which was substantially a copy of the former, except as follows : one of the legatees named in the first codicil was not named in the second ; three of the legacies given by the second codicil were less than those given by the first to the same persons ; one legacy was given by the second codicil to a person not named in the first ; the gift to servants by the second codicil was of "a year's wages liberally interpreted," and the second codicil contained a direction for payment of duty on legacies :—Held, that the case was not taken out of the general rule that the gift of a legacy by a subsequent instrument to a person who takes a legacy under an earlier instrument is cumulative, and not substitutionary. *Wilson* v. *O'Leary*, 41 L. J., Ch. 342 ; L. R. 7 Ch. 448 ; 26 L. T. 463 ; 20 W. R. 501.

A testatrix, by a codicil, gave legacies to legatees under her will. Some of such legacies were of the same amounts as the legacies given to the same persons in the will :—Held, that these legacies were cumulative, and not substitutional. *Cresswell* v. *Cresswell*, 37 L. J., Ch. 521 ; L. R. 6 Eq. 69 ; 18 L. T. 392 ; 16 W. R. 699.

—— **Presumption supported by Internal Evidence.**] — Upon the question whether a legacy is cumulative or substitutional, the object of the court will be to ascertain the testator's intention, which can only be done by a

close and critical examination of the language used in the testamentary instruments:—Held, upon the language of the codicil in this case, that a bequest contained in the codicil was in addition to one given by the will. *Guy* v. *Sharpe*, 1 Myl. & K. 589; Coop. t. Brough. 80.

A testator, having provided for his daughter by his will, by a codicil, after stating that he was most anxious to secure her comfort and happiness, gave her a further sum of 1,000*l.* for life, for the maintenance of herself, establishment, and family, out of respect to the memory of the testator's wife:—Held, that the legacies were cumulative. *Mackinnon* v. *Peach*, 2 Keen, 555; 7 L. J., Ch. 211.

A testator bequeathed to his daughter A. 1,000*l.* and 100 banking shares, and to his daughter B. 3,000*l.* and 100 shares. By a codicil he revoked both gifts to A., and bequeathed to her 500*l.* and the 100 shares specified in his will; but to B. he revoked the 3,000*l.* only, and gave to her 1,300*l.* and 100 shares:—Held, that B. was entitled to 200 shares, the legacies being cumulative. *Lobley* v. *Stocks*, 19 Beav. 392.

A testatrix, by her will, gave to A. 50*s.* a month for life "in lieu of him giving up all the other notes and claims"; and, by a codicil, she gave him "3*l.* a month" for life, and directed all other things to be paid and done as the will ordered:—Held, that A. was entitled to both the monthly payments for his life. *Lord* v. *Sutcliffe*, 2 Sim. 273.

Testator having, by his will, given sums absolutely to his four sons, and life interest in other sums to his wife and four daughters, afterwards, upon the death of one of his sons, to whom 2,000*l.* was given by the will, made a codicil in these terms:—"In consequence of the death of my son James, I have opened my will, and now wish to bequeath to my wife 600*l.* a year, to my three sons 2,000*l.* each, and to my four daughters 300*l.* a year each, and at the death of my wife the 600*l.* a year to be equally divided amongst my daughters. This memorandum will, I hope, be attended to in case of my death before I make the legal alteration in my will":—Held, that the legacies given by the codicil were additional to those given by the will. *Tweedale* v. *Tweedale*, 10 Sim. 453; 9 L. J., Ch. 147; 4 Jur. 263.

Legacy by will, the same sums given by a codicil to the same person upon a contingency, was held additional. *Hodges* v. *Peacock*, 3 Ves. 735.

By her will, a testatrix, under an existing power, appointed 1,000*l.* to A. By a subsequent testamentary instrument she bequeathed 1,000*l.* to A.:—Held, that the gifts were cumulative. *Tuckey* v. *Henderson*, 33 Beav. 174.

By a marriage settlement a sum of 4,000*l.* was to go after the decease of husband and wife and the husband's father, and subject to the father's power of appointment, to the children of the marriage equally, and the real estates of the wife were charged with a sum of 8,000*l.*, which was to be divided among the children in such shares and manners as she should appoint. The wife, by her will, appointed 100*l.* to the eldest son of the marriage, and the remaining 7,900*l.* to the other children of the marriage, directing the shares to vest in sons on their attaining twenty-one, and in daughters on their attaining that age or marriage with their father's consent; she likewise created a further charge, in order that such younger child's share of the 8,000*l.* might be augmented to 5,000*l.*, and by the same instrument she, in exercise of a power of appointment which she had under the will of C., appointed C.'s residuary property to the first and other sons of the marriage successively who should attain twenty-one, and if there were no such sons, to the daughters of the marriage who should attain twenty-one. Afterwards, by a codicil, she directed that the same fortune should be given to any child or children of whom she might be delivered, as was given by her will to each of her daughters, and that if no son of the marriage should live to attain twenty-one, or be married, each of her daughters should be entitled to have for fortune 10,000*l.*, to be paid in the manner and at the times mentioned in her marriage settlement or will respecting the fortunes of her daughters. The wife died in the husband's lifetime, leaving a son and three daughters her surviving; and in the events which happened, two daughters, the only surviving children of the marriage, became entitled under the settlement to the 4,000*l.*, and under their mother's appointment to the residuary property of C.:—Held, that they were entitled to receive 10,000*l.* exclusive of and in addition to their shares of the 4,000*l.*, and of the residuary property of C. *Whyte* v. *Kearney*, 3 Russ. 208; 6 L. J. (o.s.) Ch. 22. See also *Lyon* v. *Colville*, 1 Coll. C. C. 449; *Mackenzie* v. *Mackenzie*, 2 Russ. 262.

—— **By Express Words.**]—A testator gave a legacy of 7,000*l.* to his wife, and other similar legacies. By a codicil he gave a legacy of 6,000*l.* to his wife, and other legacies, and he directed "that, so far as the codicil was in addition to any testamentary document he had already made, he wished it to take effect, and not cancel or revoke any prior document which might exist":—Held, that the legacies were cumulative. *Townsend* v. *Mostyn*, 26 Beav. 72.

By his will a testator directed his property to be divided into eight equal shares, one to each of his seven children then living, naming them, of whom R., a daughter, was one, and the other share to the children of a deceased son. The share of each daughter was to be invested, and the interest was to be paid to her as it became due, and after her decease to her children. By a codicil the testator directed his executors to transfer 300*l.* consols as a legacy to R., "my daughter named in my will, in trust as otherwise therein stipulated, anything therein to the contrary notwithstanding":—Held, that the 300*l.* consols was additional to the gift to R. in the will, and that she took the same absolutely, subject nevertheless to have it secured. *Ledger* v. *Hooker*, 18 Jur. 481.

Testator, by his will, gave to his son a legacy of 3,000*l.*, and by a codicil a legacy of 4,000*l.*, in addition to the legacy of 3,000*l.* given by his will:—Held, that the son was entitled to a legacy of 3,000*l.*, in addition to the legacy of 4,000*l.* *Gordon* v. *Hoffmann*, 7 Sim. 29.

Two Codicils—Same Gift.]—Where the same thing is given by two codicils, it can be considered only as a repetition. The same rule as to legacies of the like sum, or of the like quantities or things, though given in different writings, unless it can be shewn it was testator's intention to make them additions. Legacies of sums, values, or quantities, given by a last, greater than by a first, codicil, are not additional, but augmented ones. Legacies of sums, quantities, or values given by a last, less than by a first,

codicil, are not additional, but ademptions or diminutions pro tanto. *St. Albans (Duke)* v. *Beauclerk*, 2 Atk. 636. *And see* 1 Bro. C. C. 392.

The rule to be collected from passages out of the "Code and Digest" is, that the apparent intention of the testator must govern in double legacies. Where another legacy is given for the same cause, though in different instruments, there shall not be a double legacy. The gift of a residue which is totidem verbis the same in the first and fourth codicils makes it manifest testator intended to substitute one in place of the other. *Id.* 639.

Where a second codicil appears to be only a repetition of the former (with the addition of a simple legacy), the legacies are not doubled. Parol evidence read to shew they were intended as accumulative. *Coote* v. *Boyd*, 2 Bro. C. C. 521.

A testator made a will and three codicils. By the first codicil, he gave to his daughter E. and her children 1,000*l.* in addition to her share under the will; and to his daughter H. his furniture, and 2,000*l.* in addition to her share under the will; and he directed that, on the death of H., the 2,000*l.* should revert to other persons. By the second codicil, he gave to E., her husband and children, 1,000*l.*, with ultimate remainders over; to H., for her separate use, the furniture; and to H. and any husband and children 1,000*l.*, with ultimate remainders over. The third codicil was in the same terms as the second, except that, by words in parenthesis, it excluded the husband of E. from any share in the 1,000*l.* It was dated three days after the second:—Held, that the legacies were substitutional. *Roxburgh* v. *Fuller*, 11 L. T. 587; 13 W. R. 39.

A testatrix gave legacies by the first codicil to her will; and by the second codicil gave other legacies of the same amount to the same persons, and expressed in the same words:—Held, that these legacies were not cumulative. *Tatham* v. *Drummond*, 33 L. J., Ch. 438; 10 Jur. (N.S.) 557; 10 L. T. 233; 3 N. R. 706; 12 W. R. 620.

A testator gave two legacies of 5,000*l.* each to the same person by two codicils executed at the same time, and in nearly the same words, neither codicil comprising any other legacy. One instrument he sent to his solicitor, and the other he sent to the legatee. Three years afterwards he withdrew the codicil held by his solicitor and sent it also to the legatee. He had previously executed his will in duplicate, sending one copy to his solicitor and the other to the principal beneficiary:—Held, that the legacies given by the two codicils were substitutional, and not cumulative. *Whyte* v. *Whyte*, 43 L. J., Ch. 104; L. R. 17 Eq. 50; 22 W. R. 180.

Unconditional legacy given by a third instrument which is nearly similar to the first held to be merely a substitution for legacy conditional under the first. *Att.-Gen.* v. *Harley*, 4 Madd. 263; 20 R. R. 296.

—— **Different Gifts.**]—A., by a codicil to his will in 1849, bequeathed the residue of his personal estate to three of his sons, X., Y. and Z., in equal shares; and by a second codicil, dated in October, 1854, he gave to his son Z. a legacy of 4,000*l.* A. died in March, 1857, leaving a widow and fifteen children him surviving, six of whom were not mentioned in his will and codicils. On a bill by the trustees for the opinion of the court:—Held, that the gift of the pecuniary legacy to Z. was additional to, and not in substitution for, the gift of the one-third share of the residue. *Gordon* v. *Anderson*, 4 Jur. (N.S.) 1097.

Testator gave 6,000*l.* to each of his daughters, then or thereafter to be born, payable at twenty-one or marriage, and directed that the portions of such of them as should die before they were payable should sink into the residue; and after devising his real estates to his sons and daughters in strict settlement, he bequeathed the residue of his personal estate to trustees in trust for such of his children as should first be entitled to his real estates. By a codicil, the testator gave to each of his daughters living at his decease 1,000*l.* in addition to the 6,000*l.* mentioned in his will, for the same uses, &c., as were mentioned therein. By a second codicil, which commenced and concluded with the same words as the first, but did not refer to it, the testator gave to each of his two daughters 2,000*l.* in addition to the 6,000*l.* mentioned in his will, and directed that the portions of his children, who should die before they were payable, should not fall into the residue, but go to his heir. The testator left two daughters:—Held, that the legacies given to them by the codicils were cumulative. *Watson* v. *Reed*, 5 Sim. 431.

By her will, a testatrix gave 1,000*l.* stock to trustees, upon trust to apply the dividends for the maintenance of her grand-daughter until she attained twenty-two, and then in trust for her absolutely; but if she died under twenty-two, then in trust for the testatrix's children living at the grand-daughter's death. By a codicil, the testatrix revoked the above trusts, and in lieu thereof directed the trustees to apply the dividends for the maintenance of the grand-daughter until she attained twenty-two, and then in trust for her for life, for her separate use; and in the event of her dying either above or under twenty-two leaving lawful issue, in trust for her children equally; but if she died without leaving lawful issue, then in trust for the testatrix's children living at the grand-daughter's death, and the children of any child who had previously died. By a subsequent codicil, the testatrix declared that she had altered her views respecting her grand-daughter as to the 1,000*l.* left in the will, which (the testatrix now thought) might prove a snare for her, and the testatrix left 500*l.* for schooling and board:—Held, that the legacy of 500*l.* was given in addition to, and not in substitution for, that of 1,000*l.* given by the codicil. *Sawrey* v. *Rumney*, 5 De G. & Sm. 698; 17 Jur. 83.

A. gives by will to B. 500*l.*, and by codicil an annuity, and by another codicil in these words, "I add this codicil to my will, I give to B. 1,000*l.*":—Held, B. was entitled to both sums. *Hatton* v. *Hooley*, Lofft, 122. Affirmed, sub nom. *Hooley* v. *Hatton*, 1 Bro. C. C. 389, n.

Will and Incomplete Testamentary Papers.]—Where a testator had given several legacies by a complete will and codicils, and by a subsequent instrument, purporting to be a "last will and testament," proceeded to give several legacies, different in amount, to the same legatees, but suddenly died before the second will was completed, and the ecclesiastical court granted probate of both instruments as one will:—Held, that such legacies were cumulative. *Armstrong* v. *Millar*, 1 Longf. & T. 557; 4 Ir. Eq. R. 659.

Testator, by a will duly attested, gave legacies

to various persons, charged upon his real and personal estates, and payable at the end of two years after his death; and he directed that, if his property should be more than sufficient to pay the legacies, they should be increased portionably. By an unattested paper, purporting to be instructions for a will, but admitted to probate, the testator gave legacies to many of the legatees in the will, either individually, or as members of a family; but the directions as to the time of payment, and the increase of the legacies, were omitted:—Held, that the legacies in the unattested paper, were not substitutional for the legacies in the will, but cumulative. *Strong* v. *Ingram*, 6 Sim. 197.

Several papers were admitted to probate as making together one will, in the first of which testator gave to his wife the whole of his property, and appointed her sole executrix, but in a later paper he gave it to her, with two others as co-trustees, in trust for herself for life, then for the payment of various legacies, some of which were repeated in different papers, then for his residuary legatee, but never appointed any:—Held, that the original gift to the wife was only revoked to the extent of the subsequent legacies, and that such of those legacies as had been repeated in different papers were not cumulative. *Brine* v. *Ferrier*, 7 Sim. 549.

Where a testamentary instrument incomplete as a will appears, on the face of it, to be intended as a substitution for a former complete will, the legacies given by the latter only shall take effect, notwithstanding both instruments are proved in the spiritual court; but where a former will makes a charge of legacies generally on land, and a subsequent will giving legacies is not attested so as to affect the land, yet the general charge of the former shall include the legacies given by the latter; otherwise where the charge is made of particular legacies. *Jackson* v. *Jackson*, 2 Cox, 35.

Donatio Mortis Causâ and Will.]—See *Hambrooke* v. *Simmons*, 4 Russ. 25.

Second Legacy whether subject to same Incidents as First—Where Substitutional.]—A testator bequeathed to his nieces 500*l.* owing to him from A., and he directed that if his estate should not be sufficient to pay his legacies in full, they should (exclusive of that to his nieces) abate proportionally, and if it should be more than sufficient they should be increased proportionally. The testator received the debt, and by subsequent codicil, "in the place of the intended legacy," gave his nieces 500*l.* to be paid out of his general personal estate:—Held, that the second legacies were substitutionary and subject to the same incidents, and that the nieces were not entitled to have them increased proportionally out of the undisposed of estate. *Duncan* v. *Duncan*, 27 Beav. 392.

A testatrix appointed a legacy out of a particular fund. By a codicil she revoked it, and gave a legacy of half the amount only, but without referring to the particular fund:—Held, that the latter was a mere substitution for the former; and the particular fund failing, that the legatee was not entitled to be paid out of the general assets. *Bristow* v. *Bristow*, 5 Beav. 289.

—— **Where Cumulative.**]—Where a legacy is given subject to specified conditions, and another legacy is given by a subsequent codicil to the same object simpliciter, without any intimation of an intention to import the conditions of the first legacy:—Held, to be cumulative and payable out of the same funds, and upon the same conditions, including exemption from legacy duty. Therefore, where a legacy of 500*l.* was given by will to a charity out of pure personalty, and a legacy of 1,000*l.* was given by codicil simpliciter to the same charity:—Held, that the second legacy was cumulative, but liable to abate, according to the proportion of the pure to the mixed personalty. *Johnstone* v. *Harrowby* (*Earl*), 1 De G. F. & J. 183; 29 L. J., Ch. 145; 6 Jur. (N.S.) 153; 1 L. T. 390; 8 W. R. 105.

A man by his will, gives to his executor an annuity of 200*l.*, and charges his real estate with the payment of it. The testator, by a codicil attested by two witnesses only, gives his executor another annuity of 100*l.*, "payable as mentioned in my will":—Held, that the executor was well entitled to both the annuities, but that the annuity given by the codicil was payable out of the personal estate. *Wright* v. *Cadogan* (*Lord*), 1 Bro. P. C. 486.

And see Cases sub tit. LEGACY DUTY (REVENUE).

Gifts to Servants.]—Where a testator makes several gifts to a stranger by different instruments the presumption is, that such gifts are cumulative, and the circumstance of differences in their character or amount, or of a further motive or reason assigned upon the instruments tends to strengthen the presumption. Several bequests to a servant of the testator made in eight different instruments:—Held, to be all cumulative, notwithstanding the gift to the party by the last codicil was much larger than any of the preceding gifts to him, and the whole amount given by that codicil was expressed as being given to provide for the servants of the testator. *Suisse* v. *Lowther* (*Lord*), 2 Hare, 424. Affirmed, 12 L. J., Ch. 315; 7 Jur. 407.

Testator bequeathed to his servant C. a legacy of 6,000*l.* He afterwards gave to his servants who should have been living with him two years at the time of his death a year's wages:—Held, that C., who had been living with the testator two years at the time of his death, was entitled to a year's wages, in addition to the 6,000*l.* *Ford* v. *Ruxton*, 1 Coll. C. C. 403.

Testator, by his will, gave to his son 20*l.* to be paid within one month after his death, and 500*l.* to his executors in trust to pay 50*l.* to his son every six months, the first payment to be made six months after his death, and to such female servants who might be in his service at his decease, 5*l.* apiece for mourning. By a codicil, he gave 2,000*l.* to Bridget Bibby, in consideration of her faithful services, and directed that sum to be paid to her within six months after his decease. By a subsequent testamentary instrument, which purported to be his last will, but which he left unfinished, he gave 19*l.* 19*s.* to his son, to be paid within ten days after his death, and to Bridget Bibby, if she should be in his service at his decease, 500*l.*, to be paid at the end of nine months after his decease. B. Bibby was the only female servant who was in the testator's service at his decease:—Held, that the legacies of 19*l.* 19*s.* and 500*l.* were substitutions for the legacies of 20*l.*, 5*l.*, and 2,000*l.*, previously

given to the son and B. Bibby respectively. *Kidd* v. *North*, 14 Sim. 463. Affirmed, 2 Ph. 91; 16 L. J., Ch. 116; 10 Jur. 995.

A bequest by the will of the testatrix of an annuity to her "servant" E. H., and a bequest by a codicil three years afterwards of an annuity of the same amount to her "servant" E. H.:—Held, to be cumulative, the word "servant" not expressing a motive, but being descriptive only. *Roch* v. *Callen*, 6 Hare, 531; 17 L. J., Ch. 144; 12 Jur. 112.

A testator gave a legacy to his "servant and friend" S. He also bequeathed a year's wages to all his servants:—Held, that S. took under the bequest to servants, as well as the legacy to himself individually. *Wilson* v. *O'Leary*, 41 L. J., Ch. 342; L. R. 7 Ch. 448; 26 L. T. 463; 20 W. R. 501.

Parol Evidence.]—Two legacies by same instrument; to prove two were intended, onus is on legatee, but if by separate instruments on heir to disprove. *Hooley* v. *Hatton*, Dick. 462.

A claim of double legacies by two instruments, a will and a codicil, repelled by the internal evidence and circumstances. Whether parol evidence of the intention of the testator can be read originally in opposition to a claim of double legacies, quære. *Osborne* v. *Leeds (Duke)*, 5 Ves. 369; 5 R. R. 74.

Under what particular circumstances, and to what extent parol evidence may be resorted to, upon the question of cumulation or substitution, quære. *Guy* v. *Sharp*, 1 Myl. & K. 589; Coop. t. Brough. 80.

Where a legacy is given for a particular purpose (as a portion), and another bounty is afterwards given for the same purpose, it is considered as implying an intention in the testator to satisfy the legacy; but this being only a presumption, may be rebutted by evidence showing a contrary intention. *Debeze* v. *Mann*, 1 Cox, 346; 1 R. R. 57. Affirmed, 2 Bro. C. C. 519.

In an application for a commission to examine evidence to show that the legacies given in two codicils were both intended for the legatee, the legatee ought to swear she believes that to have been the intention. *Coote* v. *Coote*, 1 Bro. C. C. 448.

Parol evidence admitted to explain a will, where doubtful, not to contradict. As, on a legacy to the four children of B., and afterwards another to the children of B.; B. having then two children by the first husband, four by a second; admitted to show the first legacy was restrained to the last four children, not so of the other legacy. *Hampshire* v. *Peirce*, 2 Ves. Sen. 216.

Where a second codicil appears to be only a repetition of a former (with the addition of a simple legacy), the legacies are not doubled; parol evidence read to show they were intended as accumulative. *Coote* v. *Boyd*, 2 Bro. C. C. 521.

The general doctrine of the admissibility of parol evidence to explain a testator's intention, and the cases of *Booker* v. *Allen*, *Weall* v. *Rice*, and *Lloyd* v. *Harvey* (2 Russ. & M. 270, 251, and 310 respectively) considered. *Hall* v. *Hill*, 1 Con. & L. 120; 1 Dr. & War. 94; 4 Ir. Eq. R. 27.

At the death of a testator two copies of his will were produced, one of which had been retained by himself, the other deposited with his bankers; each with a codicil containing the same gift in the same words, but of different dates, and attested by different witnesses. Probate having been granted of the duplicate will and of the two codicils:—Held, that evidence by one of the attesting witnesses to one of the codicils was admissible for the purpose of showing, from the circumstances attending the execution, that the two codicils were not two but one instrument, and accordingly that the legatee therein named was entitled to one legacy only. *Hubbard* v. *Alexander*, 45 L. J., Ch. 740; 3 Ch. D. 738; 35 L. T. 52; 24 W. R. 1058.

When after a legacy has been given by one instrument, a legacy of equal, greater, or less amount is given to the same legatee by another instrument, they are primâ facie cumulative. Evidence that the testator had in his possession his first codicil at the time he made his second was admitted, so far as it went to prove the position of the testator, but rejected, so far as it suggested any motive for his making the second codicil:—Held, also, that a letter written to the testator by his solicitor, advising him to recopy his first codicil, was inadmissible. *Wilson* v. *O'Leary*, 41 L. J., Ch. 342; L. R. 7 Ch. 448; 26 L. T. 463; 20 W. R. 501.

And see ante, cols. 662—677.

11. Charitable Legacies.

What Valid.]—A gift for the encouragement of a mere sport or game, even if such sport or game is calculated to promote the health of the community, is not for a general public purpose in such a sense as to be a charitable gift. A gift for the encouragement of yacht racing may, therefore, be void on the ground of perpetuity. *Nottage, In re, Jones* v. *Palmer*, 64 L. J., Ch. 695; [1895] 2 Ch. 657; 12 R. 571; 73 L. T. 265; 44 W. R. 22—C. A.

Quære, whether a direction to bury testator in a monument to be erected in unconsecrated ground, is void. *Mitford* v. *Reynolds*, 1 Ph. 185; 12 L. J., Ch. 40.

Bequest for purchasing the discharge of poachers, committed to prison for nonpayment of fines, fees, or expenses under the game laws:—Held, void, as encouraging offences, and opposed to public policy. *Thrupp* v. *Collett*, 26 Beav. 126; 5 Jur. (N.S.) 111.

—— **Trust for Accumulation in favour of Charities.**]—A testator, after bequeathing certain legacies, left his residuary personal estate upon trust to pay certain annuities out of the yearly income, and directed that the surplus income of any year was to be given to charities named in his will. Such surplus income was, however, to be accumulated until the death of the last of the annuitants, when the capital of the residuary estate, together with the accumulated income, was to be divided equally among the charities. The will contained no provision for making good any deficiencies in the annuities that might occur in any year out of the accumulations of income of previous years:—Held, that the accumulations had been directed solely for the benefit of the charities; that the charities took in equal shares; that the principle laid down in *Saunders* v. *Vautier* (Cr. & Ph. 240) applied as well to charities as to individuals, and that, accordingly, the trust for accumulation was inoperative, and the charities were entitled to the surplus yearly income as it arose. *Wharton* v. *Masterman*,

64 L. J., Ch. 369; [1895] A. C. 186; 11 R. 169; 72 L. T. 431; 43 W. R. 449—H. L. (E.)

Marshalling—By the Court.]—The court will not marshal assets in favour of a charitable bequest given out of a mixed fund, whether the bequest be particular or residuary. *Hobson* v. *Blackburn*, 1 Keen, 273.

Court will not marshal assets in favour of a charity. *Philanthropic Society* v. *Kemp*, 4 Beav. 581; 11 L. J., Ch. 360. S. P., *Makeham* v. *Hooper*, 4 Bro. C. C. 153; *Ridges* v. *Morrison*, 1 Cox, 180; *Foy* v. *Foy*, 1 Cox, 164; *Foster* v. *Blagden*, Ambl. 704; *Hillyard* v. *Taylor*, Ambl. 713; *Att.-Gen.* v. *Hurst*, 2 Cox, 365.

Husband borrows money; husband and wife levy a fine of the wife's land as a mortgage for it; and husband by will gives legacies to charities to the amount of his personal estate, and dies; the mortgage shall be paid out of his personal assets, though the charitable legacies will be thereby lost; but all the husband's debts, though by simple contract, shall be preferred to the mortgage. *Tate* v. *Austin*, 1 P. Wms. 264; 2 Vern. 689.

Devise of freehold and leasehold to trustees to sell, and with produce buy ground and erect an almshouse, and let out the residue in land, and bequest of residue of personal estate to like uses; decree at the rolls, which directed the assets to be marshalled, and declared that trustees might erect the almshouse if they could obtain the gift of a piece of ground, reversed on appeal. *Att.-Gen.* v. *Tyndall*, Ambl. 614; 2 Eden, 207.

A. and B. are made executors, and land devised to C., paying 1,000*l.* to executors; the residue to a charity; this 1,000*l.* is a charge on the real estate, which by the Mortmain Act is not well disposed, and results to the heir: assets not marshalled in favour of this bequest. This devise held a sale of the land for 1,000*l.*, and the bequest of this 1,000*l.* held intended to the executors as such for the purpose of the will, or as assets for debt, and not otherwise; so that, if good, it would not have lapsed by their deaths. *Arnold* v. *Chapman*, 1 Ves. Sen. 108.

Assets, not marshalled in support of a devise, contrary to law, as a gift to charity. *Bennet* v. *Musgrove*, 2 Ves. Sen. 52; *Mogg* v. *Hodges*, 1 Cox, 9; *Inchiquin* v. *French*, 1 Cox, 9.

Where the residue is bequeathed to charitable uses, equity will not marshal the assets by throwing the debts and legacies upon chattels real, that the charitable bequests may be made good out of the other personal estate. *Waller* v. *Childs*, Ambl. 524. *But see* infra.

—— **Where General Legacies charged on Realty, if Personalty insufficient.**]—Where there are general legacies charged on real estate, if the personal estate is not sufficient to pay the whole, a legacy to a charity shall be paid out of the personal, and the rest out of the real estate. *Att.-Gen.* v. *Graves*, Ambl. 158.

Where general legacies are charged on real estate, if personal is not sufficient to pay the whole, the charity legacy shall be paid out of the personal estate, and the rest out of the real. So where there is a particular disposition of different species of estate, enumerating them, and in the devise of the residue one of them is left out, that one shall be first applied. So where there is a charge on real estate, and part is left undisposed of, and descends. *Att.-Gen.* v. *Tomkins*, Ambl. 217; 2 Ken. Ch. 129.

—— **Where Bequest of Residue to Charity—Realty applied first in Payment of Debts.**]—Bequest of the remainder of testator's effects, annuities, mortgages, &c., to a charity; the devise of the mortgages is void; but being part of the enumerated residue, the court will order them to be applied first in payment of debts, before any other part of the personal estate to leave a large fund for the charity. *Att.-Gen.* v. *Caldwell*, Ambl. 635.

A. (before the statute of mortmain) gave real and personal estate to a use that would be within the statute, and the other uses which would not be affected by it. B. (after the statute) gave personal estate to the use of A.'s will; the estate of A. being sufficient for the first use, the whole of the second gift shall go to the valid use. *Att.-Gen.* v. *Hartley*, 4 Bro. C. C. 412.

—— **Where Legacy payable out of Proceeds of Real and Personal Estate—Personal Estate alone sufficient.**]—A domiciled Scotchman, having real and personal estate in India, devised and bequeathed it to trustees, to realise and out of the free proceeds to pay 10,000*l.* to three persons whom he appointed executors of his Scotch estates, and he directed such persons to employ the same in founding an hospital in Scotland. He died a few days after executing his will, leaving personal estate in India more than sufficient to pay this legacy:—Held, that, the personal estate in India being sufficient to pay the 10,000*l.*. the charitable bequest of that amount was valid, and that the law of marshalling did not apply. *Macdonald* v. *Macdonald*, 26 L. T. 685.

Where Direction to Marshal given by Testator.]—A simple declaration that charity legacies are to be paid out of pure personalty will not give to such legacies a priority upon the pure personalty over other legacies and charges, nor exempt any part of the estate from the ordinary rules of applying and distributing the assets. A testatrix created a mixed fund of realty and personalty for payment of her debts and legacies, but she directed the charity legacies to be paid out of pure personalty; she afterwards directed her trustees to set apart a sum of stock sufficient to provide for a number of annuities, and as the annuitants died, the stock let loose was to be applied in payment of the charity legacies. Semble, that the direction alone was not of itself sufficient to exempt the charity legacies from being payable out of the realty in the proportion of the realty to the personalty, but held that the second part created a demonstrative fund of pure personalty, out of which the charity legacies were to be paid. *Sturge* v. *Dimsdale*, 6 Beav. 462; 7 Jur. 543.

A testator by his will gave various legacies to charities, "to be raised and paid out of such of my personal estate as I may or can by law charge with payment of the same." The testator bequeathed other legacies, not charitable, and by a codicil disposed of the residue of his personal estate. The testator was possessed of pure personal estate and mixed personal estate, the former being insufficient for payment of his debts and legacies. The general personal estate, however, including the pure personalty, was sufficient for those purposes, and the question was, whether the charity legacies were to abate, or whether they were to be paid in full out of

the pure personalty. The court below held, that the charitable bequests must abate in the proportion which the pure personalty bore to the whole personalty. From this decision the charitable institutions appealed:—Held, that the legacies to the charities in the present case had all the incidents of demonstrative legacies to individuals, except the right to have them paid out of a particular portion of the testator's property to escape the law of mortmain; that as the testator had expressly stated that the charitable legacies were to be paid out of his pure personal estate, and as he had made no provision that the other legacies should be paid in the same way, the inference must be, that he intended the charitable legacies to be paid first out of his pure personalty; that as the testator had himself marshalled or arranged his personal estate, by saying that the legacies to the charities should be paid out of that part which by law could be charged with payment, he could only have meant the pure personal estate, which he had thereby marked as the peculiar fund to pay such legacies; and this view was forfeited by the manifest intention of the testator that all his legacies should be paid in full, which could only be done by paying the charitable ones out of the pure personalty. *Robinson* v. *Geldard*, 3 Mac. & G. 735. Reversing, 3 De G. & Sm. 499; 18 L. J., Ch. 454; 14 Jur. 143.

A testator gave the residue of his personal estate, which consisted of both pure and impure personalty, to trustees to sell and convert into money, and out of the proceeds and out of his ready money to pay his debts, funeral expenses, and legacies, and to pay the income to his wife for life, and after her death to raise sufficient to purchase certain life annuities. He then gave some pecuniary legacies, including a legacy of 100*l.* to a charity school, and bequeathed all the residue of his personal estate to three charities in equal shares, and directed that the three last-mentioned bequests should be paid and satisfied out of such part of his personal estate as could be lawfully applied to the payment thereof, and which should be reserved by his trustees for that purpose:—Held, that the direction respecting the payment of the residuary bequests was equivalent to a direction to marshal the assets in favour of the three charities; and that the debts, funeral and testamentary expenses, and legacies other than the legacy to the school, must be paid primarily out of the impure personalty. Held, also, that the direction to marshal did not apply to the legacy to the school, which must fail only in the proportion which the impure bore to the pure personalty. Held, also, that the costs of the suit were included under testamentary expenses, and must be paid primarily out of the impure personalty. *Miles* v. *Harrison*, 43 L. J., Ch. 585; L. R. 9 Ch. 316; 30 L. T. 190; 22 W. R. 441.

A testatrix by her will having given certain specific and pecuniary bequests to her general residuary legatee, and having also given various charitable legacies, directed the latter to be paid in precedence of the other pecuniary legacies out of such part of her personal property not specifically bequeathed as was by law applicable for charitable purposes, the pure personalty being insufficient to pay all the charitable legacies:—Held, that, in the administration of the testatrix's estate, the debts and the funeral and testamentary expenses and costs of the suit were, in the first place, payable rateably out of the pure personalty, and out of the personalty savouring of realty; and that, after such payment, the charitable legacies were to be paid out of the pure personalty, in precedence of the other legacies. *Tempest* v. *Tempest*, 7 De G. M. & G. 470; 26 L. J., Ch. 501; 3 Jur. (N.S.) 251; 5 W. R. 402. Reversing, 2 K. & J. 635.

A testator, after bequeathing an annuity and legacies, devised his real estate to trustees upon trust for sale, and directed the proceeds to be applied, so far as they would extend, in payment of his debts and funeral and testamentary expenses and the annuity and legacies. He then gave his personal estate to the same trustees upon trust to convert into money, and out of the proceeds pay so much of his debts and legacies as the proceeds of his real estate would not extend to pay, and to stand possessed of all the residue of his personal estate upon trust for certain charities; and he declared that only such part or parts of his estate and premises should be comprised in the residue, and be divided, paid, or transferred to or among the charities, as might by law be given or bequeathed for charitable purposes. The testator was at the time of his death entitled to real estate and to pure and impure personal estate:—Held, that the proceeds of the real estate and impure personal estate must be applied in payment of the debts and legacies before the pure personalty was resorted to. *Wills* v. *Bourne*, 43 L. J., Ch. 89; L. R. 16 Eq. 487.

A testatrix, after bequeathing several specific legacies, gave the residue of her estate to charitable purposes, and directed the charitable bequests to be paid out of the property by law applicable to the payment thereof:—Held, that the costs must be paid out of the residue, and that what was left, so far as it was pure personalty, must go to the charitable legatees, and, so far as it was impure personalty, to the next of kin. *Llewellyn* v. *Rose*, 17 W. R. 984.

A testatrix bequeathed to an hospital all her household furniture and other things in her dwelling-house, and also all her ready money, money at the bankers', and money in the public stocks or funds of Great Britain, and also all other of her personal estate and effects which she could by law bequeath to such an institution, and she appointed executors, but made no further disposition of her property, real or personal:—Held, that the charitable bequest was a specific bequest, and that the debts, funeral and testamentary expenses, and costs, must be paid first out of the undisposed-of personal estate, next out of the real estate, and lastly out of the specific bequest; but that the specific bequest must exonerate the real estate from probate duty. *Shepheard* v. *Beetham*, 46 L. J., Ch. 763; 6 Ch. D. 597; 25 W. R. 764.

A testator, after making specific and other dispositions, gave to a charity all such portions of his estate as were by law applicable for charitable purposes, and which had not been already given by his will, and declared that the portions of his estate included in that gift should be exonerated from the payment of his debts, &c., and legacies, with the payment whereof he exclusively charged his residuary estate thereinafter disposed of:—Held, that the charitable legacy was specific, and abatable for payment of debts, &c., ratably with the other specific gifts according to their respective values at the testa-

tor's death. The testator gave the residue of his real and personal estate in trust to pay debts, including debts secured upon any of the devised estates and in exoneration of such estates. He died indebted to his bankers in a sum secured by mortgage of estates comprised in the will; and possessed of a smaller sum to his credit upon his current account:—Held, that the balance on the current account was, for the purposes of the will, included in the charitable gift, notwithstanding any lien of the bankers. *Halse* v. *Rumford*, 47 L. J., Ch. 559.

Testatrix devised all her messuages, &c., and real estate to trustees, to sell and pay funeral, &c., expenses and legacies, except her charitable legacies, which she directed to be paid out of her personal estate legally applicable for that purpose, not out of any part of her said messuages, &c.; and she also directed her trustees to keep separate accounts of the proceeds of her messuages, and of her personal estate legally applicable, as aforesaid; and that if proceeds from messuages should be insufficient to pay the legacies, trustees to apply her personal estate:—Held, first, that though personal estate was more than sufficient for charity, no part of it could be applied to pay other legacies, until proceeds of real estate were exhausted. Secondly, that testatrix's leasehold passed to trustees under devise of all her messuages, &c. Thirdly, that her next of kin, and not residuary legatee, were entitled to surplus proceeds of freeholds and leaseholds: and, fourth, that freeholds having been properly sold in heir's lifetime, the surplus was part of his personal estate. *Dixon* v. *Dawson*, 2 Sim. & S. 327; 3 L. J. (o.s.) Ch. 195.

Charity legacies directed to be paid out of personal estate; decreed to stand in place of specialty creditors, for what they should exhaust of personal estate. *Att.-Gen.* v. *Montmorris (Lord)*, Dick. 379.

A testator gave such part of his residuary personal estate as might be legally applied to such purposes unto and equally between six hospitals, two of which were enabled to take impure personalty, with a direction that his estate and effects should be so marshalled and administered as to give the fullest possible effect to such bequest:—Held, that the impure personalty ought to be divided between the two hospitals which were able to take it, and that each of such hospitals ought to receive out of the pure personalty as much as would make up one-sixth of the total personalty, and that the residue of the pure personalty was to be divided among the other four hospitals. *Wigg* v. *Nicholl*, L. R. 14 Eq. 92; 26 L. T. 935; 20 W. R. 738.

A testatrix gave all her real and personal estate to trustees upon trust to convert, and out of the proceeds pay her debts, funeral and testamentary expenses, and certain legacies bequeathed to private individuals, and directed that all such legacies should in the first instance be payable out of the proceeds of sale of her "real and leasehold estate, if any." She directed her trustees to divide the residue of her estate into three parts and pay the same to certain charities. She then directed that "the foregoing charitable legacies" should be paid "exclusively" out of such part of her pure personal estate as was legally applicable for that purpose. The testatrix had no real or leasehold estate in this country, but was possessed of land in the colony of the Cape of Good Hope (the value of which was less than the amount of the general legacies, and of pure and impure personalty:—Held, that the direction as to payment of the charitable legacies was in effect equivalent to a direction that the residue should consist exclusively of pure personalty, and therefore operated as a direction to marshal for the benefit of the charities; that the general legacies were primarily payable out of the proceeds of sale of the land in the colony; and that the debts and funeral and testamentary expenses and costs of action and the unpaid portion of the general legacies must be paid in the first instance out of the impure personalty so as to leave the pure personalty, so far as possible, to constitute the ultimate residue. *Arnold, In re, Ravenscroft* v. *Workman*, 57 L. J., Ch. 682; 37 Ch. D. 637; 58 L. T. 469; 36 W. R. 424.

A testator, by will dated in 1883, after giving certain pecuniary legacies, gave the residue of his estate and property to trustees upon trust to sell and convert, and out of the proceeds of sale and the money of which he should be possessed at the time of his death to pay his funeral expenses, and upon trust to pay and divide the net residue unto and equally between the treasurers for the time being of St. Thomas's hospital, St. George's hospital, Westminster hospital, and Charing Cross hospital, to be applied for the use and benefit of the said hospitals. The testator then declared that his pure personal estate should in the first place be applied in payment of the shares of St. Thomas's hospital and Charing Cross hospital. The Westminster hospital and the St. George's hospital were empowered to take land or impure personalty; the other two hospitals were not. The testator at the time of his death was entitled to both pure and impure personal estate:—Held, that there was in the will sufficient direction to marshal the estates so that the pure personalty was first to be applied in payment of the shares of the two hospitals which could not take land or impure personalty. *Pitt, In re, Lacy* v. *Stone*, 53 L. T. 113; 33 W. R. 653.

—— **During Limited Period.**]—A testator, entitled to estates in two counties, L. and A., both subject to incumbrances, devised them to trustees in trust to apply the rents in payment of head-rents, fines for renewal, taxes, &c., and the interest upon charges affecting them, and to pay the residue of the rents to his wife for life; and after her death in trust to receive the rents, and employ them during the period of twenty-one years in payment of head-rents, fines, &c., and the interest on charges and two annuities to his nephews A. N. and C. N.; and next, so far as the rents would extend, in payment of the charges on his estates, his debts and legacies, at such time as the trustees should think most convenient. He devised portions of the L. estate to his nephews A. N. and C. N., free from incumbrances after the expiration of the period of twenty-one years; and as to the rest, residue and remainder of his estates not before devised, charged with the residue of the incumbrances, debts, and legacies then unpaid, to T. for life, remainder to T.'s first and other sons in tail male, remainder to B. for life, remainder to B.'s first and other sons in tail male, with other remainders over, and an ultimate remainder to his own right heirs. He bequeathed annuities for charitable purposes charged on the A. estate, and directed that charges which should affect his estates, and all his debts due at his death, and

his legacies, should be borne by and be charges primarily affecting the "aforesaid residue" of his estates limited as aforesaid, and be paid out of the rents and profits thereof in exoneration of his personal estate and other properties bequeathed and devised to his wife and nephews, and so that such personal estate and other property should be relieved therefrom. After the wife's death, estate A. was sold by the creditors, and the proceeds of the sale paid all the charges except a sum of 337*l.*:—Held, that during the period of twenty-one years from the death of the testator's wife the rents and profits of the estates devised to A. N. and C. N. and to B. respectively were both equally applicable to the payment of the charges on the testator's estates and his debts and legacies, and that the estates devised to B. were not bound to indemnify the estates devised to A. N. and C. N. against such charges, debts, and legacies until after the expiration of the term of twenty-one years:—Held, also, that the fact that the charges had been paid off by the sale of estate A. did not entitle A. N. and C. N. to go into possession of the estate devised to them before the expiration of the twenty-one years, and that the surplus rents of the unsold estates, after payment of the sum of 337*l.* so left unpaid and interest, and of the annuities payable to A. N. and C. N., and the legacies, were applicable, during the twenty-one years, to recoup the persons who would, but for the sale, have been entitled to the sold lands, so much of the charges paid out of the corpus of the estate sold as, but for the sale, would have been payable out of the rents during the term of twenty-one years:—Held, further, that the charitable annuities were not charged on the estates devised to A. N. and C. N., and that the legacies were only charged on the rents of these estates during the twenty-one years:—Held, further, that the charitable annuities charged on the A. estate were entitled to marshal and stand in the place of the incumbrances as against the unsold estates, but so that at the expiration of the twenty-one years' term, their right to marshal as against the estates devised to A. N. and C. N. should cease. *Biggar* v. *Eastwood*, 19 L. R., Ir. 49—C. A.

Apportionment.]—A testator gives charitable legacies, charged on a mixed fund of realty and personalty, and gives the residue to charity:—Held, that all the charitable legacies fail in the ratio of the real to the personal estate, and that the deficiency ought not to be made up out of the residue or personalty. *Patten* v. *Smith*, 8 L. J. (o.s.) Ch. 132.

A testator created a general fund of his real and personal estate, out of which he gave several charity legacies, and the residue to charitable purposes. The former failed as to the realty, and the latter failed altogether:—Held, that the former were not entitled to resort to the personalty released in consequence of the invalidity of the latter gift, but that such personalty belonged to the next of kin. *Williams* v. *Williams*, 5 L. J., Ch. 84.

If charitable legacies are charged by will on a fund which consists of pure and impure personalty, the court, in order to fix the proportion in which they are to fall, will look at the condition of the testator's estate, out of which the fund charged is directed to be raised, at the time of his death, and not at the investments of which the fund consists at the time fixed for payment of the legacies. *Calvert* v. *Armitage*, 1 H. & M. 446; 8 L. T. 269; 2 N. R. 60.

Where he gave his leaseholds, and also the residue of his property to a charity:—Held, that the leaseholds must contribute ratably with the residue towards payment of legacy, though the charity thereby received an indirect benefit from them. *Scott* v. *Furristall*, 10 W. R. 37.

Testator directed all his debts, funeral, and testamentary expenses, to be paid by his executors as soon as conveniently might be, and then gave freeholds to trustees to sell, and hold the proceeds upon trusts for J. C. and his issue; and also gave all his other real and personal estate to the trustees upon trust to sell, and, after payment of debts, to pay certain legacies, among them one to the clergyman and churchwardens for a charitable purpose, and then to pay and divide the residue to and among all the children of J. E. N., when the youngest of such children should attain the age of twenty-one. The pure personal estate was insufficient for the payment of debts; the mixed fund which the testator had created was, however, ample:—Held, that the charity legacy did not fail altogether, but that there ought to be an apportionment according to the proportion which the value of the pure personalty bore to the mixed fund. *Briggs* v. *Chamberlaine*, 23 L. J., Ch. 635; 18 Jur. 56.

—— **Where Directions given by Testator.**]—A testator bequeathed legacies to several charitable institutions, and directed that "all his charitable legacies should be paid out of his pure personal estate." He died possessed of real estate in Madeira, and of mixed personalty and pure personalty in England. The pure personalty was insufficient to pay in full the charitable legacies:—Held, that the proceeds of the Madeira estate, although not savouring of realty within the meaning of the statute of mortmain, did not fall within the words "my pure personal estate." Held, also, in a suit to administer the testator's estate, that the administration charges must be paid ratably out of the whole estate; that the charitable legatees were entitled to the remainder of the pure personalty, and had a claim against the rest of the estate for so much of their legacies as should remain unpaid, but that that claim must abate in the proportion which the personalty savouring of realty bore to the proceeds of the Madeira estate, and that the charitable legatees must be allowed their costs of the suit out of the estate. *Beaumont* v. *Oliveira*, 38 L. J., Ch. 239. Affirmed, L. R. 4 Ch. 309; 20 L. T. 53; 17 W. R. 269.

A testatrix bequeathed legacies to charities and to individuals, and she directed her charity legacies to be paid "out of her ready money, and the proceeds of the sale of her funded property, personal chattels, and effects, and not from the proceeds or by sale of her leasehold or real estates"; and she charged her leasehold estates, in addition, with the payment of her debts, funeral and testamentary expenses, and legacies not given to charities. The pure personalty was insufficient to pay the debts, &c., and all the legacies:—Held, that the charity legacies failed in the proportion of the mixed personalty to the pure personalty. *Philanthropic Society* v. *Kemp*, 4 Beav. 581; 11 L. J., Ch. 360.

Testatrix directed her residue to be divided into two portions, one such as she might give to charitable purposes, the other not; the one, therefore, pure personalty, the other savouring

of the realty; and she gave the first fund to be applied "in the endowment of district churches in populous places, so that the poor may have the gospel preached to them in this country," preference to be given to parishes under the patronage of S.'s trustees:—Held, that this was a good gift within the statutes of mortmain. The testatrix directed that the other portion of her residuary estate, i.e. that savouring of realty, should be held upon trust for such purposes as she should afterwards direct; but she died without making any direction:—Held, that such portion was residue nevertheless, and that as to debts and legacies, there must be apportionment between this and the pure personal residue. *Edwards* v. *Hall*, 11 Hare, 17; 22 L. J., Ch. 1078. Affirmed, 25 L. J., Ch. 82; 1 Jur. (N.S.) 1189; 4 W. R. 111—L. C.

A testatrix, who died in 1879, bequeathed her personal estate to trustees upon trust to sell, and out of the proceeds to pay her testamentary expenses and debts and a legacy of 14,000*l.*, and gave all the rest and remainder of her personal estate "except such parts thereof as cannot by law be appropriated to charitable purposes," to a charity. The testatrix's personal estate consisted in part of pure, and in part of impure, personalty:—Held, that the assets should not be marshalled in favour of the charity; that the charity was only entitled to so much of the estate as consisted of pure personalty after payment of the debts and legacy out of the whole estate; and that the testatrix died intestate as to the impure residuary personalty. *Edwards* v. *Hall* (supra) followed. *Somers-Cocks, In re, Wegg-Prosser* v. *Wegg-Prosser*, 65 L. J., Ch. 49; [1895] 2 Ch. 449; 13 R. 819; 73 L. T. 58; 44 W. R. 106.

—— **What is Direction by Testator.**]—A husband gave his wife a legacy of 1,000*l.*, and bequeathed out of his pure personalty 9,000*l.* to trustees for his wife for life, and ultimately between certain charities; he then gave to the trustees all other his real and personal estate for conversion, directing them to hold it, after paying the 9,000*l.*, and after payment, out of such residuary estate as should not be wanted for the legacy, of his debts, funeral, and testamentary expenses, upon trust to pay the income to his wife for life, and after her death to raise out of his residuary estate legacies for the benefit of the plaintiff, and then legacies in favour of charities to the amount of 40,000*l.*, directing these latter legacies to be paid out of his pure personalty; then as to the "ultimate residue" of his residuary estate, he directed his trustees to hold one-tenth for A., another tenth for B., and the remaining eight-tenths for a charity, and declared that the "ultimate residue" should be marshalled so that the eight-tenths might be paid out of that part of his estate which might lawfully be appropriated to charitable purposes. There was only a sum of 2,000*l.* impure personalty. The estate was not sufficient to pay all the legacies in full. On the death of the widow the question arose whether this 2,000*l.* was chargeable in exoneration of the pure personalty with the whole, or only ratably with the pure personalty with its proportion of the debts, costs of administration, and legacies (other than the 9,000*l.*):—Held, that there was nothing in the words of the will to controvert the general rule of the court, and that the debts, costs, and legacies were payable out of the pure personalty (less the 9,000*l.*) and impure personalty ratably. *Lewis* v. *Boetefeur*, 38 L. T. 93.

See also sub tit. ABATEMENT AND PRIORITY, and PAYMENT.

12. ANNUITIES—*See* ANNUITY.

13. LEGACY TO DEBTOR: SET-OFF.

Right to Set-off when arising.]—The right of set-off can only arise out of some contract, express or implied, between the parties, to pay and receive money, or other persons standing in their shoes. A. purchased a business of B., and gave him a promissory note for 350*l.*, the amount of the purchase-money. The note was unpaid at B.'s death. C. bought the business of A., and gave B.'s executors a note for 350*l.*, with an indorsement that the note was given as a collateral security for the 250*l.* secured by A.'s note. C. was entitled under B.'s will to two legacies, which he assigned for value. In a suit to have the legacies invested and secured:—Held, that the executors were not entitled to retain the legacies in payment of the 350*l.* due on the note. *Smee* v. *Baines*, 29 Beav. 661; 31 L. J., Ch. 63; 7 Jur. (N.S.) 902; 4 L. T. 573; 9 W. R. 802.

W. was indebted to K., who bequeathed his residuary estate to E. absolutely. E. bequeathed his residuary estate to W. and other persons in equal shares. The debt from W. to K.'s estate was never got in, but that estate presented a clear residue without it. W. became bankrupt before he had paid the debt, and before he had received his share of E.'s estate:—Held, that the executors of E., as residuary legatee of K., were entitled to retain, or set off, the debt, out of, or against W.'s share of E.'s residue. *Bousfield* v. *Lawford*, 1 De G. J. & S. 459; 33 L. J., Ch. 26; 8 L. T. 619; 11 W. R. 842.

Cross Demands.]—The court has, on slight circumstances, presumed the existence of an agreement to set off one against another cross demand, although existing in different rights; but such an agreemet will not be presumed without some circumstances from which it might be inferred, semble. *Freeman* v. *Lomas*, 9 Hare, 114; 20 L. J., Ch. 564; 15 Jur. 648.

Cross demands, existing in separate rights, are not, in equity (except under special circumstances), allowed to be set off one against the other; and therefore an executor and trustee of a legacy, who was also the residuary legatee, and had become a creditor of the husband and administrator of a deceased legatee, was not, in the absence of any special agreement, allowed to set off his debt against the legacy, to which the husband (having survived his wife, the legatee) was, as such administrator, entitled. *S. C.*, 9 Hare, 109; 20 L. J., Ch. 564; 15 Jur. 648.

Real estate was devised to trustees for a term of years to secure a capital sum and interest thereon in favour of M. and subject thereto, to F. for life. F. was let into possession by the trustees, but failed to keep down the interest upon the charge. M. bequeathed a legacy to F. which the executors retained as a set-off against the unpaid interest:—Held, that F. was entitled to the legacy, there being no doubt as against him, and no right of set-off in respect of the arrears of interest. *Morley* v. *Saunders*, 38 L. J., Ch. 552; 21 L. T. 132; 17 W. R. 959.

A. being indebted to B.'s estate, and B.'s estate being indebted to C.'s estate, and A. being also interested in a legacy under C.'s will :—Held, that there was no equity to impound the legacy until A. should have paid the debt, and so enable B.'s executors to pay the debt due to C.'s estate. *Avison* v. *Holmes*, 1 J. & H. 530 ; 30 L. J., Ch. 564 ; 4 L. T. 617 ; 9 W. R. 550.

Executor—Gift to, applied in making good Devastavit.]—Executor becoming indebted to the estate of a testator in respect of receipts, as such, annuity given him by will directed to be applied to repay estate. *Skinner* v. *Sweet*, 2 Madd. 244.

—— **Retainer by, against Devastavit of Co-executor.**]—Retainer allowed to one executor out of a legacy to a co-executor in respect of a devastavit. *Sims* v. *Doughty*, 5 Ves. 243.

Administrator, Retainer by—Against own Private Debtor.]—A debt due to the administrator of an intestate in his own right from one of the next of kin may be set off in a suit by the next of kin for administration of the estate against a sum due from the administrator in respect of the next of kin's share of the intestate's estate. *Taylor* v. *Taylor*, 44 L. J., Ch. 718 ; L. R. 20 Eq. 155.

Executor — Retainer abandoned by proving against Legatee's Estate.]—A bankrupt was indebted to the estate of a testator, and was also entitled as one of the residuary legatees of the testator, and also to distributive shares as next of kin of three other residuary legatees. The executor of the testator proved the debts under the bankruptcy, and received a dividend on the proof :—Held, that he had thereby abandoned the right to retain the debt out of the direct or derivative shares of the bankrupt in the testator's residuary estate. But semble, if the executor had not proved, the personal representative of the testator would have been entitled in equity to retain the amount of the debt against the bankrupt's direct and derivative shares in the residue. *Stammers* v. *Elliott*, 37 L. J., Ch. 353 ; L. R. 3 Ch. 195 ; 18 L. T. 1 ; 16 W. R. 489.

—— **By Appropriating Assets to meet Legacy.**]—Executors who have set apart and appropriated assets to meet a legacy, cannot retain or impound any part of the appropriated assets to meet a debt from the legatee to the general estate of the testator. *Ballard* v. *Marsden*, 49 L. J., Ch. 614 ; 14 Ch. D. 374 ; 42 L. T. 763 ; 28 W. R. 914.

—— **Retainer Negatived by Covenant in Creditors' Trust Deed.**]—By an indenture dated in May, 1850, A. conveyed all his real and personal estate to trustees, upon the usual trusts for sale, and directed them to apply the proceeds in the payment ratably of the debts in the schedule to the deed set opposite to the names of certain specified creditors ; and such creditors covenanted with A. that they would not bring any action, &c., against A. in respect of such debts and that if any action, &c., should be brought, the deed might be pleaded as a release. B., one of A.'s creditors, executed this deed in respect of a certain debt, and made his will in June, 1850, whereby he gave a legacy to A., and directed that if any legatee should be found indebted to him in any sum or bond, &c., or otherwise, such sum should be taken as part of his legacy. B. died in December, 1850. B.'s executors received only 7*s.* in the pound on the debt :—Held, that B.'s executors were not authorised to set off the difference between the debt and the composition from A.'s legacy. *Golds* v. *Greenfield*, 2 Sm. & G. 476 ; 23 L. J., Ch. 639 ; 2 W. R. 583.

—— **By Express Direction in Will.**]—Under a bequest of leaseholds for the legatee's personal support and maintenance, and to be entirely free from any claim, charge, or demand, or lien of his creditors :—Held, the leaseholds could not be withheld from the legatee until he paid a debt due from him to the testator, even assuming that a specific legacy may be so withheld in the absence of such a testamentary exemption ; as to which, quære. *Harvey* v. *Palmer*, 4 De G. & Sm. 425 ; 15 Jur. 982.

What Debt Set-off—Private or Partnership Debt.]—A testator bequeathed "all debts which shall be due to me by B. at the time of my decease unto B., his executors, administrators, and assigns, for his and their own use and benefit." And the testator directed his trustees "to deliver up to B., his executors, administrators, or assigns, all securities whatever which I shall hold at the time of my decease for securing the repayment of such debts, and that the trustees shall, when required by B., his executors, administrators, or assigns, give and execute to him or them an effectual release from the payment of all such debts." At the date of the will and at the time of the testator's death there was due to him from B. a sum of 50*l.*, for which B. had given the testator his promissory note. There was also due to the testator from a partnership firm consisting of B. and G. a sum of 300*l.*, for which B. and G. had given the testator their joint promissory note, and a sum of 2,300*l.*, for which B. and G. had given him their joint and several promissory notes :—Held, that, there being a private debt of B. which satisfied the words of the bequest and release, those words could not be construed as including the partnership debts. *Kirk, Ex parte, Bennett, In re*, 46 L. J., Bk. 101 ; 5 Ch. D. 800 —C. A.

Upon S. and A. entering into partnership, J. (A.'s uncle) advanced to A. 2,000*l.* At the time of J.'s death the firm was indebted to J., on loan, in a sum, A.'s portion of which, on one calculation, would have amounted to a little more, and on another to a little less, than 2,000*l.* J., by his will, made the following bequest : "I forgive to my nephew A. the debt of 2,000*l.*, which I have advanced to him on loan." The master of the rolls decided that the 2,000*l.* referred to in the will was the 2,000*l.* advanced at the commencement of the partnership, although he was of opinion that that advance had been an absolute gift :—Held, affirming his decision, that whether the first advance of 2,000*l.* was a gift or not, the testator meant that 2,000*l.* by the above clause in his will. *Smith* v. *Armstrong*, 6 De G. M. & G. 150 ; 2 Jur. (N.S.) 359.

A testator gave to Mrs. M. the debt or sum of money due from her, or the estate of her late husband, to him, the testator. At the date of the will, and at the time of the testator's death, the estate of M. was indebted in a considerable

sum to the firm of which the testator was a member. M. had also been indebted to the testator on a promissory note, after giving which he became bankrupt, and obtained his certificate. After the bankruptcy, however, the amount secured by the note, which had been paid to him out of the assets of the firm, was included, with his approbation, in the account current between him and the firm :—Held, that under the circumstances the sum for which the promissory note was given was not a debt due to the testator from the estate of M., and that there was not in existence anything strictly answering the description of a debt due from the estate of M. to the testator, and that the description was to be taken to apply to the debt due to the firm :—Held, accordingly, that the partnership debt passed by the bequest, subject to the rights of the other partners ; and it being admitted that the affairs of the firm were in such a state that the testator was entitled to more than the amount of such debt :—Held, that the legatee was entitled to the debt, and the benefit of the securities for it. *Maybery* v. *Brooking*, 7 De G. M. & G. 673 ; 25 L. J., Ch. 87 ; 2 Jur. (N.S.) 76 ; 4 W. R. 155.

—— **Usurious Debt.**]—A testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of the legatee. A debt, though usurious, must be deducted from the legatee's share. *Stanton* v. *Knight*, 1 Sim. 482.

—— **Rent.**]—The executor of A., being sued for payment of a legacy, set up as a defence that the plaintiff had, for several years, occupied a house, part of an estate of which he, and A., and other persons were tenants in common, under the will of B., and that A.'s share of the rent, due from the plaintiff in respect of such occupation, exceeded the amount of the legacy. Semble, the court will not, in a suit so framed, direct inquiries as to the plaintiff's liability for rent, or as to the amount due from him to A.'s estate in respect thereof, although the other parties interested in such inquiries be willing to be bound by them, but will decree immediate payment of the legacy in question, without reference to the counter-claim. *M'Mahon* v. *Birchell*, 2 Ph. 127 ; 1 Coop. t. Cott. 457. Varying, 3 Hare, 97.

A testator bequeathed all his personal estate free from debts to A., and directed that his debts should be paid out of the real estate. At his death the testator owed various sums to his tenants, but the arrears of rent due from them exceeded those sums :—Held, that A. was only entitled to the balance between the sums due from the testator and the arrears of rent. *Ekins* v. *Morris*, 8 W. R. 301.

Executors granted a lease of part of the testator's property to a legatee, who afterwards incumbered his legacy, notice of the charge having been given to the executors :—Held, that they had, as against the mortgagee, a right to set off the rent due from the legatee at the date of the notice, but not the subsequent rents. *Stephens* v. *Venables*, 30 Beav. 625.

—— **Statute-barred Debt.**]—In a suit by a legatee to obtain payment of the legacy out of the assets of the testator, in a due course of administration :—Held, that the executor might retain so much of the legacy as was sufficient to satisfy a debt due from the legatee to the testator, at the time of his death, although the remedy for such debt was, at the time of the death of the testator, barred by the Statute of Limitations, 21 Jac. 1, c. 16. *Courtenay* v. *Williams*, 3 Hare, 539 ; 15 L. J., Ch. 204.

Whether the executor would have had the same right of retainer if the suit had been for payment by himself personally and not out of assets of the testator, quære. *Ib.*

A testator directed his residuary estate to be divided amongst his six children. "And I direct that, in order to equalise my said residuary estate amongst my six children, in case it shall appear by my private ledger, that any, or either of them my said children, or the present or any future husband of any of my said daughters, are indebted to me at my decease in any sum of money, such debt shall be considered as forming part of my residuary estate, and the shares of my said children shall respectively become liable to pay such debt." One of his sons owed him a large debt, but part of it was barred by the statute of limitations :—Held, nevertheless that the whole must be paid out of his share, and that the clause amounted to a hotchpot clause. *Rose* v. *Gould*, 15 Beav. 189 ; 21 L. J., Ch. 360.

Although a debt due to a testator's estate is barred by the statute of limitations, his executors may set off a legacy bequeathed by him to the debtor against the debt, and retain the same accordingly. *Coates* v. *Coates*, 33 Beav. 249 ; 33 L. J., Ch. 448 ; 10 Jur. (N.S.) 532 ; 9 L. T. 795 ; 12 W. R. 634.

A. lent B. two sums of 1,000*l.*, for which B. gave promissory notes of 1,000*l.* each, and in one of them C. joined as surety. B. subsequently deposited a policy of insurance with A. as collateral security for both debts. A., by will, gave C. a legacy of 1,000*l.*, payable six months after the death of his widow. After A.'s death B. became bankrupt ; A.'s executors, without communicating with C., surrendered the policy, and proved against B.'s estate for the balance. After the death of the widow, A.'s executors claimed to set off so much of the legacy of 1,000*l.* as was necessary to make good the balance due on the 1,000*l.* note, in which C. joined as surety :—Held, first, that the legacy could be set off against the debt, although the debt was barred by the statute of limitations. Held, secondly, that the remainder of the surrender of the policy did not operate to release the surety. Held, thirdly, that the whole of the consideration money for the surrender of the policy ought to be applied in satisfaction of the debt for which the surety was liable. *Ib.*

A testator held 2,000*l.* belonging to his nephew, on which for eight years he paid interest, notwithstanding the nephew owed him 1,000*l.* on his promissory note, though the nephew had paid no interest on the note, and had given no acknowledgment of the debt :—Held, that although the remedy for recovering the 1,000*l.* was barred by the statute of limitations, still the right of the executors to set it off against the 2,000*l.* remained. *Gee* v. *Liddell*, 35 Beav. 629.

An administrator is entitled to set off against the share of one of the next of kin in the intestate's estate, the whole of a debt of which part had become barred by the statute of limitations. *Cordwell, In re, White* v. *Cordwell*, 44 L. J., Ch. 746 ; L. R. 20 Eq. 644.

Where Bequest to Wife of Debtor—No Set-off.]—A share of rent due from the occupying tenant of certain premises to the estate of a testatrix, who was one of several tenants in common of the same premises, allowed to be set off by her executors in a suit for a legacy bequeathed by the testatrix to the debtor; but not as against a legacy bequeathed by the testatrix to the wife of the debtor. *M'Mahon* v. *Burchell*, 3 Hare, 97. Varied, 2 Ph. 127.

Where a testatrix devised a freehold estate to trustees upon trust, to sell and to pay 140*l.*, part of the proceeds, to A., and the residue of the proceeds to B., and appointed the devisees in trust her executors:—Held, that in a suit by A. and her husband against the trustees, for payment of the 140*l.*, the latter were not entitled to set off the damages or costs of an action, brought by them as executors against the husband, to recover a deposit note in the hands of the wife, forming part of the testatrix's estate. *Reeves* v. *Richer*, 1 De G. & Sm. 624; 17 L. J., Ch. 86; 11 Jur. 960.

Upon the bill of a married woman, entitled to a share of the personal estate, as one of the next of kin of the intestate against her husband and administrator, the latter claiming to retain towards satisfaction of a debt by bond from the husband to him; it was declared he was not entitled to retain, but that the plaintiff's share was subject to a further provision in favour of her and her children; the settlement on her marriage being inadequate to the fortune she then possessed, and it was referred to the master to see a proper settlement made on her and her children; regard being had to the extent of their fortune, and the settlement already made upon her. *Elibank* (*Lady*) v. *Montolieu*, 5 Ves. 737; 5 R. R. 151.

—— **Set-off under Particular Circumstances—Where Memorandum of Testator's Intention.**]—Mrs. A., the wife of Mr. A., wrote a letter to her mother, B., strongly urging her to lend Mr. A. the sum of 2,000*l.* (the amount of an intended legacy from B. to Mrs. A.), at interest, to be paid to B. during her life. B. sold out 2,000*l.* consols, and remitted the proceeds to Mr. A., and made the following indorsement on the broker's receipts: "The enclosed sums were sold out for Mrs. A., with a promise on her part that I should receive interest at 5*l.* per cent. during my life, seeing that it was my intention to have left it to her at my death, but her application was too urgent." B. died intestate:—Held, that under these circumstances, the proceeds of the stock were lent, and not given to Mr. A., and that the amount was a debt due from him to B. at her death, and ought to be set off against the distributed share to which Mrs. A. was entitled in her mother's estate. *Rannie* v. *Chandler*, 23 L. J., Ch. 609; 2 W. R. 537.

—— **Where Legacy payable to Husband.**]—A legatee, who is also a debtor to the testator's estate, cannot claim payment of the legacy without paying the debt; and the legacy given to a wife, but payable by law to the husband, who is in the same position for this purpose as a legacy to the husband himself, subject to her right of survivorship where the interest is reversionary, and to her equity to a settlement when it becomes vested in possession. Where, however, the legacy to the wife is reversionary, and she, with her husband's concurrence, under 20 & 21 Vict. c. 57, assigns it to a purchaser for value, the deed acknowledged under the statute overreaches the jus mariti, and the purchaser takes the legacy discharged from all right of retainer which the executor might have asserted against the husband. *Bachelor, In re, Sloper* v. *Oliver*, 43 L. J., Ch. 101; L. R. 16 Eq. 481; 21 W. R. 901.

—— **Where Legacy not Claimed by Wife.**]—Legacy to wife of A., A. being indebted to testator: A. becomes bankrupt, and wife dies without having asserted her right over legacy:—Held, executor of testator might retain legacy against assignees of A., in discharge of debt due to testator. *Ranking* v. *Barnard*, 5 Madd. 32.

—— **Where Husband Bankrupt.**]—Executor allowed to set off a moiety of a legacy given by their testator to the wife of the bankrupt, against a debt due from the bankrupt to their testator. The other moiety ordered to be settled on the wife for life, with remainder to the issue of the marriage. *O'Ferrall, Ex parte*, 1 Glyn & J. 347.

—— **Settled Legacy—Advances by Trustees to Husband set off against Wife's Interest.**]—A grandfather having made a will of his real and personal estate in 1808, cancelled it in 1810, but wrote on the back of the will a letter addressed to his only daughter, stating that she was his heiress-at-law, and charging her to fulfil his wishes at her death, by a disposition of a specified freehold estate to her eldest son, and by an equal disposition of his "property" equally among his grandchildren, her eldest and youngest son and daughter, her three only children. The letter was unattested, and thought to be inoperative as to the grandfather's personal as well as real property. The daughter became his administratrix, and entered into possession of his real estate, and she and her husband received his personal estate in right of the daughter as sole next of kin. By a settlement in 1811, between the husband of the daughter and the daughter and two trustees, and the three children of the daughter, reciting the will, its cancellation, and the letter, and that the testator had died wholly intestate, but that the daughter was desirous of fulfilling the intention of the grandfather, his real estates were settled in accordance with the directions contained in the letter. The daughter died in 1827, and her husband became her administrator, and also administrator de bonis non of the grandfather. The husband of the daughter died in 1840, having previously by will, after reciting his wish to carry into effect the desires of the grandfather, disposed of the grandfather's and his own real and personal property, between the two grandsons and the grand-daughter (his children) accordingly. The grand-daughter, who had married, obtained in 1843, letters of administration to the grandfather with his letter to his daughter, which was then admitted as a will annexed, and instituted a suit against the personal representative of her father, claiming that the personal estate of the grandfather should be accounted for to her. The grand-daughter had received an allowance of 300*l.* a year from the time of her marriage in 1829 till the death of her father, and her husband was also greatly indebted for advances made to him on several occasions, and became bankrupt, and obtained his certificate and a disclaimer by the assignees of all interest under the grandfather's.

will in his favour :—Held, that the allowance must go towards satisfaction of interest on the grand-daughter's one-third of the grandfather's personal estate ; and that the debt due from the husband of the grand-daughter must be set off against the third of his wife, the grand-daughter to be received by him in right of his wife, against the estate of her father. *Lee* v. *Egremont*, 5 De G. & Sm. 348 ; 16 Jur. 352.

Where Gift to Debtor and Wife.]—Where there was a bequest of 300*l.* to A. and his wife for their own use and benefit, followed by a direction that if A. should be indebted to the testator at the time of his death, the debt should be deducted from the legacy, and A. died in the lifetime of the testator, owing to him 250*l.* which remained unpaid at the testator's death :—Held, that the wife was entitled to the whole of the 300*l.* *Davies* v. *Elmes*, 1 Beav. 131.

Gift to Wife of Debtor operating as Release of Bond.]—Mrs. W. made her daughter, Mrs. P., her sole executrix and universal legatee. At the death of Mrs. W., her son-in-law, P., was indebted to her on a bond conditioned for payment of a sum of money by yearly instalments, some of which did not become due till after her death ; but others which became due before her death remained unpaid. Mrs. P. proved the will, and about twelve months after her mother's death passed the residuary account, showing that the debts were all paid. P. took the bond into his possession and kept it till his death, which took place more than six months after passing the account, and applied to his own use all the other personal estate of Mrs. W. After the death of P. a decree having been made for administration of his estate, Mrs. P., as executrix of her mother, sought to prove as a creditor on the bond :—Held, that, as the debts of Mrs. W. had been paid and the residue had become a clear fund in the lifetime of P., the liability of P. on the bond was extinguished, and the proof could not be allowed. *Price* v. *Price*, 48 L. J., Ch. 478 ; 11 Ch. D. 162 ; 40 L. T. 668 ; 27 W. R. 698.

Set-off against Mortgagees of Legacy.]—A trustee or an executor, when he receives notice that a legatee has charged his legacy, is bound to withhold all further payments to that legatee. All right of set-off and adjustment of equities between the legatee and the executor existing at the date of the notice have priority over the charge, but the trustee can create no new charges or rights of set-off after that time. *Stephens* v. *Venables*, 30 Beav. 625.

One of the residuary legatees mortgaged his share ; after which a debt of the legatee, for which the testator was surety, was paid out of his estate :—Held, that the lien of the executors had priority over the mortgage. *Willes* v. *Greenhill*, 29 Beav. 376.

At the death of a testator A. owed him 350*l.* for the purchase of his business. After his death A. sold the business to a legatee for 350*l.*, and the legatee gave the executors his promissory note, as a collateral security for A.'s debt :—Held, that the executors had no right to set off the debt against the legacy, nor any right of retainer as against the mortgagee of the legacy. *Smee* v. *Baines*, 29 Beav. 661 ; 31 L. J., Ch. 63 ; 7 Jur. (N.S.) 902 ; 4 L. T. 573 ; 9 W. R. 802.

—— **Against Assignees of Legatee.**]—Legatee having become bankrupt since death of testator, and a large sum of money being due from him to the estate, his assignees were held not entitled to take any part of the personal estate bequeathed to legatee. *Richards* v. *Richards*, 9 Price, 219 ; 23 R. R. 665.

I., being indebted to his sister C., became a bankrupt ; shortly afterwards C. made her will, and thereby gave certain sums to her trustees and executors as pecuniary provisions for the benefit of I., in a form apparently intended to exclude the claims of creditors. She never proved her debt against the bankrupt's estate, and died before he obtained his certificate. On a bill by the assignee against the executors of C. for payment of the money bequeathed for the use of the bankrupt, the lord chancellor held, affirming the decree of the master of the rolls, that the executors were not entitled to set off the amount of the unproved debt against the demand of the assignee. *Cherry* v. *Boultbee*, 4 Myl. & Cr. 442 ; 9 L. J., Ch. 118 ; 3 Jur. 1116. Affirming, 2 Keen, 319.

A., one of the executors of the will of B., was entitled thereunder to a share of the estate. A., being at the time a debtor to B. for 500*l.*, was adjudicated bankrupt in the lifetime of B. :—Held, that the debt of 500*l.* could not be retained by way of set-off against the share payable to A., nor any dividend in respect thereof, but that the share must be paid over intact to A.'s trustee in bankruptcy, and the executors must put in their proof as ordinary creditors. *Hodgson, In re, Hodgson* v. *Fox*, 9 Ch. D. 673 ; 27 W. R. 38.

—— **Of Next of Kin.**]—One of the creditors of an insolvent died, leaving the insolvent one of his next of kin :—Held, that the insolvent's share of the personal estate must be paid to the assignees of the insolvent, without any retainer on account of the insolvent's debt. *Bell* v. *Bell*, 17 Sim. 127 ; 13 Jur. 1040.

Bequest of Release of Debt.]—A testator by his will, made in 1838, devised his real estates at M. to his nephew, and bequeathed legacies amounting to 8,000*l.* to other persons, which legacies were primarily charged on the moneys which might be in the bank to the credit of the testator at his death. In 1839 the nephew, in compliance with the express desire of the testator, became the purchaser of real estates at C. The testator, out of moneys standing to his credit in the bank, lent the purchase-money to the nephew, who shortly afterwards repaid it in part, but a balance of 7,700*l.* still remained due to the testator. By a codicil made in 1840, the testator, reciting that he had by his will devised certain real estates to his nephew, charged the same with a sum of 8,000*l.*, with interest at 5 per cent. from his decease, and directed that sum of 8,000*l.* and interest to be paid to his executors within six months from his decease, for the purpose of paying off certain legacies named in his will :—Held, that these facts amounted in equity to a release by the testator of the debt of 7,700*l.* due to him from his nephew ; and that the charge of 8,000*l.* upon the estates at M. must be considered as substituted for that debt. Semble, the dictum of Wigram, V.-C., in *Cross* v. *Sprigg* (6 Hare, 552 ; 18 L. J., Ch. 204 ; 13 Jur. 785), that if a debt be not released at law, it cannot be considered as released in equity, is not sustainable. *Hedges* v. *Aldworth*, 13 Ir. Eq. R. 406.

A testator mortgaged a mine as a collateral security for a debt of two of his sons, and took from them a bond as a counter security. He afterwards devised the mine to one of his sons, and directed his executors to pay out of his residuary estate his debts, and particularly the sums charged on the mine :—Held, that thereby the testator intended to give to the two sons the amount of the mortgage debt. *Mushet* v. *Cliffe*, 2 De G. & Sm. 243 ; 17 L. J., Ch. 269 ; 12 Jur. 739.

An annuity given by testator to his debtor shall not be withheld to discharge the debt, for it is extinguished by the devise. *Gould* v. *Adams*, Vern. & Scriv. 258.

Debt discharged by entry in the testator's hand that the debtor pays no interest nor should he (the testator) take the principal unless greatly distressed ; and upon evidence of his circumstances. *Eden* v. *Smyth*, 5 Ves. 350 ; 5 R. R. 60.

A., on death-bed, desires executor not to trouble B. for bond debt. Executor puts bond debt in suit. Bond ordered to be delivered up to be cancelled, and costs paid by executor of law and equity, but reversed as to costs. *Wekett* v. *Raby*, 2 Bro. P. C. 386.

Though a gift of a legacy may release a debt, yet where the bond remains uncancelled, it must clearly express the intention so to do. *Wilmot* v. *Woodhouse*, 4 Bro. C. C. 227.

Notwithstanding declaration of the testator to his executor, that he never meant to call for payment of a promissory note, it was held part of the assets which were insufficient for the legacies ; a charge on the real estate failing for want of a proper attestation of the will. *Byrn* v. *Godfrey*, 4 Ves. 6 ; 4 R. R. 155.

See also *Fish* v. *Jesson*, 2 Vern. 114.

Where Debt greater than Legacy.]—Testator bequeathed his residuary estate in trust for his son and daughter equally, and declared that certain sums which he had lent to his son should be deducted from his share of the residue, and that certain sums which he had lent to C. W., his daughter's husband, on bonds, should be taken and allowed in account as part of her share ; and, if the balance should appear to be against C. W., the trustees were to refrain from putting the bonds in force against him, and to take a security from him for payment of the balance by instalments :—Held, nevertheless, that C. W. was released from the debts due from him, and was answerable only for the excess (if any) of those debts beyond the amount of a moiety of the residue. *South* v. *Williams*, 12 Sim. 566 ; 11 L. J., Ch. 410 ; 6 Jur. 332.

A. proved a debt of 424*l.* against the separate estate of B., and died before B. had obtained his certificate, having bequeathed to him 200*l.* A.'s executor afterwards received a dividend under the commission upon the whole sum proved. Ordered, that the proof of A. be reduced to 224*l.*, and that his executor refund the excess of dividend. *Man, Ex parte, Harvey, In re*, Mont. & M'Ar. 210.

Testator gave J. P. and I. P. 10*l.* each for mourning, and 100*l.* to J. T. N. his executor, for the trouble he would have in the execution of the will. By a codicil he gave legacies to other persons, and directed that if they or any other person who had a legacy left them by any will should owe him any sum or sums of money at his decease, it should be considered as part of their legacy. At the testator's death, J. T. N. owed the testator 4,000*l.*, and two of the other legatees also owed him sums much greater than their legacies :—Held, that the testator intended to remit their debts as well as to give them their legacies. *Hyde* v. *Neate*, 15 Sim. 554 ; 11 Jur. 259.

Where Debt created after Date of Will.]—A will made since the statute contained the words, "I hereby exonerate my sister from all claims in respect of money laid out by me in improvements of the estates in Scotland being charged thereon" :—Held, that this exoneration only applied to moneys so charged at the date of the will, and not to money afterwards laid out and charged, nor even to money then laid out, but afterwards charged. *Douglas* v. *Douglas*, Kay, 400 ; 23 L. J., Ch. 732.

A. devised 100*l.* to B., and by will released to B. all debts and demands, and afterwards A. lends B. 100*l.* : whether this 100*l.* is released by the will, quære. *Bentham* v. *Alston*, 2 Vern. 136.

Where Condition implied.]—A testatrix advanced to the defendant 900*l.* on the security of an assignment by him of a covenant by F. to transfer 1,000*l.* stock, and to pay interest in the meantime. By her will she gave F. 3,000*l.*, and all sums due to her from him, and directed her executors not to require payment of the 900*l.* due from the defendant, but out of the 3,000*l.* given to F. to retain enough to purchase 1,000*l.* stock for the benefit of her estate, and if the stock was worth more than the 900*l.* and interest, the surplus to be paid to the defendant. F. having predeceased her, she, by a codicil, directed that the 3,000*l.* should form part of her residuary personal estate, but directed her executors not to call on F.'s representatives for transfer of the 1,000*l.* stock, nor to enforce payment of the 900*l.* from the defendant :—Held, that the defendant was not at liberty to enforce performance of the covenant to transfer the 1,000*l.* stock against F.'s estate, except as to the difference between the 900*l.* and the value of the stock. *Synge* v. *Synge*, L. R. 9 Ch. 128 ; 29 L. T. 855 ; 22 W. R. 227.

Release by Unattested Memorandum.] — J. was indebted to the testator for 550*l.* on a mortgage, with covenant for repayment, dated 1834, and on a promissory note for 100*l.*, dated 1836. J. paid interest on these sums to the testator down to his death in 1840, and subsequently to the executors of the testator to 1846. An administration suit being instituted, a memorandum was discovered in the handwriting of the testator (but which had never been propounded for probate), in which the two sums were mentioned in one sum, with the words in the margin, "not to be enforced" :—Held, that this was not sufficient evidence of a release by the testator to relieve J. from accounting for these sums to the testator's estate ; but liberty was given to J. to propound such document to the ecclesiastical court for probate, and it was offered that the cause should stand over till the result should be known. An enforceable instrument will not be set aside in equity in favour of the debtor, as against the executors of a deceased creditor, unless under circumstances which amount to evidence of a release at law.

An imperfect declaration of such a nature will not be enforced in equity, unless the person to be charged has been instrumental in causing the testator to omit perfecting the declaration in his lifetime. *Peace* v. *Hains*, 17 Jur. 1091.

A creditor bequeathed to his debtor 700*l.*, being part of a debt of 1,200*l.* owed by the latter to the former, which 1,200*l.* was secured by bond. He afterwards revoked the bequest, but on the same day he made an indorsement on the bond, by which he said he forgave the debtor 700*l.* part of the within-named sum of 1,200*l.*, and in consequence of this gift, he had revoked a former bequest to the amount of the said sum of 700*l.* The executors of the creditor afterwards brought an action on the bond:—Held, on a motion for an injunction, that having given no consideration, he was not entitled to relief. *Tufnell* v. *Constable*, 8 Sim. 69.

Power to Executor to Release Debt.]—Where, from construction of will, executor, who was residuary legatee, had power to release debtor of testator, and he waived the debt by writing, but did not formally release his executor, executor might, it seems, withhold annuity given in consideration of whole debt being paid. *Hemming* v. *Gurrey*, 2 Sim. & S. 311. *See* 25 R. R. 209.

Release against whom Good.]—Where a testator forgives a debt it will not be good against creditors, but against an executor it may, and if an action should be brought for it, the court will grant an injunction. Plaintiff's grandmother, by her will, forgave her son-in-law, C., a debt of 500*l.* due to her on bond, which she desired her executors to deliver up to be cancelled. The legatee died in the life of the testatrix:—Held, that plaintiff, as representative of C., should have the benefit of the discharge of this debt, and decreed that the bond should be delivered up to be cancelled. *Sibthorp* v. *Moxon*, 3 Atk. 581. And see *S. C.*, 1 Ves. Sen. 49.

Release or Legacy.]—A testator bequeathed 1,000*l.* to A., who was indebted to him on a bond. He gave instructions for a codicil, and, in his own hand, wrote his wish that A.'s legacy should be made up 8,000*l.*, specifying the bond as part of that sum. The codicil was never executed, and the document was not proved as testamentary:—Held, that the bond debt was not released, and that A. took the legacy subject to the payment of the debt. *Chester* v. *Urwick*, 23 Beav. 404.

A testatrix, after giving various sums to trustees for her children and grandchildren, directed the sale and conversion of her real and personal estate, the proceeds to go to her children as tenants in common, and she declared that her son, for reasons stated, should receive 1,000*l.* less than what one-fifth of her "entire estate and property when she died would amount to." This by a codicil she reduced to 500*l.*, and also gave to her son-in-law, who owed her a debt on bond, all sums owing by him to her:—Held, that the gift of the "entire estate and property" excluded debts and legacies, and that the forgiveness of the debt did not constitute a legacy. *Higgins* v. *Smith*, 17 L. T. 29.

A. devises to B. 400*l.* which he owed him, provided he should thereout pay several sums to his children; the rest he freely gives him, and directs his executors to deliver up the security, and not to claim any part of the debts, but to give such release as B., his executors, &c., should require. B. died in the life of A. Decreed, this was a lapsed legacy. *Elliot* v. *Davenport*, 1 P. Wms. 83; 2 Vern. 521.

"I return to A. his bond," in a will, is not a release, but a legacy, and, having lapsed, the bond remains in force against a surviving co-obligor. *Maitland* v. *Adair*, 3 Ves. 231.

Bequest by obligee to one of joint obligors of debt, due on bond in these terms:—"I remit and forgive to A. the sum of 500*l.* in which he stands indebted to me on his bond, and I direct said bond to be delivered up to him and cancelled":—Held, merely a personal bequest to A., and lapses by his death before testator; therefore, surviving obligor and A.'s representatives are not released from bond. *Ixon* v. *Butler*, 2 Price, 34.

J. bequeathed in these words, "I give to N. the sum of 400*l.* which he owes me on mortgage of his estate in Shropshire, and I further order my executor to give him up all bonds owing from him to me, and which shall be found in my custody at my decease, with all interest due thereon." N. had given the testator a bond as a collateral security for the mortgage money: N. died before the testator. This is a lapsed legacy, and the executor of N. must pay the money. *Toplis* v. *Baker*, 2 Cox, 118; 2 R. R. 21.

A testatrix by her will gave all her real and personal estate to be converted into money, in trust, to pay debts and "the following legacies"; then followed a legacy of 10*l.*, and a legacy of 5*l.*, and the will proceeded thus: "Also I give to my nephew S. the sum of 2,000*l.*, in which sum, or thereabouts, he now stands indebted to me, subject nevertheless to, and I hereby charge the same with, payment of the following annuities and sums of money, that is to say to," &c. The will, after declaring when these legacies were to be paid, went on thus: "Provided always, and I hereby declare, that I do not intend, by the legacy of 2,000*l.* bequeathed to my nephew, to exonerate or release him from the debt which may be due from him to me at the time of my decease; but I direct that whatever sum or sums of money shall be due or owing from him to me at the time of my decease, shall be taken and considered in trust or in satisfaction (as the case may be), of the legacy or sum of 2,000*l.*, and shall be reckoned and accounted for by him accordingly." S. became insolvent, and was never able to satisfy the debt due to the testatrix's estate:—Held, that the deficiency to meet the annuities and legacies charged on the 2,000*l.* must be made out of the general assets. *Vickers* v. *Pound*, 6 H. L. Cas. 885; 28 L. J., Ch. 16; 4 Jur. (N.S.) 543; 6 W. R. 580.

Amount.]—Bequest to C. G. of all moneys due by her or her husband M. G. to the testatrix at the time of her death. M. G., at the death of the testatrix, owed her 50*l.* and 120*l.*, but she at the same time was his debtor to the extent of 32*l.* 12*s.* and 45*l.* 13*s.* 2*d.*:—Held, that the executors of the testatrix, in ascertaining the amount of the bequest payable to C. G. were entitled to deduct the latter sums from the former, and that C. G. was only to get the balance. *Ganly* v. *Dowling*, 5 L. R., Ir. 628.

One of the residuary legatees of a testator owed his estate three bond debts, under heavy penalties. One of the bonds was in the penalty of 8,000*l.* to secure 4,000*l.* with legal interest, to be paid within three months next after the legatee should take an absolute interest in one moiety of the testator's residuary personal estate. The testator charged the legatee's share of the residue with the payment of all debts at that time due from him, and of all interest thereon, and directed the same to be deducted from his share of the residue. The testator died in 1821, and the bond debtor obtained the prescribed interest in the residuary estate in 1864. At that time the principal and interest on the bond debts far exceeded in amount the penalties in each case:—Held, that in settling the amount due to the bond debtor, or his representatives, in respect of his moiety of the testator's residuary personal estate, there was to be deducted the full amount of the penalties of the bonds, and no more for the interest. *Mathews* v. *Keble*, 37 L. J., Ch. 8; 15 W. R. 1193. Affirmed, 37 L. J., Ch. 657; 16 W. R. 1213.

At a testator's death J. N. owed him 4,000*l.*, but claimed to be entitled to it as bequeathed to him by the will. By an order on motion he was ordered to pay the 4,000*l.* into court to an account intituled "the disputed legacy account of J. N.," and that sum was to be invested in stock, and the dividends were to be accumulated. At the hearing, the court decided in favour of his claim:—Held, nevertheless, that he was entitled, not to 4,000*l.* sterling, but only to the stock and the accumulations, although, owing to a fall in the funds, they together were of less value than 4,000*l.* *Hyde* v. *Neate*, 15 Sim. 558.

—— **Where Recital in Will.**]—Where a testator recites that a legatee is indebted in a certain sum, the recital binds the legatee, except in case of a clear mistake of figures. *Robinson* v. *Bransby*, 6 Madd. 348.

A testator, by his will, gave a legacy, and by a codicil, after reciting that he had advanced to the legatee a certain sum, he directed that sum to be considered as a payment on account of the legacy:—Held, that the sum mentioned would be deducted from the legacy, though the advance in fact made was less than that sum. *Aird's Estate, In re, Aird* v. *Quick*, 48 L. J., Ch. 631; 12 Ch. D. 291; 41 L. T. 180; 27 W. R. 882.

A testator gave a legacy of 7,000*l.* in trust for his daughter, the wife of J. T., and her children, and after reciting that he had given a bond for 3,000*l.* for J. T., he directed that what should remain due on the bond at his death should be paid out of the legacy. By a codicil made about a year afterwards he recited that he had paid the 3,000*l.* and other sums for which he was bound for J. T. to an amount exceeding 5,000*l.* in the whole, and directed that if J. T. should not before his death have repaid to him 5,000*l.*, at least the sum of 5,000*l.* should be taken in part payment of the 7,000*l.*, and to that extent he revoked the legacy. It was admitted that J. T. had not repaid the 5,000*l.*, but the legatees disputed the fact that the testator had paid so much as 5,000*l.* for J. T.:—Held, by the vice-chancellor, that the legacy must be reduced by 5,000*l.*, for that the legatees could not dispute the statements made by the testator as to the payments made by him. But held, by the court of appeal, that the legacy must be reduced only by the amount remaining unrepaid of sums advanced by the testator for J. T., and that an account must be directed. *Aird's Estate, In re* (supra), not followed. *Taylor's Estate, In re, Tomlin* v. *Underhay*, 22 Ch. D. 495; 48 L. T. 552—C. A.

But see *Wood, In re*, ante, col. 674.

Parol Evidence.] — A legatee, son-in-law to the testator, was held entitled to his legacy, discharged from debts due by him to the testator, and a debt for which the testator was his surety, upon evidence from the testator's accounts, letters, and memorandums in his handwriting. Parol evidence of declarations in conversation was produced for the same purpose, but the court appeared to rely on the evidence in writing. *Eden* v. *Smyth*, 5 Ves. 341; 5 R. R. 60.

It being admitted, or proved, that advances had been made by the testator to the legatee:—Held, that cheques drawn by the testator on his bankers in favour of, and paid by them to the legatee, were evidence on the question of the amount of such advances; and that an admission of a debt to the testator, made by the legatee in his balance sheet, and examination under his bankruptcy (though it did not charge himself so as to take the debt out of the statute of limitations), was evidence of the character of the advances which had been made, on the question whether such advances were loans or gifts. *Courtenay* v. *Williams*, 3 Hare, 539; 13 L. J., Ch. 461; 8 Jur. 844.

A testator bequeathed 1,200*l.* to his son J., which legacy "shall be in lieu of and full satisfaction of all claims and demands my son may have upon me; but in case my son shall make any claim upon my estate after my death, then such legacy shall not be paid to him, and it shall sink into the residue." J.'s wife was entitled under the will of C. to C.'s residuary estate to her separate use, with limitations to her children. C. died before the testator, who was indebted to her estate in 1,100*l.*, which remained unpaid at his death:—Held, that parol evidence was inadmissible to show that the testator intended the debt to be set off against the legacy, and that the assertion by J.'s wife of her claim under C.'s will to this debt did not preclude her from taking the 1,200*l.* as legal personal representative of J. *Parmiter* v. *Parmiter*, 1 John. & H. 1; 8 W. R. 578. Affirmed, 30 L. J., Ch. 508; 3 L. T. 799.

See also *Campbell* v. *Graham*, ante, col. 1515.

14. Legacy to Creditor—Satisfaction.

General Rule.]—The rule of ademption by length of time is become the fixed rule of property, and it is admitted that where a legacy either exceeds the debt, or is equal to it, i.e. where there is a debt due in the testator's lifetime, and nothing but a plain general legacy given to the creditor, it shall prevail. This rule is too well established to be disputed, and the court will not break through it, though they will not go a jot beyond it, for it is said, that if the maxim debitor non presumitur donare were to be reconsidered, the doctrine would not now hold, and distinctions from the rule must arise from circumstances, not in the will, but of the legatee. *Richardson* v. *Greese*, 3 Atk. 68.

Circumstances rebutting Presumption.] — Slight circumstances are laid hold of to get rid

of the rule that a legacy to a creditor extinguishes the debt, but a little difference between a portion and a legacy to a child, and as to the time of payment, will not prevail against the presumption of satisfaction. *Barclay* v. *Wainwright*, 3 Ves. 466 ; 9 R. R. 245.

Where a debtor gives a legacy to his creditor, the court will lay hold of minute discrepancies between the debt and the thing given to rebut satisfaction. Thus, when a debtor gave 400*l.* to a creditor to whom he owed 145*l.*, and gave him also other large benefits by way of life estates, and remainders in real and personal estate, and expressly directed his debts and legacies to be paid :—Held, that the debt was not satisfied by the legacy, or any others of the benefits given. *Hassell* v. *Hawkins*, 4 Drew. 468.

Mere difference of amount, or slight circumstances of difference in the times of payment, between provisions made by a will and subsequent gift, would not prevent the presumption of the one being an ademption of the other ; but the principle does not extend to devises of real estate, which would be to repeal the statute of frauds, nor does the bequest of a residue fall within the rule. *Davys* v. *Boucher*, 3 Y. & C. 397.

Though it is a rule that a legacy greater or as great as the debt shall be taken to be a satisfaction, yet where there is a presumption the testator's intention was otherwise, the courts, in late cases, have leant against the rule. *Nicholls* v. *Judson*, 2 Atk. 300.

Equity leans against satisfaction of debt by legacy, but in favour of a provision by will being in satisfaction of a portion by contract. Small differences between the debt and the legacy negative the presumption of satisfaction, but are disregarded in the case of portions. So in case of debt a smaller legacy is not a satisfaction of a larger debt, but may be a satisfaction of a portion pro tanto. A gift of residue cannot be a satisfaction of a debt, because, the amount being uncertain, it may be less than the debt ; but as a portion may be satisfied by a smaller legacy pro tanto, so on principle a residue ought to be considered as satisfaction of a portion altogether, or pro tanto, according to the amount. *Thynne* (*Lady*) v. *Glengall* (*Earl*), 2 H. L. Cas. 131 ; 12 Jur. 805. Affirming, 1 Keen, 769 ; 6 L. J., Ch. 25.

By a separation deed, dated the 7th of September, 1844, the husband covenanted that his executors or administrators should on his decease pay to his wife, if she survived him, 100*l.*, with a proviso that if 6*l.* per month was paid her for six months from his death, the balance should only be paid at the end of that period. By his will dated the 5th of September, 1844, but alleged to have been signed on the 9th, "after all my just debts, funeral and testamentary expenses, are paid, I bequeath to my wife 100*l.*, payable within six months after my decease, 6*l.* to be paid to her or her order until my estate is finally settled, the same to be deducted from the said 100*l.* as per indenture stated in our mutual separation" :—Held, that the legacy was not in satisfaction of the sum covenanted by the deed to be paid, but that the widow was entitled to both sums. The circumstance that two documents are contemporaneous, so that both are present to the mind of the donor when he executes each of them, is a strong reason against holding a gift in one to be a satisfaction of an obligation under the other to pay a like sum. *Horlock* v. *Wiggins*, 58 L. J., Ch. 46 ; 39 Ch. D. 142 ; 59 L. T. 710—C. A.

Effect of Direction for Payment of Debts.]—M., being indebted in 25*l.*, the balance of a larger sum, to a female, E., directed by his will all his just debts and legacies thereinbefore mentioned to be paid. Afterwards E. married, and then M., by codicil, gave E. a legacy of 100*l.* :—Held, that the charge in the will of legacies "thereinbefore" mentioned could not be extended to the legacy given by a codicil, and that the legacy was to be taken in satisfaction of the debt. A direction by a testator that all his just debts shall be paid will not by itself suffice to prevent the application of the general rule, that a legacy to a creditor is to be taken as a satisfaction pro tanto of a debt. A running account, to prevent the application of such general rule, must be an account in which there are payments in and out on both sides, not where all the payments are in one direction, viz. in diminution of the debt. *Edmunds* v. *Lowe*, 3 K. & J. 318 ; 26 L. J., Ch. 432 ; 3 Jur. (N.S.) 508 ; 5 W. R. 444.

When a testator directs debts to be paid without mentioning legacies, the presumption of satisfaction of a debt by a legacy is rebutted. A lady gave a bond to her nephew for 1,000*l.*, to be paid within twelve calendar months of her death, if he should then be living or should have died leaving issue him surviving, but not otherwise, with interest at 5 per cent. from her death. The bond was given on his marriage, and assigned to the trustees of his marriage settlement. There was evidence that the aunt knew this. She was not in loco parentis to her nephew. By her will she bequeathed 3,000*l.* to this nephew. In a codicil she directed that "all just and lawful debts" should be paid at once :—Held, that there was no satisfaction of the bond by the legacy, but that both were payable. *Edmunds* v. *Lowe* (supra) disapproved. *Huish, In re, Bradshaw* v. *Huish*, 59 L. J., Ch. 135 ; 43 Ch. D. 260 ; 62 L. T. 52 ; 38 W. R. 199.

"After payment of his debts" a testator gave certain legacies, one of 150*l.* to E. B., and he directed his executors to pay "my bequest only to the individuals herein named." The testator owed E. B. 150*l.* :—Held, that the legacy was not a satisfaction of the debt, but that E. B. was entitled to both. *Jefferies* v. *Michell*, 20 Beav. 15.

A testator bequeathed 250*l.* to his son, and directed that his debts of every kind, including specialty debts, should be paid out of his personal estate :—Held, that the legacy was not a satisfaction of a debt of 92*l.* due by the testator to his son for business advances on a current account. *Buckley* v. *Buckley*, 19 L. R., Ir. 544.

Creditors named whether to take as Creditors or Legatees.]—Testator by his will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his will. The schedule contained both the names of the creditors and the debts due to them respectively :—Held, that the parties so named in the schedule were not to be considered as legatees, but strictly as creditors, and consequently that the representatives of such as died in the testator's lifetime were entitled to the benefit of the will. *Williamson* v. *Naylor*, 5 Y. & C. 208.

A. and B. having been bankrupts in 1822, B., the survivor, in 1851, by his will directed his executors and trustees to pay his just debts,

including the unpaid-in full debts proved under the bankruptcy; and he directed his executors to pay to the official manager of the bankruptcy, or to some authorised person to be appointed by the court of chancery, in trust for all the creditors under the commission, so much money as would make the dividend on the estate equal to 20*s.* in the pound on all the debts so proved:—Held, that the direction to pay must be regarded as a bounty, not only in favour of those creditors who survived B., but of the representatives of those who predeceased him, and that the official assignee and the joint estate was entitled to receive the amount found due to all the creditors, less the amount of legacy duty. *Turner* v. *Martin*, 7 De G. M. & G. 429; 26 L. J., Ch. 216; 3 Jur. (N.S.) 397; 5 W. R. 277.

Amount bequeathed — Legacy greater than Debt.]—A debt is not satisfied by a legacy of a less amount bequeathed by the debtor to the creditor. *Gee* v. *Liddell*, 35 Beav. 621.

If a testator is chargeable with two annuities, and devises an annuity equal but to one, it will not be a satisfaction for either. Contra where he is not a general debtor for both. *Graham* v. *Graham*, 1 Ves. Sen. 262.

Where legacy is left by will smaller than debt, accompanied with annuity, they are never considered as a satisfaction of debt, unless so expressed in will. *Stanway* v. *Styles*, 2 Eq. Abr. 355.

A debtor wrote to her creditor, that she was unable to pay the debt in full, but would pay interest, and leave the creditor a legacy of 300*l.* by her will. The creditor wrote an answer, not acceding to the proposition in terms, but asking to have the 300*l.* secured. The debtor shortly afterwards made her will, leaving her creditor a legacy of 200*l.*:—Held, that the creditor took the legacy in trust, in part payment of his debt. *Hammond* v. *Smith*, 33 Beav. 452; 10 Jur. (N.S.) 117; 9 L. T. 746; 12 W. R. 328.

—— **Legacy less than Debt.**]—S. devised 10*l.* per annum to A. for life, chargeable on leasehold estate, and made his wife sole executrix, and died. Afterwards she (the wife) made her will, and B. executor, and thereby also devised 10*l.* a year to A. for life. B. being afterwards seised in fee of other lands, settled his estate on himself for life, remainder to his first, &c., son in tail, remainder to trustees for ninety-nine years, to pay his debts and legacies, and afterwards that A. should have and receive 20*l.* a year for life, and then died without issue, whereby term vested in trustees to execute trust. Lord chancellor decreed gifts by wills good; and said that where a man is debtor in 10*l.*, and gives 20*l.*, it shall be satisfaction, not a legacy; and that he believed in his own private opinion, that the 20*l.* annuity was intended for satisfaction, and that there was no case like this in print; yet it was agreed costs should be decreed against A., plaintiff, because he knew in his conscience that B. intended satisfaction. *Davidson* v. *Goddard*, Gilb. Eq. R. 65.

A testator, under his wife's appointment, was entitled to her residuary estate, charged with her pecuniary legacies, including one of 100*l.* to T., and another of 100*l.* to M., who was a married woman, to her separate use, independent of her husband, and it was left to his discretion either to pay the charges in his lifetime, or direct them to be paid by his executors. He did not pay them in his lifetime, but amongst other legacies, which by his will he directed his executors to pay, was a sum of 500*l.* to T., and a sum of 100*l.* to M., not limited to her separate use:—Held, that the sum of 100*l.* given to T. by the appointment of the wife was satisfied by the 500*l.* bequeathed by the testator, and that the sum of 100*l.* bequeathed to M. was in addition to, and not a satisfaction of, the 100*l.* given to her separate use by the wife. *Fourdrin* v. *Gowdey*, 3 Myl. & K. 383; 3 L. J., Ch. 171.

Debt of 200*l.* held satisfied by legacy of 500*l.* *Gaynon* v. *Wood*, Dick. 331.

On construction, greater legacy held not a satisfaction of lesser debts. *Field* v. *Mostin*, Dick. 543.

—— **Legacy exactly equal to Debt.**]—A testator bequeathed his wife a legacy of 625*l.* He then owed her that exact amount. The debt was paid off in his lifetime:—Held, that the sum was not payable as a legacy. *Fletcher*, *In re*, *Gillings* v. *Fletcher*, 57 L. J., Ch. 1032; 38 Ch. D. 373; 59 L. T. 313; 36 W. R. 841.

Error as to Amount of Debt.]—A testator reciting the amount of a debt he owed A., according to his own computation of it, directs such amount to be paid out of his real and personal estate, and bequeaths an annuity to A. for life out of his real and personal estate; such creditor may enjoy the annuity, and be at liberty to dispute the testator's calculation of the debt. *Clark* v. *Guise*, 2 Ves. Sen. 617.

A., by will, devised to B. 400*l.* in full satisfaction of all the moneys which he owed B., and subjects his real estate to the payment of his debts. The debt which A. owed B. was in all 800*l.*, but was barred by the statute of limitations. Court will suppose the testator mistaken in his computation, and the whole debt of 800*l.* shall be paid. *Gofton* v. *Mill*, 2 Vern. 141; Pre. Ch. 9.

Testatrix bequeaths all her personal estate to trustees in trust to sell, and out of the produce to pay all debts, "and in the next place to pay to A. 300*l.* due on bond." The testatrix owed only 120*l.* to A. upon bond; but the court decreed payment of the whole 300*l.* *Whitfield* v. *Clement*, 1 Mer. 402; 15 R. R. 143.

A sum of 200*l.* was charged on a brother's estates in favour of his sister. By his will he devised the estate in trust to raise 950*l.* for his sister, owing (as he expressed himself) to her by him:—Held, that the 200*l.* was thereby satisfied. *Shadbolt* v. *Vanderplank*, 29 Beav. 405.

A father directed his debts, including 300*l.* due to his daughter, to be paid immediately. He owed his daughter 150*l.* only:—Held, there was no legacy given by this direction. *Wilson* v. *Morley*, 46 L. J., Ch. 790; 5 Ch. D. 776; 36 L. T. 731; 25 W. R. 690.

Nature of Property bequeathed.]—Money and lands being things of a different kind, the one, though of greater value, shall never be taken in satisfaction of the other, unless so expressed; whatever is given by a will is primâ facie to be intended a benevolence. *Eastwood* v. *Vinke*, 2 P. Wms. 616.

Money and land go in a quite different channel, and therefore the one not to be taken in satisfaction of the other. *Chaplin* v. *Chaplin*, 3 P. Wms. 247.

Land not a satisfaction for money, nor money

for land, not being ejusdem generis. *Bengough* v. *Walker*, 15 Ves. 512 ; 10 R. R. 106.

One, on the marriage of his daughter, gives a bond to the husband for the daughter's portion, and afterwards, by will, devises land of much greater value to the husband and the wife, and their heirs. The devise no satisfaction of the bond, though there be a defect of assets to pay the testator's debts. *Goodfellow* v. *Burchett*, 2 Vern. 298.

When a bequest is made in satisfaction for that to which the legatee is previously entitled, the thing given in satisfaction must be of the same nature, and attended with the same certainty, as the thing in lieu of which it is given, as land for land, money for money. If personal estate be given for personal estate, one shall not be with a contingency, and the other without, for here the same certainty is wanting. *Bellasis* v. *Uthwatt*, 1 Atk. 428.

A testatrix devises leaseholds to A., subject to the yearly sum of 12*l.* for the sole use of Mrs. B., to be paid half-yearly ; and this annuity was payable on the 27th of January and 27th of July ; many years afterwards, A. devises to R. all his lands (in which these leaseholds were included), paying Mrs. B. 12*l.* per annum, by half-yearly payments, to be made on the 27th of January and the 27th of July : Mrs. B. is entitled under A.'s will to a second annuity, distinct from and in addition to the annuity given her by the will of the testatrix. *Bartlett* v. *Gillard*, 3 Russ. 149 ; 6 L. J. (O.S.) Ch. 19 ; 27 R. R. 45.

Covenant in marriage articles by the husband to pay his wife, if she should survive, 200*l.* as jointure, and 50*l.* to provide herself with a house, yearly for life ; afterwards by will he gave her for life an estate and house above the yearly value of 100*l.* a year, with the household goods, &c., and an annuity of 100*l.*, commencing and payable at different times from those in the articles :—Held, not a performance, nor intended as a satisfaction, no such intent being expressed. *Richardson* v. *Elphinstone*, 2 Ves. J. 462.

Devise of residue of real and personal estate for life not a satisfaction for a sum to be laid out in lands in fee by articles. *Alleyn* v. *Alleyn*, 2 Ves. Sen. 409.

F., by will, dated in 1843, devised to his brother W. and his heirs an estate which he had conveyed to him in fee to secure 3,476*l.*, and he directed that it should be freed and discharged of and from all equity of redemption, and be in part discharged of 3,476*l.* and upwards, in which he was indebted to his brother. F. also devised to W. in further part discharge of the said sum an additional strip of land. W., by will, dated in 1845, after a general devise of all his freehold estates, recited the devise in F.'s will, and declared that the arrears of interest on 3,476*l.* should not be claimed by his executors, and he bequeathed such arrears to his nephews and nieces. W. also bequeathed the future arrears of such interest to his wife for life, then to his daughter L. for life ; and after her decease, he gave the said sum to L.'s children, "after deducting a fair and reasonable sum of money as the value" of the mortgaged estate, and the strip of land so devised to him by his brother "as aforesaid" ; and in default of such issue, W. gave and bequeathed the sum of money so due to him from the estate of his brother "to his nephews and nieces" :—Held, that the devise by F. of the mortgaged estate in part discharge of the debt, and of the strip of land "in further part discharge of the same," was to go, pro tanto, in diminution of the debt due from him to his brother. *Davie* v. *Messiter*, 7 Jur. (N.S.) 349 ; 3 L. T. 874—L. C.

A. mortgaged lands situate at R. for 1,000*l.* The mortgagees resided with A. for two years prior to his death, and by his will he directed that they should remain for a year after his death. He also made them joint residuary legatees and executors :—Held, that there was no satisfaction of the debt. *Keogh's Estate, In re*, 23 L. R., Ir. 257.

—— **Of Debt.**]—A negotiable bill of exchange not satisfied by a legacy. *Carr* v. *Eastabrooke*, 3 Ves. 561.

If a testator is indebted to his executor for goods in the way of trade, a devise to the executor of a much larger sum than the debt amounts to shall not extinguish the debt. *Mortimer* v. *Powell*, 10 Mod. 398.

A legacy of 100*l.* was in 1818 bequeathed to C., to invest for the benefit of E. to apply the interest towards maintenance and education, and to pay the residue on his attaining twenty-one. C. received the legacy, but did not invest it ; but the maintenance and education of E., who resided with him, were paid for by him ; and he bequeathed 2,200*l.* to E. or for his benefit. C. died in 1829, and his executors thereupon invested 100*l.* (which had accumulated to the amount claimed) to meet the payment of the legacy of that amount, if claimed. E. died in 1859. On a question whether the 2,200*l.* was in satisfaction of the legacy or not :—Held, that the legal personal representative of E. was entitled to the accumulative fund. *Clare's Trust, In re*, 7 Jur. (N.S.) 769 ; 4 L. T. 789.

A testatrix, after referring to a debt due from her to a partnership of A. and B., deceased, bequeathed a fund "upon trust to pay and divide the produce of stock to and for the benefit of their respective estates." A. and B. were not partners, but one was the successor of the other. The sum of 4,517*l.* was claimed by A., and 197*l.* by B., against the testatrix's estate :—Held, that the fund was divisible between their estates equally, and not in proportion to the debts due to A. and B. respectively. *Greville* v. *Greville*, 27 Beav. 594.

Debt subsequent to Date of Will.]—A legacy given to J. S. shall not be taken to be a satisfaction of a subsequent debt. *Thomas* v. *Bennet*, 2 P. Wms. 343.

Particular Persons as Creditors—Testator's Child.]—As to a presumed satisfaction of a debt by a legacy, there is no distinction between the cases of parent and child and of strangers ; therefore circumstances of difference, as that the legacy given by the parent is contingent, are laid hold of to prevent the application of the rule of satisfaction. *Tolson* v. *Collins*, 4 Ves. 483 ; 4 R. R. 264.

A son placed by his father in business, accounting to his father for all profits, deducting only the expense of his board, having made no demand for wages during his father's life, was held not entitled as a creditor after his father's death, or if he had a demand, it was held satisfied by a will giving him a legacy to a greater amount,

and other benefits. *Plume* v. *Plume*, 7 Ves. 258.

A testator, who had received two legacies, bequeathed to his infant daughters, gives them, by his will, great contingent benefits, and specifies, by a memorandum, that he had received their legacies. These contingent benefits are not a satisfaction of the demand which the daughters have against their father's assets in respect of his receipt of their legacies. *Sandford* v. *Toby*, 4 L. J. (O.S.) Ch. 23.

A. devised to each of the children of B. 50*l.* to be paid to B. for their use; B. left each of them 260*l.* if they attained twenty-one:—Held, no satisfaction. *Pullen* v. *Cresy*, 3 Anstr. 830. S. P., *Field* v. *Mostyn*, *Ib.*, 831, n.; Dick. 543.

By the settlement on the second marriage of A. his intended wife's father settled estates on himself for life, remainder for the separate use of his daughter for life, remainder for the children of the marriage, and the trustees were directed to apply the rents, after the death of the survivor of the tenants for life, in the maintenance and education of the children during their minorities; and A. covenanted to permit his intended wife to enjoy any future property that might accrue to her for her separate use; and her father covenanted that all personal property he should die possessed of should be settled on his daughter and her children, in the same manner as the property comprised in the settlement, subject to any other dispositions, qualifications, or charges that he might make by his will. The father died, having bequeathed his residuary estate to A., and appointed him his executor. A. entered into possession of the settled estates, and received the rents, and mixed them with his own moneys. There was issue of the marriage two children. A. maintained them at his own expense, and died, having by his will given them benefits in real estates, which it was alleged he had purchased, in part, with the rents of the settled estates:—Held, that A. was a purchaser of the trust for the maintenance and education of the children, and that the executors were entitled to be allowed, on account, the sums which it would have been proper to apply for those purposes; that the covenant by the father of the wife was a provision against intestacy only; that the sums due from A. to his children, being a debt, were not satisfied by the benefits given them by his will; but an inquiry was directed as to what part of the real estates, devised for their benefit, had been purchased by A. out of the rents of the settled estate. *Stocken* v. *Stocken*, 4 Sim. 152; 2 Myl. & K. 489; 4 Myl. & Cr. 95; 4 L. J., Ch. 278; 7 L. J., Ch. 305; 2 Jur. 693.

A father, upon the marriage of his daughter, executed to the intended husband his bond, with warrant of attorney for confessing judgment thereon, conditioned for the payment of 800*l.* by instalments. He afterwards, by his will, bequeathed to his said daughter 800*l.*:—Held, that this legacy could not be considered as a satisfaction of the debt due to the husband. *Hall* v. *Hill*, 1 Dr. & War. 94; 1 Con. & L. 120; 4 Ir. Eq. R. 27.

A testator, by his will, gave to his married daughter 2,000*l.* for her separate use, "to be in bar and full discharge of all other claims which she or her said husband might have or make on his estate":—Held, that this was not like a case of election properly, nor a condition of forfeiture; but that the legacy was a discharge, pro tanto, of any rights which the wife, or her husband in her right, might have against the estate. *Hardingham* v. *Thomas*, 2 Drew. 353; 23 L. J., Ch. 910.

Trustees of a marriage settlement transferred, contrary to the trusts, 2,000*l.* stock, part of the trust fund, to the husband; two of the trustees became bankrupt; the remaining trustee (who was the father of the wife) by his will gave to the trustees of the settlement 6,000*l.* like stock, without declaring any trust of it, but directing certain bonds to be sold for giving his daughter "her legacy of the above-mentioned 6,000*l.* stock":—Held, that the 6,000*l.* was not given to the trustees beneficially, nor to the daughter exclusively, but was given upon the trusts of the settlement, and in satisfaction of the breach of trust. *Bensusan* v. *Nehemias*, 4 De G. & Sm. 381.

Where a testator has covenanted to give a fund to the trustees of his son's marriage settlement to be held on the trusts of that settlement, which include a reservation to himself of a contingent reversionary interest in the fund, and subsequently by will gives to his son half his residuary estate, and directs that all sums which he has covenanted to give to or with his son shall be taken in or towards satisfaction of his share, the whole of the fund must be brought into hotchpot, and the words "taken in or towards satisfaction" operate as a gift of the testator's contingent reversionary interest to the son. *Cosier, In re, Humphreys* v. *Gadsden*, 66 L. J., Ch. 236; [1897] 1 Ch. 325; 76 L. T. 31; 45 W. R. 376—C. A.

—— **As to Portions.**]—*See* PORTION.

—— **Testator's Wife.**]—A wife parts with 14*l.* per annum of her jointure, and the husband gives her a note that his executors should pay her that sum during life, and he after by will gives her 14*l.* per annum out of certain lands for life:—Held, a satisfaction of the note. *Brown* v. *Dawson*, Pre. Ch. 240; 2 Vern. 498.

Husband, on marriage settlement, settled 100*l.* per annum pin-money in trust for wife for her separate use, which becomes in arrear, and then the husband by will gives the wife a legacy of 500*l.*, after which there is a further arrear of pin-money, and then the husband dies. This legacy being greater than the debt, decreed, even in the case of the wife, to be a satisfaction of the arrears of pin-money due before the making of the will. *Fowler* v. *Fowler*, 3 P. Wms. 353.

Bond upon marriage to secure 300*l.* (the wife's fortune) to the wife within one month after husband's decease: by will, the husband gave her 500*l.*, payable within six months after his decease, together with other legacies; the bequest of 500*l.* is not a satisfaction for the 300*l.* secured by the bond. *Haynes* v. *Mico*, 1 Bro. C. C. 129.

A sum of 600*l.*, to which a married woman was entitled for her separate use, was paid to her husband, who, by his will, gave her 2,800*l.*, and directed his executor to pay all his debts, and to take all the residue of his property. The husband died, and his widow received the legacy of 2,800*l.*, and executed a general release to the executor as to all matters under the will. The widow filed her bill for payment of the 600*l.*:—Held, that the 600*l.* existed as a debt, and that the legacy of 2,800*l.* was not intended to be in satisfaction of it, and that the plaintiff was entitled to payment, notwithstanding the execution of the release. *Rowe* v. *Rowe*, 2 De G. & Sm. 294; 17 L. J., Ch. 357; 12 Jur. 909.

Bond by husband to pay to trustees in his lifetime or immediately after his death 500*l.* in trust (subject to their own charges, &c.) for his wife for life, and after her death to issue, and in default of issue for wife absolutely. Bequest after payment of debts of 1,000*l.* to wife absolutely within six months of death held not a satisfaction of bond. *Adams* v. *Lavender*, 1 M'Cle. & Y. 41.

By a marriage settlement, a rent-charge of 200*l.* a year was secured to the wife for life, payable quarterly, with powers of distress, &c. To enable the husband to mortgage, the wife relieved her rent-charge to the mortgagee. The equity of redemption was reserved to the husband, who covenanted to convey other land on the trusts of the settlement. The husband by his will gave his real and personal estate to his brother, on condition that he would allow his wife 300*l.* a year for life:—Held, that the 200*l.* a year remained a valid charge on the equity of redemption; and, secondly, that it was not satisfied by the 300*l.* a year. *Wood* v. *Wood*, 7 Beav. 183.

A bond to secure 2,000*l.* to be paid to trustees within three months after the death of the obligor for the benefit of A., his intended wife for life, and then over. The obligor, by will, after directing payment of his debts, gave to A., whom he had married in the meanwhile, an annuity of 200*l.*:—Held, that the annuity was not a satisfaction of A.'s interest under the bond. *Cole* v. *Willard*, 4 Jur. (N.S.) 988; 6 W. R. 712.

A married woman, being entitled under the wills of her father and brother to sums of money bequeathed by them to trustees for her sole and separate use, entered into an arrangement with her husband, that the money should be paid to him, and that he should hold the same in trust for her, and that certain railway stock should be transferred into his name also in trust for her, and that he should allow her an annual sum as interest in respect of the whole. Afterwards the husband made his will, and bequeathed to his wife a legacy considerably larger than her separate property in his hands:—Held, that the legacy was not a satisfaction of the debt, and that he held the property as a trustee for his wife. *Taylor* v. *Taylor*, 4 Jur. (N.S.) 1218.

—— **Brother or Sister.**]—Where A. sold an annuity of 92*l.* for his own life to his brother B. for 500*l.*, and agreed by letters to bequeath him a sum of 500*l.* by will, if B. were then living; and, in the course of the negotiations, B. agreed to take this 500*l.*, or 50*l.* annually if A. should die before him, A. died, and, by his will, directed his debts to be paid, and then left an annuity of 50*l.* to B.:—Held, that this was a fraternal transaction, the agreement contained in the letters was good, and that the 500*l.* was payable under the direction in his will for payment of debts, and that B. was also entitled to the 50*l.* a year under the will. *Fitzgerald* v. *Coote*, Wall. Lyn. 297.

A brother who had two sums of 1,000*l.* and 500*l.* in his hands upon trust for his sisters E. and A. respectively for life for their separate use, and after their deaths for their children equally, by his will desired that his real estate should be sold, and that two sums of 1,000*l.* and 500*l.* should be paid to his sisters out of the proceeds of sale, and desired that the remainder of the proceeds of sale might be equally divided amongst other persons named:—Held, that the gifts to the sisters were not a satisfaction of the moneys held by the testator as trustee for his sisters and their children. *Fairer* v. *Park*, 45 L. J., Ch. 760; 3 Ch. D. 309; 35 L. T. 27.

—— **Servant.**]—One being indebted to his servant for wages in 100*l.*, gives her a bond for this 100*l.* as due for wages, and afterwards, by will, gives her 500*l.* for her long and faithful services. This is not a satisfaction of the bond. *Chancey's Case*, 1 P. Wms. 408; 10 Mod. 399.

A. gives bond to B., her servant, to pay her 20*l.* per annum quarterly for her life, free from taxes, and by will, without taking notice of the bond, gives B. 20*l.* per annum for her life, payable half-yearly, but not said free of taxes; decreed the annuity by the will not to be a satisfaction of the bond, and that B. should have both the annuities. *Atkinson* v. *Webb*, 2 Vern. 478; Pre. Ch. 236.

—— **Execution.**]—Legacy to executor excluded him from the undisposed surplus, but is not at the same time a satisfaction for debt. The rule of constructive satisfaction is not carried so far as to answer a double purpose. *Mathews* v. *Mathews*, infra, col. 1576. And see *Binns* v. *Nichols*, 35 L. J., Ch. 635; L. R. 2 Eq. 256; 14 W. R. 727.

—— **Husband of Legatee under Will of Creditor.**]—A testator bequeathed a legacy to A., "in full satisfaction of all claims he may have upon me." The testator was at the time indebted to the executors of B., whose residuary estate was bequeathed upon trust for B.'s daughter, the wife of A., her issue and next of kin:—Held, that this debt was not a claim within the meaning of the conditions attached to the legacy. *Parmiter* v. *Parmiter*, 1 J. & H. 135; 8 W. R. 578. Affirmed, 30 L. J., Ch. 508; 3 L. T. 799—L. C.

—— **Legatee under Will of which Testator was Executor.**]—Legacy at twenty-one, the interest for maintenance; the debt is not satisfied by advancements during minority for the infant's benefit, nor by a legacy larger, but of a different nature, received under the will of the executor, there being no positive relinquishment, though no demand for ten years. *Lee* v. *Brown*, 4 Ves. 362; 4 R. R. 208.

Where Gift Contingent.]—A legacy left to a creditor is a satisfaction, if it be equal or exceed the debt, otherwise if given upon a contingency. *Spinks* v. *Robins*, 2 Atk. 493.

A debtor, without taking notice of the debt, devises a sum as great or greater than the debt to his creditors. This shall be a satisfaction. Secus if it were devised on a contingency, or if it were less than the debt. *Talbot* v. *Shrewsbury*, Pre. Ch. 394; Gilb. Eq. R. 89.

Where testator gave bond for 200*l.* to A., and afterwards, by his will, devised certain lands for a term of years upon trust to raise and pay, within two years after his death, to A. 200*l.*, and also devised other lands to the same trustee for three hundred years on trust to pay 200*l.* to A. within one year after his death:—Held, that this was a contingent legacy, for if the legatee had died before the time of payment, it would have sunk in the land, and that, the rule of ademption not extending so far as to take in a contingent legacy, this is not a satisfaction of the bond. *Nicholls* v. *Judson*, 2 Atk. 300.

Husband, by will, gives an annuity of 10*l.* per

annum to his niece A., an annuity of 10*l.* per annum to his niece B., and makes his wife his executrix. The wife, by will, gives 10*l.* per annum annuity to the said A., and 10*l.* per annum to the said B., to begin upon the contingencies of their surviving their respective mothers; these must be intended additional annuities, and not in satisfaction of those given by the husband's will. So, though not given upon such contingencies and greater in point of duration, yet, if not expressed by the wife to be in satisfaction of the annuities given by the husband's will, the court will allow them the annuities given by both wills. *Crompton* v. *Sales*, 2 P. Wms. 553.

Bond conditioned that executors to pay 5,000*l.* to a natural son at twenty-one if he should attain that age; by will afterwards, the father gave 15,000*l.* to trustees to pay 200*l.* per annum for the maintenance of the son till twenty-five, and then to pay him the principal, and if he should marry between twenty-two and twenty-five, and die, to pay the whole to the issue; but if he died unmarried before twenty-five, the whole over: the devise is not a satisfaction of the bond. *Jeacock* v. *Falkener*, 1 Bro. C. C. 295.

Wife entitled, under bond by the husband upon the marriage, to a sum payable three months after the death for her life, then for the children; if none, for her absolutely. By will he gave all real and personal estate he then had, or might die possessed of, upon trust to pay her the rents and interest for life, then the whole equally to the children; if none, over; and revoked all former settlements and wills: there were no children; the widow entitled to both. *Forsight* v. *Grant*, 1 Ves. 298; 3 Bro. C. C. 242.

Where Gift uncertain—Gift of Residue.]—On marriage, the husband covenanted that if the wife should survive him, and there should be no issue, his executors should, within nine months after his death, pay to the wife 800*l.* for her own use; but if there should be issue, then the 800*l.* should be laid out by the trustees, and the interest paid to the wife for life, and after her death the principal divided amongst the children. There was no issue of the marriage. The husband, by will, bequeathed one moiety of certain articles of his personal estate to his wife, which moiety greatly exceeded in value the sum of 800*l.*:—Held, not a performance or satisfaction of the covenant in settlement. Gift of residue is never considered a satisfaction of a certain provision made for wife on marriage, although much more beneficial. *Derese* v. *Pontet*, 1 Cox, 188; 1 R. R. 15. And see *Thynne* (*Lady*) v. *Glengall* (*Earl*), supra, col. 1565, and *Alleyn* v. *Alleyn*, supra, col. 1569.

—— **Gift after Payment of Debts.**]—Bond by husband to pay to trustees in his lifetime or immediately after his death 500*l.* in trust (subject to their own charges, &c.) for his wife for life, and after her death to issue, and in default of issue for wife absolutely. Bequest after payment of debts of 1,000*l.* to wife absolutely within six months of death:—Held, not a satisfaction of bond. *Adams* v. *Lavender*, 1 M'Cle. & Y. 41.

—— **Upon Condition.**]—A debtor bequeaths a much larger legacy upon a condition which by a subsequent deed it becomes impossible to perform; by the will, it would not have been a satisfaction, as it was for another purpose, but being freed from the condition by the deed, it is a satisfaction. General rule, that a legacy larger than, or equal to a debt, is a constructive satisfaction; but any minute circumstance is laid hold of to take it out of that rule; it must be certain as to duration and commencement. *Mathews* v. *Mathews*, 2 Ves. Sen. 635.

—— **Payable at Later Date.**]—Bond upon marriage to secure 300*l.* (the wife's fortune) to the wife within one month after husband's decease: by will, the husband gave her 500*l.*, payable within six months after his decease, together with other legacies; the bequest of 500*l.* is not a satisfaction for the 300*l.* secured by the bond. *Haynes* v. *Mico*, 1 Bro. C. C. 129.

—— **No Time fixed for Payment.**]—A legacy to a creditor as to which no time is fixed for payment is not a satisfaction of a debt for a smaller amount payable within three months after the testator's death. *Atkinson* v. *Littlewood* (L. R. 18 Eq. 595) discussed; *Dowse, In re, Dowse* v. *Glass* (50 L. J., Ch. 285), followed. *Horlock, In re, Calham* v. *Smith*, 64 L. J., Ch. 325; [1895] 1 Ch. 516; 13 R. 356; 72 L. T. 223; 43 W. R. 410.

Parol Evidence of Intention.]—Parol proof allowed as to a man's intention in a will where the question was, whether a legacy should go in satisfaction of a debt due from the testator to the legatee. *Cuthbert* v. *Peacock*, 2 Vern. 593.

On presumption of satisfaction by will, evidence admissible, first, to constitute the fact that testator was debtor; secondly, to meet or fortify the presumption. *Pole* v. *Somers* (*Lord*), 6 Ves. 321. *See* 12 R. R. 36, n.

Parol evidence admitted, and prevailed against the presumption, that a debt is satisfied by a legacy of a greater amount; the will also affording an inference in favour of that presumption. *Wallace* v. *Pomfret*, 11 Ves. 542; 8 R. R. 241.

Legacy to A. in satisfaction of all claims which she then had or might have upon the estate at testatrix's decease; legatee having a claim against testatrix as executrix of a deceased party, but no other, parol evidence of that fact was refused. *Dixon* v. *Samson*, 2 Y. & C. 566; 1 Jur. 495.

Quære, whether parol evidence is admissible to explain a testator's intention as to a legacy being in satisfaction of an existing claim. *Hales* v. *Darell*, 3 Beav. 324; 10 L. J., Ch. 10.

A testator bequeathed a legacy to A. "in full satisfaction of all claims he may have upon me." The testator was indebted to the executor of B., who held B.'s residuary estate on trust for the wife of A. Parol evidence to shew that the testator regarded the debt as belonging to A.'s wife, or to A. in her right:—Held, not admissible. *Parmiter* v. *Parmiter*, 1 J. & H. 135; 8 W. R. 578. Affirmed, 30 L. J., Ch. 508; 3 L. T. 799—L. C.

See also *Cuthbert* v. *Peacock*, 1 Salk. 155; *Canner's Case*, 2 Salk. 508.

15. Ademption.

Principles—Specific Gift Adeemed by Disposal in Lifetime.]—Where a particular chattel is specifically described and distinguished from all other things of the same kind, and is not found among the testator's effects, it fails; if given first to A. and then to B., they must divide it; and if disposed of in the testator's lifetime, it is an

ademption of such legacy. *Purse* v. *Snaplin*, 1 Atk. 417.

Where specific bequest does not remain in specie at the time of the testator's death, it is regarded as adeemed, without considering the animus adimendi. *Barker* v. *Rayner*, 5 Madd. 208 ; 26 R. R. 18.

A testator by his will bequeathed to his trustees therein named, in trust for two persons, the sum of 4,000*l.*, "at present secured by a mortgage of certain landed property at Podington, Beds." During the lifetime of the testator the mortgage was paid off. The question therefore was, whether the legacy must be treated as adeemed, or whether it was a general legacy, having regard to the words "at present" in the gift:—Held, that the legacy was specific, and that the gift failed. *Robe, In re, Slade* v. *Walpole*, 61 L. T. 497.

—— **But not by Inchoate Disposition only.**]—An offer by an agent to sell the subject-matter of a specific legacy, made before but accepted after the testator's death, does not operate as an ademption. *Pearce, In re, Roberts* v. *Stephens*, 8 R. 805.

A testator resident in Jamaica bequeathed to A. B. 2,000*l.*, part of a sum of 7,000*l.* in the hands of his agents in England, and received by them from the transport board on his account. The testator afterwards went to Philadelphia, where he died; seven days before his death he wrote to his agent in Jamaica, desiring him to order his agents in England to invest all his moneys in their hands received from the transport board in any stock most beneficial to his estate. The agent wrote accordingly, but some time before his letter arrived in England, the agents there had of their own accord invested the whole of the testator's moneys in their hands in the 4*l.* per cents.:— Held, that the legacy was not adeemed. *Bason* v. *Brandon*, 8 Sim. 171.

A testator resident in Jamaica, by his will, dated the 30th March, 1843, gave all his moneys in the 3 per cents. and bank stock to A. On the 20th June, 1846, the testator by a letter directed his London agent (who had a power of attorney to sell out the stock) to sell such a sum as would produce 800*l.*, and apply it in the manner mentioned in the letter. The testator died on the 29th of June. On the 24th of July a part of the stock was sold out by the London agents in pursuance of the directions given them:—Held, that neither the direction to sell, nor the sale after the testator's death, adeemed any of the legacy. *Harrison* v. *Asher*, 2 De G. & Sm. 436; 17 L. J., Ch. 452; 12 Jur. 833. And see *Hughes* v. *Walmesley*, 12 Jur. 834, n.

—— **Effect of Parental Relation.**]—Difference of the legal presumption where the legacy and gift are by a stranger, and where they are by one standing in a parental relation. *Griffith* v. *Bourke*, infra, col. 1582.

Gift by a brother standing in loco parentis is an ademption of a legacy in his will. *Monck* v. *Monck* (*Lord*), infra, col. 1582.

—— **Moral Obligation other than Parental.**]—The doctrine of ademption of legacies founded on parental or quasi-parental relation applies also to cases where a moral obligation other than parental or quasi-parental is recognised in the will, though without reference to any special application of the money. A testatrix by her will bequeathed to a niece of her deceased husband 500*l.* with these words, "according to the wish of my late beloved husband," and she afterwards in her lifetime paid 300*l.* to such legatee, with a contemporaneous entry in her diary that such payment was a "legacy from" the legatee's "uncle John":—Held, that the presumption was that such legacy was adeemed to the extent of 300*l.*, and that such presumption of ademption pro tanto only was not displaced by evidence that more than a year before the 300*l.* was given the testatrix had said that the legatee, when asked by the testatrix whether she would rather receive 300*l.* down than a larger sum after the testatrix's death, had replied that she would prefer 300*l.* down. *Pollock, In re, Pollock* v. *Worrall*, 54 L. J., Ch. 489; 28 Ch. D. 552; 52 L. T. 718—C. A.

—— **Where Gift not Specific.**]—Where a legacy is of the value of securities, &c., though the specification be varied, the legacy is not adeemed. *Pulsford* v. *Hunter*, 3 Bro. C. C. 416.

A testator, by his will, stated that he had lent his money to various persons named on their notes of hand, and to sundry other persons whose names and notes would be found among his papers. He then said, "Now my will is that the moneys as aforesaid be disposed of as follows"; he then gave legacies to the amount of 9,900*l.* At his death, none of the enumerated investments existed:—Held, that the legacies were not specific, but general legacies. *White* v. *Wakley*, 28 L. J., Ch. 79.

One devises 500*l.*, "viz. 400*l.* due on bond and 100*l.* in money"; afterwards the testator receives part; this no ademption of the legacy. *Orm* v. *Smith*, 2 Vern. 681; Gilb. Eq. R. 82.

—— **Charge on Estate.**]—A testator, by his will dated the 23rd June, 1869, after reciting that he was entitled as against the M. estates to the sum of 7,966*l.* 11*s.* 4*d.*, being the amount ascertained to be paid by him in his character of executor of the late R. H. E., in discharge of the residue of liabilities to which the inheritance in the M. estates was liable, bequeathed to his son W. the sum of 7,966*l.* 11*s.* 4*d.*, or such other sum as he might be entitled to raise off the M. estates. The testator was tenant for life of the M. estates, with remainder to W. in tail male. By deed, dated the 9th day of July, 1875, the M. estates, and also the B. estates, of which the testator was tenant for life, with remainder to W. in tail, were resettled. This deed recited that, upon the winding up of the testamentary estate of R. H. E. (under whose will the M. estates were limited), an account was settled between the several devisees of the respective estates of R. H. E., with a view to ascertain their liability, and that the testator had been ascertained to be entitled to stand against the M. estate for the sum of 8,329*l.* 0*s.* 2*d.*, and that it had been agreed that the said sum of 8,329*l.* 0*s.* 2*d.* should be charged on the inheritance of the said several estates; and by the said deed the M. estates and the B. estates were granted to trustees for 500 years, in trust to raise the sum of 8,329*l.* 0*s.* 2*d.*, and pay the same as the testator should appoint:—Held, that there was no ademption of the bequest to W. of the charge on the estates. *Longfield* v. *Bantry*, 15 L. R., Ir. 101.

Case where, from the general tenor of will, legacies which were charged on certain funds

not existing at time of death were held not adeemed. *Wingfield* v. *Newton*, 9 Mod. 428.

A testator gave a number of legacies, adding, "I guarantee my estates at C. for the payment of the above legacies"; and, in the subsequent part of his will, he gave many other legacies. The first class of legacies are not specific, and, failing the estates at C., are to be borne by the general personal estate. *Willox* v. *Rhodes*, 2 Russ. 452.

A pecuniary legacy, given with a particular security, is a demonstrative legacy. Such a legacy does not fail by the failure of the security upon which it is given. *Fowler* v. *Willoughby*, 4 L. J. (o.s.) Ch. 72.

A testator, domiciled in Jamaica, gave legacies in Jamaica currency to J. C., H. C. and M. C., persons also domiciled in that island, and desired them to be paid out of money due to him on certain bonds which the will specified. At his death, which happened in Scotland in 1790, no such bonds were to be found, but J. C. was then indebted to his estate upon other bonds in a sum which exceeded the value of his legacy, and which, a year after the testator's death, including interest, was equal to the amount of the penalties. In 1794 actions were brought in Jamaica upon those bonds by the testator's personal representative there, and judgments recovered against J. C. for the full penalties and costs; but no attempt was made to levy execution upon the judgments, and they remained unsatisfied. About the time of the testator's death the legatees came to England, and never returned to Jamaica, nor did any of them set up a claim to their legacies prior to the year 1817. In the year 1818 H. C. and M. C. assigned their respective legacies to the plaintiff, who was the personal representative of J. C., the other legatee; and he, in the year 1821, when administration was for the first time taken out to the testator's estate in England, filed the bill for the purpose of enforcing payment:—Held, that the legacies were demonstrative only, and were not to be considered as having been adeemed. *Campbell* v. *Graham*, 1 Russ. & M. 453; 9 L. J., Ch. 234.

A testator devised his estate X. to trustees for sale, for payment of his debts and legacies, in exoneration of his personal estate; and after reciting that he became entitled on his marriage to a sum of 7,442*l.*, of which he had received 2,442*l.*, and the 5,000*l.* remained due, he bequeathed 2,442*l.*, to be paid out of the produce of the estate X., and the sum of 5,000*l.*, when and if the same should be received and got in, but not otherwise, to A., B., C. and D., equally, and, in case the 5,000*l.* should be received by him in his lifetime, he directed the same to be raised out of the estate X. The testator received the 5,000*l.*:—Held, that the legacy was demonstrative, and that it was a charge upon the general personal estate as well as on the estate X. *Colville* v. *Middleton*, 3 Beav. 570.

A gift of a sum of money to one, to be paid out of the produce of a real estate directed to be sold, followed by a gift to others of the residue of that produce, is substantially a gift of the whole estate, and not a gift of legacies, with a collateral charge upon the estate, and these gifts are adeemed, if the testator sell the estate in his lifetime. *Newbold* v. *Roadknight*, 1 Russ. & M. 677; Tam. 492.

—— **Intention — Separate Gift.**]—Where there is a fixed, independent, separate, and distinct intent to give the legacy, the legacy will stand though the fund out of which it is directed to be paid does not exist. *Mann* v. *Copland*, 2 Madd. 223.

—— **Where Purpose of Gift Fails.**]—A testator gave to his brother absolutely certain collieries, and all debts which might be due to him at the time of his decease in respect of such collieries and works, but subject to the payment of all debts and engagements due and payable in respect of or connected with the works; and for the better enabling his brother to carry on the collieries, the testator bequeathed to him 10,000*l.* Shortly before his decease, the testator sold all his property in the collieries to his brother:—Held, that there was no ademption of the legacy of 10,000*l.*, and that the direction as to receiving and paying debts could not be carried into effect. *Parsons* v. *Coke*, 27 L. J., Ch. 828; 6 W. R. 715.

Devise failing as to one part of property devised, being the effect of a paramount title, established as to the other premises devised, against the express intention that they should go together. *Southey* v. *Somerville* (*Lord*), 13 Ves. 486.

A. bequeathed 200*l.* to trustees, to accumulate for twenty-one years, and then to lay out the accumulated fund in repairing certain premises, and to pay the surplus to the same persons to whom the premises were devised, and then devised the premises in strict settlement. She afterwards sold the premises, and by a codicil bequeathed the purchase-money to the original devisee for life absolutely, and the codicil contained no reference to the 200*l.*:—Held, that it was adeemed. *Whiteway* v. *Fisher*, 9 W. R. 433.

—— **Where Purpose Satisfied by Gift inter vivos.**]—Legacy to the parish priest of the parish K., for the erection of a new chapel in the town C.:—Held, adeemed by the gift of a like sum, for the same purpose, to the Roman Catholic archbishop of the diocese by the testator in his lifetime. *Griffith* v. *Bourke*, infra, col. 1582.

Ademption or satisfaction of legacy charged on land by loan to legatee's husband. *Higginson* v. *Wilson*, 2 W. R. 217.

Devise of 400*l.* to be laid out in finishing a house. Testator lives to lay out as much himself, but leaves the house unfinished. The 400*l.* shall not be laid out. *Husbands* v. *Husbands*, 1 Vern. 95; 2 Ch. Cas. 127.

Different construction of a bequest to persons who had been creditors, but had been paid in full, where the payment had been made before, and where after, the date of the will. *Philips* v. *Philips*, 3 Hare, 298; 13 L. J., Ch. 445.

Whether the right of a creditor to a share of the residue would not be sustained, if the principal of his debt had been paid, but he had not received interest upon the debt for the time that the payment was delayed, quære. *Ib.*, 303.

One having, by his will, given his wife 600*l.* in money on his death-day, ordered his servant to deliver to his wife, then present, two bank notes, payable to bearer, amounting to 600*l.*, saying he had not done enough for his wife. This gift is additional, and shall not be construed a payment of the former legacy in the testator's lifetime. *Miller* v. *Miller*, 3 P. Wms. 356.

A testator, by will dated the 17th December, 1862, gave to his wife a legacy of 200*l.*, to be paid within ten days after his death. On the

28th November, 1867, during his last illness, he, at the request of his wife, who did not know the contents of his will, gave her 200*l.*, that she might have a sum of money which she could control immediately on his death, without the interference of the executors. He died on the 8th December, 1867:—Held, that the legacy was not adeemed or satisfied by the gift of the 200*l.*, for that the providing the wife with ready money immediately after the testator's decease was not such a particular purpose as to bring the case within the rule that, where a testator gives a legacy for a particular purpose, and afterwards accomplishes that purpose himself, the legacy is satisfied. *Pankhurst* v. *Howell*, L. R. 6 Ch. 136; 19 W. R. 312. And see *Armstrong, In re, Marescaux* v. *Armstrong*, ante, col. 733.

—— **Contrary Intention.**]—J. made his will, dated the 6th March, 1879, and thereby bequeathed all his real and personal estate to his executors, in trust to pay certain legacies which he set forth. The will then proceeds as follows:—"And inasmuch as my property almost exclusively consists of United States securities, which are to be redeemed by that government at specified times, my will is that they be not disposed of or realised until they are redeemed by the said government. I direct that, in case I shall die before the time for such redemption shall arrive of the said securities, the interest to accrue due thereon shall be divided equally" between certain charities which the testator specified. At the date of the will the testator's property consisted of two United States 5-20 bonds of 1869 loan for 1,000 dollars each, four bonds of the same loan for 500 dollars each, and three bonds of the United States 6 per cent. 1861 loan for 1,000 dollars each. Shortly after the date of the will he sold these bonds, and purchased in lieu of them four United States bonds for 1,000 dollars each, and one bond of the Victoria government for 500*l.* The testator died on the 11th May, 1883, the last-mentioned securities being then in his possession:—Held, that the bequest to the charities was adeemed. *Murphy* v. *Cheevers*, 17 L. R., Ir. 205.

—— **Confirmation of Will—Adeemed Legacy, when Set Up.**]—An adeemed bequest is not set up again by a subsequent confirmation of the will. A testator charged a leasehold with an annuity of 60*l.* in favour of J. He afterwards assigned the estate upon the trusts of a marriage settlement, reserving to himself a power, by any writing, or by will or codicil, to charge the same with an annuity of 60*l.* in favour of J. The testator afterwards made a codicil, whereby he expressly confirmed and ratified his will:—Held, that the annuity charged by the will was adeemed, and that the codicil did not operate as an execution of the power reserved by the settlement. *Cowper* v. *Mantell*, 22 Beav. 223; 2 Jur. (N.S.) 745; 4 W. R. 500.

Codicil ratifying the will does not set up an adeemed legacy. *Monck* v. *Monck* (*Lord*), infra.

Where a testator, having given a general legacy, by a subsequent instrument makes it specific, the ademption of the specific legacy, without more, will not set up the general legacy. A testator bequeathed as follows: "To M. C. B., besides Austrian metalliques for 104,000 florins, I give 5,000*l.*" By a subsequent codicil he bequeathed as follows: "Whereas I have, by indorsement on two little parcels containing 104 Austrian bonds of 1,000 florins each, given them to M. C. B., I confirm the said disposition, and add to it 20,000*l.*":—Held, first, that the testator, as to the Austrian securities, referred to the same subject-matter; and the testator not possessing such securities at his death, that the gift of them failed; and, secondly, that the gift of the two sums of 5,000*l.* and 20,000*l.* (though both were connected with the gift of the same Austrian securities) was cumulative, and not substitutional. *Hertford* (*Marquis*) v. *Lowther* (*Lord*), *Berchtoldt's* (*Countess*) *Case*, 7 Beav. 107; 13 L. J., Ch. 41; 7 Jur. 1098. Affirmed on appeal by Lord Chancellor, 11th February, 1845.

A testator gave to M. F., whom he afterwards married, among other bequests, 50*l.* long annuities, which he had purchased with 1,000*l.* left him by the will of J. T. After his marriage he made a codicil, by which he confirmed to his wife the benefits given to her by his will, in addition to the provision made for her by her marriage settlement. He afterwards sold his long annuities, and with the produce purchased new annuities, which differed only from the long annuities by being terminable a quarter of a year sooner. Subsequently to this transaction, he made another codicil, by which he confirmed his will and former codicil:—Held, that the legacy of 50*l.* long annuities was adeemed. *Pattison* v. *Pattison*, 1 Myl. & K. 12; 2 L. J., Ch. 15. And see *Coppin* v. *Fernyhough*, ante, col. 1269; *Porter* v. *Smith*, ante, col. 1270.

—— **Parol Evidence, when Admitted.**]—Parol evidence admissible to fortify the presumption of a legacy being adeemed. *Monck* v. *Monck* (*Lord*), 1 Ball & B. 298; 12 R. R. 33.

Parol evidence and declarations of the testator contemporaneous, or subsequent, are admissible to rebut or to confirm the legal presumption of ademption, but they must be directed to the very transaction relied on as an ademption. *Griffith* v. *Bourke*, 21 L. R., Ir. 92.

Legacy of interest then due on mortgage. After making will, testator survives eleven years, and receives interest on mortgage. Evidence admissible to prove interest was received as accruing since the making of will, and not on account of what was due before; therefore legacy was held not adeemed. *Graves* v. *Hughes*, 4 Madd. 381.

Testatrix bequeathed 200*l.* reduced annuities standing in her name to her nephew. That bequest was copied from a former will, at the date of which she had 200*l.* reduced annuities standing in her name. Afterwards she sold out, and invested in long annuities, and this latter was all the stock she had at her death:—Held, it passed to the nephew. *King* v. *Wright*, 14 Sim. 400; 14 L. J., Ch. 214.

Where Disposition made under Compulsory Powers.]—A testator bequeathed two leasehold houses to A., and subsequently notice to treat for the sale was served upon him by a railway company. The purchase-money was ascertained by surveyors, but no written agreement for sale was made. After the death of A. the property was conveyed to the company by his executrix and residuary legatee, down to which time the rents had been received in lieu of interest on the purchase-money:—Held, that the bequest of the leaseholds had been adeemed, but that A. was entitled to the rents received from the tes-

tator's death to the date of conveyance. *Watts* v. *Watts*, L. R. 17 Eq. 217 ; 22 W. R. 105.

—— **In Lunacy.**] —Testator gave to wife ready money, &c., which he should have in house at time of death ; he gave specifically to others his exchequer bills, stock, &c. Becoming insane, 3,000*l.* paid into his house was laid out in stock and exchequer bills ; specific legatees of exchequer bills, &c., entitled. *Browne* v. *Groombridge*, 4 Madd. 498 : 20 R. R. 326.

A testator devises Blackacre to A., and Whiteacre (which is of equal value) to B. ; afterwards a commission of lunacy having issued against him, Whiteacre is sold by the order of the Lord Chancellor for the payment of the lunatic's debts :—A. is not entitled to have any compensation out of the lands devised to B. for the loss of lands devised to him (A.). *Holmes* v. *Goodworth*, 7 L. J. (o.s.) Ch. 128.

After the testator, who was a shopkeeper, had made a will, bequeathing his leasehold house and shop, and the stock-in-trade therein, to his wife (subject to certain trusts which failed), and giving his residuary estate in another manner, he became insane. No commission of lunacy was taken out, but his wife, not being disposed or competent to carry on the trade, joined with the persons whom he had named executors, and also with the residuary legatees, in an agreement for the sale of the leasehold premises and stock-in-trade therein for a gross sum, to be paid by instalments. After this agreement was made, and possession of the property delivered to the purchaser, the testator died. The court, in an administration suit, approved of the agreement as beneficial to the estate, and directed it to be carried into effect :—Held, that, notwithstanding the agreement for sale, and the transfer of the possession of the property specifically bequeathed, none of the parties having any lawful authority to effect such a sale, both the leasehold estate and the stock-in-trade must be taken as unconverted at the death of the testator, and passed to the specific legatee. *Taylor* v. *Taylor*, 10 Hare, 475.

A testator made a will, containing a specific bequest of the farming stock which should be in his possession at the time of his decease, and afterwards became of unsound mind. He remained of unsound mind until his death. A short time before his death the farming stock was sold, and the money resulting from the sale was placed to a separate account :—Held, that there was no ademption, and that the money passed to the specific legatee of the farming stock. *Jones. In re, Jenkins* v. *Jones*, 35 L. J., Ch. 520 ; L. R. 2 Eq. 323 ; 12 Jur. (N.S.) 368 ; 14 L. T. 540 ; 14 W. R. 665.

A testator having specifically bequeathed by his will certain shares in a company, was found a lunatic by inquisition, and by an order in lunacy the shares were sold, and the proceeds invested in consols :—Held, in the absence of any provisions in the Lunacy Regulation Act (16 & 17 Vict. c. 70) affecting the case, that the shares were converted for all purposes by the order, and the bequest of them was adeemed accordingly. *Jones* v. *Green*, 37 L. J., Ch. 603 ; L. R. 5 Eq. 55 ; 16 W. R. 603.

A testator made a specific bequest of stock in the G. railway company. After the date of his will he was found a lunatic. Under an order in the lunacy, the stock was sold, and the proceeds were invested in a sum of consols, which was carried to the credit of the lunatic to an account intituled "Proceeds of the sale of stock in the G. railway company." In an action for the administration of the testator's estate :—Held, that the specific legacy was adeemed by the sale in the lunacy, and that the consols therefore fell into the residue. Observations on *Jones* v. *Green* (supra) and *Leeming, In re* (3 De G. F. & J. 43). *Freer, In re, Freer* v. *Freer*, 52 L. J., Ch. 301 ; 22 Ch. D. 622 ; 31 W. R. 426.

A testator bequeathed a policy on his own life on trust to pay two debts due from him, and to pay the balance of the money to be received on the policy, if any, to his daughter J. The testator paid off one debt ; he became lunatic ; his committee paid off the other debt :—Held, that J. was entitled to the money received on the policy, less the debt paid by the committee. *Larking, In re, Larking* v. *Larking*, 57 L. J., Ch. 282 ; 37 Ch. D. 310.

—— **By Person under Disability.**]—By a marriage settlement funds were settled to the separate use of the wife for life, with restraint on anticipation, and with power to her, in events which happened, to appoint by will. By her will she bequeathed specific parts of the funds to a charity. After the date of her will the trustees of the settlement, with her consent, sold out the stock and advanced part of the proceeds to her and her husband. The husband died, and she by a codicil appointed that all funds, subject to the settlement, should be held upon trust to indemnify the trustee in respect of the amount he had advanced to her and her husband, and confirmed her will :—Held, that as she was, during coverture, incapable of consenting, there had been no ademption of the bequest to the charity, but that after her husband's death sh had adopted the breach of trust, and that the bequest was, therefore, decreased by the amount of the advances. *Kitchen, In re*, 31 L. T. 642.

—— **Conversion of Stock by Act of Legislature.**]—A legacy of 7,000*l.* 5 per cent. stock (converted by statute, passed between the making the will and the death of the testator, into 4 per cent. stock) not adeemed by the conversion. For the statute did not destroy the identity of the stock ; it was a debt due by the public to the testator, who had the option either to reduce the interest or to be paid the principal, and he chose the former. The legatee decreed entitled to the 4 per cent. stock, together with the dividends from the death of the testator. *Browne* v. *M'Guire*, Beat. 358.

If a person has 1,800*l.* stock in funds, and devises 1,000*l.* of it, and afterwards sells 1,600*l.*, and then buys 1,400*l.*, and, between the making of the will and the testator's death, the legislature changes that kind of stock into annuities, these circumstances make no alteration in the legacy. *Partridge* v. *Partridge*, 9 Mod. 269 ; Cas. t. Talb. 226.

Bequest of all the testator's Great Western Railway shares and all other the railway shares of which he might be possessed at the time of his decease : — Held, to pass Great Western Railway shares which he had at the date of his will, and which were afterwards, by a resolution of the company made under the authority of an act of parliament, converted into consolidated stock ; but held not to pass consolidated stock in the same company purchased by the testator after the date of his will. *Oakes* v. *Oakes*, 9 Hare, 666.

A testator by will, dated 25th September, 1860, made a bequest of all his Lake Erie bonds and debentures and other property, to certain persons according to the nature and qualities thereof respectively. At this date he was possessed of some bonds of a company called "The New York and Erie Railway Company," but an exchange was then being carried out by the holders of the bonds of this company for shares to a like amount in a company to be called "The Erie Railway Company," and a contract for such transfer had been signed in October, 1859. It did not appear that the testator knew of the negotiations or contract at the date of his will; but he became acquainted with them on or before the 20th July, 1861. On the 5th October, 1861, he made a codicil, which did not refer in any way to the bequest, and on the 27th November, 1861, he died:—Held, that the shares of the Erie Railway Company, of which the testator was possessed at the time of his decease, passed under the specific devise of the testator's Lake Erie bonds and debentures. *Pilkington, In re*, 13 L. T. 35.

Testatrix bequeathed all her shares in the Imperial Gas Light and Coke Company. After the date of her will all the testatrix's shares of the above description were, by a statutory scheme of amalgamation of the Imperial and other companies, converted into stock of the Gas Light and Coke Company:—Held, that a provision in the scheme, transferring to the substituted stock the trusts and limitations affecting the old shares, "so as to give effect to and not revoke any testamentary disposition," was effectual to prevent ademption. After the amalgamation the testatrix purchased other stock of the Gas Light and Coke Company:—Held, that these also passed by the bequest. *Loveman, In re, Watson* v. *Watson*, 48 L. J., Ch. 565.

Sale of Stock by Testator—Where Gift Specific.]—Legacy of my 1,000*l.* East India stock is specific, and adeemed by the testator's having sold the stock. *Ashburner* v. *Macquire*, 2 Bro. C. C. 108.

Testator, being indebted on mortgage, and being possessed of 5,000*l.* stock, by will gave to A. and B. all the stock he had in the 3 per cents., being about 5,000*l.*, except 500*l.*, which he gave to C., and he devised other specific parts of his property to be sold and the produce to be applied in discharge of the mortgage. Testator himself afterwards sold out 2,000*l.* part of the 5,000*l.*, and paid off the mortgage with it: this adeemed the legacy pro tanto, and the specific legatees can have no relief from the funds by the will appropriated for payment of the mortgage. *Humphreys* v. *Humphreys*, 2 Cox, 185.

A., by will, bequeathed to his two daughters, B. and C., 2,702*l.* bank stock, and 2,000*l.* East India stock, to be equally divided; after making his will, he sold a part of the bank stock. As testator had the stock when he made his will, it was held that he meant to give that individual stock, and the sale of part only was an ademption pro tanto; but where a man bequeaths such a quantity of corn, or number of sheep, generally, it is a devise of quantity only. *Jeffreys* v. *Jeffreys*, 3 Atk. 120. And see *Abney* v. *Miller*, 2 Atk. 599; *Purse* v. *Snaplin*, 1 Atk. 414, and n.

A testator gave to his wife, F. H., the interest of all his property in the public funds, during her life, the principal being placed in the names of the undermentioned trustees for that purpose; and he also gave to his wife all his other property which he might be possessed of at his decease, after paying his funeral expenses and debts, part of his funded property being applied for that purpose, if necessary. On the death of his wife, he gave to his daughter J. H. 200*l.* stock 3 per cent. reduced annuities, and to two other persons 50*l.* 3 per cent. reduced annuities respectively; and to his son the residue of his property, after paying those legacies; and he appointed two persons his executors and trustees. At the date of his will the testator had 700*l.* 3 per cent. reduced annuities, but he afterwards sold out that stock, and invested part of the produce on mortgage:—Held, that the gift to F. H. of the interest of the testator's property in the funds was specific, and was consequently adeemed by the sale of the stock; but that the other legacies were general, and that F. H. took only a life interest in the testator's residuary estate. *Hayes* v. *Hayes*, 1 Keen, 97; 5 L. J., Ch. 243.

A testator specifically bequeathed railway stock which he afterwards sold. At his death he was entitled to similar stock which the description in the will was probably sufficient to comprise:—Held, that as there had been a specific thing existing at the date of his will to which the description applied, this circumstance was sufficient to exclude the application of the general rule contained in 7 Will. 4 & 1 Vict. c. 26. s. 24, that a will shall be construed to speak from the time of the testator's decease. *Gibson, In re, Matthews* v. *Foulsham*, 35 L. J., Ch. 596; L. R. 2 Eq. 669; 14 W. R. 818.

A testator bequeathed to his daughter his twenty shares in the S. office, or in any other office in which the same had been or should be transferred, and all his right therein, or in the moneys arising, or that might arise, from the sale thereof. Negotiations, of which the testator was aware, were then pending, for the transfer of the business of the S. office to the A. office, which were afterwards concluded, and, in lieu of the S. shares, the testator received a number of A. shares, and a sum of 1,200*l.*:—Held, that the A. shares passed under the bequest, but the money did not. *Phillips* v. *Turner*, 17 Beav. 194.

—— **Where Gift not Specific.**]—One devises the sum of 2,000*l.* S. S. stock: at the time of making his will he had just 2,000*l.* S. S. stock; he afterwards sold 1,500*l.* of it, and three-fourths of the residue was turned into annuities by act of parliament:— Held, the bequest was not specific nor adeemed. *Brondson* v. *Winter*, Ambl. 57.

A testator, amongst various specific bequests, gave "1,500*l.* of my Egyptian 9 per cent. bonds" to H., and "500*l.* Egyptian 9 per cent. bonds" to L. Before his death he sold his Egyptian 9 per cent. bonds, and purchased with the proceeds Khedive 7 per cent. bonds:—Held, that the gift of "my" Egyptian bonds was specific and adeemed, but that the gift of Egyptian bonds to L. was not specific and not adeemed. *Macdonald* v. *Irvine*, 47 L. J., Ch. 494; 8 Ch. D. 101.

Testator, having at the date of his will fifteen and a half shares in the Leeds and Liverpool Canal, which by act of parliament were to be deemed personal estate, bequeathed "five and a half shares in the Leeds and Liverpool Canal to A., five to B., and five to C." There was no

reference or description in the will to shew that he meant the particular shares he then held. He afterwards parted with them :—Held, that the legacies were general and not specific. *Robinson* v. *Addison*, 2 Beav. 515 ; 9 L. J., Ch. 369 ; 4 Jur. 647.

Transfer into Testator's Name of Stock devolving under Settlement.]— Stock was, in contemplation of a marriage, vested in trustees for the separate use of the wife for life, and with full power for her to dispose of it by will. She made her will during coverture. She survived the husband, and afterwards took a transfer of the stock into her own name. This does not operate as a revocation of the will, or an ademption of the bequest of the stock. *Dingwell* v. *Askew*, 1 Cox, 427.

A testator bequeathed all the personal estate of which he should die possessed, except such share as he should become entitled to in the property of A., to his wife absolutely ; and he bequeathed all his share in A.'s property upon certain trusts mentioned in his will. A.'s estate, which consisted of two separate sums of stock, came into the testator's possession after the date of his will, and the sums were transferred into his name. One of such sums of stock remained in his name at his death, but the other sum was sold out by him and applied for his own purpose : —Held, that there was an ademption of the legacy in respect of the stock sold out, it having been mixed with the testator's property and spent ; but the stock transferred to him, and continuing to stand in his name, passed under the bequest. *Lee* v. *Lee*, 27 L. J., Ch. 824 ; 6 W. R. 846.

Revocation of Voluntary Settlement—Reinvestment of Funds.]—Upon an intended marriage between B. and C., which, under 5 & 6 Will. 4, c. 54, was void in its inception as being contracted with the husband of a deceased sister, C. assigned various mortgage debts, stocks, and securities to trustees by way of settlement. She afterwards, by will, directed her trustees to hold all the moneys and the securities in the proportions mentioned for the several persons named who should be living at the decease of B. ; she then gave several legacies to persons by name. C. survived B. ; she destroyed the settlement, and also the assignment of some of the securities to the trustees, and took re-transfers of stock into her own name, and died without altering her will :—Held, that the legacies were not adeemed by the destruction of the deeds, but that they were adeemed to the extent to which she had called in, received, and reinvested the moneys on new securities. *Jones* v. *Southall*, 32 Beav. 31 ; 32 L. J., Ch. 130 ; 9 Jur. (N.S.) 93 ; 8 L. T. 103 ; 1 N. R. 152 ; 11 W. R. 247.

Change of Investment.]—Testator enumerates mortgages, bonds, and notes, due to him, and gives out of the interest an annuity to A. for life, and after her death directs the securities to be vested in trustees for charitable uses ; some of the securities are paid off and new securities taken after the will :—Held, a general bequest of the amount of the value of the securities, to be made good out of the general assets. *Att.-Gen.* v. *Parkin*, Ambl. 566.

D. by will "reciting that it was the wish of her mother and herself that the 500*l.* then out upon mortgage should be given to G. and her family," bequeaths "the said 500*l.* with interest" accordingly. The testatrix, at the time of making her will, had a sum of 500*l.* out in mortgage, which she afterwards called in and applied to different purposes. The mother being dead, the testatrix took out administration, and, upon her death, without having altered or revoked her will, held no ademption. *Le Grice* v. *Finch*, 3 Mer. 50 ; 17 R. R. 10.

If a mortgagee were required to reduce the rate of interest, or to receive payment of his mortgage money, it could hardly be argued, that his assent to reduce the interest, changed the nature of his property, or could operate a revocation or ademption of a prior bequest of the mortgage. *Browne* v. *M'Guire*, Beav. 364.

Testator bequeathed 7,000*l.* secured on mortgage of an estate at W., belonging to R. T. The 7,000*l.* and interest were received after the date of the will, by the testator's agent, on his account, and, immediately afterwards, 6,000*l.* part of it, was invested on another mortgage, and the remainder was paid into a bank in which the testator had no other moneys, but was afterwards drawn out by a person to whom the testator had given a cheque for the amount : —Held, that the legacy was specific, and notwithstanding the 6,000*l.* remained due on the second mortgage at the testator's death, that the legacy was wholly adeemed. *Gardner* v. *Hutton*, 6 Sim. 93.

A testator bequeathed to trustees a sum of 15,000*l.* in the 3 per cent. consols, to be deemed a legacy of quantity, and to be due at his death, as if the same were a specific legacy, and he directed that, if he should not die possessed of 3 per cent. consols sufficient to satisfy the said sum, his executors should within two months after his decease purchase so much consols as should make up the deficiency or full amount thereof, as the case might require ; and he created a term in his real estates, one trust of which was to raise the full amount or deficieney of the said sum of consols in case he should not have at his decease a sufficient sum in that fund to answer the legacy. The will was dated in 1832 ; the testator died in 1835, having only 3,000*l.* 3 per cent. consols, which had been purchased in 1834 ; he had in 1834 sold out 12,000*l.* consols, which then stood in his name, and paid the produce to his brother upon mortgage of freehold estates, subject to redemption by transferring or replacing on request 12,000*l.* consols into the names of the testator or his executors, and on payment of interest equal to the dividends until replaced : — Held, that the 12,000*l.* consols secured by the mortgage to be replaced were well bequeathed to make up the legacy of 15,000*l.* 3 per cent. consols. *Collison* v. *Curling*, 9 Cl. & F. 88 ; 6 Jur. 673. Affirming 4 Myl. & Cr. 63.

A testator, reciting that he was entitled, after the death of his sister, to 5,602*l.* consols, bequeathed to his son 2,000*l.* consols, part thereof, or a sum equal thereto, to be transferred or paid to him when the same should be received by his executors. After the date of his will his sister died, and he received the 5,602*l.* consols, which he sold out and mixed with his other moneys. He afterwards confirmed his will by a codicil, but died without having any sum of consols :— Held, that the legacy was specific ; and that the particular fund, part of which was given to the son, being no longer in existence, the legacy failed. *Oliver* v. *Oliver*, 40 L. J., Ch. 189 ; L. R. 11 Eq. 506 ; 24 L. T. 350 ; 19 W. R. 432. And see *Puttison* v. *Puttison*, supra, col. 1582.

—— **Unknown to Testator.**]—Bequest of a note for 500*l.* "in the hands of F.," when F. had laid it out in stock unknown to the testatrix; though the bequest of the note is specific, the legatee shall have the stock in which it is vested. *Drinkwater* v. *Falconer*, infra, col. 1591.

—— **By Trustees of Settlement.**]—By a post-nuptial settlement a specific sum of bank annuities was settled so as to give the wife a general power of appointment by will. Three days after the settlement the wife made her will in execution of the power, and apportioned the sum of bank annuities between three appointees. Subsequently a portion of the bank annuities was, with the consent of the wife and her husband, sold out under a power of varying securities, contained in the settlement and invested in railway stock:—Held, that the legacies appointed by the will were not adeemed by the subsequent change in the investment of the fund, but that the appointees took the railway stock in the proportions in which the bank annuities were appointed to them by the will. *Johnstone's Settlement, In re*, 49 L. J., Ch. 596; 14 Ch. D. 162; 28 W. R. 593.

By marriage settlement a sum of 1,000*l.* lent on mortgage to A. was settled so as to give the wife a life interest in the event of her husband's death or bankruptcy, but with restraint on alienation during marriage, and a general power of appointment by will. The wife, by her will, directed the 1,000*l.* A. had to go to C. D. Subsequently the 1,000*l.* was repaid, and expended by the trustees, with the concurrence of husband and wife, in the purchase of land (which was not an authorised investment), after the wife's death:—Held, that the gift of the 1,000*l.* was not adeemed by the change of investment. *Willett* v. *Finlay*, 29 L. R., Ir. 497—C. A.

A testator bequeathed 1,000*l.* D. stock of the London and North-Western Railway Company, then standing in the names of the trustees of his marriage settlement, and which had been bequeathed to him by his late wife under a power enabling her so to do, contained in the marriage settlement (and which stock it was his intention to have transferred into his name as soon as conveniently could be done), to H. if he should be living at the testator's death. The stock was redeemed and paid off at par in the life of the testator, and reinvested in the names of the trustees in Lancashire and Yorkshire preference shares, and a cheque for 8*l.* 18*s.*, the balance, was sent to the testator, but was not cashed to him:—Held, that the legacy was adeemed, and that the Lancashire and Yorkshire shares and the 8*l.* 18*s.* did not pass to H. *Harrison* v. *Jackson*, 47 L. J., Ch. 142; 7 Ch. D. 339.

Receipt of Legacy by Testator, and Reinvestment.]—A testator bequeathed all the property to which he was or should be entitled under his uncle's will to trustees upon trust for the benefit of the defendant. After the date of his will he received a sum in cash from his uncle's estate, part of which sum he invested in the purchase of stock in a railway company:—Held, that the railway stock passed under the bequest. *Morgan* v. *Thomas*, 46 L. J., Ch. 775; 6 Ch. D. 176; 37 L. T. 689; 25 W. R. 750.

A testatrix by her will, after directing the payment of her debts, and giving certain legacies, gave a sum of 7,500*l.*, "which I believe is left under uncle Price's will to me," in various legacies to several persons. At the date of her will she was entitled in reversion to shares in two sums of 25,000*l.* and 20,000*l.*, which together amounted to 7,500*l.* under her uncle's will and a settlement which contained the usual power to change investments made by him. When the reversion fell into possession the testatrix received the money representing her share, which she invested and the investments could be traced:—Held, that the gift of the 7,500*l.* was not adeemed, but was effectual so far as the funds representing the shares of the testatrix under her uncle's will and settlement could be traced. *Kenyon's Estate, In re, Mann* v. *Knapp*, 56 L. T. 626.

Gift of Debt—Receipt by Testator.]—One by will gives 100*l.* due to the testator for rent, from B., and now in B.'s hands, afterwards the testator sues B. for this rent, and recovers it; yet this is no ademption of the legacy. *Ford* v. *Fleming*, 2 P. Wms. 469; 2 Stra. 823.

Where the testator devises a debt, and afterwards receives it, or even calls it in, in neither case is this an ademption of the legacy. *Ashton* v. *Ashton*, 3 P. Wms. 385; Cas. t. Talb. 152.

Bequest of two navy bills, describing them and the money due thereon. Testator afterwards received the navy bills in the course of payment. Decreed the value of the bills to be answered out of his personal estate. *Bronsdon* v. *Winter*, Ambl. 59.

Testator gave the interest of a bill of exchange on the East India Company to his wife for life, and directed that after her death the bill should be sold, and the money divided among certain persons, with survivorship in case of the death of any in her life. This bill, which constituted the bulk of the testator's property, was paid in his life. That was not an ademption of the legacy. *Coleman* v. *Coleman*, 2 Ves. 638.

A legacy of a horse or a debt is adeemed if the testator call in the debt, or sell the horse. *Ellis* v. *Walker*, Ambl. 310.

A., having a debt due to him from J., devises 500*l.* of it to B., and the residue of it to C., but does not mention what the debt is which is owing from J. A. receives the whole debt in his lifetime; B. dies in the testator's lifetime; testator's receiving the debts in his own lifetime is an ademption of the legacy as to the devise of the residuum, but it may be otherwise as to the certain legacy given to B. if B. had survived the testator. *Rider* v. *Wager*, 2 P. Wms. 330.

B. owes A. a debt; A. by will gives the debt to B., and afterwards receives it himself in his lifetime; this is an ademption of the legacy. *Ib.*, 331.

One placed 500*l.* in goldsmith's hands on his note, and afterwards orders part out again, and then devises the 500*l.* in the goldsmith's hands to J.; this good for the whole 500*l.*; secus, if the testator had, after making the will, drawn out part of this money, for this had been an ademption pro tanto. *Crockat* v. *Crockat*, 2 P. Wms. 164.

Specific legacy of money due on a note, received afterwards by testatrix, and paid to banker with whom she had no other money; where it remained till testatrix's death, except 10*l.*, which she had drawn out:—Held, an ademption. *Fryer* v. *Morris*, 9 Ves. 360; 7 R. R. 222.

Bequest of a sum of money due on bond, the amount afterwards paid voluntarily by the debtor to the testator, and by him invested with other

money in government stock:—Held, that the legacy was adeemed, by the testator having received payment of the debt. The bill by the legatee dismissed, but the suit having been instituted by order of the court to ascertain whether the legacy had been adeemed, the costs of all parties paid out of the fund. *Ashe* v. *Berry*, Beat. 255.

A legacy of a sum of money owing to a testator by A. upon a mortgage of premises therein mentioned, and which mortgage was paid off in the testator's lifetime, after the date of the will:—Held, to be a specific and not a merely demonstrative legacy, and to be adeemed by such payments. The testator placed part of the mortgage money received by him from A. in a bank, and afterwards drew out a part of such deposit, leaving in the bank at the time of his death a balance amounting to a moiety of the sum which had constituted the mortgage debt; but it was held that the specific legatee of the mortgage debt was not entitled in respect of such legacy to the money so remaining in the bank. *Sidebotham* v. *Watson*, 11 Hare, 170; 1 W. R. 303.

A testator bequeaths "the principal sum" secured to him by a mortgage in fee. It was afterwards voluntarily paid off in the testator's lifetime:—Held, that the legacy was adeemed. *Phillips* v. *Turner*, 17 Beav. 194.

A testatrix bequeathed all her property, real and personal, to her son; and in the event of his receiving 450*l.*, or thereabout, to which she considered herself entitled, she requested that he would add to that sum 50*l.*, to make up 400*l.*, which she left to her grand-daughter. The testatrix received the 450*l.* in her lifetime:—Held, that the legacy, as to the 450*l.*, was not specific or demonstrative, but conditional on the son receiving 450*l.*, and that the grand-daughter was not entitled to be paid that sum out of the general assets of the testatrix:—Held, also, that 400*l.* should be read "500*l.*" by construction. *Taylor* v. *Creagh*, 8 Ir. Ch. R. 281.

Testatrix gives legacies to be paid within three months out of a bond debt due to her; the obligor afterwards, in the lifetime of testatrix, paid the debt and took up the bond; the legacies are thereby adeemed. *Badrick* v. *Stevens*, 3 Bro. C. C. 431. And see *Manton* v. *Tabois*, infra.

—— **As to Distinction between Voluntary and Compulsory Calling in.**]—Specific legacies, if existing, the whole paid, though nothing left for pecuniary, but if not existing the right is gone. A debt specifically bequeathed, and afterwards voluntarily paid, is no ademption of the legacy; if a compulsory payment, it may or may not be an ademption, according to circumstances, for if a particular reason is given, or replaced on some fund, or so ordered, it is no ademption. Sed quære. *Drinkwater* v. *Falconer*, 2 Ves. Sen. 623.

Where a particular debt is bequeathed and afterwards recovered by testator in an adverse way, it is an ademption of a legacy. *Lawson* v. *Stitch*, 1 Atk. 508.

There is no reason in the distinction between a voluntary and a compulsory payment of debts as to ademption. *Att.-Gen.* v. *Parkin*, Ambl. 569.

A bequest of a debt is adeemed by the debt being paid to the testator in his lifetime, whether the payment be compulsory or voluntary, or whether the sum be expressed in the bequest or the debt bequeathed generally. *Stanley* v. *Potter*, 2 Cox 180; 2 R. R. 26.

The Master of the Rolls was of opinion that, upon the bequest of a debt, there is no distinction between a voluntary and compulsory payment to the testator as to the question of ademption. *Innes* v. *Johnson*, 4 Ves. 574.

—— **As to Testator's Intention.**]—A debt specifically devised, and afterwards called in, whether it is an ademption is a question of intention, if no account can be given why it was called in; it is otherwise if a reason can be given, as in this case it is not an ademption. *Hambling* v. *Lester*, Ambl. 401.

T. S., having a claim upon the estate of Sir C. B., gave and bequeathed "a third part of the amount of whatever sum or sums of money might arise and be received from his claim in respect of Sir C. B.'s estate" to his son A. B.; another third of the same amount T. S. gave to trustees, in trust for his daughter M. C. (who died in his lifetime) for life, remainder to her husband for life, and in default of issue (which happened), to his son A. B. absolutely; the remaining third was given in trust for his wife, R. S., for life; and after her death, in moieties in the same manner as the two former shares were given. T. S. appointed his wife, R. S., residuary legatee. After the date of the will, but during T. S.'s lifetime, the greater part of the money due in respect of the claim upon Sir C. B.'s estate, was paid to and invested by T. S. This fund, slightly varied, was standing in the name of T. S. at his death. After T. S.'s death, R. S., who was his executrix, transferred one-third of the fund to A. B., and the remaining two-thirds to the trustees of T. S.'s will, upon certain trusts, as it was alleged, for the benefit of herself and the husband of M. C. for their lives, which trusts were never declared. The proceeds of the two-thirds were, during thirty-two years, paid in moieties to R. S. and the husband of M. C., who survived R. S. Upon the death of the survivor, the plaintiff, representing the estate of R. S., claimed the fund, on the ground that the bequest to the trustees was specific, and was adeemed in the testator's lifetime, and fell into the residuary estate, and that after the life estates of R. S. and the husband of M. C. there was a resulting trust in favour of the estate of R. S.:—Held, that the bequest to the trustees of the will of T. S. was not specific, but that if it had been specific it would have been adeemed. Held, further, that upon a principle of the civil law, recognised in *Barker* v. *Rayner* (5 Madd. 208; 26 R. R. 18), the acts of the testator, shewing an intention to preserve the fund for the legatees, prevented any extinguishment of the subject-matter of the bequest. Held, also, that the acts and course of dealing, for a period of thirty-two years, with the fund as appropriated to answer the legacy, was a circumstance of great weight in rebutting the case of ademption, and the claim on the footing of a resulting trust. *Clark* v. *Brown*, 2 Sm. & G. 524; 18 Jur. 903; 2 W. R. 665.

Testator devised "all my interest in the C. estate" after the death of his wife, to M. Previously to his death the C. estate was sold and the proceeds of sale paid into court. The money was then paid out to the testator, and part of it was paid into a deposit account and part into his current account with other moneys:—Held, that there was an ademption of the C. estate, and that nothing passed to M. *Clark* v. *Brown* (supra) not followed. *Moore* v. *Moore* (29 Beav. 496) distinguished. *Manton* v. *Tabois*,

54 L. J., Ch. 1008 ; 30 Ch. D. 92 ; 53 L. T. 289 ; 33 W. R. 832.

—— **Receipt by Testator of Dividend in Bankruptcy.**]—Legacy of a debt is not adeemed by the testator having received dividends on a bankruptcy. *Ashburner* v. *Macquire*, 2 Bro. C. C. 108.

—— **Release of Debt by Testator.**]—One devises to her grandchild a debt of 4,000*l.* owing to the testatrix by J. S. ; provided, if any part of the debt should be paid in before the testatrix's death, then so much as should be paid in to be made good to the grandchild out of the surplus of her estate : afterwards the testatrix released 2,000*l.* of the said debt to J. S. without having received any of the money : decreed, that this was no ademption of the legacy, pro tanto, but that the legatee or her representative was entitled to the whole 4,000*l.* as much as if same had been paid in to the testatrix. *Thomond* (*Earl*) v. *Suffolk* (*Earl*), 1 P. Wms. 461.

A testator by his will, after reciting that there was due to him from his son 1,440*l.* or thereabouts, secured to him by bills or notes, or otherwise, released his son from payment of any interest up to the time of his death, and directed that he should have time for payment of the principal by instalments. Some years after he made a codicil not containing any reference to the release. At the date of the will the son was indebted to his father in 1,400*l.*, and between the dates of the will and codicil that sum was paid off and a subsequent advance of 1,291*l.* was made to the son by the testator, which was owing at the time of his death :—Held, that the release of interest was equivalent to a specific legacy of the interest on the debt due at the date of the will ; that the legacy had been adeemed, and that the release did not extend to the interest on the subsequent debt due at the date of the codicil. *Sidney* v. *Sidney*, 43 L. J., Ch. 15 ; L. R. 17 Eq. 65.

—— **Receipt and Investment of Insurance Moneys by Testator.**]—A testator bequeaths all his right, title, and interest in two policies of insurance which he had effected on the life of his wife, together with all benefit and advantage thereof, to his executors, upon trust, after the death of his wife, to receive the amount of the policies, and thereout to pay or provide for certain legacies ; his wife having died he received the money, and invested it in securities of which he continued possessed at his death :—Held, that the legacies failed. *Barker* v. *Rayner*, 2 Russ. 122 ; 26 R. R. 18.

Gift of Interest—Partnership—Where Specific.]—A testator gave to A. all balances of profits due to him from the firm in which he was a partner, up to the month of June, 1869, and gave all his share and interest in the firm and profits from June, 1869, to other persons. Between that date and the time of his death the testator had drawn from the partnership, on account of profits, nearly the whole amount due to him in June, 1869 :—Held, that the legacy to A. was adeemed pro tanto by the drawings. *Aston* v. *Wood*, 43 L. J., Ch. 715 ; 31 L. T. 293.

The court leans against considering legacies specific. One partner by will gives to the other 2,000*l.* which appears to be due to him on the last settlement, in trust, &c., if he did not draw it out of trade :—Held, these last words made it a specific bequest ; without them it would not have been specific. *Ellis* v. *Walker*, Ambl. 309.

Where Partnership Insolvent.]—A testator bequeathed all his share of the leasehold premises in which his business was carried on to his partner. The leasehold premises were assets of the partnership between the testator and his partner held by them as joint tenants. The partnership assets proved insufficient to pay the partnership debts. The estates of both partners being however solvent :—Held, that the partner was not entitled to the value of the testator's share of the leasehold premises out of his general estate, but that the bequest in fact conferred no benefit on him. *Farquhar* v. *Haddon*, 41 L. J., Ch. 260 ; L. R. 7 Ch. 1 ; 25 L. T. 717.

—— **Where Partnership determined in Lifetime of Testator.**]—A testator bequeathed to his two sons, who had been in partnership with him as traders, 3,000*l.* equally to be divided between them, such legacy to be paid out of a portion of his capital in the co-partnership business, which had been subsequently reduced, but which at the time of his death remained to his credit in the firm. On a dissolution of the partnership, a short time before the date of the testator's will, and the commencement of a new partnership with an added member to it (the father not being one), it was arranged that 12,000*l.*, which represented the father's capital, should remain in the new firm during his life, the sons paying him the interest on that sum during such period, and to give bond as security for the repayment after his death of the principal, with interest, to his executors, administrators, or assigns by certain instalments of 2,000*l.* annually :—Held, that the legacy of 3,000*l.* to the sons had not been adeemed by the circumstances which had, subsequently to the dissolution of the partnership, taken place. *Penny* v. *Penny*, 13 L. T. 496.

One partner by will gives one-ninth of one-twelfth of the profits reserved to him by his partners ; he afterwards, on the expiration of the partnership, renews it with the same partners, giving them a greater interest than they had under the former articles :—Held, they were entitled to one-ninth of the testator's interest in the partnership, at his death, and that the renewal of the articles was not an ademption nor revocation of the devise. *Backwell* v. *Child*, Ambl. 260.

See also *Russell, In re, Russell* v. *Chell*, ante, cols. 1265–6.

Removal of Chattels—From House.]—Bequest of furniture in one house which is afterwards removed to another house is adeemed. *Heseltine* v. *Heseltine*, 3 Madd. 276.

Testator gave to his wife his house in B., and the furniture in the said house. The lease of the house expired in the testator's lifetime, and he took another house and removed his furniture to it :—Held, that the legacy was adeemed. *Colleton* v. *Garth*, 6 Sim. 19 ; 2 L. J., Ch. 75.

A testator, after describing himself as "of Broomfield Place," gives "all the household furniture, &c., which shall be in my said dwelling-house or belong to me at the time of my decease." He was living at Broomfield Place at the time of making his will, but afterwards removed, and took the furniture, &c., to Battersea :—Held, that

this operated as an ademption of the gift. *Haulding* v. *Cross*, 1 Jur. (N.S.) 250 ; 3 W. R. 334.

A. bequeathed to B. his furniture, &c., which at the time of his death should be in the house he then occupied at X. The testator, at his death, had ceased to occupy that house, and had no furniture, &c., therein :—Held, that the bequest failed. *Spencer* v. *Spencer*, 21 Beav. 548.

A testator directed his furniture in Gloucester Square to be applied in payment of his debts, and in a subsequent part of his will, he bequeathed his furniture in England to his sisters. The testator removed the furniture in Gloucester Square to another residence :—Held, that it did not pass to his sisters. *Blagrove* v. *Corre*, 27 Beav. 138.

The testator by will gave to B. all his goods, &c., in his study, except his books and writings. He gave to C. all his books at his chambers in the Temple. He removed the books into the country before his death :—Held, that C.'s legacy was adeemed. *Green* v. *Symonds*, 1 Bro. C. C. 129, n.

—— **Exception where for necessary Purpose.**]—Goods removed for a necessary purpose, the legacy of them is not adeemed, as from fire, or sent to be repaired, &c. Testator gave all his plate and linen in his house in S. (with the lease) to his wife ; he had but one set of plate and linen, which was usually removed with the family from house to house. The plate happened to be at B., the country house, at his death, yet it passed to the wife. *Land* v. *Devaynes*, 4 Bro. C. C. 537.

—— **Or without Privity of Testator.**]—J. devises all his household goods and furniture which should be in his house at R., at his death, to his wife, and afterwards going beyond sea, his steward gets the landlord of the house to accept a surrender of the house and removes the goods to another house, and writes an account of this to J., who approves of it. The goods will not pass by the will to the wife ; otherwise if they had been removed by fraud to defeat the legacy, or by any fortuitous act without the privity of the testator. *Shaftesbury* v. *Shaftesbury*, 2 Vern. 747.

—— **Ambiguous Words Construed in Favour of Legatee.**]—Testator bequeathed to his wife as follows : "All my interest in my house at Lavender Hill, furniture, books, pictures, wines," &c., &c. After the date of his will the testator removed from Lavender Hill to Spencer Lodge, taking with him furniture, books, pictures, wines, and plate. He afterwards purchased more of these articles, and died at Spencer Lodge :—Held, that his wife was entitled to the furniture, books, pictures, wines, and plate which he had at the time of his death. *Norris* v. *Norris*, 2 Coll. C. C. 719 ; 15 L. J., Ch. 420 ; 10 Jur. 629.

A testator, by his will, said, "I give to my wife all my household furniture, plate," &c., "and other effects of the like nature, and all wines," &c., "which shall, at my decease, be in or about my dwelling-house, then occupied by me" :—Held, that in construing the bequest, the sentence ought to be divided into two, and that the qualification as to his dwelling-house applied only to the latter part, and therefore that it passed plate at the testator's bankers, family plate in the possession of the testator's father as tenant for life, and to which the testator was entitled absolutely in remainder, and also the produce of family plate wrongfully sold by the tenant for life, and furniture, &c., deposited for safe custody at a warehouse. *Domvile* v. *Taylor*, 32 Beav. 604.

—— **Chattels on Ship.**]—Bequest of goods on board a ship is good, though they may have been afterwards removed, and were not on board at the testator's death. *Chapman* v. *Hart*, 1 Ves. Sen. 271.

—— **Where Ship Lost at Sea—Insurance Money.**]—A testator bequeathed certain chattels to A., and afterwards insured them from loss by sea. The testator embarked with these goods in a ship, which was totally wrecked, and he and the chattels perished together :—Held, that A. had no interest in the money recovered by the executors from the insurance office. *Durrant* v. *Friend*, 5 De G. & Sm. 343 ; 21 L. J., Ch. 353 ; 16 Jur. 709.

16. LAPSE AND INTERESTS UNDISPOSED OF.

a. Lapse.

Principles.]—No difference between a lapse and what is not disposed of, except for construing intention. *Bennet* v. *Batchelor*, 1 Ves. 67 ; 3 Bro. C. C. 28.

To prevent the lapse of a legacy a will ought to be specifically penned. *Sibthorp* v. *Moxom*, 3 Atk. 582. S. P., *Elliot* v. *Davenport*, 1 P. Wms. 86 ; 2 Vern. 521.

A testator has an undoubted right and power to prevent a legacy from lapsing, but to be effectual it must be exercised by express terms. *Bone* v. *Cook*, M'Cle. 177 ; 13 Price, 333 ; 28 R. R. 679.

By the law of Scotland, as well as of England, a legacy lapses by the death of the legatee in the testator's life. *Rose* v. *Rose*, 17 Ves. 351. See also *Williams* v. *Jones*, 1 Russ. 517.

—— **Death of Legatee before Testator.**]—A testator, having an absolute power of disposition over a fund subject to the interest of a tenant for life, directed that at the death of the tenant for life, 1,000*l.* of the fund should be invested in the purchase of a life annuity for the benefit of D., and that in the event of insolvency or alienation by D., the annuity fund should fall into residue. and he gave his residuary estate to the aforesaid tenant for life. The annuitant predeceased the tenant for life :—Held, that the gift of the annuity fund failed, and the fund fell into the residue. *Power* v. *Hayne* (L. R. 8 Eq. 262) followed. *Day* v. *Day* (1 Drew. 569) not followed. *Draper's Trusts, In re*, 57 L. J., Ch. 942 ; 58 L. T. 942 ; 36 W. R. 783.

—— **Simultaneous Death of Testator and Legatee.**]—A testator and two of the legatees in his will perished in a ship which was supposed to have foundered. There being no evidence of survivorship :—Held, that the bequest failed. *Barnett* v. *Tugwell*, 31 Beav. 232.

—— **Where Legatee a Society.**]—A legacy of 1,000*l.* was bequeathed by the testatrix to a clergyman for the benefit of the "Society for Suppressing Cruelty by United Prayer," and for accomplishing its purposes and objects. The

so-called society had been originated by the testatrix herself in 1876, and had, at various times, had some thousands of members. The society had no rules, but the members were required to buy a card at the cost of twopence, and to use a prayer which was printed on the card. The testatrix caused the cards to be printed at her own cost, and received the money for the cards, but published no accounts:—Held, that on the face of the will, the gift was to a particular society; that, therefore, if at the date of the death of the testatrix the society had ceased to exist, the ordinary doctrine of lapse would apply, unless the gift could be shewn to be to a society which was a charity:—That the evidence shewed that the testatrix was in truth the society itself, and that consequently at her death the society came to an end; and further, that the legacy was rather for the improvement of the persons praying privately for the objects stated under the name of the society than for the suppression of cruelty by ordinary means, which was not a purpose of general utility; and that therefore the legacy lapsed and fell into the residue. *Joy, In re, Purday* v. *Johnson*, 60 L. T. 175.

—— **Gift to Benefit A. and Others.**]—One devises to his sister 350*l.* on condition that at or before her death she gives 200*l.* thereof to her children. The sister dies in the life of the testator. The whole legacy is lapsed. *Birkhead* v. *Coward*, 2 Vern. 116.

Testator gave his sister M. and his brother W. the interests of the residue equally; at the death of M. one-half of the principal to her children, her husband by no means to have any part of it, but to be entirely for the children; if none, to W.'s children; and after the death of W. and his wife the other half to his children; and he excluded his eldest brother from any benefit. M.'s life interest is not to her separate use; the interest of the other moiety during the lives of W. and his wife would have vested in W., and therefore lapsed by his death in the lifetime of the testator. *Brown* v. *Clark*, 3 Ves. 166.

—— **Gift to Legatee, in what Capacity—Peer.**]—A testatrix, after bequeathing diamonds and china to L., Baron I., declared that she made "the bequest to Lord I. as head of the existing family," and so far as she lawfully could directed that the diamonds and china should be "deemed heirlooms in the family of I., and be held and enjoyed by the person for the time being bearing the title of Baron I." She then made a further bequest to "the said Baron I." L., Baron I., died in the lifetime of the testatrix, being succeeded in the title by E.:—Held, that, although the first bequest was not executory, L., if he had survived the testatrix, would only have taken a life interest in the diamonds and china, with remainder to the person who should succeed him, and that consequently E. was entitled to have the chattels delivered to him, but without prejudice to the question whether he was entitled for life or absolutely. Held, also, that the second bequest was to L., and lapsed by his death in the lifetime of the testatrix. *Montagu* v. *Inchiquin* (*Lord*), 32 L. T. 427; 23 W. R. 592.

—— **Gift upon Condition already Broken or Impossible**]—If a testator bequeaths a legacy to A. so long as A. shall remain unmarried, and A. marries in the testator's lifetime, the legacy as regards A. is in the nature of a lapsed legacy. *Andrew* v. *Andrew*, 1 Coll. C. C. 690.

Testator bequeathed a bust, after his wife's death, to "J., now Duke of B.," on condition that he caused it to be placed and remain in W. Abbey, and at the time of the delivery of it to him settle it so as to be held as an heirloom by the persons who under the limitations to which the abbey should be subject should then be entitled to the possession thereof, with a gift over in case J. should neglect to do so for twelve months after request by the trustees. J., Duke of B., had died in 1839. F. was Duke of B. at the time of the testator's will and death, and was owner in fee of W. Abbey. F. died during the lifetime of the tenant for life, and consequently never received the bust. The present Duke of B. was willing to allow F.'s executors to place the bust in the abbey:—Held, that the condition could not be performed by the duke's executors, and that the bequest fell into the residue of the testator's personalty. *Patching* v. *Barnett*, 51 L. J., Ch. 74; 45 L. T. 292—C. A. Reversing 28 W. R. 886.

A testator devised all his real and personal estates to trustees, their heirs, executors, administrators, and assigns, upon trust to sell the same as soon as conveniently might be (except his advowson of the rectory of C. and certain land in the parish, which he directed should be sold immediately after the decease of the then incumbent, his son, J.). The trusts of the proceeds were declared to be for his children therein named. J. had lately died:—Held, that the right of presentation did not revert to the heir-at-law of the testator, but passed by the will. Held that the right of the parties beneficially entitled under the will to present to the rectory should not be successive, but should be decided by lot. *Johnstone* v. *Baber*, 6 De G. M. & G. 429; 25 L. J., Ch. 899; 2 Jur. (N.S.) 1053; 4 W. R. 827.

Where Express Substitution.]—Testator gave 1,000*l.* to D.; but if D. should not be alive, and there be certain intelligence thereof, the testator willed that the same should be divided between A. and B. D. appeared to have been alive at the time of the will, but died in the lifetime of the testator. A. and B. are entitled to the 1,000*l.* *Parry* v. *Boodle*, 1 Cox, 183.

Where Express Declaration against Lapse.]—A. gave several legacies, and declared that if any of the persons should die before they became due, they should not be deemed lapsed legacies; and then said "to B., the wife of R., and to her executors or administrators, I give 50*l.*" B. died in testator's lifetime, and her husband administered:—Held, not a lapsed legacy, but shall go to the husband. *Sibley* v. *Cook*, 3 Atk. 572.

If a man devises his real estate to S. and his heirs, signifying his intention, that if S. die before him, it should not lapse, the heir is not excluded, unless the testator nominates another devisee. *Ib.*, 573.

By will a testator gave a legacy "equally between my brothers and sisters now living"; and he directed that their shares should not lapse by their deaths in his lifetime, but should go to their executors. By a codicil of the same date he bequeathed another legacy, "between my brothers and sisters, in like manner, as I have directed by my will":—Held, that the class men-

tioned in the codicil were not the same as that in the will; that the "manner" referred to the mode in which the class was to take, and not to the class itself; and consequently that the representatives of a sister who predeceased the testator took no interest in the second legacy. *Wilder, In re*, 27 Beav. 418.

A father gave property to trustees for sale and investment, and directed that the proceeds should constitute a general trust fund; and he directed that his trustees should appropriate one-sixth of this fund as a maintenance fund for his son J., which on his death was to fall into and again become part of the general trust fund, and that subject thereto the fund should be held upon trust as to one moiety for his wife for life, and upon her death upon the trusts and subject to the provisions contained relative to the other moiety, and as to the other moiety as to three fifths for his daughters, E., C. and S., each to take one fifth part, and as to the remaining two fifth parts for his son A., provided that if any of his daughters should die in his lifetime, without leaving issue living at the death of the testator, the shares in the general trust fund for each daughter so dying should not lapse, but should sink into and form part of the general trust fund and maintenance fund in the same manner as if the same share had never been so provided, and the name of the daughter had accordingly been omitted in the gift and disposition and trusts of the general trust fund. One of the daughters died in the lifetime of the testator:—Held, that the one fifth was undisposed of by the will. *Smith* v. *Stone*, 25 L. T. 893.

A testator bequeathed his residue to B. and six others "and their respective executors, administrators, and assigns, to whom I bequeath the same accordingly, and I declare that such shares shall be vested interests in each of my residuary legatees immediately upon the execution hereof":—Held, that on B.'s death before the testator died her share lapsed, and did not go to her personal representatives. *Browne* v. *Hope*, 41 L. J., Ch. 475; L. R. 14 Eq. 343; 27 L. T. 688; 20 W. R. 667. And see *Featherstone's Trusts, In re* (infra, col. 1613), and *Aspinall* v. *Duckworth*, infra, col. 1605.

Wills Act, Sect. 33—Principles.]—The 33rd section of the statute 1 Vict. c. 26, which provides that where a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, shall die in the lifetime of the testator, leaving issue, and any such issue shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after that of the testator, does not substitute for the predeceased devisee or legatee the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the predeceased devisee or legatee, and therefore disposable by his will, notwithstanding his death before the death of the testator. *Johnson* v. *Johnson*, 3 Hare, 157; 13 L. J., Ch. 79; 8 Jur. 77.

The fiction introduced by s. 33 of the Wills Act is not to be extended further than is necessary to prevent a lapse. *Pearce* v. *Graham*, 1 N. R. 507; 32 L. J., Ch. 359; 9 Jur. (N.S.) 568; 8 L. T. 378; 11 W. R. 415.

The fiction, by which the 7 Will. 4 & 1 Vict. c. 26, prolongs the life of a legatee who dies before, but leaves issue surviving, a testator, does not prolong the coverture for any other purpose than to prevent a lapse of the legacy. Accordingly, where the husband of such a legatee had covenanted to settle property which should come to or be vested in her during the coverture:—Held, that the legacy was not within the covenant. *Ib.*

The provisions in the Wills Act against the lapse of legacies given to children, renders it necessary for a testator, intending that a legacy to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will. *More's Trust, In re*, 10 Hare, 178.

—— **Effect of.**]—A testator, by a will made since the Wills Act, 7 Will. 4 & 1 Vict. c. 26, gave to his son a residuary share of his estate. The son died after the act came into operation, and before the date of the will, leaving children:—Held, that under s. 33 of the Wills Act the gift took effect, although, according to the law prior to the statute, there would have been no actual devise or bequest. *Mower* v. *Orr*, 7 Hare, 473; 18 L. J., Ch. 50, 361; 12 Jur. 997. And see *Wild* v. *Reynolds*, 5 Romilly's Notes of Cases, 1.

A bequest to a child of a testator, which child is dead, leaving issue at the time of making the will, is valid under the 7 Will. 4 & 1 Vict. c. 26. *Barkworth* v. *Young*, 4 Drew. 1; 26 L. J., Ch. 153; 3 Jur. (N.S.) 34; 5 W. R. 156.

J. W., a devisee, died in his father's (the testator's) lifetime, and before the date of the will, leaving an only son, who was his heir-at-law:—Held, that upon the construction of statute 7 Will. 4 & 1 Vict. c. 26, s. 33, the estate devised to J. W. descended to his son. *Wisden* v. *Wisden*, 2 Sm. & G. 396; 18 Jur. 1090; 2 W. R. 616.

A testator gave his residuary personal estate to his children in equal shares, and directed that the share of his daughter, Mrs. B., if she survived him, should be subject to the trusts of her marriage settlement and paid to the trustees thereof. Mrs. B. died in the testator's lifetime, but left children surviving him. Her husband having taken out administration to her, he claimed her share:—Held, that under s. 33 of the Wills Act (1 Vict. c. 26) Mrs. B. must for all the purposes of the will be taken to have survived the testator, and that the share must be paid to the trustees of the marriage settlement and not to the administrator. *Hone's Trusts, In re*, 52 L. J., Ch. 295; 22 Ch. D. 663; 48 L. T. 266; 31 W. R. 379.

A father by his will devised a freehold house to a son, and his residuary real estate to trustees in trust for other persons. The son died in his father's lifetime leaving issue living at his father's death, and having by his will devised all his real estate to his father:—Held, that as, under the 33rd section of the Wills Act, the son must be deemed to have survived the father, the property passed to the son absolutely under his father's will, and became subject to testamentary disposition by the son. But that as by the will of the son the property was devised to his father, the devise by the son failed, and his heir-at-law was entitled to the property. *Hensler, In re, Jones* v. *Hensler*, 51 L. J., Ch. 303; 19 Ch. D. 612; 45 L. T. 672; 30 W. R. 482.

Under s. 33 of the 7 Will. 4 & 1 Vict. c. 26, which excludes from lapse a bequest to the issue of a testator, "where the legatee shall die in the lifetime of the testator, leaving issue, and

any such issue shall be living at the time of the death of the testator," it is not necessary to prevent a lapse that the issue living at the time of the death of the testator should have been living when the legatee died. The legacy in such case must be considered the property of the deceased legatee, and passes to his representatives and not to the issue. *Parker, In goods of*, 1 Sw. & Tr. 523 ; 31 L. J., P. 8 ; 6 Jur. (N.S.) 354.

A. bequeathed all her personal estate to her daughter B., who died a widow and intestate in the lifetime of the testatrix, leaving a daughter C. C. also died in the lifetime of the testatrix, intestate, leaving a husband and a daughter, D., her surviving. Upon the death of the testatrix, in the lifetime of D., C.'s husband took out the administration to his wife, and applied for administration with the will of the testatrix annexed, as representative of B., his wife's mother :—Held, that as D., a grandchild of the legatee, was living at the time of the death of the testatrix, the legacy had not lapsed, and that C.'s husband was entitled to the grant as the representative of the legatee. *Ib.*

Held, that although "the issue" left by the legatee was not the issue living at the time of the death of the testatrix, there was issue of the legatee "living at the time of the death of the testatrix" ; so that the legacy did not lapse, and that it was payable to the person who would have been entitled thereto had the legatee died immediately after the testatrix. *Ib.*

M. by her will gave to her daughter, a married woman, a legacy of 1,000*l.* and half her residue, which was settled to the daughter's separate use. The daughter died in the lifetime of the testatrix leaving her husband her surviving, who died before the testatrix :—Held, that the fund thus bequeathed passed by the daughter's will ; but, quære, whether, in construing the 33rd section of the Wills Act, the gift is to be considered as taking effect immediately before the actual death of the legatee, or as taking effect immediately after the actual death of the testator. The daughter's will appointed two specific sums of money, and all other her "moneys or securities for money" on a certain trust, and gave all personal estate not thereinbefore disposed of to S. and W. :—Held, that the legacies given by M.'s will passed to S. and W. under the general residuary gift. *Mason's Will, In re*, 6 N. R. 193 ; 13 W. R. 799.

A testator died in 1875, having by his will, dated in 1872, devised a freehold estate to his daughter (the plaintiff's wife), her heirs and assigns, for her separate use. The daughter died in 1874, in the lifetime of the testator, leaving an only child, who was her heiress-at-law. The plaintiff claimed to be entitled for his life as tenant by the curtesy :—Held, upon demurrer, that the plaintiff was entitled for his life to the property devised by the testator as tenant by the curtesy. *Eager* v. *Furnivall*, 50 L. J., Ch. 537 ; 17 Ch. D. 115 ; 44 L. T. 464 ; 29 W. R. 649.

—— **Where Gift to Children as a Class.**]—The 33rd section of the 7 Will. 4 & 1 Vict. c. 26, does not apply where the devise or bequest is to the testator's "children" as a class. A devise or bequest over, in terms made dependent upon the marriage of the donee of the preceding estate, will be extended by implication, so as to take effect on the determination of that estate by death. *Browne* v. *Hammond*, Johns. 210.

The 33rd section of the Wills Act applies only to cases of strict lapse, not to the case of gifts to a class. Testator gave real estate to his wife for life, and after her death on trust to sell twelve months after her death, the proceeds to go "equally between all his children ; but if any of them should be then deceased, leaving lawful issue surviving them, then the respective share or shares of such deceased child or children should be given to such issue, if more than one, in equal proportions." The widow died, leaving the testator ; one of the children of the testator survived the widow and died, living the testator, leaving a husband and children :—Held, that her share went to the surviving children of the testator, and not to her issue, nor to her personal representatives under the Wills Act. *Olney* v. *Bates*, 3 Drew. 319 ; 3 W. R. 606.

—— **Where express Gift to Children living at Testator's Death.**]—Devise and bequest to all the testator's children living at his decease (without naming them). A subsequent codicil confirmed the gift, as mentioned in his will, "to his surviving children" (naming them all). One died in the testator's lifetime, leaving children who survived the testator :—Held, the survivorship had relation to the testator's death, and not to the date of the will, and that the representatives of the deceased child took nothing under the 1 Vict. c. 26, s. 23. *Fullford* v. *Fullford*, 16 Beav. 565 ; 1 W. R. 315.

—— **Gift whether to Class or Personæ designatæ.**]—Testator directed that at the decease of his wife (who died in his lifetime) his real estate and household furniture should be sold, and the moneys equally divided "between my nine children." He then bequeathed his personal estate not thereinbefore bequeathed to his trustees, upon trust to get in and convert the same into money, and pay and divide the same "equally to and between all my children," except that his eldest son John, by reason of his becoming entitled to a piece of property by a different title, should receive 30*l.* "less than each of my other children" :—Held, that the gift of residuary personalty was a gift to the testator's nine children as persons designated ; and hence that the representative of a child who died in the testator's lifetime was entitled to participate by virtue of the 33rd section of the Wills Act, 1837. *Stansfield, In re, Stansfield* v. *Stansfield*, 49 L. J., Ch. 750 ; 15 Ch. D. 84 ; 43 L. T. 103 ; 29 W. R. 72.

—— **Section 34—Effect of.**]—The testator, by a will made before the Wills Act, 7 Will. 4 & 1 Vict. c. 26, came into operation, bequeathed a share of his residuary estate to one of his sons, who was also thereby made one of the devisees in trust and executors of his estate ; the son died after the Wills Act came into operation, leaving issue, and after his death the testator made a codicil to his will altering a bequest to another child, but in other respects confirming his will :—Held, that the gift to the son did not lapse, but that the same, so far as it was real estate descended to the heir-at-law of the son, and so far as it was personal to his executrix under a will made before the Wills Act came into operation ; and that, under the 34th section of the Wills Act, the effect of the republication of the will by the codicil was the same as if the testator had at the date of the codicil made a

will in the words of the will so republished. *Winter* v. *Winter*, 5 Hare, 306.

Lapse of Particular Gifts—To A. or his Heir.]—Legacy to A. of 600*l.*, to be paid at the end of one year after testator's death, or to her respective heir :—Held, lapsed by death of A. in lifetime of testator. *Tidwell* v. *Ariel*, 3 Madd. 403 ; 18 R. R. 259.

—— **To A. or his Heirs.**]—On a gift to "S. or his heirs," the question of lapse or no lapse, which arises in the event of the decease of S. in the lifetime of the testatrix, is to be answered by reference to the question, "substitution or no substitution." If the gift is substitutionary, then there is no lapse. If there is no substitution, then there will be a lapse in the event of S. predeceasing the testator. A testatrix gave the whole of her residuary estate to her sister P. for life, and on the decease of P. gave the legacy to her brother S. "or his heirs." S. died in the lifetime of the testatrix :—Held, that the legacy did not lapse, but went by substitution to the heirs of S. *Porter, In re*, 4 K. & J. 188 ; 27 L. J., Ch. 196 ; 4 Jur. (N.S.) 20 ; 6 W. R. 187.

A testator gave to the children of his sister, the late E. W., whose names he enumerated, "or to their heirs," certain legacies. Three of the children died in the lifetime of the testator :—Held, that the legacies to these children did not lapse, but that their next of kin took by substitution at the death of the testator. *Gittings* v. *M'Dermott*, 2 Myl. & K. 69 ; 2 L. J., Ch. 212.

A testator gave the sum of 500*l.* to each of three persons, and gave his further surplus to be equally divided between the same three persons or their legal heirs and successors. One of the three died in the testator's lifetime :—Held, that the testator was intestate as to the legacy of 500*l.* and as to the share of surplus expressed to be given to that one who died. *Gibson* v. *Hale*, 17 Sim. 129 ; 14 Jur. 27.

Testator, by a will made since the statute 1 Vict. c. 26, after directing payments of his debts, and bequeathing several specific articles of plate to his sister L., desired that all his other plate, jewellery, books, pictures, and other property, except freehold and leasehold property, should be sold, and the produce, after deducting funeral and other expenses, be divided in equal parts amongst L., M., N., O. and P. He then directed that his freehold house and his leaseholds, some of which were held for years, and others for years determinable on lives, should be kept in hand and let to the best advantage, and the produce be divided every half year among the above-named L., M., N., O. and P., or to their lawful heirs ; and in case of there being no heirs, the share or shares to be divided in equal parts among the surviving legatees. The testator at his death left L., his heiress-at-law and sole next of kin ; M., N., O. and P. were not related to L., but were related to and capable of inheriting from each other ; M. died unmarried in the testator's lifetime :—Held, first, that M.'s share of the residuary personal estate lapsed for the benefit of the next of kin ; secondly, that M.'s share of the freehold property did not lapse, but went to the surviving devisees, the words "heir and lawful heirs" referring to heirs of the body, and "or" being construed "and" ; thirdly, that M.'s share of the leaseholds for years lapsed and fell into the residue, the words "there being no heir" referring to an indefinite failure of issue, and the word "surviving" meaning "other." *Harris* v. *Davis*, 1 Coll. C. C. 416 ; 9 Jur. 269.

—— **To A. and his Issue, Remainder to Heirs of A.**]—Devise to A. and his issue, remainder to B. and his issue, remainder to the heirs of A. A. dies without issue in the life of the testator ; B. dies in the life of the testator, leaving issue, who is also the heir of A. The issue shall not take an estate tail as issue of B., nor the remainder in fee as heir of A. *Goodright* v. *Wright*, 1 P. Wms. 397.

—— **To A. and the Heirs of his Body.**]—Lands are devised to A. and the heirs of his body. A. dies in the lifetime of the testator :—Held, that the devise thereby became void, and that the only son of A. could derive no title under it. *Wynne* v. *Wynne*, 3 Bro. P. C. 95.

Devise of lands to A., and the heirs male of his body. A. dies in the life of the testator, leaving issue. The devise is void, and the issue cannot take. *Hutton* v. *Simpson*, 2 Vern. 722 ; Pre. Ch. 439 ; Gilb. Eq. R. 115, 120.

A. devises lands to her sister B. for life, remainder to trustees to preserve, &c., remainder to the heirs of the body of B., remainder to her other sister C. for life, with remainders to trustees to preserve, &c., remainder to the heirs of the body of C., remainders over. B. died in testatrix's lifetime ; C. suffered a recovery, and then contracted to sell estate. On a bill by C. against the purchaser :—Held, that B. would have taken an estate tail in the premises if she had survived testatrix ; and that having left an only daughter, C. could make no title, and therefore bill was dismissed. *Ambrose* v. *Hodgson*, 3 Bro. P. C. 416.

—— **To A. or his Executors, &c.**]—A legacy given out of the personal estate of the testator, in trust, to pay the interest to a legatee for her life, and after her death to pay the principal absolutely in certain shares to and amongst several legatees, and in case of the death of such legatees (naming them) or any or either of them before such their respective legacies should or might become payable, then the legacy, or part, of him, her, or them so dying, to go to his, her, or their executors or administrators, as part of his, her, or their personal estate :—Held, as to one of such shares to have lapsed, notwithstanding the intervening life estate, on the death of one of the legatees in the lifetime of the testator, and that the mention of the executors and administrators in the clause of the will did not amount to a substitution, so as to vest any interest in them and prevent the lapse. A legacy bequeathed out of personal estate, also, after the death of a legatee, of the interest and dividends thereof for life, in precisely the same words, except that there was this further provision introduced after the bequest to the several legatees : "And in case of the death of any of the said legatees before their legacies should become payable, then the said testatrix willed and directed that the legacy of each of them so dying should go to be paid amongst his, her, or their children, share and share alike, and in case of such decease of any of the said legatees without leaving a child or children, the legacy of him or her so dying should go to her or his executors

or administrators, as part of his or her personal estate" :—Held, also, to be lapsed as to the share of a legatee dying unmarried in the lifetime of the testatrix, and of the tenant for life, and consequently that the executors and administrators of the legatee so dying were not entitled to it. Such a legacy so lapsing lets in the next of kin of the testator. *Bone* v. *Cook*, 13 Price, 332; M'Cle. 168; 28 R. R. 697.

Legacy to a person, dead in the lifetime of the testator, lapsed, although the words are, "to M., his executors, administrators, and assigns"; and parol evidence inadmissible that the testator knew, at the time of making the will, that the legatee was dead. *Maybank* v. *Brooks*, 1 Bro. C. C. 84.

Gift of residue to the widow for life, and afterwards to fifteen designated persons, or their executors, administrators, or assigns, and to be absolutely vested on the testator's death, and to be payable at twenty-one, provided the widow had died :—Held, that the shares of two of the fifteen, who predeceased the testator, lapsed. *Leach* v. *Leach*, 35 Beav. 185.

Testator gave the residue of his estate to his executrix, or her heirs, executors, administrators, or assigns. She died in his lifetime :—Held, it was given her as executrix; and she dying before him, he is dead intestate as to the residue. *Stone* v. *Evans*, 2 Atk. 86.

Bequest of the residue to A. for life, and after her death legacies were given to B., or to her proper representative, in case she should not be living at the decease of A., and four other persons, or their representatives or representative. One of the four died in the life of A., the former lapsed, and the last vested. *Corbyn* v. *French*, 4 Ves. 419; 4 R. R. 254.

A testator bequeathed a fund to his nephew A. and the children of his late sister B., as tenants in common; but in case any died before the testator leaving issue, his share was not to lapse, but to go to his executors as part of his personal estate. Three of the children of B. died before the testator, and left no issue :—Held, that there was no lapse, but that the whole went to the other members of the class. *Aspinall* v. *Duckworth*, 35 Beav. 307.

A testator gave a legacy to each of his brothers and his sisters, "or to their legal representatives," to be paid to them two years after his death, and legacies to his nephews. He then gave the residue of his property to his widow absolutely, except 4,100*l*., which she was only to take for life; and after her death it was to be divided among his relations before mentioned. One of the sisters to whom a legacy was given died in the interval between the date of the will and the death of the testator, and after the death of the widow a petition was presented for determining as to who was entitled to the share of such deceased sister in the sum then to be divided :— Held, first, that the share of the deceased sister in the 4,100*l*. had, notwithstanding the words "or to their legal representatives" attached to the former gift, lapsed; held, secondly, that as the sum of 4,100*l*. was given not as a part of his residue, but as an exception out of it, the personal representatives of his widow, and not his next of kin, were entitled to the share of his deceased sister, which had lapsed. *Thompson* v. *Whitelock*, 4 De G. & J. 490; 28 L. J., Ch. 793; 5 Jur. (N.S.) 994; 7 W. R. 625.

A testator directed real estate to be sold, the proceeds to go in equal moieties between A. and B. as tenants in common, and their respective heirs or representatives :—Held, that these were words of limitation, and that the share of A., who predeceased the testator, lapsed. *Appleton* v. *Rowley*, 38 L. J., Ch. 689; L. R. 8 Eq. 139; 20 L. T. 600.

—— **To several as Joint Tenants.**]—A. devises the surplus of his estate to his two nephews, equally to be divided between them, and appoints his executor to lay it out for their benefit. One of them died in the testator's lifetime. The whole decreed to the survivor, not to the executors, the testator not intending them any benefit. *Cock* v. *Burrish*, 1 Vern. 425.

Where testator devises four parts of his personal estate to B. and the children born of her body, and B. had no child at the date of the will, but had one child born afterwards, and B. died in testator's lifetime :—Held, that the legacy was not lapsed; for B. did not take an estate tail, but as a joint tenant with the child, and that the child took the whole by survivorship. *Buffar* v. *Bradford*, 2 Atk. 220.

One joint legatee being outlawed, a codicil revoked his share. The other takes the whole. *Alexander* v. *Alexander*, 2 Ves. Sen. 645.

Devise of residue to A. and B. Codicil revokes every legacy, thing, and part as to A. B. shall take the whole. *Humphrey* v. *Tayleur*, Ambl. 138; Dick. 161. And see *Dowsett* v. *Sweet*, Ambl. 175.

If an estate is limited to two jointly, the one capable of taking and the other not, he who is capable shall take the whole. *Id.* 138.

If a man devises lands to A. and B. and their heirs, and A. dies in the life of the devisor, B. shall take the whole land. *Davis* v. *Kemp*, 1 Eq. Abr. 216.

Where there is a joint tenancy under a will, and one of the joint tenants witnesses the will, the others take the whole. *Young* v. *Davies*, 2 Dr. & Sm. 167; 1 N. R. 419; 32 L. J., Ch. 372; 9 Jur. (N.S.) 399; 8 L. T. 80; 11 W. R. 452.

A testatrix by her will bequeathed (inter alia) the interest of certain money invested in the Belgravian Dairy Co. to C., D., and E. in equal sums for life, and "on their deaths I will that the whole sum invested as above be used for the purpose of erecting an east window in St. Martin's Church, Epsom." The testatrix died on March 5, 1895, having survived the above-mentioned legatee C., who died after the date of the will :—Held, that the whole of the income arising from this bequest was payable to D. and E. in equal shares during their joint lives, and to the survivor of them for her life. *Buller, In re, Buller* v. *Giberne*, 74 L. T. 406.

—— **To several as Tenants in Common.**]—Testator directed his residue to be divided amongst the children of L. D., to wit, I. D., E. D., and A. D. :—Held, that the gift was not made to the children as a class, but as individuals; and that one of them having died in the testator's lifetime, the share intended for that child was undisposed of. *Bain* v. *Lescher*, 11 Sim. 397.

Bequest of a moiety between two. One of them dying in testator's lifetime, no survivorship, and his moiety is undisposed of. *Peat* v. *Chapman*, 1 Ves. Sen. 542.

One devises the surplus of his personal estate to four equally, and leaves J. S. executor in trust. One of the four dies in the life of the

testator; his share, as so much of the testator's estate undisposed of by the will, shall go according to the Statute of Distributions. *Bagwell* v. *Dry*, 1 P. Wms. 700.

Bequest of residuary estate to accumulate for ten years, and then to be distributed in seven equal shares unto seven persons, named in the will, and appointment of the same seven persons residuary legatees, creates a tenancy in common, and the share of one dying in the testator's lifetime belongs to the next of kin of the testator. *Norman* v. *Frazer*, 3 Hare, 84; 7 Jur. 763.

Gift of share to the children of my late cousins W. and J., share and share alike, at their respective ages of twenty-one. This is a tenancy in common among those then living, and one of them dying in the lifetime of the testator, that share is lapsed. *Martin* v. *Wilson*, 3 Bro. C. C. 324.

Bequest (charged upon land) to each and every the younger child or children of testator living at his decease, to be paid to sons when they shall severally and respectively attain the age of twenty-one, and to daughters at that age or marriage; some not to vest until the time aforesaid, but interest on the shares to be paid from the testator's death, provided that, in the event of any of the sons becoming an eldest son, his share should be divided amongst his brothers and sisters:—Held, that the shares of two daughters who died under the age of twenty-one and unmarried did not survive to the others, but merged for the benefit of the inheritance, the gift not being to the younger children as a class. *Carroll* v. *Barry*, 15 W. R. 212.

A testator gave a sum of money to be divided between the relations of his late wife, in such shares as if she had died a spinster and intestate. The wife had sixteen next of kin at her death, five of whom died in the lifetime of the testator:—Held, that those living at the death of the testator each took a share, and that five shares went to the residuary legatees. *Ham's Will, In re*, 2 Sim. (N.S.) 106; 21 L. J., Ch. 217; 15 Jur. 1121.

A testator by his will gave several pecuniary legacies, including one to his son E., and devised his freehold, copyhold, and leasehold estates to his sons T. and A. as tenants in common, and he appointed them as his residuary legatees and executors. T. died, and by a codicil the testator appointed E. executor in the room of T., and revoked the legacies given to A. and E. by the will, and he appointed them "residuary legatees," and he declared that the freehold and leasehold property comprised in his marriage settlement, and which he had power to appoint, should go to the residuary legatees, his sons A. and E.:—Held, that the moiety of the real estate devised by the will to T. had lapsed and descended on A. as the testator's heir-at-law, he taking also the other moiety as devisee under the will. *Windus* v. *Windus*, 6 De G. M. & G. 549; 26 L. J., Ch. 185; 2 Jur. (N.S.) 269, 1101.

A testator bequeathed several sums of money to several pecuniary legatees by name, including one of 500*l.* to his sister, and the residue of his personal estate "unto all the before-mentioned pecuniary legatees (with certain exceptions), to be divided among them in proportion to their respective pecuniary legacies:—Held, that the residue was not given to the pecuniary legatees as a class; and that, the testator's sister having died in his lifetime, the surviving pecuniary legatees were not entitled to her share. By a codicil the testator, after reciting his sister's death, bequeathed 500*l.* to a trustee for her children, but was silent as to the residue:—Held, that the children were not entitled to their mother's share of the residue, and that there was an intestacy as to that share. *Gibson's Trust, In re*, 2 J. & H. 656; 31 L. J., Ch. 231.

A. by will devises lands to trustees and their heirs, in trust that the profits should be equally divided between his wife and daughter during the wife's life, and after her death he devised the same to the use of his daughter in tail, with remainders over. The daughter died during the mother's life:—Decreed, this to be a tenancy in common between the mother and daughter; and that during the mother's life the daughter's moiety did not descend or result to the heir, but was an interest undisposed of, and in nature of a tenancy pur autre vie, and should go to the administrator of the daughter. *Phillips* v. *Phillips*, 2 Vern. 430; Pre. Ch. 167; 1 P. Wms. 34.

Gift to A. for life, and afterwards to seven named persons equally, "the share of each who shall happen to die to be equally divided amongst the survivors, unless A. (one of them) should die leaving children; in that case, I mean that her children should inherit the share of the parent." The seven all died before the tenant for life, A. being the survivor of them:—Held, first, that the seven took equally; secondly, that the children of A. took no more than one-seventh; and thirdly, that the share of one of the seven, who predeceased the testatrix, was undisposed of. *Cambridge* v. *Rous*, 25 Beav. 409. And see *Stansfield, In re, Stansfield* v. *Stansfield*, supra, col. 1602.

—— **To a Class.**]—In gifts to a class the true rule is that those members take the whole who are capable of taking, however the incapacity of the others may arise. Where there was a devise to the children of the testator's late brother who should be living at his decease, or who should have died in his lifetime leaving issue living at his death as tenants in common:—Held, that the survivors took to the exclusion both of the issue of a child dying in the testator's lifetime and of the testator's heir-at-law. *Coleman* v. *Jarrom*, 35 L. T. 614; 25 W. R. 137.

A testator devised five freehold houses to "all and every the children of my late brother J. C. who shall be living at my decease, or who shall have died in my lifetime leaving issue living at my death, in equal shares." By a codicil, after reciting that some of the children of his late brother J. C. had lately died without issue, he revoked his previous devise, and devised one of the houses to A., and the remaining four in the same terms as the original devise. Four children of his late brother were living at the testator's death, and one other child died in his lifetime leaving children living at the testator's death:—Held, that the four children who survived the testator took the whole property. *Coleman, In re*, 46 L. J., Ch. 33; 4 Ch. D. 165.

A father directed the residue of his estate to be divided into fourteen equal parts, and gave one such part to the daughters of his late niece, and one other part to each of thirteen persons or such of them as should be living in England at his death:—Held, that there was an intestacy as to the shares of the persons who were not living in England at the time of his death. *Ross* v. *Iles*, 20 W. R. 858.

Gift to B. for life, with remainder to the children of B. living at his decease equally between them. B. died in the lifetime of the testatrix, leaving three children, one of whom afterwards died in the lifetime of the testatrix:—Held, that there was no lapse of the third part of the legacy by the death of one of the children of B. after him and before the testatrix, and that the two surviving children were entitled to the whole legacy. *Lee* v. *Pain*, 4 Hare, 250; 14 L. J., Ch. 346; 9 Jur. 247. And see *id.* 24.

The testatrix bequeathed 1,500*l.* to Mrs. B. for life for her separate use, with remainder to her husband for his life, and with remainder to all and every the child and children of Mrs. B. living at her decease in equal shares; afterwards, by a codicil, the testatrix revoked the said legacy of 1,500*l.* given by her will to Mrs. B., her husband and children, and instead thereof gave 1,000*l.* to each of them upon similar trusts for the said Mrs. B., her husband and children, as were contained in her will as to the 1,500*l.* The legatee, Mrs. B., died in the lifetime of the testatrix, leaving her husband and seven children. One child afterwards died in the lifetime of the testatrix:—Held, that the husband and six children who survived the testatrix were entitled to 8,000*l.* to be settled for the benefit of the husband, with remainder to the children. As to the legacy in respect of any child of Mrs. B. who (if Mrs. B. had herself survived the testatrix) should have survived the testatrix, and died in the lifetime of Mrs. B., quære. *Id.* 4 Hare, 225.

Bequest to A. B. for life, and after his death to "all the present born children of A. B. equally." One of them died between the date of the will and the death of the testatrix:—Held, that his share did not lapse, but that the bequest being to a class, the whole was divisible amongst those who survived the testatrix. *Leigh* v. *Leigh*, 17 Beav. 605; 23 L. J., Ch. 287; 18 Jur. 115; 2 W. R. 205.

Under a devise of freehold property, among all such children of the testator as should be living at his death:—Held, that the testator having by a codicil revoked the devise as to one child, that revoked share went among all the other children, and did not descend to the heir. *Shaw* v. *M'Mahon*, 2 Con. & L. 528; 4 Dr. & War. 431.

Devise to five in fee, to be equally divided between them, "if more than one." One died in the testator's life:—Held, that there was no lapse, but that the four survivors took equally. *Sanders* v. *Ashford*, 28 Beav. 609.

A testatrix, having a general power of appointment over a fund which was settled on her husband for life, by her will bequeathed legacies thereout; and the remainder or residue of the fund, share and share alike, to her sisters; and as to "any other" residue of moneys or property not specified and disposed of, she directed it to be given, share and share alike, to her then surviving sisters, who might be living when her will and the bequests therein might become available. One of the sisters died in the lifetime of the testatrix, who died before her husband:—Held, first, that the lapsed share of a deceased sister passed under the general residuary clause to the surviving sisters:—Held, secondly, that those sisters only who survived the husband took under the general residuary clause. *Hickson* v. *Wolfe*, 9 Ir. Ch. R. 144.

Testator gave 300*l.* to A. if living, and if dead the 300*l.* to become part of the residue. The will contained a gift of the residue to B., C., D., and A. if living. A. was dead at the date of the will:—Held, that the gift to A. had not lapsed, but was contingent upon his being alive, so that the residuary legatees, and not the next of kin, took the share to which he would have been entitled. *Hornby, In re*, 7 W. R. 729.

The wife of F. S. was the only child of a person who was entitled to certain shares in the N. canal, which, upon that person's death, were transferred into the names of "F. S. and wife," the wife having been her father's administratrix. F. S. was ever afterwards, until his death, treated by the canal company as proprietor of the shares, and received the dividends upon them, and was a member of a committee which, by the company's act of parliament, was required to consist of proprietors of two or more shares. F. S. bequeathed "all my shares in the canal navigation," and all other his personal estate, to trustees, in trust for his wife for life; and after her death, if he should leave no issue (which happened), in trust to apply the same equally between all and every his brothers and sisters, their respective executors, administrators, and assigns, absolutely and for ever. The testator had no canal shares at all, unless those so transferred into the names of himself and his wife could be considered his. Two of his brothers and a sister, who were all living when he made his will, died in his lifetime:—Held, that the representatives of the brothers and sister who died in the testator's lifetime were not entitled to any share of his personal estate under his will, but that the whole vested in the brothers and sisters who survived him. *Shuttleworth* v. *Greaves*, 4 Myl. & Cr. 35; 8 L. J., Ch. 7; 2 Jur. 957.

By a marriage settlement funds were settled upon the wife for life, with remainder to the children of the marriage in equal shares, "to be a vested interest at their ages of twenty-one years," with a gift over to the husband in the event of all the children dying under twenty-one, and a reversion to the settlor in the event of there being no child born, but no clause of survivorship and accruer as to shares of children dying under twenty-one. There were five children, of whom four attained twenty-one, and the fifth died an infant:—Held, that the whole fund vested in the four children who attained twenty-one. *Colley, In re*, L. R. 1 Eq. 496; 14 W. R. 528.

A testator bequeathed his residuary estate in trust for all and every his children and child then born and thereafter to be born, who being a son or sons should attain twenty-one, or being a daughter or daughters should attain or marry under that age, in equal shares as tenants in common; and if there should be but one child, then the whole in trust for that one child. And he declared that the share to which each of his daughters, on her attaining twenty-one, or marrying under that age, should become entitled under the trusts aforesaid should be held by the trustees in trust for such daughter for her life, and afterwards for her children:—Held, that the children of a daughter who died in the lifetime of the testator did not take any interest. *Stewart* v. *Jones*, 3 De G. & J. 532; 5 Jur. (N.S.) 229; 7 W. R. 184.

A father made a general gift by will of his real and personal estate to trustees upon trusts for sale and conversion, and to hold the proceeds in trust for all his children who being sons should

attain twenty-one, or being daughters should attain that age or marry, the share of each of his sons to be for his own absolute use and benefit. And he directed that the share of each of his daughters should be held upon trusts in effect for herself for life for her separate use, and after her death for her children. The will contained provisions for substituting the issue of sons dying in the lifetime of the testator for the sons, but no similar provision for the case of daughters. A daughter having died in the testator's lifetime leaving children who survived him :—Held, that the gift of the daughter's share did not fail, and that her children were entitled. *Speakman, In re, Unsworth* v. *Speakman*, 46 L. J., Ch. 608 ; 4 Ch. D. 620 ; 35 L. T. 731 ; 25 W. R. 225.

A testator bequeathed the residue of his personal estate to trustees upon trust for a nephew and three nieces by name, equally between them ; and he declared that his trustees should retain the share of each of his nieces, upon trust to pay the income to her during her life, for her separate use without power of anticipation, and after her decease, as to the capital thereof, upon trust as she should by will appoint, and in default of appointment, upon trust for her child or children, sons at twenty-one and daughters at twenty-one or marriage, equally between them if more than one. One of the nieces married, and died before the testator, leaving an infant daughter her surviving :—Held, that the share of the deceased niece had lapsed, and that there was an intestacy in respect of it. *Stewart* v. *Jones* (supra) followed, *Unsworth* v. *Speakman* (supra) disapproved. *Roberts, In re, Tarleton* v. *Bruton*, 53 L. J., Ch. 1023 ; 32 W. R. 986. Affirmed 30 Ch. D. 234 ; 53 L. T. 432—C. A. And see *Aspinall* v. *Duckworth*, supra, col. 1605, and *Fullford* v. *Fullford*, supra, col. 1602.

Gift whether to Class or to Personæ Designatæ.]—A testator gave after the death of A., one of his children, to such of his other children as should be living at the death of A. :—Held, this was a gift to a class, and that one of the children having died before the testator, the survivors took the whole. *Cruse* v. *Howell*, 4 Drew. 215 ; 6 W. R. 271.

An aunt gave personal estate in trust for all the nephews and nieces of her late husband who were living at the time of his decease, except A. and B. as tenants in common. Two nephews, who would otherwise have taken under the bequest, died before the testatrix, one before and the other after the will :—Held, that the gift was to a class, and not to designated persons, and therefore that there was no lapse, but the fund was divisible among those of the class who survived the testatrix. *Diamond* v. *Bostock*, L. R. 10 Ch. 358 ; 33 L. T. 217 ; 23 W. R. 554. And see *Stansfield, In re*, supra, col. 1602.

A testator directed that his debts should be paid by his executors ; he then gave two legacies, one to one of his executrices, to be paid to her in addition to what was afterwards devised to her ; and gave the residue of his personal estate and all his real estate to five persons, whom he appointed executors, in equal shares, as tenants in common :—Held, one of the five devisees having died in the testator's lifetime, that as between the heir and devisees the lapsed share was in the hands of the heir, liable to bear a rateable proportion only of the debts and legacies. *Peacock* v. *Peacock*, 34 L. J., Ch. 315 ; 11 Jur. (N.S.) 280 ; 12 L. T. 299 ; 13 W. R. 516.

Gift to a Class and Named Individuals.]—Bequest of residue to the children of A., the children of B., to C., to the children of D., and to E., in equal shares. Revocation by codicil of the gifts to C., and to the children of A., with a declaration that they should not be residuary legatees :—Held, the gift of residue was to the residuary legatees as a class, notwithstanding that some of the individuals to take were named ; and that the effect of the will and codicil, taken together, was to give all the residue to the legatees whose bequests were not revoked. *Clark* v. *Phillips*, 17 Jur. 886.

A testator bequeathed the residue of his property equally to all and every the children of R. B. and B. B. who should be living at his decease, and to ten other persons by name ; and one of the latter died in the testator's lifetime :—Held, that the ten persons named were not members of a class, and that the share of the deceased legatee lapsed. *Clark* v. *Phillips* (supra) commented on. *Chaplin's Trust, In re*, 33 L. J., Ch. 183 ; 3 N. R. 289 ; 9 L. T. 677.

Bequests to a brother for life, and at his death to be equally divided amongst his surviving children "and my niece R.":—Held, that this was not a gift to a class ; and, R. having died in the life of the testator, that R.'s share lapsed. *Drakeford* v. *Drakeford*, 33 Beav. 43. And see *Aspinall* v. *Duckworth*, supra, col. 1605.

A gift in a will "equally amongst all the children of R. W., the child of W. W. and L., his wife, and A. W., the widow of H. S. W., share and share alike," is not a gift to a class :—Held, therefore, that there was an intestacy as to a share of the child of W. W. and L., his wife, such child having predeceased the testator. *Allen, In re, Wilson* v. *Atter*, 44 L. T. 240 ; 29 W. R. 480.

Where there was a gift of residue among such of the children of A. as are now alive, and fourteen named persons, and there were no children of A. :—Held, that there was no lapse, but the residue was divisible among the fourteen persons named. *Spiller, In re, Spiller* v. *Madges* or *Madge*, 50 L. J., Ch. 750 ; 18 Ch. D. 614 ; 45 L. T. 41 ; 29 W. R. 782.

Testator devised, that in case of failure of issue descending from himself and his wife, a trustee and his heirs should stand seised of freehold lands, for the use and benefit of B. W. and his children, share and share alike, at his disposal. B. W. died in testator's lifetime :—Held, that the children of B. W. took the entire interest in those lands as tenants in common. *Hayes* v. *Ward*, 2 Ridgw. P. C. 85.

A testator gave freeholds and leaseholds to trustees, upon trust to pay the income to C. for life, or at their discretion to invest it, with remainder to his children, and in default of children, on trust to sell and divide the produce in manner afterwards directed. He made similar gifts for the benefit of his other children and their issue, and directed the trustees to divide the produce in sixths, and apply one-sixth to the purchase of an annuity to C. C. died without children, and the trustees sold :—Held, that the one-sixth of the product of the sale was undisposed of, and went to the next of kin of the testator. *Walters* v. *Corpe*, 16 Jur. 764.

A testator having five daughters gave a legacy to one, and the residue to the remaining four (by name) "and their issue" ; but he afterwards directed that any subsequent born daughters and their issue should be entitled to equal shares

with the four daughters. One of the four died without issue in the life of the testator:—Held, that there was no intestacy, that the daughters took as a class, and that those who survived took absolutely. *Stanhope's Trusts, In re*, 27 Beav. 201.

A testator by his will gave his residuary estate to trustees in trust for five of his children (naming them), and such of my child or children, if any, hereafter to be born as shall attain the age of twenty-one years or marry, in equal shares as tenants in common, but subject as to the share of any daughters, whether now living or a child hereafter to be born, to the trusts following. The testator had six children only—viz., the five named and one other—all of whom had attained twenty-one at the date of the will. Two of the five named died in the testator's lifetime without issue:—Held, that the gift was a gift to a class, and not to individuals. *Stanhope's Trusts, In re* (supra), followed. *Jackson, In re, Shiers* v. *Ashworth*, 32 W. R. 194.

Testator gave to trustees all his estates upon trust to sell and directed that the proceeds of sale should be part of his personal estate and be subject to the dispositions concerning his residuary estate, and after giving legacies—one to R. A., and another to the children of J. D.—he gave the residue unto and equally amongst all the children of his brother-in-law, J. D., and the said R. A., and directed that the same should be vested legacies at the time of his decease. R. A. died before the testator, leaving children living at the testator's death. Three children of J. D. were living at the testator's death:—Held, that R. A. would, if living, have taken a share of the residue and not his children, and that, as he died before the testator, the share which he would have taken belonged to the three surviving residuary legatees, not as a class with R. A., but under the special term of this will. *Featherstone's Trusts, In re*, 52 L. J., Ch. 75; 22 Ch. D. 111; 47 L. T. 538; 31 W. R. 89.

—— **To Creditors.**] — Testator by his will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his will. The schedule contained both the names of the creditors and the debts due to them respectively:—Held, that the parties so named in the schedule were not to be considered as legatees, but strictly as creditors, and consequently that the representatives of such as died in the testator's lifetime were entitled to the benefit of the will. *Williamson* v. *Naylor*, 3 Y. & C. 208.

The testator gave the residue of his estate to trustees, upon trust to divide the same amongst the several persons who were his creditors at the time he executed a certain conveyance for their benefit, their executors and administrators; such payment and provision to be made to and amongst such persons respectively, their respective executors or administrators, rateably and in proportion to the quantum or amount of the original debt or debts due from him to such person or persons respectively: and if any person or persons claiming under such bequest should not give notice of such claim to the trustees within two years of the testator's decease, such share or shares of the residue to go to certain residuary legatees:—Held, that the residue was to be divided into parts corresponding in number and proportion with the original debts; that the shares attributed to the debts of executors who died in the lifetime of the testator did not lapse by their death; that the surviving partners were the persons to receive and give receipts for the share of the residue attributed to a joint debt, and that it was not necessary, before carrying over the shares in this suit, to inquire into the state of the accounts as between the surviving and the representatives of the deceased partners; that a claim made by the representatives of a partner beneficially interested in a joint debt was a sufficient claim, although such partner was not the last survivor of the partners in the firm to which the debt was owing; that the share of the residue attributed to a debt, in respect of which no claim was made, belonged to the residuary legatees; that the amount of the residue, whether as exceeding or falling short of the amount of the unpaid debts, did not affect the construction of the will. *Philips* v. *Philips*, 3 Hare, 281; 13 L. J., Ch. 445.

Testator bequeathed 1,000*l.* to the trustees of a chapel "towards the reduction of their debt on the chapel," and after certain other gifts he bequeathed the residue of his personal estate to the treasurer of the fund called the S. fund. He then charged all his legacies bequeathed to charitable purposes on his bank and India stock, &c., and gave all his real estate to trustees upon trusts for sale, with a direction to apply the proceeds in part payment of the legacies bequeathed by his will and not being charitable. On a suit instituted for the administration of the testator's estate, and the usual inquiries having been directed, the chief clerk found that the testator had no real estate, but was possessed of some Tothill Fields Improvement bonds, leaseholds, and considerable personal estate. That there had been a debt on the chapel which had long before the date of the testator's will been paid off. That there was no fund answering to the exact description of the S. fund; but there were two funds, the W. fund and the T. fund, the names of which were nearly resembling the S. fund, and the objects of which were somewhat similar. On the several questions arising in the suit:—Held, that though the debt on the chapel was discharged, the gift to the trustees was good. That as there was no contest between the W. fund and the T. fund, there was no intestacy; but that the T. fund, as the W. fund did not dispute it, was entitled to the gift to the S. fund, although the leaning of the court was in favour of the W. fund. That the leaseholds must be applied as far as they would extend in paying the legacies not charitable, that the deficiency must be made up and out of the residuary personal estate, and that the Tothill Fields Improvement bonds were not within the Statute of Mortmain. *Bunting* v. *Marriott*, 19 Beav. 163.

A testator, who had been bankrupt, and had obtained his certificate thirty years before the date of his will, directed by his will that all his debts should be paid, including the debts proved and not paid in full in the bankruptcy, and directed his executors to pay to the official assignee in the bankruptcy, in trust to pay all such creditors, so much money as would make the dividend in the bankruptcy equal to 20*s.* in the pound: — Held, that the benefit thereby intended to be conferred on a creditor did not lapse by his death in the testator's lifetime. *Somerby's Trust, In re*, 2 K. & J. 630; 7 De G. M. & G. 429.

A testator by his will directed his just debts

to be paid, including "the unpaid-in-full debts proved on the estate of" himself and his father, who were bankrupts in 1822: and he directed his executors to pay to the official assignee, in trust for all the creditors under the commission, so much money as would make the dividend equal to 20*s.* in the pound on the debts so proved: —Held, that the official assignee was entitled to receive the amount found to be due to the creditors, less legacy duty; and that the shares of those who died before the testator did not lapse, but were payable to their representatives. *Turner* v. *Martin*, 26 L. J., Ch. 216; 3 Jur. (N.S.) 397; 5 W. R. 277.

—— **To Debtor.**]—A. devises to B. 400*l.* which he owed him, provided he should thereout pay several sums to his children; the rest he freely gives him, and directs his executors to deliver up the security, and not to claim any part of the debts, but to give such release as B., his executors, &c., should require. B. dies in the life of A.:—Decreed, this was a lapsed legacy. *Elliot* v. *Davenport*, 1 P. Wms. 83; 2 Vern. 521.

"I return A. his bond," in a will is not a release, but a legacy; and having lapsed, the bond remains in force against a surviving co-obligor. *Maitland* v. *Adair*, 3 Ves. 231.

J. bequeathed in these words: "I give to N. the sum of 400*l.* which he owes me on mortgage of his estate in Shropshire, and I further order my executor to give him up all bonds owing from him to me, and which shall be found in my custody at my decease, with all interest due thereon." N. had given the testator a bond as a collateral security for the mortgage money. N. died before the testator. This is a lapsed legacy, and the executor of N. must pay the money. *Toplis* v. *Baker*, 2 Cox, 118; 2 R. R. 21.

In order to prevent a legacy from lapsing by the legatee's death, it is necessary to substitute another legatee in his stead. *Id.* 119.

Bequest by obligee to one of joint obligors of debt due on bond in these terms: "I remit and forgive to A. the sum of 500*l.*, which he stands indebted to me on his bond; and I direct said bond to be delivered up to him and cancelled": —Held, merely a personal bequest to A., and lapses by his death in lifetime of testator; therefore surviving obligors and representatives of A. are not released from bond. *Izon* v. *Butler*, 2 Price, 34.

Plaintiff's grandmother by her will forgave her son-in-law C. a debt of 500*l.*, due to her on bond, which she desired her executors to deliver up to be cancelled. The legatee died in the life of the testatrix:—Held, that plaintiff, as representative of C., should have the benefit of the discharge of this debt, and decreed that the bond should be delivered up to be cancelled. *Sibthorp* v. *Moxon*, 3 Atk. 581. And see *S. C.*, 1 Ves. Sen. 49.

Gift over after Absolute Interest—Death of First Donee.]—If a testator possessed of a specific chattel, or chattel real, bequeath it to A. and the heirs of his body, and in default of such issue to B., the death of A. in the testator's lifetime without issue does not enable B., though surviving the testator, to take under the will, but causes a lapse. *Harris* v. *Davis*, 1 Coll. C. C. 416; 9 Jur. 269.

Devise of 100*l.* and of 50*l.* per annum to A. and his heirs, and if A. die without heirs then to a charity; A. dies without issue, living the testator: the will void as to the whole, and the charity cannot take. *Att.-Gen.* v. *Gill*, 2 P. Wms. 369.

A legacy to the testator's daughter, with a gift over, in the event of her dying unmarried, to such of the testator's other children as she should appoint, and in default of appointment to and amongst his other children equally, is not an absolute gift, and does not lapse by the death of the daughter unmarried in the lifetime of the testator; and consequently, the power of appointment not having been exercised, one of the testator's other children was held to be entitled to a distributive share of his sister's legacy, with interest in the absence of laches on his part, from the death of the testator in 1847, according to the express trust in the will. *Kellett* v. *Kellett*, Ir. R. 5 Eq. 298.

A testator gave all his residuary estate to his wife, her heirs, executors, and administrators; but "if she should die intestate," then over. The wife died in the testator's lifetime:—Held, that the gift over was inoperative, and the bequest lapsed. *Hughes* v. *Ellis*, 20 Beav. 193; 24 L. J., Ch. 351; 1 Jur. (N.S.) 316; 3 W. R. 310. And see *Andrew* v. *Andrew*, 1 Coll. C. C. 690.

A testator gave and devised to his brother all his real and personal estate and effects whatsoever and wheresoever, with full power to dispose thereof by deed or will, and then provided that if his brother should not dispose thereof the real estate should go to H. for life, with numerous limitations over. He then bequeathed his furniture, &c., to executors, as heirlooms, and gave all the residue of his estate and effects to the executors upon trust, after the decease of the survivor of his brother and himself, to sell and dispose thereof, and invest in other real estates to be settled to the same uses as he had declared concerning the real estates devised by his will, with powers of investment in the meantime. The brother died before the testator. On the death of the testator, in 1803, H. entered into possession, and held the estates till his death in 1869. On the death of H. the persons entitled under his will took possession of the property, which was then claimed by the persons entitled under the limitations in the will of the original testator:—Held, that though the first clause in the will amounted to an absolute gift, the whole will shewed a clear intention to give the testator's brother an estate for life only with a power of appointment, and as that power of appointment had not been exercised, the limitations over took effect. *Stringer, In re, Shaw* v. *Ford*, 46 L. J., Ch. 633; 6 Ch. D. 1; 37 L. T. 233; 25 W. R. 815.

Lapse of Gift in Trust—Effect on Interest of Beneficiary.] — Trust legacy cannot lapse by death of trustee. *Moggridge* v. *Thackwell*, 3 Bro. C. C. 517. Affirmed 13 Ves. 416; 6 R. R. 76.

Estate devised to a body corporate, which cannot take by the Statute of Mortmain, in trust to sell and apply the proceeds for persons competent to take; though the devise of the legal estate is void in law, yet the trust shall not be defeated. The heir-at-law therefore considered as a trustee for the purpose. *Sonley* v. *Clockmakers' Co.*, 1 Bro. C. C. 81.

Devise to trustees for a charity; the trustees die in the testator's lifetime. This subsists in equity, though lapsed at law. *Att.-Gen.* v. *Hickman*, W. Kel. 4.

—— **Of Gift subject to Charge—Effect on Chargee.**]—As long as the fund itself exists upon which a legacy is charged, though it devolve either upon the heir or the executor, yet they take it, subject to the charge. *Hills* v. *Wirley*, 2 Atk. 605.

A testator bequeathed leaseholds, subject to the payment thereout of an annuity to A. He afterwards assigned the leaseholds on other trusts, and reserved a power to appoint a like annuity to A. Subsequently he confirmed his will, but he did not, in terms, execute his power:—Held, that the annuity failed. *Cowper* v. *Mantell*, 22 Beav. 223.

The testator directed the share of one of the nephews to be subject to the payment of 100*l.* to W. The share did not amount to 100*l.*:—Held, that W. took the share, so far as it went, towards the 100*l.* *Arrowsmith, In re*, 2 De G. F. & J. 474; 30 L. J., Ch. 148; 7 Jur. (N.S.) 9; 9 W. R. 258.

—— **Of Gift subject to Condition—Effect on Persons taking Benefit of Condition.**] — E. devises lands to his second son T., upon condition that T. or his heirs should pay to T.'s children 90*l.*, to be equally divided among them, and on default of payment a clause of entry or distress. T. died in the testator's lifetime; the son of the eldest son of the testator entered on the lands as heir-at-law, and sold them. The legacy to the children of T., the testator's second son, is a continuing charge on the land in the hands of the purchaser, and they are entitled to be satisfied for the same, with interest. *Wigg* v. *Wigg*, 1 Atk. 382.

A. devises lands to B., on condition to pay a sum of money, and no clause of entry. The legatee at law has no lien on the lands, but the heir of the testator shall enter for breach of condition, and yet in this court is but trustee for the legatee. *Id.* 383.

A wife having power to appoint 4,000*l.* to any of her kin, and for want of appointment to go according to the statute, appoints it by will to her nephew, "upon condition" that he paid his mother an annuity of 100*l.* She then bequeathed to her niece, S., all the real and residue of what she had power to dispose of. The nephew dying in her lifetime, the appointment as to him was void; but not so as to the annuitant; and the remainder was held to pass by the above residuary bequest. *Oke* v. *Heath*, 1 Ves. Sen. 135.

Testator devised land at M. to his son R. in fee, on the express condition that, within three months after testator's death, he should relinquish the debt owing to him from the testator, and deliver the promissory notes therefor to the executor to be cancelled. The testator devised land at S. to trustees upon trust for sale (with power to postpone the sale, the unsold portion being transmissible as personalty), to invest the net proceeds (after payment of the deficiency of his residuary personalty to pay debts), and pay the income to the widow, and after her death pay the capital to four grandchildren in equal shares. The testator devised his residuary realty to his sons R. and J. in equal shares in common. He also bequeathed his residuary personalty upon trust therewith to pay his debts (except a mortgage debt and the debts due to his sons), and to retain the surplus for the benefit of R. and J. equally; but in case the residuary personalty was insufficient to pay his debts (except as aforesaid), the deficiency was to be paid out of the realty directed to be sold. By a codicil the testator revoked the gift of one of the fourth shares in the proceeds of the S. estate, and gave such proceeds, subject to the widow's life interest and such deficiency of personalty, to pay debts, as to 900*l.* for certain persons, and he declared that the residue of clear proceeds should form part of the residuary personalty. R. died before the testator, without issue:—Held, that although the devise of the M. estate to R. had lapsed, that estate, and not the residuary personalty, must bear the debt owing to R. Although a testator makes it a condition of a devise that the devisee should do something, the devisee by refusing to perform the condition, or dying before it is to be performed, cannot deprive the person who is to have the benefit of the condition from such benefit; and there is no distinction between a condition to pay a sum or an annuity, or to give a valuable thing to a legatee, and a condition that the personal estate shall be exonerated from a debt. *Kirk, In re, Kirk* v. *Kirk*, 21 Ch. D. 431; 47 L. T. 36; 31 W. R. 94.

—— **Of Prior Gift—Effect on Executory Gift Over.**] — *See* VESTED CONTINGENT AND FUTURE INTERESTS.

b. Interests Undisposed of.

What is undisposed of—Gift on Condition unperformed.]—Devise on condition to pay 500*l.* in six months, upon trust to pay the interest to the devisor's wife for life, and after her death the principal, according to her appointment in writing, with witnesses, whether sole or married, provided she shall release her dower within six months, and in case of her marriage without consent of the trustees, one moiety to go over. The wife, who took other interests under the will, died within the six months, and not having married nor released dower, the 500*l.* did not vest in her. *Croft* v. *Slee*, 4 Ves. 60.

—— **Realty not included under "any Residue."**]—Devise of real estate to W. R. W. and his heirs, upon trust to receive the rents and profits, and apply same in discharge of the testator's debts and legacies, and after payment thereof to convey a portion of said real estate to testator's brother, R. W., for his life, and the residue thereof and the part so devised to R. W., after his decease, to such of the sons of W. R. W. as should at his decease be his second son for life, with remainder to his first and other sons in tail male, with remainder to the third and fourth, and every other son of W. R. W. successively in strict settlement. The will concluded thus: "And as to all my personal estate, &c., subject, however, to my debts and legacies heretofore bequeathed, I give and bequeath same to my relative W. R. W., whom I appoint executor of this my will, and also in case of any residue I appoint him my residuary legatee." The debts and legacies having been all paid, and R. W. having died in the lifetime of the trustee, W. R. W.:—Held, that the residuary clause was confined to the personal estate, and that under it these rents and profits did not pass to W. R. W. for his life. *Wills* v. *Wills*, 1 Dr. & War. 439.

Heir, Title of.]—In case of the lapse of a real estate the heir takes. *Cambridge* v. *Rous*, 8 Ves. 25.

W. H. by will devised the perpetual advowson of S. to W. C., upon trust to present his son to the living; and that, if the church shall next after his death be full of an incumbent, then to sell the perpetuity, and to apply the profit arising from the sale first to the payment of debts, and then to distribute the surplus in thirds to his daughters. The trustees presented the son, who died before the advowson was sold, leaving an infant daughter, who brought her bill, insisting upon a resulting trust in the advowson to her, as heiress-in-law, after debts and legacies paid:—Held, that the whole legal estate being devised away, there could be no resulting trust for the heir. At common law, where an estate is devised to trustees and their heirs, the whole is gone from the heir; but in equity there may be a beneficial interest remaining to the heir upon the trust. It is a certain rule in equity, that where an estate is charged with an incumbrance for payment of debts, and after such payment the surplus is given over, the whole property vests in the residuary legatee. *Hawkins* v. *Chappel*, 1 Atk. 621.

A testator died in 1821, having devised and bequeathed his real and personal estates to trustees upon certain trusts. In 1826 a bill was filed for the execution of the trust as to the personal estate. In 1847 a supplemental bill was filed, raising questions on the will as to the real estate, in which the heir, who was then unknown, was interested; and in 1849 another supplemental bill was filed to bring the heir, who was then ascertained, before the court:—Held, that the heir was barred, by lapse of time, from claiming the real estate adversely to the trustees; but that he was not barred from claiming part of the real estate as being, in the events that had happened, undisposed of and held by the trustees in trust for him. *Simmons* v. *Rudall*, 1 Sim. (N.S.) 115; 15 Jur. 162.

—— **Where Gift in Trust, but no Trust declared.**]—Devise to trustees for ninety-nine years upon the trusts hereinafter expressed, and from and after the expiration or other sooner determination of the said term in strict settlement. The term, no trust being declared, decreed to attend the inheritance, according to the limitations of the will, and no resulting trust for the heir upon apparent intention to devise immediate estates, subject to the term, not future estates, expectant on its determination. *Sidney* v. *Shelley* or *Miller*, 19 Ves. 352; Coop. 206; 14 R. R. 247.

Testator devised all his freehold estates to his most dutiful and respectful nephew, E. E., "upon the trusts and for the uses following"; but did not declare any use or trust except as to one of his estates:—Held, from the context of the will and a codicil thereto, that there was no resulting trust in favour of his son and heir as to any part of his estates. *Hughes* v. *Evans*, 13 Sim. 496; 7 Jur. 523.

—— **Attempts to Exclude.**]—A testator gave his real and personal estate to trustees for his sister. By a codicil he gave a legacy to his eldest nephew, whom he called his heir-at-law; and he directed that the codicil should not give to his trustees, for the benefit of his sister, any after-acquired freeholds or copyholds; but that the same as to freeholds should descend to his heir-at-law, and as to customary estates to his customary heir. At his death his sister was his heiress-at-law and customary heir:—Held, that she was not excluded from taking by descent the after-acquired copyholds. *Gould* v. *Gould*, 32 Beav. 391.

A bare intention, or even negative words, will not exclude an heir-at-law from insisting on a resulting trust; but a man, by empowering other persons to dispose of his estate, disinherits his heir as much as by his own actual disposition; therefore where a testator appoints his executor to sell his estate it is turned into personal assets, and leaves no resulting trust for the heir; but if the testator says, "I will my heir shall sell the land," he is not obliged to sell it. *Cook* v. *Duckenfield*, 2 Atk. 566, 568.

Upon a devise of personal and real estate for sale, to be held by the trustees as a fund of personal estate only, and no part by reason of any event to lapse or result for the benefit of the heir-at-law; and the testatrix, after bequeathing certain legacies, directed the residue of her estate to be paid and applied as she should thereafter appoint, and she made no appointment:—Held, that the heir was entitled to the proceeds of the real estate undisposed of by the will. *Fitch* v. *Weber*, 6 Hare, 145; 17 L. J., Ch. 361; 12 Jur. 645.

Next of Kin—Title of.]—The legal interest in a lapsed legacy is in the executor; but the beneficial is in the next of kin of the testator. As an heir does not take real estate by the intention of his ancestor, but by act of law, so, with regard to the personal, the next of kin take in succession ab intestato, and not by the intention of the testator. *Owen* v. *Owen*, 1 Atk. 496.

A legacy to the next of kin does not exclude him from taking the residue. *Att.-Gen.* v. *Parkin*, Ambl. 568.

The next of kin of a party who died leaving a codicil, but no will, allowed to take the residue, upon giving recognisances to refund in case a will should be found. *Bakewell* v. *Tagart*, 3 Y. & C. 173; 2 Jur. 699.

Residuary bequest cancelled by striking through with a pencil all the general description, with notes in pencil in the margin, indicating alteration, and a different disposition of certain articles, a resulting trust for the next of kin. *Mence* v. *Mence*, 18 Ves. 348.

The next of kin stands as to personalty in the same position as the heir-at-law as to realty, and the person claiming against him must make out his title. *Underwood* v. *Wing*, 4 De G. M. & G. 633; 24 L. J., Ch. 293; 1 Jur. (N.S.) 169; 3 W. R. 228.

Testator gave a sum of money to trustees, in trust only and for the use and benefit of his adopted daughter, and which he desired might be paid to her and to be settled on her during her life in case of her marriage, or in case she did not marry then the interest of the money, being vested in government securities, to be paid to her, and in the event of her not marrying or dying then the money to go to his nephews. The daughter married and shortly afterwards died without issue:—Held, that her husband, who had taken out administration to her, and not the testator's nephews, was entitled to the fund. *Hawkins* v. *Hawkins*, 7 Sim. 173.

A testator directed his trustees to sell his leaseholds, and stand possessed of the moneys to arise therefrom as part of his personal estate.

He gave the residue of his personal estate to trustees, and directed them to sell his real estate and to stand possessed of the produce of the sales of the real estate, and of his leasehold estate, and of his residuary personal estate, upon the trusts thereinafter declared. As to one equal fourth part thereof, in trust for A.; as to one other equal fourth part thereof, in trust for B. and her children; as to one other equal fourth part of the residue of the moneys to arise from the sale of his real estate, upon trust for C. and her children; and as to the remaining equal fourth part of the residue of the moneys to arise from the sale of his real estate, upon trust for D. and his children. He then gave power of maintenance and advancement for the children, in which no distinction was made between the different fourth parts:—Held, that there was intestacy as to two fourth parts of the leaseholds and personal estate. *Seymour, In re*, 14 Jur. 585.

A testator made a general bequest to two persons, and in case of their decease to their executors and administrators. Both the legatees died in the testator's lifetime, one of them having bequeathed to the testator the residue of her property, which included the share of the testator's property which passed to her representative:—Held, that this share was not to be treated as forming part of the testator's estate, and so distributed again under his will, but went to his next-of-kin as undisposed of. *Valdez' Trusts, In re*, 58 L. J., Ch. 861; 40 Ch. D. 159; 60 L. T. 42; 37 W. R. 162.

—— **Attempts to Exclude.**]—Where there is no gift of the undisposed-of residue, a testator cannot by negative words exclude one of his next of kin from participating in it. *Johnson* v. *Johnson*, 4 Beav. 318.

Where a will declared that "testator's widow and her child shall be cut off from all part of my property," but contained no disposition of the property, it was treated as an intestacy, and the widow and child held entitled to a share of the undisposed-of residue. *Ib.*

Testator gave real and personal estate to one daughter, in satisfaction of her child's part of whatsoever more she might have expected from him or out of his personal estate; he also gave a provision to his wife in full of her dower, thirds, or other claim at law or in equity, or by any local custom, to any other part of his real or personal estate; and residue to his other daughter. Upon her death in his life, he by codicil gave it according to the appointment of his wife. The power not being duly executed, the residue goes according to the statute as undisposed of, and the widow and daughter are not barred. *Pickering* v. *Stamford* (*Lord*), 3 Ves. 355. Affirmed *id.* 492. And see 2 Ves. 272, 581.

A. devises to B. and C., his wife's children, as he called them (not owning them to be his), ten shillings apiece, and no more, and gave the children that he owned considerable legacies. B. and C. shall come in for a share of the undisposed surplus, for the words of exclusion must be taken strictly. *Vachell* v. *Jefferey*s, Pre. Ch. 170. *S. C.*, nom. *Vachell* v. *Breton*, 5 Bro. P. C. 51.

A testator gave his residuary real and personal estate to trustees for his five sons as tenants in common, and by a codicil revoked and made void all the trusts in his will contained concerning his residuary estate, so far as the same trusts related to his son R., or his interest therein, and in lieu gave a pecuniary legacy upon trust for R. his wife and children; and if R. should have no children, he directed that the legacy should sink into the residuary estate, but so that R. or his representatives should not take any share or interest therein:—Held, that the testator died intestate as to the trusts of one-fifth share of his residuary estate, and that the legacy was payable out of the residuary estate and out of the share which was undisposed of. *Sykes* v. *Sykes*, 37 L. J., Ch. 367; L. R. 3 Ch. 301; 16 W. R. 545.

A testator ordered that his real and personal property should be divided into as many equal parts as he should have children living at the date of his decease, and that one such part should be given to or held for each of such children. Afterwards he made a codicil revoking and annulling every bequest and provision in his said will in favour of his daughter E.:—Held, that there was no class, and consequently that there was an intestacy as to the share of E., so that E. herself, who, with three other children, survived the testator, was entitled as one of the next of kin to take a fourth part or share of the property originally bequeathed to her. *Ramsay* v. *Shelmerdine*, 11 Jur. (N.S.) 903; 13 L. T. 393; 14 W. R. 46.

A testator by his will gave an annuity of 1,200*l.* to his wife, and after her decease he "directed that the said sum of 1,200*l.* per annum so to be paid should go to and be equally divided amongst all and every his children who should be then living, share and share alike." And the testator declared that the said annuity so given as aforesaid to his wife was by him "meant and intended to be and should by his said wife be accepted and taken in full and entire lieu, bar, recompense, discharge, and satisfaction of and from all and all manner of claims and demands whatsoever which she at any time might or could have, or which, without provision and declaration, she could or might have at the time of my decease, of, in, to, or out of any part or parts of any real or personal estate under or by virtue of any settlement or other writing by him at any time made upon or in favour of his said wife, or as for or on account of any dower or thirds which she, my said wife, might, could, or would in any manner have claim, challenge, or demand, out of or upon, or from or in respect of, any part of his estate or effects in any manner howsoever." The testator died, leaving a wife and several children; and in the events that happened there was an intestacy as to a part of his personal property:—Held, first, that the testator's widow was excluded by the terms of the will from a distributive share of the property so undisposed of; secondly, that the annuity of 1,200*l.* was not perpetual, but that on the death of such child who survived the widow his share should sink into the residue. *Lett* v. *Randall*, 2 De G. F. & J. 388; 30 L. J., Ch. 110; 6 Jur. (N.S.) 1359; 3 L. T. 455; 9 W. R. 130. Questioned in *Tavernor* v. *Grindley*, 32 L. T. 424.

Testator, after stating that it was his will that neither L. S. nor her children should take any benefit from his property other than what was given to her or them; and that it was not his intention that G. S., or any person claiming under him, should partake of any share in the distribution of his personal estate except what was given to him or them, said he considered that the provision which he had made for his brother and two sisters was adequate for their

support, and therefore it was his intention that they should not, nor should any of them, take any benefit from his property except what was given for them; and he declared that L. S., G. S., and his brother and two sisters should not be entitled to take any share of his personal estate of which he might happen to die intestate, but should be wholly excluded therefrom in the same manner as if they had all died in his lifetime. There was an intestacy as to residue:—Held, that the next of kin other than the five persons named who were excluded were entitled. *Bund* v. *Green*, 12 Ch. D. 819.

A testator, who died in 1889, by his will, dated in 1887, gave various pecuniary bequests to individuals and charitable institutions, and ended his will thus: "And now revoking and hereby making utterly and for ever void and powerless any and all wills by me at any time heretofore by me made, and hereby utterly and for ever excluding any and all relatives except my two dear nieces aforesaid . . . from any and all advantages or benefit in this my last will and testament, I hereby lastly nominate, constitute and appoint my said two dear nieces," and certain other persons executrixes and executors of his will. The two nieces of the testator named in his will were not his only next of kin, and the question therefore arose, who were entitled to the residue of the testator's estate, of which no disposition was contained in the will:—Held, that the residue of the testator's estate was undisposed of and devolved upon his statutory next of kin without any person of that class being excluded. *Holmes, In re, Holmes* v. *Holmes*, 62 L. T. 383.

Trustee, Title of—Where Failure to Declare the Trust.]—If A. gives 40*l.* to S., to be disposed of as A. by private note should acquaint him, and A. dies without making any appointment, this is a good bequest to S. *Martin* v. *Clerk*, 2 Ch. Cas. 198. S. P., *Lambert* v. *Bainton*, 1 Ch. Cas. 199.

A testator bequeathed certain parts of his personal estate to A., B., and C., as joint tenants upon trust, and he also gave, devised, and bequeathed his residuary real and personal estate to the same three persons as tenants in common, "subject, however, to such disposition, limitation, or appointment thereof as he might, by any deed or writing duly executed, thereafter direct, limit, or appoint." He made no such disposition, limitation, or appointment before his death:—Held, that A., B., and C. took the residuary real and personal estate equally between them. *Fenton* v. *Hawkins*, 4 L. T. 737; 9 W. R. 300.

A testator being possessed of real estates in England and Canada, by his will, made in England in 1801, devised all his estate to trustees, upon trust to sell, and to divide the net proceeds between his brothers and sisters and their children. In 1804 the testator went to Canada, and by a codicil made there in that year he devised and bequeathed all his real and personal estate in Canada to other trustees resident there, upon trust to convert the same, and out of the proceeds to pay his debts in Canada, and legacies, and to remit the surplus to one of the trustees named in his will, to whom the testator gave all the residue of his estate and effects, in Canada or in Great Britain, not otherwise disposed of by that codicil, or by his will then in England, to hold to him, his heirs, executors, administrators, and assigns for ever; and the testator thereby revoked everything contained in his will which might be construed to be contrary to the above disposition of his said estates:—Held, that this devisee took the surplus proceeds of the sale of the property in Canada beneficially. *Schofield* v. *Cahuac*, 15 Jur. 1069.

Testator gave real estates to be sold, and the produce to be considered as part of his personal estate, and thereout and out of his personal estate gave legacies to his next of kin, heir, and others. He gave other estates to be sold, and the produce to be considered from thenceforth as other part of his said personal estate, and to be disposed of in manner following. He then gave legacies and some estates specifically, and other legacies out of his said trust moneys and personal estate, and gave his executor 1,000*l.* to be disposed of according to any instructions he might leave in writing, and gave all the residue of his goods and chattels, personal estate and effects whatsoever, subject to debts, legacies, &c. No instructions being found, the heir is entitled to the 1,000*l.* *Collins* v. *Wakeman*, 2 Ves. 683.

A testator made a general devise of all his property to A. upon trust, for purposes or legacies he should make in any codicil he might add to his will; and afterwards made a codicil which was unattested:—Held, that A. was not entitled in his own right to the property, but was a trustee for the heir-at-law of the testator. *Davall* v. *New River Co.*, 18 L. J., Ch. 299; 13 Jur. 761.

—— **Where Trust too Indefinite.**]—If a testator means to create a trust, and the trust be ineffectually created or fails, the next of kin take. *Ommanney* v. *Butcher*, Turn. & R. 270; 24 R. R. 42.

Residue to trustees on trust for purposes too general for court to execute. Next of kin shall take. *Vezey* v. *Jamson*, 1 Sim. & S. 69.

Where the trust is too vague for the court to execute, the next of kin are entitled. A testatrix bequeaths the residue of her property to her executors upon trust, to dispose of the same at such time and for such purposes as they should think fit, it being her intention that the distribution thereof should be left entirely to their discretion:—Held, that the executors were trustees of the residue of the property for the next of kin of the testatrix. *Fowler* v. *Garlike*, 1 Russ. & M. 232; 8 L. J. (o.s.) Ch. 66.

If trust is mentioned, but is not expressed, or is ineffectually created or fails, the next of kin are entitled; but if the person taking has a discretion whether to make the application or not, it is an absolute gift and not a trust. *Morice* v. *Durham* (*Bishop*), 10 Ves. 535; 7 R. R. 232.

Devise and bequest to trustees of freehold, leasehold, copyhold, and personalty upon trusts, which were declared, of the freehold, leasehold, and personalty only:—Held, that the cestui que trust was not interested in the copyholds which descended to the customary heir. *Jackson* v. *Noble*, 2 Keen, 590; 7 L. J., Ch. 133; 2 Jur. 251.

An aunt gave all her personal estate to trustees upon trust, after payment of her funeral and testamentary expenses, debts, and legacies, to hold the residue "in trust for such of my nieces A. and B. as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my

wishes." The nieces both survived the testatrix:—Held, that they took the residue for their own benefit. *Stead* v. *Mellor*, 46 L. J., Ch. 880; 5 Ch. D. 225; 36 L. T. 498; 25 W. R. 508.

It is not necessary to exclude the legatee from a beneficial interest that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended. *Briggs* v. *Penny*, 3 Mac. & G. 546; 21 L. J., Ch. 265; 16 Jur. 93. Affirming 3 De G. & Sm. 525. And see *Ellis* v. *Selby*, 1 Myl. & Cr. 286; 5 L. J., Ch. 214. Affirming 7 Sim. 352; and *Stubbs* v. *Sargon*, 2 Keen, 255. Affirmed 3 Myl. & Cr. 507; 7 L. J., Ch. 95; 2 Jur. 150.

The testatrix, by her will, after giving, among other legacies, a sum of 3,000*l.* to S. P., and a like sum of 3,000*l.* in addition for the trouble she would have in acting as executrix, bequeathed all her residuary personal estate and effects unto the said S. P., "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes." The testatrix appointed S. P. sole executrix of her will:—Held, that S. P. did not take the residue for her own benefit, but that the words of the bequest created a trust. *Ib.*

—— **Title to Land where no Heir or Cestui que Trust.**]—A., being seised in fee ex parte paternâ, conveys to trustees in trust for herself, her heirs and assigns, to the intent that she should appoint, &c., and for no other use, intent, or purpose whatsoever. A. dying without appointment, and without heirs ex parte paternâ:—Held, per Henley, Custos Sigilli, and Clarke, Master of Rolls, the first, that the maternal heir was not entitled; secondly, there being a terre-tenant, the Crown, claiming by escheat, has not a title by subpœna to compel a conveyance from the trustee, the trust being absolutely determined; no opinion was given on the right of the trustee. Per Mansfield, Chief Justice, the heir ex parte maternâ was not entitled; secondly, that from the analogy between trusts and legal estates the Crown was entitled by escheat, but that if the conveyance had barred the Crown of its right, as between the maternal heir and the trustee, the former was entitled. *Burgess* v. *Wheate*, 1 Eden, 177; 1 W. Bl. 121.

Devise of copyhold (duly surrendered) to A. and his heirs, in trust for B. and his heirs; upon the death of B. without heirs, the heir of the trustee has no equity to compel the lord to admit him, and his bill was dismissed without costs. *Williams* v. *Lonsdale* (*Lord*), 3 Ves. 752; 4 R. R. 149.

In *Att.-Gen.* v. *Sands* (Hardr. 488; 2 Freem. 129; 3 Ch. R. 33) it was held that the trust of a term attending on the inheritance was not forfeited by the felony of cestui que trust, because it was no more than an accessory to the inheritance, which was not forfeited. It is not denied, however, that where a term is attending on the inheritance, and the king extends the inheritance, he shall have a right to the term. *Nicholls* v. *How*, 2 Vern. 389.

Trustee not having the legal estate, cannot hold against the Crown, claiming by escheat. *Walker* v. *Denne*, 2 Ves. 170; 2 R. R. 185.

A testatrix devised real estate to her trustee and his heirs, in trust out of the rents to maintain her son William until he attained twenty-one, "and when and as soon as" he should attain twenty-one, she devised to him in fee. But in case he should die before attaining twenty-one, to his children, if any; or if none then to the defendant. The son did not attain twenty-one, and died without issue in the lifetime of the testatrix. There being no heir or next of kin of the testatrix:—Held, that the trustee was entitled to hold the real estate beneficially. *Cox* v. *Parker*, 22 Beav. 168; 25 L. J., Ch. 873; 2 Jur. (N.S.) 842; 4 W. R. 453.

A., by will in 1837, bequeathed the residue of her real and personal property to trustees, "their heirs, executors, administrators, and assigns," to sell and convert such parts of her estate as should not consist of money or stock in the public funds, and to stand possessed thereof, to pay thereout two life annuities, and subject thereto upon such trusts as she should thereafter by any codicil or codicils direct. The testatrix died without making any further bequest. By an order in an administration suit the trustees were declared entitled to the residue of the real estate, and the Crown to the personalty. One of the trustees and an annuitant had since died. A petition was presented by the surviving trustees for the payment of the sum arising from the real estate which had been set apart to answer the annuity:—Held, that the trustees took as joint tenants for their own benefit, and that the surviving tenants were therefore entitled. *Taylor* v. *Haygarth*, 14 Sim. 8; 6 L. T. 95.

A trustee under a deed held freehold premises in trust for L. S., her heirs and assigns, for her and their own use and benefit. L. S. by her will devised these premises among others to trustees, in trust to sell, and out of the proceeds to pay debts and legacies, the legacies being specified in a certain paper marked A. This paper not being forthcoming, the trustee of the deed, offering to pay the debts, claimed to be entitled to retain the trust premises for his own benefit. On a bill filed, however, by the trustees of the will, a conveyance to them was directed, the Lord Chancellor holding that the will gave them a title as against the trustee of the deed, who had nothing to do with the question how the premises would be disposed of in consequence of the trustees of the will not being able to carry the trusts into full effect. *Onslow* v. *Wallis*, 1 Mac. & G. 506; 1 Hall & Tw. 513; 19 L. J., Ch. 27; 13 Jur. 1085. Affirming 16 Sim. 485.

Title to Personalty where no Next of Kin.]—*See* CROWN.

Gift which fails—Principles determining who takes.] — Wherever land, &c., which would descend to heir-at-law is devised for purposes which law will not suffer to take effect, the heir-at-law shall have the benefit of the interest so devised as undisposed of, whether testator intended he should have it or not. Testator, limiting a remainder to his right heirs, shewed his intention that, failing the devise, the heir should take. Heir-at-law can only be disinherited by express words or necessary implication. Where a devise is made subject to be reduced to a certain extent on the happening of a given event, that is the condition or ground of reduction, and if the event never happens, the ground of reduction is gone, and the devise remains entire and absolute. *Tregonwell* v. *Sydenham*, 3 Dow, 194.

Where a real estate is directed to be sold, and a part of the produce is to be applied to a pur-

pose which fails, and the residue of the produce is given over, the heir and not the residuary devisee will take the sum intended for that particular purpose. Where the real estate is not directed to be sold, and the residuary gift is not of the produce, but of the corpus of the estate, then if a gift intended for a particular purpose, which fails, is to be considered as an exception from the residuary gift, the heir will take. If it is to be considered as a charge from the devised estate, the residuary devisee will be entitled to the benefit of the failure. *Cooke* v. *Stationers' Co.*, 3 Myl. & K. 262.

Money charged upon a real estate for a charity, void by the Statute of Mortmain, shall sink in favour of the specific devisee; not go to the heir-at-law or residuary legatee. Secus, when it is an exception out of the devise. *Wright* v. *Roe*, 1 Bro. C. C. 61. And see *Bland* v. *Wilkins*, cited *id.* in notes.

—— **Where Charge for Purpose which Fails.**]—Bequest to executors of a sum of money, "to be chargeable and paid as thereinafter mentioned," upon trust for the testator's wife for life, remainder for his children; then a gift of freehold and leasehold property to his nephew, subject to the payment of the said sum, and to the testator's debts, with a residuary devise and bequest to the wife absolutely:—Held, as between the testator's widow and his nephew, that the sum was a charge on the gift to the nephew, and not an exception out of the gift; and the testator never having had any child, the sum, subject to the widow's life interest, belonged to the nephew, the principle being, that where there is a gift by will of any property, whether real or personal, subject to a particular charge, if any of the purposes of the charge fail before all are satisfied, the donee takes the property, relieved from the residue of the burthen which, in the events that have happened, the testator no longer intended him to bear. *Tucker* v. *Kayess*, 4 K. & J. 339.

Devise of a specified real estate to trustees, upon trust, in the first place, to raise, either by sale or otherwise, out of such estate, within one year next after his decease, the sum of 2,000*l.*, and invest the same on good security, and pay and apply the same in manner thereinafter directed; also on trust to permit the testator's son P. to enjoy the said real estate (after raising as aforesaid) for life, and then upon certain trusts for his children; and in case he should happen to die without leaving issue, then the testator devised the said estate to his sons S. and T., their heirs and assigns, as tenants in common, and not as joint tenants. The testator then gave 1,000*l.* part of the 2,000*l.* directed to be raised as aforesaid, upon trust to pay the interest thereof to his daughter M. for life, and after her decease upon trust to divide the said sum of 1,000*l.* amongst her children equally; and the testator gave the other moiety of the said sum of 2,000*l.* upon similar trusts for the benefit of his daughter E. C. and her children. Finally, the testator gave all his residuary real and personal estate to his sons S. & T., their heirs and assigns for ever. The testator's three sons all survived him, and S. and T. then died, without having disposed of their interest in the estate, out of which the 2,000*l.* was to be raised, or of their interest (if any) in such sum of 2,000*l.* After the death of P. the son of the testator who survived his brothers, and not till then, the 2,000*l.* was raised for the purposes of the trusts declared thereof in the testator's will; and subsequently to that E. C. died without having had a child:—Held, upon the true construction of the will, and in the events which had happened, first, that the 2,000*l.* directed to be raised by the testator's will was a charge upon the estate out of which it was to be raised, and not an exception out of the devise of such estate. Secondly, that the 1,000*l.* part thereof, the trusts whereof had partially failed, sank into the said estate as realty, for the benefit of the devisees thereof, and belonged to the devisee in trust, under the will of P., the son of the testator, upon whom such estate had descended as heir-at-law of his brothers S. and T. *Cooper's Trusts, In re*, 4 De G. M. & G. 757; 2 Eq. R. 65; 23 L. J., Ch. 25; 17 Jur. 1087; 2 W. R. 601—L.JJ.

Devise of lands subject to and charged with legacies in mortmain the legacies sink for benefit of devisee. *Jackson* v. *Hurlock*, Ambl. 487; Eden, 263.

Trust of an annuity for a charity charged upon a devised estate being void, under the Act 9 Geo. 2, c. 36, does not pass by a residuary disposition, but sinks for the benefit of specific devisees. *Baker* v. *Hall*, 12 Ves. 497; 8 R. R. 366.

Where a testator directs his real and personal estate to be sold, and his debts and legacies to be thereout paid, including certain charitable legacies, and gives the residue of the mixed fund to A. and B., the failure of the charitable legacies, as far as they would affect the real estate, will enure to the benefit of A. and B. *Green* v. *Jackson*, 5 Russ. 35; 29 R. R. 12.

If an estate is devised charged with legacies which fail, the devisee, not the heir, shall have the benefit of it. *Kennell* v. *Abbott*, 4 Ves. 811; 4 R. R. 351.

A testator, owing his sister 10,000*l.* on mortgage and 3,788*l.* on a promissory note, and having power of appointment by deed or will under her will, gives an estate (not in mortgage) to W. H. C., subject to a charge of 7,000*l.*, which he directed his executors to raise by mortgage or sale of part thereof, such sum to be appropriated—1,000*l.* to his mother, 1,000*l.* to his sister, and 1,000*l.* to his uncle's children, and the remaining 4,000*l.* to be appropriated towards payment of the debt due on the note; and there was a declaration that the mortgages should be employed in paying his debts remaining after the appropriation of the 4,000*l.* W. H. C.'s sister died before the testator; and on the question whether her legacy lapsed for the benefit of W. H. C.:—Held, that it did; that there was a devise of the whole estate to W. H. C. subject to the charge, and that the 4,000*l.* was subject to the payment of debts generally. *Sutcliffe* v. *Crosse*, 3 Drew. 135; 3 W. R. 265.

Land was devised subject to a charge of a certain sum. The will contained no other reference to the charge, and no specific disposition of it:—Held, that the charge sank in the estate for the benefit of the devisee. *Heptinstall* v. *Gott*, 2 J. & H. 449; 31 L. J., Ch. 776; 8 Jur. (N.S.) 1091; 7 L. T. 92; 10 W. R. 708.

—— **Where Exception out of the Devise.**]—If a testator devise land for purposes which are in part illegal, or which partially fail, or which require part only of the land devised, the heir takes the part which fails, or is not required for

the purposes of the will; and so conversely in the case of personal estate, the next of kin are entitled. A testator directed his executors immediately to lay out 30,000*l.* in the purchase of an estate in his name, the income of which he settled to one for life, with remainder to others in tail, with remainder to a charity; the money was not actually laid out previous to the estate for life and the estates tail being spent. The gift of the charity failing by reason of the Mortmain Act, and the estates tail not having been barred:—Held, that the next of kin, and not the heir-at-law, were entitled to the 30,000*l.* *Cogan* v. *Stephens*, 5 L. J., Ch. 17.

A. and B. are made executors, and land devised to C., paying 1,000*l.* to executors, the residue to a charity. This 1,000*l.* is a charge on the real estate, which, by the Mortmain Act, is not well disposed of, and results to the heir. This devise held a sale of the land for 1,000*l.*, and the bequest of this 1,000*l.* held intended to the executors as such, for the purpose of the will, or as assets for debt, and not otherwise; so that, if good, it would not have lapsed by their deaths. *Arnold* v. *Chapman*, 1 Ves. Sen. 108.

If a child who has a legacy payable out of land dies before the contingency happens, it goes to the heir; à fortiori where it is given to a stranger. *Att.-Gen.* v. *Milner*, 3 Atk. 114.

A. makes a lease to B. (his wife's nephew) for twenty-one years, for payment of his debts and legacies, and at the same time by will, taking notice of the said lease, devises the lands, after the expiration of the said lease, to C., his nephew and heir, and makes B. executor. A. lives twelve years, and pays all his debts himself, and the personal estate was sufficient for the legacies. C. brings his bill to have the lease delivered up, the trusts being performed; but dismissed, the reversion only after the expiration of the term being devised to him. *Bushnell* v. *Parsons*, Pre. Ch. 218.

A. gives 800*l.* to his executors on trust to pay annuities to B. and C. for their lives exceeding the interest of the 800*l.*, and gives the surplus to D. and E. The annuitants being dead, the 800*l.* shall go to the residuary legatee, and not to the executors. *Cock* v. *Burrish*, 1 Vern. 425.

Where devisor directs that after payment of 800*l.* to charity, to be raised by sale of real estate, the residue thereof should go to a legatee. Legacy to charity being void, 800*l.* goes to heir, and not to the legatee. Costs to be borne equally by each party. *Jones* v. *Mitchell*, 1 Sim. & S. 290; 1 L. J. (o.s.) Ch. 163.

Bequest of accumulated fund from real and personal estate, when the legatee attains twenty-one, upon his death, under that age, a resulting trust for the respective representatives. *Chambers* v. *Brailsford*, 18 Ves. 368; 19 Ves. 652; 11 R. R. 214. And see *Spencer* v. *Wilson*, 42 L. J., Ch. 754; L. R. 10 Eq. 501; 29 L. T. 19.

A tenant for life of real estate under a settlement, having power to charge it with 6,000*l.*, to be raised and paid at such time and to such purposes as he should think fit, by deed charged the estate with that sum, payable to trustees for such purposes as he should by will appoint, and afterwards appointed the same by his will for certain purposes, which partially failed:—Held, that the part of the money undisposed of was personalty, and went to the estate of the next of kin. *Simmons* v. *Pitt*, 43 L. J., Ch. 267.

Title to Surplus undisposed of—Principles.]—General devise and bequest upon trust, not sufficient to exhaust the whole property, a resulting trust for the heir and next of kin. *Dawson* v. *Clarke*, 18 Ves. 247. And see *Barrs* v. *Fewkes*, 6 N. R. 355; 34 L. J., Ch. 522; 11 Jur. (N.S.) 669; 12 L. T. 727; 13 W. R. 987.

It is not universally true that the expression of a purpose, for which even a devise of land is made, limits the devise to the purpose expressed. Where, for instance, there is a devise of land for payment of debts, it does not necessarily follow that there is a trust for the heir after the debts are paid. Each case depends upon the circumstances. Where the purpose expressed is in favour of the party to whom the bequest is made, the presumption for limiting the bequest is rather stronger. *Walton* v. *Walton*, 14 Ves. 322.

Construction of a devise in fee, subject to and chargeable with annuities, upon the intention, collected from the whole will, a beneficial devise and not a trust resulting to the heir as to the surplus beyond the annuities. *King* v. *Denison*, 1 V. & B. 260; 12 R. R. 227.

Distinction between a devise charged with debts and on trust to pay debts: the former a beneficial devise, subject to the particular purpose; the latter limited to the particular purpose; and therefore the interest not exhausted, a resulting trust for the heir. *Id.* 272.

No resulting trust for an heir taking a benefit by the will; but subject to circumstances. *Id.* 278.

Resulting Trust for Heir or Next of Kin.]—Resulting trust for the heir; the only express devise being to convey to the devisor's son from and after his age of thirty, which he did not attain; and no devise by implication from a declaration that he shall have no power over the estate until his age of thirty. *Nash* v. *Smith*, 17 Ves. 29.

A. devised to his wife a rent-charge of 200*l.* for thirteen years, in trust, nevertheless, for the payment of his debts and legacies; he also devised to her certain lands, in augmentation of her jointure. The surplus of this rent-charge, after debts and legacies paid, is not a beneficial trust for the wife, but a resulting trust for the heir. *Wych* v. *Packington*, 3 Bro. P. C. 44.

Lands are devised to three persons and their heirs, to the use of them and their heirs, upon the trusts after mentioned, and then the testator directs them to convey part to A. for life, and other part to B. in tail, but gives no direction as to the remainder in fee. Though two of the trustees were related to the testator, yet the remainder in fee will not belong to them, but be a resulting trust for the testator's son. *Hobart* v. *Suffolk* (*Countess*), 2 Vern. 644.

H. devises his manors, advowsons, &c., to trustees, to pay his son 1,000*l.* for life, and the rest of the profits to be laid out in land during his son's life, and then settled:—Held, the son had a right to present to the living when vacant, not under the devise, but as heir-at-law, it being a fruit undisposed of. *Sherrard* v. *Harborough* (*Lord*), Ambl. 165.

If under a will any part of the legal estate is undisposed of, it goes to the heir-at-law. So of the trust estate. *Id.* 166.

A. directs 1,000*l.* to be laid out in the purchase of lands, that the rents and profits thereof might

come to his nephew W. for his life; but the testator made no disposition of these lands after the death of W.:—Held, that the lands belonged to the testator's heir-at-law. *Fletcher* v. *Chapman*, 3 Bro. P. C. 1.

Question of a resulting trust only arises between the real and personal representatives of the testator, not between the representatives of a party taking under the will. *Ashby* v. *Palmer*, 1 Mer. 296; 15 R. R. 116.

A. B. by his will reciting that he had a clear yearly profit rent of 60*l.* out of his freehold lands, devised the same with the rents, &c., thereof to his nephew C. D., for the term of ninety-nine years upon trust, to pay testator's only son a yearly sum of 10*l.* during his life, and which was to be in full of all claim he might or could have hereafter upon his real or personal property; and from and after his death to pay said sum of 10*l.* to his daughter M. and her issue, together with an additional sum of 18*l.* yearly, and upon this further trust to pay his other daughter N. and her issue the yearly rent of 28*l.*; and in case his said daughters M. and N. should happen to die without issue, &c., the testator devised said freehold lands (out of which the annuities issued) to his said nephew C. D. for ever:—Held, that C. D. was not beneficially entitled to the surplus rents of the said lands, which remained after payment of said annuities, for the residue of the term of ninety-nine years, but that same was a resulting trust for the heir-at-law. An heir-at-law is not to be disinherited, unless by express words; and unless it be distinctly pointed out to whom the estate is to go, it devolves on him. *Salter* v. *Cavanagh*, 1 Dr. & Wal. 668.

Real and personal estate devised to the executor in trust to pay debts and legacies, the rest and residue to himself, the only purpose of devising the real appearing to be to insure payment of the debts, without any intention to disinherit the heir:—Held, only a charge, and that the heir was entitled to the surplus of the real estate. *Halliday* v. *Hudson*, 3 Ves. 210.

Term raised for a particular purpose; when that purpose is answered the term shall be in trust for the heir. *Levet* v. *Needham*, 2 Vern. 139.

The distinction between a direction to sell real estate out and out, for payment of debts, and a charge for payment of debts, is exploded, as to any effect in exempting the personalty. In either case, the residue, if undisposed of, goes to the heir, unless there be a disposition made demonstrative of an intent that it shall change its nature and become personal. *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 538.

If lands are appointed to pay debts, the heir is entitled to them when the debts are paid; and if to be sold, he is entitled to the surplus; but if there be any abuse, his remedy is against the trustee, and not against the purchaser. *Culpepper* v. *Aston*, 2 Ch. Cas. 115.

A Scotchman, by trust, disposition, and settlement, gave the whole of his real and moveable estate to three persons by name—first, to pay debts; secondly, to pay certain specified sums; thirdly, to lend out 2,000*l.* on security, taking the interest, payable to A. for life, and the said principal sum payable to his said trustees at A.'s death:—Held, that this was not a gift to the trustees for their own benefit, but that the 2,000*l.* at A.'s death fell into the general trust estate. *Miller* v. *Rowan*, 5 Cl. & F. 99.

—— **Rebutted by Internal Evidence of Intention.**]—J. S. by her will made H. N. her executor, and gave all her estates, real and personal, to be disposed of for the payment of her debts, and all such legacies as she therein or by codicil bequeathed to her said executor. She gave several money legacies, and among others 200*l.* to her heir-at-law; and by codicil she gave her executor's sister 500*l.*, but nothing to her executor:—Held, that there was no resulting trust for the heir, but that H. N., the executor, had a fee, for otherwise he would have no benefit by the devise. *North* v. *Crompton*, 1 Ch. Cas. 196.

J. by will bequeathed all his estate and effects, real and personal, whether in possession, reversion, or otherwise, unto his wife E., her executors, administrators, or assigns, upon trust to pay unto his daughter, during the lifetime of E., an annuity; and upon further trust that E., at the time of her decease, should cause her executors to pay certain legacies, but which did not exhaust the personal estate:—Held, that E. was a trustee only to the extent of the legacies, and that she was not deprived of a beneficial interest in the rest of the property. *Williams* v. *Roberts*, 27 L. J., Ch. 177; 4 Jur. (N.S.) 18; 6 W. R. 33.

Where a real estate is devised to be sold for payment of debts, and no more is said, there is clearly a resulting trust; but if a particular reason occurs why the testator should intend a beneficial interest to the devisee, there is no precedent that it shall not be held a beneficial interest. R. S., rector of B., devised his perpetual advowson of B. to G. S., willing and desiring her to sell it to Eton College, and on their refusal to Trinity College, and on the refusal of both to any other college in Oxford or Cambridge, being the best purchaser. This is not a resulting trust of the advowson to the heirs of the testator, but a devise of the beneficial interest therein to G. S., with an injunction only to sell to particular societies, and, on an avoidance by the death of the testator, the devisee and not the heir shall present. *Hill* v. *London* (*Bishop*), 1 Atk. 618.

Executors may take Beneficially though Will Professes to Dispose of whole Estate.]—Testator gave the interest of the 4 per cent. bank annuities then standing in his name, together with the interest of a sum of money, then at his banker's, which he directed to be invested in the same stock, to his wife, with a power of disposing of one-third thereof, after her decease. "And as to the rest and residue of his estate," after payment of the said bequest to his wife, viz., two-thirds of the property he should die possessed of, he gave the same as follows:—First, to the children of A. 60*l.* of the 4 per cent. consols; also to the eldest of such children 30*l.* per annum for life, and to his lawful heir, payable out of the interest. He then made a similar bequest in favour of the children of B., and he appointed his second wife and C. to be executors of his will, and declared his intention, "if the residue of his said property after the payment of the children of B. was not sufficient to pay the specified annuities of 30*l.*, the residue should be equally divided as above specified." The money at his banker's having been invested in the 4 per cents., the whole of that sum was 5,306*l.*:—Held, first, that the children of A. and B. respectively were entitled only to 60*l.* stock, and that the residue of the fund, after satisfying the two sums of 60*l.* and the two annuities of 30*l.*, was undis-

posed of; secondly, that the testator having by his will professed to dispose of the whole of the property, although according to the aforesaid construction he had not in fact done so, yet this was not sufficient to exclude the executors from taking beneficially as such; and, thirdly, that the interest given to the wife in one-third, or the residue, did not prevent her taking her share of the remaining two-thirds under the Statute of Distributions. *Oldham* v. *Carleton*, 2 Cox, 399.

17. Charge of Legacies.

Implied — Where Intent shewn.] — Though a legacy is not expressly said to be paid out of an estate, nor by whom, yet it has been considered as a charge thereon, when the general intent of testator has appeared. Testator devised lands to his wife for life; remainder to his son R. in fee, and he gave to A. a legacy of 150*l.* to be paid in twelve months after his son R. should come to enjoy the premises. The legacy was held a charge, and was decreed with interest at 4 per cent. from the death of testator's wife, against R.'s son and heir. *Miles* v. *Leigh*, 1 Atk. 573.

Real estate made liable to a legacy, the personal estate proving deficient, and it being the testator's intention that it should be raised at all events. *Jones* v. *Selby*, Pre. Ch. 288.

Devise of lands made chargeable with what "I shall hereafter charge upon it." A legacy not expressly charged, shall be paid out of the land. *Compton* v. *Oxenden*, 4 Bro. C. C. 402; 2 Ves. 261.

Testator gave a legacy to his daughter, and all his real and personal estate to his wife, and after her death he gave his real estate, subject to legacy, to his son in fee. The wife survived the testator, and afterwards died:—Held, that the legacy, with interest from the end of a year after the testator's death, was raisable out of the real estate, in case the personal estate was deficient. *Freeman* v. *Simpson*, 6 Sim. 75; 2 L. J., Ch. 141.

Where Intent Doubtful—Simple Direction for Payment of Legacies.]—A will beginning "First, I will and direct that all my legal debts and legacies, and funeral expenses, shall be fully paid," is not sufficient alone to charge legacies on real estates specifically devised, for which the intent must be clear. *Kightley* v. *Kightley*, 2 Ves. 328; 2 R. R. 224.

The words, "from and after payment of my just debts, funeral and testamentary expenses, and of the several specific legacies hereby given and bequeathed," occurring in connection with a devise of real estates:—Held, regard had to the whole frame of the will, to create no charge of the legacies upon realty. *Sherratt* v. *Sherratt*, Coop. t. Brough. 35.

A man makes his will in the following manner: "As to the disposal of my worldly estate, I give and devise," &c.; and then gives his lands to his eldest son in tail, remainder to his three other sons in tail, and devises copper mines and other estates to his eldest son, to be sold for payment of his debts and legacies, and gives his daughter 1,500*l.*; there not being personal estate sufficient to pay this legacy, whether real estate by the words of this will shall be charged therewith. *Pawlet* v. *Parry*, Pre. Ch. 449.

Quære, whether legacies were charged on the real estate, by a direction, in the introductory part of a will, that all the testator's debts, legacies, and funeral expenses should be paid as soon as conveniently might be after his decease. *Graves* v. *Graves*, 8 Sim. 43; 5 L. J., Ch. 270.

Where Contrary Intent shewn.]—A will says in the beginning, "After testator's debts and legacies paid"; then gives several legacies and portions to the testator's daughters, and then says, that "after legacies the surplus of the personal estate shall go to the son; after which follows a devise of land to the son": but if he dies without issue in the life of any of the daughters, then to the daughters; there is out of the personal estate a sufficiency to pay great part, though not all, of the legacies: in such case the deficiency is not chargeable upon the land. *Davis* v. *Gardiner*, 2 P. Wms. 187.

A testator bequeathed to each of his executors 100*l.*, but directed that, if they declined to act, the same should merge in the residue. He bequeathed to his wife and A. J. annuities of 200*l.* and 150*l.* respectively, charged on portions of his real estate, and pecuniary legacies of 200*l.* and 150*l.* respectively, over and above the annuities. He gave to his younger children legacies, with interest thereon, till paid off, and appointed C. their guardian, whom he directed to receive, and apply for their maintenance, education, and advancement as C. should think expedient, the income of the legacies during their minority; and he empowered C. to raise by charge or mortgage of his real estate a portion of the legacies not exceeding 500*l.* for the advancement of any younger child. He created a trust term in certain of his lands, to secure the annuities, and directed that the term should cease when the trusts thereof were satisfied; and he devised the land subject to the term and all other his real and leasehold estate, and the residue (if any) of his personal estate to his eldest son. The testator's will also contained a clause that, in the event of any of the younger sons becoming entitled to the testator's real estate, the legacies, both original and accruing, bequeathed to him or them should be divided amongst the other younger children. By a codicil the testator bequeathed to his eldest son a pecuniary legacy over and above the bequests made to him in the will, and charged upon the whole of the testator's freehold and personal estate, in priority to the annuities bequeathed by the will:—Held, that the legacies to the testator's younger children were not charged on his real estate. *James* v. *Jones*, 9 L. R., Ir. 489.

When Implied from Particular Words.]—A codicil directed that legacies given by the will should be paid in proportion, and according to the deficiencies in the testator's real and personal estate:—Held, that they became chargeable upon the real estate. *Rich* v. *Whitfield*, 14 W. R. 907.

Lands being inadequate to the payment of a sum charged upon them by marriage settlement, for maintenance of the issue of the marriage, and of a prior charge, the settlor by will, after giving an annuity to his wife, and other legacies, gave a further annuity and small legacy to his daughter, on whose marriage the settlement was made; and subject to such annuities and legacies, and also subject to the payment of all moneys secured to his daughter by the settlement, he bequeathed all his estates over to his son in fee:—Held, that the latter words did not charge any other estates of the testator than

those already charged for the benefit of the daughter. *Gough* v. *Andrews*, 1 Coll. C. C. 69 ; 8 Jur. 305.

A testator gave realty and his residuary personalty to trustees, with a discretionary power to sell the realty during the life of his wife, and directed the trustees, out of the stocks in which the proceeds of the sales and the personalty were invested, to pay certain legacies, after the death of his wife, and also out of his personal estate to pay legacies for certain charities:—Held, that the general legacies were charged on the unsold real estate, and that the testator had not marshalled his assets in favour of the charity. The fact that the time for the payment of a legacy was deferred would not give other legacies priority in the distribution of assets ; they all rank equally, and must be provided for accordingly. Held, also, that there being an insufficiency of assets to pay the legacies, the trustees were bound to exercise their discretionary power of sale to meet the deficiency. *Nickisson* v. *Cockill*, 3 De G. J. & S. 622 ; 32 L. J., Ch. 753 ; 9 Jur. (N.S.) 975 ; 8 L. T. 778 ; 11 W. R. 1082.

A testator, after giving legacies and annuities, proceeded to say: "My executors may realise such part of my estate as they think right in their judgment to pay the aforenamed legacies": —Held, that the legacies were not charged on the real estate, for that the direction to the executors to realise such parts of his estate as they thought right to pay the legacies, was satisfied by holding it to apply to property which they took as executors. *Cameron, In re, Nixon* v. *Cameron*, 53 L. J., Ch. 1139 ; 26 Ch. D. 19 ; 50 L. T. 339 ; 32 W. R. 834—C. A. See also *Buckley* v. *Buckley*, post, col. 1661, and *Biggar* v. *Eastwood*, ante, col. 1547.

—— "**Guarantee my Estate.**"] — A testator gave a number of legacies, adding, "I guarantee my estate at C., for the payment of the above legacies" ; and he, in the subsequent part of his will, gave many other legacies. The first class of legacies are not specific, and, failing the estate at C., are to be borne by the general personal estate. *Willox* v. *Rhodes*, 2 Russ. 452.

—— "**Not otherwise disposed of.**"]—Where a testator, after giving legacies, gave and devised all his real and personal estate not otherwise disposed of:—Held, that the legacies were payable out of the mixed fund of realty and personalty. *Bawden, In re, Bawden* v. *Cresswell*, 63 L. J., Ch. 412 ; [1894] 1 Ch. 693 ; 8 R. 76 ; 70 L. T. 526 ; 42 W. R. 235.

—— "**Subject to the Charges thereon.**"]—A father, on the marriage of his second son, by deed of settlement covenanted to pay him an annuity of 1,000*l.* a year for life, and to charge the annuity on a sufficient part of the real estate he might die seised of ; provided that nothing in the settlement should prevent his dealing with his real estate during his life, or, so only that sufficient real estate were left charged with the annuity, by will. The father subsequently made his will, by which he devised his real estate (subject to the charges and incumbrances thereon) in strict settlement on his first and other sons in tail male:—Held (Cotton, L.J., dissentiente), that the settlement operated not only as a covenant by the father, but also as a charge upon all the real estate of which he should die seised. *Montague* v. *Sandwich* (*Earl*), 55 L. J., Ch. 925 ; 32 Ch. D. 525 ; 54 L. T. 502—C. A.

—— "**Subject as hereinafter.**"]—A testatrix, whose personal estate was insufficient to pay her legacies, and who had a general power of appointing real estate by her will, in 1880 "devised, bequeathed, and appointed all her real and personal estate, any moneys and other chattel property" to her trustees as executors thereinafter named "subject as hereinafter." She then "gave, devised, and bequeathed" a number of pecuniary and some specific legacies, and "gave, devised, and bequeathed" her freehold and leasehold estate to her two nieces, and all the rest and residue of any property "she might have at her death, subject to the payment of the legacies aforesaid" and her debts. By a codicil she revoked some of the legacies on account of the depreciation of her property:—Held, that the legacies were charges on the real estate. *Wybrants* v. *Maffett*, 17 L. R., Ir. 229.

—— "**Paying thereout.**"]—Devise to A. of house, he paying thereout 20*l.* to B., with interest after three months from death, creates a charge. *Seal* v. *Tichener*, Dick. 444.

—— **What included under "thereinafter."**]— The testator, after directing that his debts and funeral expenses should be paid out of his residuary personal estate, devised his real estates in trust, as to a particular estate, for his wife for life, and, after her death, to A. L. for life, with remainder over, and the residuary realty in trust to sell and convert, and pay an annuity of 80*l.* to his wife, and to be possessed of the residue on the trusts thereinafter declared. He then gave a legacy of 800*l.* to be paid to T. L., his executors, &c., immediately after the decease of testator's wife, notwithstanding T. L. might die in the testator's lifetime. He then gave 10*l.* each to his trustees, and his furniture, &c., to his wife, W. M., and the residue of his personalty to trustees, after payment of debts, legacies, &c., and subject to the said annuity of 80*l.*, the proceeds of the real estate, in trust for M. L., for her life, &c. :—Held, that the legacy of 800*l.* was not charged on the real estate. *Lee* v. *Rutley*, 1 Jur. 493.

—— "**Videlicet.**"]—A charge of legacies under a videlicet includes only those which follow, and not others at a great distance separated by other bequests. *Hone* v. *Medcraft*, 1 Bro. C. C. 261.

Where Executor Devisee.] — Real estates decreed to be charged with an annuity given by the will, though no express words to charge the land, the executor being devisee of the land. *Elliot* v. *Hancock*, 2 Vern. 143.

Devise of 100*l.* to a daughter, to be paid by executor in a month after death of the widow, to whom the real estate was devised for life, and afterwards to his son, the executor in fee ; appointing two trustees or overseers to see the will performed. On deficiency of assets, the real estate charged with the 100*l.* *Lypet* v. *Carter*, 1 Ves. Sen. 499.

P. devised real estate to his son A. in fee, and also gave to A. the residue of his effects, and directed that his son should pay unto his (P.'s) grandson a certain sum by instalments. A. paid several sums on account of the instalments, and then refused to pay any more, on the ground that the personal estate was insufficient:—Held, that under the terms of the will the legacy was charged on the real as well as on the personal

estate, and that A. himself was personally liable in case the assets should be deficient. *Preston* v. *Preston*, 2 Jur. (N.S.) 1040; 4 W. R. 455.

Neither the word "thereout" nor "paying" is required to make the payment of a legacy a condition so as to give the devisee in fee the lands charged with it. A testator devised his lands to his wife, and by a separate clause gave her certain chattels, and added, "Fourthly, I order my wife to pay the following legacies," which he enumerated and made her and another executors:—Held, the legacies were charged on the lands, and the wife took the fee. *Johnson* v. *Brady*, 11 Ir. Eq. R. 386.

J. S., by will, devises his lands to his brother, who was the heir-at-law, in fee, gives legacies, and makes his brother executor, desiring him to see his will performed. The real estate is charged with the legacies. *Alcock* v. *Sparhawk*, 2 Vern. 228.

Where Trustees appointed for Execution of Will.]—Testator, by will, gives annuity to wife, and legacies to children, knowing he has not sufficient personal estate. He says nothing of his real estate, but appoints certain persons trustees of the inheritance for the execution of his will. Semble, the trustees took an interest in the real estate for the purpose of this will. *Trent* v. *Trent*, 1 Dow, 102.

A testatrix, by will, gave to G. an interest in certain chattels, and gave her residuary real and personal estate to trustees, in trust out of her personal estate to pay her debts, funeral, and testamentary expenses and a legacy of 10*l.* to H.; and out of the rents and profits of the real estate, to pay such of the debts, funeral, and testamentary expenses as her personal estate should be insufficient to pay; and subject thereto, should stand possessed of the entire residue of realty and personalty in trust for the testatrix's three grandchildren. By a codicil, the testatrix directed that the trustees or trustee acting under her will should pay to H. 40*l.*, "in addition to the legacy of 10*l.* above mentioned, and to G. 100*l.* a year for life, in addition to the bequests above mentioned":—Held, that the direction in the codicil to the trustees to pay the legacy and annuity primâ facie made them a charge upon whatever funds the trustees had in their hands, and therefore charged them on the real estate in aid of the personalty, and that this was not rebutted by their being given "in addition" to bequests not charged on the realty. *Gallemore* v. *Gill*, 2 Sm. & G. 158; 23 L. J., Ch. 604; 18 Jur. 480. Affirmed, 2 Jur. (N.S.) 1178; 4 W. R. 773—L.JJ.

Where Direction to Convert Realty.]—The testator directed his debts and funeral and testamentary expenses to be paid out of his personal estate. He then devised his freeholds to trustees to be sold, and the proceeds, after deducting costs, to be deemed part of the residue of his personal estate, and to be subject to the dispositions thereinafter made of the same. The testator then gave a legacy of 1,000*l.* upon certain trusts, and finally directed all the rest and residue of his personal estate to go to his wife for life, remainder over. The pure personal estate being insufficient to pay all the debts and legacies:—Held, that the legacy of 1,000*l.* ought to be paid out of the moneys arising from the sale of the real estate. *Woollard's Trust, In re*, 18 Jur. 1012.

A., after bequeathing legacies, devised his real estate to trustees, to sell, and declared that until sale the same should be considered as converted in equity from the time of his death, and that the proceeds of such sale should be deemed part of his residuary personal estate thereinafter bequeathed:—Held, that the legacies were payable out of the real estate. *Field* v. *Peckett*, 29 Beav. 568; 30 L. J., Ch. 811; 7 Jur. (N.S.) 983; 4 L. T. 459; 9 W. R. 525.

A testator, by will, gave a life annuity which he directed to be issuing out of his real estate, until a nephew attained twenty-one, and thenceforth out of his personal estate. He directed the real estate to be sold by trustees (who were also executors of the will) on the nephew attaining twenty-one, and the proceeds to be held upon the trusts thereinafter declared. He also directed the trustees to sell his personal estate, out of the proceeds to pay his debts, funeral, and testamentary expenses and legacies, and to invest the residue, with the surplus rents and profits of the real estate, until it was sold, and the proceeds of it after the sale, and stand possessed of the investments upon trust to set apart thereout a fund for payment of the annuity, and on its determination to apply the fund set apart to answer it in the same manner as was therein directed with respect to the residue of the personal estate. And he gave the residue of the trust fund to his nephew. An insufficient fund was set apart to answer the annuity against which there were, consequently, arrears at the annuitant's death:—Held, first, that the legacies were payable out of the proceeds of the real as well as of the personal estate:—Held, secondly, that the annuity was also payable out of the mixed fund:—Held, thirdly, that the arrears of it were payable out of the fund set apart to answer it. *Bright* v. *Larcher*, 3 De G. & J. 148; 28 L. J., Ch. 837; 5 Jur. (N.S.) 1283; 7 W. R. 658. And see *S. C.*, 4 De G. & J. 608.

Substituted Legacies in Codicil held Charged on same Fund.]—Testator, declaring his debts should come out of the real estate and the personal, gave the real to trustees charged with some charitable legacies, and one to each trustee; by codicil he removed one trustee, and revoked his legacy, appointing another with the same legacy. He revoked all the charitable legacies, and gave a less legacy to one of the charities mentioned before, and other new charitable legacies, without specifying any fund; all held to be charged on the real estate, and, therefore, void as to the charitable legacies. *Leacroft* v. *Maynard*, 1 Ves. 279; 3 Bro. C. C. 223. See also *Austen* v. *Halsey*, 6 Ves. 475; *Hassel* v. *Hassel*, Dick. 527.

Where Gift of Realty and Personalty joined.]—Where goods, lands, and chattels are given by will, altogether as one fund, and a legacy is given subject to the exception of what was given before, it is as a charge on the land. *Edgell* v. *Haywood*, 3 Atk. 358.

The circumstance that a mixed fund of real and personal estate is devised to the executor is not alone sufficient to make pecuniary legacies a charge upon the real estates. Testator devised a mixed fund of real and personal property to a trustee, upon trust to pay the rents, issues, and profits to certain persons (among whom was his daughter M.), for their respective lives, and subject to those trusts, he gave M. power to appoint, by will, the whole property. M. married, and

by a will executed in pursuance of the power, devised the whole fund to a trustee, upon trust to permit her husband to receive and take the rents, issues, and profits for his life, subject as thereinafter mentioned; and, in case she should leave any issue of the marriage, son or daughter, living at her decease, she charged the estate with 4,000*l.*, for the benefit of that son or daughter; and after the decease of her husband, she devised the whole fund to such son or daughter, absolutely. She then proceeded as follows: "And in case there shall be no issue of my marriage living at my decease, then I give, devise, and bequeath to my said dear husband, all and singular my said estates and effects to hold to him, his heirs, executors, &c., subject, nevertheless, and chargeable with the payment of 100*l.* to each of his sisters, A., B., C., D.; also I give and bequeath to E., the sum of 200*l.*, to be paid to her within twelve calendar months next after my decease":—Held, that E.'s legacy was a charge upon the real estate, over which M. exercised her power of appointment. *Nyssen* v. *Gretton*, 2 Y. & C. 222. *S. C.*, nom. *Nyssen* v. *Ernst*, 6 L. J., Exch. Eq. 22. See *Bray* v. *Bree*, 8 Bligh (N.S.) 568; 2 Cl. & F. 453.

A testator gave legacies, and charged his executors, to whom he devised real and personal estate, with the payment thereof:—Held, that the legacies were charged on the real estate. *Cross* v. *Kennington*, 9 Beav. 150; 15 L. J., Ch. 167; 10 Jur. 343.

J. A. devised and bequeathed to S. H. all his real and personal estate for her life, she paying thereout the legacies after mentioned, in three years after his decease; he then gave life annuities, and declared "the said several legacies or annuities to be charged on my real estate, the first payment to be made three years after my decease;" and then bequeathed several pecuniary legacies, and gave all his real and personal estate, after the death of S. H., to T. P. H. for life, with remainders over, if he should die without issue:—Held, on demurrer, that the legacies were charged upon the inheritance. *Boyd* v. *Higginson*, 5 Ir. Eq. R. 97; Fl. & K. 603.

A testator gave his real and personal estate to trustees, for the maintenance of his four children, until they attained twenty-one. As they arrived at that age respectively, he directed it to be divided as follows: A legacy of 100*l.* to his son, and his property at G. (freehold) between his daughters:—Held, on a deficiency of personal estate, that the legacy was not charged on the real estate. *Bentley* v. *Oldfield*, 18 Beav. 225.

A testator by will, dated in 1851, gave all his personal estate, not specifically bequeathed, and the proceeds of real estate directed to be sold, to trustees for payment of his debts (including mortgage debts), funeral, and testamentary expenses, and a legacy, and directed the surplus to be held in trust for his grandson if he should attain twenty-one, but if he should die under that age, then for his grand-daughter if she should attain that age. After making a specific devise of a messuage in favour of his grandson, he devised all the residue of his real estate to the grandson, charged in manner thereinafter mentioned; and gave to his wife an annuity charged on the hereditaments lastly thereinbefore devised to his grandson, and bequeathed a legacy of 2,000*l.* to his grand-daughter. The mixed fund proved insufficient for payment of debts:—Held, that the legacy of 2,000*l.* was not charged upon the real estate. *Hensman* v. *Fryer*, 37 L. J., Ch. 97; L. R. 3 Ch. 420; 17 L. T. 394; 16 W. R. 162. Reversing 12 Jur. (N.S.) 681.

Where Gift of Mixed Residue.]—If there are general gifts of legacies, and then of the rest and residue, real and personal, blending the whole in one mass (though accompanied by a power to the legatee of the residue "to dispose of the same in any manner he may think proper"), the legacies are a charge on the realty. *Greville* v. *Browne*, 7 H. L. Cas. 689; 5 Jur. (N.S.) 849; 7 W. R. 673.

A. gave a legacy, which, if not received, was to form "part of the residue of my property." Then followed a legacy to A., but if the legatee should die before time for payment, it was to be considered "as part of the residue of my property, and to go and merge in the same." After some small legacies, the will concluded, "All the rest, residue, and remainder of any property I may die possessed of, whether estates, freeholds, bonds, bills, annuities, &c., I devise and bequeath to my son in the fullest manner I can, with liberty to him to dispose of the same in any manner he may think proper." The son was named as one of the executors, but did not act as such. The will was proved by the other executor. The son mortgaged the real estates:—Held, that the legacy to A. was a charge on the real estates, and on a sale of them in the Incumbered Estates Court in Ireland, took precedence over the mortgages, notwithstanding the general power to the devisee to dispose of the estates in any manner he thought proper. Held, also, that the words in the bequest of the residue to the son gave him no power to mortgage or dispose of the real estate discharged of the legacies. *Ib.*

The doctrine of *Greville* v. *Browne* (supra), viz., that a gift of legacies, followed by a gift of the residue of the real and personal estate, charges the legacies on the residuary real estate, is applicable to a gift of legacies followed by a gift of the residue of all the property of the testator, and over which the testator has a power of appointment, though the power be special and non-exclusive; and in such a case the legacies are charged on property subject to a power of appointment. *Gainsford* v. *Dunn*, 43 L. J., Ch. 403; L. R. 17 Eq. 405; 30 L. T. 283; 22 W. R. 499.

The rule that legacies followed by a gift of real and personal residue in one mass are charged on the real estate, applies although preceded by a direction that the debts and legacies shall be paid by the executors.

A testatrix by her will directed her debts and funeral and testamentary expenses, and the legacies thereby bequeathed, to be paid by her executors thereinafter named, and after bequeathing specific and pecuniary legacies and making a specific devise, she gave the residue of her real and personal estate to A. and B. upon certain trusts, and appointed A. and C. executors:—Held, that the legacies were charged on the residuary real estate of the testatrix. *Brooke, In re, Brooke* v. *Rooke*, 45 L. J., Ch. 730; 3 Ch. D. 630; 35 L. T. 301; 24 W. R. 959.

A husband gave various pecuniary legacies, and all the rest and residue of his estate, real and personal, he gave, devised, and bequeathed to his wife, her heirs, executors, administrators, and assigns, absolutely:—Held, that the legacies

were charged on the real estate, and therefore that the general devise did not pass property of which the testator was seised in fee as trustee. *Bellis, In re*, 46 L. J., Ch. 353; 5 Ch. D. 504; 36 L. T. 644; 25 W. R. 456.

Testator directed that all his debts and funeral and testamentary expenses (not mentioning legacies) should be paid out of his personal estate. He then gave a number of legacies, and directed that if one of the legacies should fail, it should fall into his "residuary estate." He then devised all his freehold and leasehold hereditaments in the parishes of B., L., and R., "and all the rest, residue, and remainder of" his real and personal estate, to trustees, upon trust to make a weekly payment to his wife during her life, and subject thereto to invest the residue, and after his wife's decease, as to all his freeholds, and all his leaseholds, and all the residue and remainder of his estate and effects, to stand possessed thereof upon certain trusts. The personal estate, and the real estate other than the real estate in the parishes of B., L., and R., were insufficient to pay the legacies:—Held, that the legacies were a charge on the real estate in the parishes of B., L., and R. *Bray* v. *Stevens*, 12 Ch. D. 162.

A testator gives an annuity and pecuniary legacies, and then devises all the rest, residue, and remainder of his freehold, copyhold, and leasehold estates to trustees for the use and benefit of his children. The annuity and pecuniary legacies given prior to the devise are well charged upon the freehold, and copyhold, and leasehold estates. *Cole* v. *Turner*, 4 Russ. 376; 6 L. J. (o.s.) Ch. 101.

On a bequest of all the testator's personal estate, upon trust to lay out 2,000*l.* in the purchase of an estate to be held on certain trusts, and upon trust to invest the residue of the personal estate and stand possessed of 1,500*l.*, part of the testator's estate on certain trusts and various other sums described as further parts of his estate upon other trusts, followed by bequests of pecuniary legacies, simpliciter, and a concluding gift of all the residue and remainder of the testator's estate and effects, whatsoever and wheresoever, and whether in possession, reversion, remainder, or expectancy:—Held, that the residuary clause passed the real estate charged with the pecuniary legacies, but not charged with the gifts directed out of the investment of the personal estate. Held, also, that the 2,000*l.* was to be set apart in priority to the other gifts. *Gyett* v. *Williams*, 2 J. & H. 429; 6 L. T. 279.

A testator, after bequeathing a number of pecuniary legacies to different persons, and giving a certain field to his godson, directed that all his debts and the above legacies should be paid and discharged within six months after his decease; and all the rest and residue of his estate, both real and personal, he gave to N. The personal estate proving insufficient to pay the debts and legacies:—Held, upon demurrer to a bill by some of the legatees seeking to charge their legacies on the real estate which passed under the residuary devise to N., that both the debts and legacies were, by the words of the will, effectually charged upon that estate. *Mirehouse* v. *Scaife*, 2 Myl. & Cr. 695; 7 L. J., Ch. 22. Affirming 1 Jur. 134, on different grounds. And see *Brudenell* v. *Boughton*, 2 Atk. 257.

Where Contrary Intent shewn.]—A testator, after directing his debts to be paid by his executors out of his personal estate, and making a specific bequest, gave all his realty and personalty to trustees for the conversion, getting in, and investment of his personalty; and by five clauses in his will he directed his trustees to stand possessed of five portions of his real estate (in each case giving the specific description), and five sums of 1,300*l.* (in each case describing the sum of money as "part of my personal estate") upon trust for the benefit of his five children and their issue; and as to all the residue of his realty and personalty not thereinbefore specifically or otherwise disposed of, upon trust, to release, assign, pay, and transfer the same to his said children:—Held, that the rule in *Greville* v. *Browne* (supra) did not apply, and that the five legacies were not charged upon the residuary realty. *Browning* v. *French*, 24 L. T. 649.

A father, after giving certain pecuniary legacies, devised as follows: "As to all my messuages, farms, and lands at Naunton, consisting of about 180 acres, my stock, crops, and implements of husbandry, moneys, securities for money, and all the residue of my estate and effects, real and personal, I bequeath and devise the same unto my wife to hold unto my wife until my youngest child shall attain twenty-one," with limitations over in favour of the children:—Held, that the pecuniary legacies were not charged on the farm at Naunton, or on the residuary real estate. *Castle* v. *Gillett*, L. R. 16 Eq. 530.

Testatrix directed her legacies to be paid by executors, to whom she afterwards gave all her real estates and the residue of her personal, after payment of her debts and funeral expenses:—Held, that legacies were not charged on real estates. *Parker* v. *Fearnley*, 2 Sim. & S. 592.

Subject to the payment of his debts, and certain legacies previously given, a testator devised "all his real estate," and bequeathed "all the residue of his personal estate," to trustees in trust for A. A. died in his lifetime:—Held, that the personal estate was the primary fund for the payment of debts and legacies, the testator not having manifested any intention to discharge it. *Wells* v. *Row*, 48 L. J., Ch. 476.

A testator directed that his debts, and all charges and incumbrances affecting his estates, should be paid by the application in the first instance of all ready money and securities for money which he should die possessed of; and he charged his estates of C. exclusively with the payment of such, if any, which should remain after such application. He devised his real estate to trustees and their heirs, as to the residue thereof not before disposed of (which included C.), to the use of his wife for her life; and he bequeathed to her, in case she should survive him, all his personal property not before bequeathed. He then bequeathed a legacy payable immediately after his decease, and gave, devised, and bequeathed, after the decease of his wife, two other legacies, and appointed his wife executrix:—Held, that the legacies were not charged on the lands of C., and that money of the testator, which at his death was in the hands of a salesmaster in Smithfield, was not ready money within the meaning of the will. *Smith* v. *Butler*, 1 Jo. & Lat. 692; 7 Ir. Eq. R. 467.

—— **Where Executor Devisee.**]—The principle of the decisions in reference to the question, whether a charge on real estate is effected by reason of a residuary devise, is the same in the

case of legacies as in that of debts, and is this, that where residuary, real, and personal property is given in one mixed fund to the creditor, who is to pay debts and legacies, these legacies, as well as debts, are charged upon the real estate. A testator, after bequeathing a legacy and expressly charging part of his real estate with an annuity to the legatee, devised and bequeathed all the rest, residue, and remainder of all and singular his real and personal estate (subject to his debts, funeral, and testamentary expenses) to trustees, whom he also appointed executors, upon certain trusts:—Held, that the legacy was well charged upon the real estate. *Wheeler* v. *Howell*, 3 K. & J. 198.

A testator gave some pecuniary legacies, and devised a certain farm and lands to his wife, for such term and at such rent as his brother Robert should think fit, and then gave, devised, and bequeathed all the rest, residue, and remainder of his real and personal estate to his son James, and appointed him executor:—Held, that the residuary form of the devise to the executor made the legacies a charge upon the real estate, notwithstanding that a previous interest in real estate was given by the will. *Francis* v. *Clemow*, Kay, 435; 23 L. J., Ch. 288; 18 Jur. 223; 2 Eq. R. 426; 2 W. R. 308.

A testator directed that his debts should be paid by his executors; he then gave two legacies, one to one of his executrixes, to be paid to her in addition to what was afterwards devised to her: and gave the residue of his personal estate and all his real estate to five persons, whom he appointed executors, in equal shares, as tenants in common:—Held, that the legacies were charged on the real estate. Held, one of the five devisees having died in the testator's lifetime, that as between the heir and devisees the lapsed share was in the hands of the heir, liable to bear a rateable proportion only of the debts and legacies. Where residue is devised subject to charges, a share which in the result is undisposed of bears only its own proportions of the charges. *Peacock* v. *Peacock*, 34 L. J., Ch. 315; 11 Jur. (N.S.) 280; 12 L. T. 299; 13 W. R. 516.

—— **Notwithstanding previous Gift of Interest in Realty.**]—Where a testatrix after giving several pecuniary legacies devised and bequeathed all her real and leasehold estates to trustees to pay the rents and profits of her freehold house at G. (specifically describing it) to A. for life, with remainder to his children, in equal shares, and as to all the residue of her real and personal estate she directed her trustees to pay the rents and income to B. for life with remainder to his children in equal shares, and the personal estate proved insufficient for the payment of the legacies:—Held, that the legacies were a charge on the residuary real estate, notwithstanding that a previous interest in real estate was given by the will. *Skiller* v. *Haisman*, 24 L. T. 745; 19 W. R. 693.

T., by will, after bequeathing stock in trust for certain persons for life, and which he directed should, in certain events, "fall into his residuary estate," and also after bequeathing other legacies to charities and others, which he directed should be paid out of his personal estate, devised and bequeathed his freehold houses at S., and all and singular other the "residue and remainder of his estate and effects," to his executors, upon trust to pay the income to his sister for life; and after her decease, to convey, assign and pay the same residuary estate and effects" to her children as therein mentioned. The testator had no other real estate than the houses at S. The personal estate was insufficient to pay both the debts and legacies:—Held, that the real estate at S. was part of the testator's residuary estate, and that, as such, it was subject to the payment of the legacies, except the charitable legacies, so far as the personalty was insufficient. *Thorman* v. *Hilhouse*, 5 Jur. (N.S.) 563; 7 W. R. 332.

E. by her will, after a specific devise of real estate to S., and pecuniary legacies of 50*l.* and 200*l.*, bequeathed three other pecuniary legacies of 100*l.* each, with the proviso that "if her estate would not produce these sums of 100*l.* each, after the previous legacies were paid," then these sums were to abate; and she appointed S. her "residuary legatee." E. left real estate not specifically devised:—Held, that the pecuniary legacies were charged upon the testatrix's real estate not specifically bequeathed. Held, further, that the real estate not specifically devised passed to S., as residuary devisee as well as legatee. *Salter, In re, Farrant* v. *Carter*, 44 L. T. 603.

Bequest to wife of real and personal estate for life, and after her death a gift of various legacies, and a devise of all the rest, residue, and remainder of real and personal estate to testator's nephews:—Held, legacies were charged on real estate. *Bench* v. *Biles*, 4 Madd. 187; 20 R. R. 292.

A residuary gift of "all the rest, residue, and remainder of my freehold estates, real and personal property of any nature or description whatsoever, not thereinbefore by me disposed of," amounts to a charge of legacies on the residuary real estate, even where there are specific gifts of realty preceding it. *Carrall* v. *Hargrave*, Ir. R. 5 Eq. 123.

—— **Charge, whether pro ratâ or in aid only.**]—A testator, by will made in 1866, after specifically disposing of certain parts of his property and giving certain real estate to his wife during widowhood, gave the rest and residue of his real and personal estate to trustees upon trust to convert the same into money and thereout pay his debts, including debts due on mortgage of the property given to his wife during widowhood, and his funeral and testamentary expenses, and the cost of proving and executing his will. He directed his trustees to pay the income of the fund to his wife during widowhood, and after her death or second marriage he gave so much of the fund as consisted of pure personalty to charitable purposes, and bequeathed the rest of it to his wife. In a subsequent part of his will he appointed executors, and gave a legacy to each of them who accepted the trusts. At his death part of the residuary real estate was subject to mortgages:—Held, by Fry, J., that the executors' legacies were charged on the real estate, and that as there was a mixed fund they must be paid pro ratâ out of the different parts of it. But held, by the court of appeal, that the legacies were charged on the real estate, but only in aid of the personalty, the principle of pro ratâ payment only applying to payments which the testator had expressly directed to be made out of the mixed fund. *Elliott* v. *Dearsley*, 16 Ch. D. 322; 44 L. T. 198; 29 W. R. 494—C. A.

Effect of Will and Codicil—Legacies given by Valid Codicil.]—One gives legacies by his

will, and other legacies by his codicil, and the lands are charged with the legacies in the will only, and the personal estate is not sufficient to pay all the legacies, the legacies in the will shall be charged on the land, and the legacies by codicil on the personal estate. *Masters* v. *Masters*, 1 P. Wms. 422.

Real estate is by will charged with the payment of the legacies "above mentioned"; this will not extend to the legacies in the codicil. Secus, if the land were charged with the payment of the legacies generally. *Id.* 423.

The principle that where a will contains a gift of legacies and residue the legacies are (in the event of the personal estate proving insufficient for their payment) to be deemed to be charged upon the real estate applies in favour of an additional legacy given by a codicil to a legatee named in the will. *Hall, In re, Hall* v. *Hall*, 51 L. T. 86.

A gift of a share of moneys to arise by sale of real estates was revoked by a codicil, and 2,000*l.* given in lieu thereof. The latter was held to be payable out of the general personal estate. *Buxton* v. *Buxton*, C. P. Cooper, 97.

A testator directed 2,000*l.* to be invested in the funds, and the dividends to be paid to his widow during her life, and gave or confirmed to her two annuities. By codicil, he charged these on his real estates; and by a second codicil he directed to be paid to his widow, during her life, such yearly sum as, together with the interest of the 2,000*l.*, and the annuities, should amount to the annual sum of 1,200*l.*:—Held, that the testator's intention was, that his widow should have 1,200*l.* a year out of his real estates, subject only to a deduction of so much as the interest of the 2,000*l.* should amount to; and that she had a claim on the real estates for the whole annuity so long as that 2,000*l.* should not produce any income. *Devaynes* v. *Noble*, 8 L. J., Ch. 256; 3 Jur. 550. And see *S. C.*, 2 Jur. 1082.

A testator gave all his personal and leasehold estate to trustees, upon trust, to sell and dispose of the same, and convert the whole into money, and, out of the money to arise by such sale, disposition, and conversion, to pay his debts and the legacies given by his will, or which he might give by any codicil thereto. He afterwards made a codicil, by which he gave to the same trustees 2,000*l.* out of his personal estate, upon trust to distribute and pay the same for charitable purposes. This legacy was held not to be charged on the leasehold estate. *Wilson* v. *Thomas*, 3 Myl. & K. 579; 3 L. J., Ch. 144.

A testator, by his will, dated in 1828, attested by three witnesses, gave to his son an annuity or rent-charge of 20*l.*, charged on his real and personal estate. In 1831 he made a codicil, expressly referring to his will, attested by two witnesses only, by which he revoked the annuity of 20*l.*, and gave to the wife of his said son an annuity or clear yearly rent-charge of 70*l.* for her separate use, with powers of entry and distress over his real estate, if in arrear; and he ratified and confirmed his will in all other respects. In the same year he made another codicil, attested by three witnesses, and thereby, after reciting that he had executed his last will and testament, and also a codicil thereto, he declared the same to be a second codicil to his will, and, after making various alterations in the disposition of his property, ratified and confirmed his will:—Held, that the annuity of 70*l.* was well charged by the first codicil, to which effect was given by the second codicil, upon the real estate. *Aaron* v. *Aaron*, 3 De G. & Sm. 475; 14 Jur. 125.

Gift of "an annuity or clear rent-charge" of 40*l.* in a codicil, held to charge all the estates devised by the will. *M'Dowal, Ex parte*, 5 Jur. (N.S.) 553.

A testatrix, by her will, after giving various legacies, directed that in case her personal estate should be insufficient for the payment of the legacies in full, they should be charged upon her real estate. By her codicil she gave other legacies, and confirmed her will:—Held, that the legacies given by the codicil were a charge upon the real estate. *Williams* v. *Hughes*, 24 Beav. 474; 27 L. J., Ch. 218; 4 Jur. (N.S.) 42; 6 W. R. 94.

A testator gave sums of money as legacies to his three daughters, and charged them on his realty if his personalty should be insufficient. By a subsequent will, proved as a codicil, he gave, subject to two new legacies, all his personal estate to the daughters:—Held, that the legacies were not revoked by the codicil, but were payable out of the personalty, and if that were insufficient, out of the realty. *Leese* v. *Knight*, 11 L. T. 134; 12 W. R. 1097.

The trusts of a will were, in part, to provide an annuity of 1*l.* a week to each of the testator's sons, charged on the devised property. By a codicil reciting these trusts, he charged the property by the codicil with 1*l.* per week to each of his two sons:—Held, that this was not a cumulative legacy, but merely a reference to the old gift; and that it was charged primarily on the seven cottages, and as a subsidiary security on that which passed by the codicil. *Hincheliffe* v. *Hincheliffe*, 2 Dr. & Sm. 96; 5 L. T. 660. See also *Leacroft* v. *Maynard*, supra, col. 1638; *Rich* v. *Whitfield*, supra, col. 1634; *Gallemore* v. *Gill*, supra, col. 1637; *Lushington* v. *Sewell*, infra, col. 1656; and *Conron* v. *Conron*, infra, col. 1659.

—— **Effect of "Herein" and "Hereinafter" or Equivalents.**]—Testator directed his trustees to sell his real and personal estate, and to apply the produce in paying his debts and the legacies thereinafter given. The testator afterwards gave legacies by codicils, one of which was duly attested:—Held, that only the legacies in the will were payable out of the real estate. *Strong* v. *Ingram*, 6 Sim. 197.

Trust of a term by will to pay the several legacies thereby given, and also the several other legacies hereinafter bequeathed. The subsequent part of the will, reciting that the legacies given by the will to the testator's daughters were not an adequate provision, gave each of them a further legacy, in addition to the said legacies given them respectively by the will. The legacies by the codicil are not charged upon the real estate. *Bonner* v. *Bonner*, 13 Ves. 379.

A testator, having bequeathed pecuniary legacies, some of them to charities, gave the residue of his real and personal estate to trustees to sell and thereout to pay his debts and the legacies therein mentioned, and further directed the charitable bequests to be paid, and that the proceeds of such part of his estate as the law did not permit to be given to charities should be first applied in payment of such of the legacies therein mentioned as were not given to charities. He directed that no charitable bequest should be legally payable till six months after his decease. By a codicil he gave other charitable legacies, and the residue of his property among charitable

legatees:—Held, that the words "herein mentioned" included the legacies given by the will and codicil, taken together:—Held, secondly, that, having regard to the distinction made in the will between property capable of being bequeathed for charitable purposes, and property not so applicable, the word "property" in the codicil signified such property as was legally applicable to the purpose of the legacy:—Held, thirdly, that the charitable legacies were not payable on the expiration of six months, but in the ordinary way. *Jauncey* v. *Att.-Gen.*, 3 Giff. 308; 8 Jur. (N.S.) 6; 5 L. T. 374; 10 W. R. 129.

M., being indebted in 25*l.*, the balance of a larger sum, to a female, E., directed by his will all his just debts and legacies thereinbefore mentioned to be paid. Afterwards E. married, and then M., by codicil, gave E. a legacy of 100*l.*:—Held, that the charge in the will of legacies "thereinbefore" mentioned could not be extended to the legacy given by a codicil, and that the legacy was to be taken in satisfaction of the debt. *Edmunds* v. *Lowe*, 3 K. & J. 318; 26 L. J., Ch. 432; 3 Jur. (N.S.) 508; 5 W. R. 444.

The will of a testator directed all his debts, funeral and testamentary expenses, and legacies thereby given, to be paid as soon as conveniently might be after his decease, and then followed, "and I charge my debts and legacies on my real and personal estate":—Held, that the charge on real estates extended to a legacy given by codicil in trust for A. for life, and that such construction was not cut down by his directing the stocks to be appropriated for payment of it to return and become part of the residue of his personal estate. *Rooke* v. *Worrall*, 11 Sim. 216.

A testatrix, by her will, gave all her real and personal property to trustees, whom she had appointed executors, upon trust thereout, in the first place to pay her debts, and in the next place to pay the legacies which she should give by any codicil. The testatrix, by a codicil, devised to her sister an estate, called "The Tradeswill Estate," "for her life: at her death, to be sold for the payment of legacies"; and thereby also gave to various parties legacies amounting in the whole to above 50,000*l.* The testatrix's personal estate proving insufficient for the payment of her debts and legacies:—Held, that the testatrix had not, by her codicil, made the Tradeswill estate the primary fund for the payment of legacies, but that the sole effect of the direction in the codicil to sell at the death of her sister was to exempt her sister's life estate from the payment of legacies; and that, with that exception, the real estate was an auxiliary fund for the payment of legacies. *Whieldon* v. *Spode*, 21 L. J., Ch. 913; 16 Jur. 281.

—— **Effect of Unattested Codicil.**]—Testator, by his will, gave an annuity, payable out of his freehold, copyhold, and personal estate, and by a codicil, not duly attested, revoked the annuity:—Held, that this was a subsisting charge upon the freeholds. *Mortimer* v. *West*, 2 Sim. 274; 29 R. R. 104.

A testator by a will duly attested gave all his real and personal estate to trustees to convert into money and pay his debts, and then to appropriate and take out of his said trust-moneys 1,000*l.*, which he gave to the plaintiff. By a codicil not properly attested so as to pass real estate, he revoked the legacy:—Held, that on this will the testator had made his real and personal estate a common fund for payment of this legacy, that the revocation was inoperative as regarded the real estate, and that the plaintiff was entitled in the proportion which the real estate bore to the personal. *Stocker* v. *Harbin*, 3 Beav. 479.

B. devised an estate to A. for life, with remainder in tail male, and by an unattested codicil directed certain weekly allowances to be paid by whomsoever inherited the estate. To a bill against the tenant in tail for payment of one of the weekly allowances, a general demurrer was held good. *Middlebrook* v. *Bromley*, 2 N. R. 224; 9 Jur. (N.S.) 614; 11 W. R. 712.

A testator made a will and codicil; the former was attested so as to pass real estate, but the latter was not. By his will he bequeathed a legacy of 3,000*l.*, and charged it on his real, "in aid of his personal estate." And he devised his real and personal estate to trustees, charged with his legacies thereout, by mortgage, sale, or other disposition, to pay the legacy of 3,000*l.* By the codicil he reduced the legacy to 2,000*l.*:—Held, that the codicil, though not properly attested, effected the reduction. *Coverdale* v. *Lewis*, 30 Beav. 409; 8 Jur. (N.S.) 351; 10 W. R. 307.

When a sum of money is given originally out of land, a will with that charge must be equally executed with the same solemnity, because it is considered as part of the land. When a first will charges real estate with legacies, and a second gives general pecuniary ones, though not executed in form, yet the later legacies will be equally a charge upon the land. The rule is the same as to revocations of a devise of lands, and a revocation of a sum of money charged on lands; they must be revoked in the same manner. *Brudenell* v. *Boughton*, 2 Atk. 272.

Where real estate is charged with legacies generally by will duly attested, legacies may be revoked or charged by an unattested instrument. *Buckeridge* v. *Ingram*, 2 Ves. 665. And see *Hannis* v. *Packer*, Ambl. 556.

Testator, by will duly attested, gave an annuity to his daughter, charged on his real estate in aid of his personal; by codicil not attested he gave his real and personal estate to his mother for life; during her life the personal estate is discharged from the annuity, but it remains a charge on the real. *Id.* 652.

Legacy given by an unattested codicil is within a general charge, in the will, of debts and legacies to be given by codicil, on the real estate, though the will gives no legacies. An annuity is a legacy for this purpose. *Swift* v. *Leach*, 1 Jur. 507.

Devise and bequest of all the testator's real and personal estate in Grenada, to pay all such annuities, legacies, or bequests as he should give or bequeath to be paid out of or charged upon his real or personal estate in Grenada, by his will, or any codicil, whether witnessed or not. A charge by an unattested codicil is void, this being not a charge by the will of legacies, but a reservation by a will, executed according to the statute, of a power to charge by an unattested paper. As to the objection that the real estate was not charged as a subsidiary fund to the general personal estate, quære. *Rose* v. *Cunyngham*, 12 Ves. 29.

A testator directed his real and personal estate to be sold, and the moneys arising from the sale to be applied in the first place to the payment of his debts, funeral and testamentary expenses, and also the legacies which he might bequeath by any codicil or codicils to his will. He after-

wards gave an annuity to his wife by an unattested codicil :—Held, that the annuity was well charged on the real estate. *Swift* v. *Nash*, 2 Keen, 20 ; 6 L. J., Ch. 363 ; 1 Jur. 557.

Testator having, by will duly executed, charged upon his real estate the legacies thereby given, afterwards gave legacies by several unattested codicils, and finally executed a codicil duly executed and attested, varying the appointment of trustees and executors, and revoking some legacies given to them by some of the codicils :—Held, that the legacies given by unattested codicils were not charged upon the estate. *Radburn* v. *Jervis*, 3 Beav. 450.

If a testator, by will properly attested, charge real estate with legacies he shall after give by codicil, a legacy by codicil not attested is good. *Inchiquin* v. *French*, Ambl. 41 ; Ridgw. 230 ; 1 Cox, 1.

Where a testamentary instrument, incomplete as a will, appears, on the face of it, to be intended as a substitution for a former complete will, the legacies given by the latter only shall take effect, notwithstanding both instruments are proved in the spiritual court ; but where a former will makes a charge of legacies generally on land, and a subsequent will, giving legacies, is not attested so as to affect the land, yet the general charge of the former shall include the legacies given by the latter : otherwise where the charge is made of particular legacies. *Jackson* v. *Jackson*, 2 Cox, 35.

A codicil does not revoke or alter a will to a greater extent than was intended. A testator, by his will, gave certain legacies, exclusively charged on real estate. By a codicil, after reciting so much of the will as related to those legacies, he revoked that part of his will, and in lieu of the legacies therein given gave smaller ones. The object of the codicil being only to alter the amount of the legacies :—Held, that it could not extend to charge the personal estate, and not being attested by three witnesses, could not alter the legacies charged on the real estate. *Kirke* v. *Kirke*, 4 Russ. 435 ; 6 L. J. (o.s.) Ch. 143.

A testator gave his freeholds and copyholds upon trust for his son, a lunatic, absolutely ; and, in case he should not recover, upon trust for sale, the proceeds to be held upon trusts to pay certain legacies without any gift of the residue. By an unattested codicil he gave other legacies in the like event, and made three persons his residuary legatees :—Held, that although the unattested codicil did not affect the freeholds, the legacies thereby given were a charge on the copyholds, and that the residuary legatees therein named were also entitled to the proceeds of the sale of the copyholds. *Wildes* v. *Davies*, 1 Sm. & G. 475 ; 22 L. J., Ch. 495 ; 1 W. R. 253.

—— **Effect of Revocation of Devise of Lands charged.**]—Where a testatrix devised real estate to A., charged with certain annuities and legacies, and by a codicil revoked the devise of the lands to A., and devised them to B., and "confirmed her will in every other respect" :—Held, that the lands were charged in the hands of B. A testatrix, by her will, devised the lands of D. to trustees to the use of her son Y. for life, with remainder to his sons in tail. She then bequeathed a number of annuities to different members of her family, and among the rest an annuity of 100*l.* to H. ; and she directed that these annuities should be paid without any deduction, and charged them "on the lands so devised to the use of my son Y." ; and on the residue of certain other lands which she directed to be sold. The testatrix subsequently made a codicil to her will, in which the following clause occurred : "And whereas I did, by my said will, give the lands of D. to the use of my son Y. as therein, now I do hereby revoke so much of my said will as gives said lands of D. to my said son Y., and I direct the trustees shall stand seised of the said last-mentioned lands to the use of my daughter H. (the annuitant) for her life, in addition to what I have left her by my said will" : —Held, that the testatrix merely meant to substitute one devisee for the other, and did not intend to discharge the lands of D. from contributing to the payment of the annuities, with which, by the will, they were charged. A codicil is never held to revoke a will further than is necessary to give effect to the intentions of the testator. *Young* v. *Hassard*, 1 Dr. & War. 638.

A testator bequeathed one moiety of his personal estate to pay certain legacies, and then to pay the residue of such moiety to J. J., and in the event of the death of J. J., living H., then over ; provided if J. J. left a widow, to pay to her 200*l.*, part of the moneys so given to J. J. By a codicil the testator revoked the gift of the moiety to J. J. :—Held, that the 200*l.* legacy to his widow was revoked by the revocation of the gift of the moneys out of which it was to be paid. *Grice* v. *Funnell*, 1 Sm. & G. 130.

A testator devised an estate, X., and other estates to A., charged with annuities, and an estate, Y., and his residuary, real, and personal estate to B., subject to the payment of his debts, funeral expenses, and legacies. He afterwards revoked so much of the second devise as included Y., and devised it, subject to the same annuities and in the same manner as the estate X. :—Held, that the charge of debts, &c., on Y. was revoked. *Ravens* v. *Taylor*, 4 Beav. 425. And see *Hills* v. *Wirley*, infra, col. 1665.

Property chargeable—Order of Application—Personalty primarily liable.]—Held, that under a bequest of real and personal estates, upon trust to receive the rents and profits, and to pay legacies and annuities, and vest the surplus rents, &c., for other purposes, the personal estate is the primary fund liable to the payments, there being no direction to discharge it or to sell the real estate so as to constitute a mixed fund. *Boughton* v. *Boughton*, 1 H. L. Cas. 406. Varying *S. C.*, nom. *Boughton* v. *James*, 1 Coll. C. C. 26 ; 8 Jur. 329. And see *Bright* v. *Larcher*, supra, col. 1638.

—— **Where Mixed Fund created.**]—In order that legacies charged upon real estate may be payable out of the real and personal estate pro ratâ it is not necessary that the testator should have directed an absolute conversion of the real estate. It is sufficient that he has shewn an intention of creating a mixed fund of realty and personalty out of which the legacies are to be paid. A testator gave his real and personal estate to trustees, and empowered them to sell the real estate, and he directed that an annuity should be paid out of the annual income of the estate ; and he also directed certain legacies to be paid out of his trust estates, moneys, and premises. He was intestate as to the residuary estate by reason of the death, in his lifetime, of the residuary devisee and legatee :—Held, that the legacies were payable out of the real and personal estate rateably. *Allan* v. *Gott*, 41 L. J

Ch. 571; L. R. 7 Ch. 439; 26 L. T. 412; 20 W. R. 427.

—— **Where Realty charged in Aid of Personalty.**]—Devise of freehold estate in trust to sell and apply the money towards payment of the legacies; the residue of the personal estate, after payment of debts, legacies, &c., upon trust to convert all the said residue of his personal estate into ready money, to be laid out in freehold property, to be settled. The personal estate leaving a residue beyond the charges, the real estate a resulting trust for the heir-at-law, and charged with the legacies, not primarily, but only as an auxiliary fund to the personal estate. *Maugham* v. *Mason*, 1 V. & B. 410; 12 R. R. 251.

Testator gave 1,500*l.* to his illegitimate son, to be paid, with interest, within twelve months next after his decease, and he charged that sum upon his farm called L., which, he added, was then rented for 100*l.* a year, and which he purchased before his marriage, and was not, in settlement or otherwise, incumbered. And he gave other legacies, and directed, as to some of them, that they should be paid by his executors, and he charged his real estates with the payment of his funeral and testamentary expenses and debts, in aid of his personal estate. By a codicil he confirmed, to his illegitimate son, all devises, gifts, by his will, made to him, and desired that all his (the testator's) debts, annuities, and legacies (except two annuities thereby given to A. E. and S. D.) should be paid, in the first place, out of any moneys he might die possessed of in the 3 per cent. consols, as far as they would extend, and he charged his farm called R. with the payment of all such debts, annuities, and legacies (except as aforesaid), in aid of his moneys in the 3 per cents.:—Held, that the 1,500*l.* was not charged on the farm called L. exclusively, and in exoneration of the testator's personal estate; but that the consols were to be applied first, the farm called R. next, the testator's general personal estate next, and the farm called L. last, in payment of it. *Evans* v. *Evans*, 17 Sim. 102; 14 Jur. 383.

Where there is a charge in the will of legacies upon real estate, they are at first directed to be paid out of the realty, the personal fund proving deficient. *Minor* v. *Wicksteed*, 3 Bro. C. C. 627.

E. B. by his will bequeathed certain legacies, including an annuity to his wife. And he directed that his trustees and executors should stand possessed of the net proceeds arising from the sale and conversion of his real and residuary personal estate (after and subject to the payment of his debts and funeral and testamentary expenses and legacies, and after making due provision for the said annuity) upon trust for E. B. K. And he directed that after the death of his wife the fund set apart to answer the said annuity should be held in trust for the Royal Agricultural Benevolent Institution of England:—Held, that the annuity fund was not payable rateably out of the blended fund constituting the residue, but was payable primarily out of the testator's personalty, and was only charged on the testator's realty in aid of his personalty. *Elliott* v. *Dearsley* (supra, col. 1644) followed. Dicta of Jessel, M.R., in *Gainsford* v. *Dunn* (supra, col. 1640) doubted. *Boards, In re, Knight* v. *Knight*, 64 L. J., Ch. 305; [1895] 1 Ch. 499; 13 R. 278; 72 L. T. 220; 43 W. R. 472.

A testator after directing his executors (whom he also appointed trustees) to pay his debts and funeral and testamentary expenses, and giving various pecuniary legacies, gave all his personal estate and effects, except money or securities for money, to R.; and he gave and devised all the rest, residue, and remainder of his estate, both real and personal, to his trustees, upon trust thereout, in the first place, to pay two specified sums, and as to the residue thereof, or such part or parts thereof as might lawfully be appropriated for the purpose, for such one or more, or any hospital of a charitable nature, and in such proportions as they in their uncontrolled discretion should think fit. It was held by the court of appeal that the gift to R. was not specific, but that all the pecuniary legacies were payable in full before she could be entitled to anything under the bequest to her. The personal estate (including that bequeathed to R.), was insufficient for the payment of the legacies, and the real estate had to be sold to make good the deficiency. After the legacies had been paid there remained a surplus of the proceeds of the sale of the real estate:—Held, that the real estate was charged with the payment of the legacies only in aid of the personal estate, and that R. was not entitled to be recouped pro tanto out of the surplus the loss which she had suffered by the application of the personal estate bequeathed to her in the payment of legacies. *Ovey, In re, Broadbent* v. *Barrow*, 55 L. J., Ch. 103; 31 Ch. D. 113; 53 L. T. 723; 34 W. R. 100. See *Taylor, In re*, infra; and *Whieldon* v. *Spode*, supra, col. 1647.

—— **Where Personalty originally Sufficient, but Wasted.**]—A testator gave his real estate for a term of 800 years to A., his son, and B., a stranger, to secure payment of so much of his debts and legacies as his personal estate should be insufficient to pay. Subject thereto he gave his residuary real estate to A. and C., another son. A. and C. were his executors; they paid his debts and legacies, except two legacies of 1,500*l.* each. At the testator's death, his personal estate was sufficient to pay the two 1,500*l.* legacies; but the executors wasted it, and the two legacies of 1,500*l.* each were not paid. A. and C. (B. being dead) made two mortgages: one to persons who knew, or had the means of knowing, that the advance was for the personal use of A. and C., but the money was paid into the hands of A. alone, the surviving trustee of the term; the other mortgage was to a person without notice of any improper application of the money; and the deed recited truly that the debts were paid, but untruly that the two legacies not paid were provided for, and the trusts satisfied:—Held, that the legacies were charged on the term, though the testator's personal estate was sufficient at his death. *Howard* v. *Chaffer, Howard* v. *Robinson*, 2 Dr. & Sm. 236; 32 L. J., Ch. 686; 9 Jur. (N.S.) 767; 11 W. R. 1057.

—— **As between Debts and Legacies.**]—A testator, by his will, made in 1882, charged his copyhold and freehold estates with his debts and funeral expenses and legacies, and gave the residue of his personal property to the trustees of the deed-poll upon trust to build a hospital on the site of premises conveyed by a deed-poll. The testator died within twelve months from the execution of the deed-poll, which therefore became void under the Statute of Mortmain. Upon further consideration in an administration

action :—Held, that the legacies must be paid out of the proceeds of the real estate, and the debts and funeral expenses, in the first instance, out of the personalty. *Taylor, In re, Martin* v. *Freeman*, 58 L. T. 538.

A testator devised his estates to his eldest son, but charged certain of them with legacies to his younger children, specifically charging one of such legacies, amounting to 10,000*l.*, upon one of his estates, and another legacy of 20,000*l.* upon a different estate. He then made other devises and bequests, and directed that a certain house and his residuary property should be sold in payment of his debts, and in ease of his real estates. The legatee of the 10,000*l.* filed a bill to have the trusts of the will declared and executed. Creditors were directed to come in, and the estates specifically charged with the payment of the debts were found not sufficient for that purpose. The court afterwards directed a reference to the master to take an account of the debts, and that in taking such account he should report the order and priority of such debts and incumbrances, and particularly that he should inquire and report whether any and what sum remained due to the person entitled to the legacy of 20,000*l.* and the priority thereof. This legacy had been assigned to trustees under a marriage settlement, and they were not parties to the suit, but went in with others upon the reference to the master. The master made a report of the amount of the debts, and found that this legacy was a charge affecting this particular estate, but was only next in priority after the payment of the judgment and bond debts of the testator remaining unpaid by sale of the other fee-simple estates of testator :—Held, that such finding was right. *Bouverie* v. *Norbury*, 3 Cl. & F. 247 ; 9 Bligh (N.S.) 611.

Exoneration of Personal Estate.]—Testator gave to his wife an annuity of 60*l.*, issuing and payable out of his real estate thereinafter devised to his three sons. He then gave to his daughter A. a legacy of 500*l.*, and to each of his sons H. and S., and to each of his daughters M. and E., a legacy of 1,600*l.*, to be paid, with interest, two years after his death. And he thereby charged and made chargeable his real estate, thereinafter devised to his three sons J., T., and F., with the payment of the said legacies and the interest thereon. He gave his personal estate (charged with the payment of debts, funeral and testamentary expenses and expenses of proving his will) unto his said sons J., T., and F., and gave all his residuary real estate (subject to mortgages, and subject to and charged with the payment of the annuity of 60*l.*, and the legacies to his sons H. and S., and his daughters M. and E., and also the legacy of 500*l.* to his daughter A., and subject also, in aid of his personal estate, to the payment of his debts, funeral and testamentary expenses, and the expenses of proving his will) equally between his said sons J., T., and F. :—Held, that the legacies were charged on the real estate exclusively in exoneration of the personal estate. *Needham, In re, Robinson* v. *Needham*, 54 L. J., Ch. 75.

By his will a testator bequeathed a legacy of 16,000*l.* to trustees for his daughter A. during her life, and after her death directed that the legacy should revert to and be added to his general residuary personal estate and go as the same was bequeathed by his will. The testator then gave his general residuary personal estate to B. The testator devised his estates in certain places to other trustees as a fund for the discharge of his debts, funeral and testamentary expenses, and his pecuniary legacies in aid of his personal estate, with power to his trustees, if they thought it expedient or necessary, either before or after his residuary personal estate should be exhausted, to raise money for those purposes by sale or mortgage, and subject thereto, upon trust for B. in fee. The personal estate of the testator was insufficient for the payment of his debts and legacies, and B. supplied such deficiency, including the annual payments to A. in respect of her legacy. A. survived both the testator and B. On the death of B. the question arose whether, as the testator's personalty was insufficient for the payments before mentioned, the testator intended that the corpus of the legacy should be raised out of the real estate devised to B. for the benefit of B., who was the testator's residuary legatee :—Held (following *Johnson* v. *Webster*, 4 De G. M. & G. 474), that the words "revert to and be added to my general residuary estate," in the will, shewed that the testator meant the legacy to be restored to the funds from which it was taken ; and that it was not to be taken from the real estate merely for the purpose of augmenting the personal estate: —Held, also, that B. had a vested interest in the charge on the real estate of which he was absolute owner ; and that such interest was in immediate contact with his ownership of the inheritance in the land :—Held, further, that, inasmuch as the charge was not raised during the lifetime of B., and that now it was neither necessary nor expedient to raise it, the corpus of the legacy was not raisable out of the real estate for the benefit of B.'s personal estate at the instance of those who were entitled to his personal estate. *Somerset* (*Duke*), *In re, Thynne* v. *St. Maur*, 55 L. T. 753. See *Lloyd* v. *Lloyd*, ante, col. 1141.

The testator bequeathed certain pecuniary legacies, and he gave his leasehold estates to his executors, to sell and apply the proceeds in part payment of the legacies :—Held, that the leaseholds were to be applied, as far as they would extend, in payment of the legacies, and that the deficiency was to be paid out of the general personal estate. *Bunting* v. *Marriott*, 19 Beav. 163.

—— **Lapsed Bequest.**]—A testatrix devised her real estate to trustees in trust for sale, and directed them out of the proceeds to pay her funeral and testamentary expenses, debts and legacies, and pay the residue to a class of persons. She then directed her trustees, who were also her executors, to sell her leaseholds, and if the sale moneys of the real estate were insufficient to pay her debts, funeral and testamentary expenses, and legacies, to apply so much of the proceeds of the sale of the leaseholds as should be sufficient for that purpose, and to pay the residue, or if no part was required for the above purpose, the whole of the proceeds to another class of persons. She then bequeathed to her trustees "all my personal estate," upon trust to call it in and convert it into money, and after payment of the expenses of such calling in and conversion, to pay the proceeds to the churchwardens of C. for charitable purposes. Part of the personal estate consisted of a mortgage debt, as to which the charitable bequest failed, and the crown became entitled, there being no next of kin :—Held, that there was upon the will a sufficient

indication of intention that the general personal estate should be exonerated from debts, funeral and testamentary expenses, and legacies out of the real estate; and if that was insufficient, out of the leaseholds; but that this right to exoneration failed as regarded the property which went to the crown, and that there was no distinction in this respect between the freeholds and leaseholds. *Browne* v. *Groombridge* (4 Madd. 495), in which a direction to exonerate the general personal estate out of a specific fund of personalty was held to enure for the benefit of persons who took by lapse, not followed:—Held, therefore, that the debts, funeral and testamentary expenses, and legacies, must be apportioned rateably between the pure and impure personalty, including the leaseholds; that the real estate and then the leaseholds were to be applied in exonerating the pure personalty from its proportion of debts, &c., and that the charity took the pure personalty, subject to so much of that proportion as the freehold and leasehold estates were insufficient to satisfy, and that the crown took the impure personalty (other than leaseholds) subject to its proportion of debts, &c. *Meere, In re, Kilford* v. *Blaney*, 55 L. J., Ch. 185; 31 Ch. D. 56; 54 L. T. 287; 34 W. R. 109—C. A.

And see EXECUTOR AND ADMINISTRATOR.

Agreement between Residuary Devisee and Trustee ineffectual to Re-adjust Burden of Charge.]—A testator gave a legacy of 4,000*l.* to trustees for the benefit of certain persons in succession, and directed that in case his personal estate should be insufficient, the amount should be raised out of his real estate. B. was residuary devisee and legatee. The trusts having been duly administered, with the exception of raising the 4,000*l.* B. was let into possession of the real and personal estate. The interest on the legacy was regularly paid. B. subsequently executed a deed, to which the surviving trustee of the testator was a party, whereby it was agreed that certain of the estates should be discharged from the liability to pay the legacy, and that the remaining estates should alone be charged with such payment. B. died, having devised some of the real estates. Upon a bill to obtain payment of the 4,000*l.* and interest:—Held, that the dealings with the property had not affected the charge created by the testator, and that both the real and personal estate remained liable for the payment of the legacy; that if the personal estate was originally sufficient to pay the legacy, then the residuary legatee had made his own assets liable; that if insufficient, then the real and personal estate which was handed over to the residuary legatee was liable, the personal estate remaining in specie being the fund primarily liable. *Hepworth* v. *Hill*, 31 L. J., Ch. 569; 8 Jur. (N.S.) 960; 6 L. T. 403; 10 W. R. 477.

What Property Charged—Estate in Remainder.]—Devise of lands to A. for life, remainder to such child or children as should be living at his death, and to their heirs, A. paying 40*l.* to R. This is a charge, not only on A.'s estate for life, but also on the remainder. *Sadd* v. *Carter*, Pre. Ch. 27.

A testator, after a specific bequest and devise, devised all his other real property to his wife for life or widowhood, and after her decease or second marriage he devised part thereof to his eldest son, but subject to the payment of an annuity to his daughter, and he directed that such annuity should be payable in equal half-yearly payments, the first to become due six months after his decease:—Held, that the annuity commenced at the death of the testator, and was payable from that time, but was chargeable only on the reversionary interest. *Jackson* v. *Hamilton* (post, col. 1675) approved; *Bywater, In re, Bywater* v. *Clarke* (ante, cols. 698–9) distinguished. *Williams, In re, Williams* v. *Williams*, 64 L. J., Ch. 349; 13 R. 316; 72 L. T. 324; 43 W. R. 375.

—— **Estate preceding Fee.**]—Devise to trustees, from and immediately after determination of precedent estate, to use of A. in fee, charged and chargeable with legacies, to be paid in twelve months, they run over the precedent estates as well as the fee. *Carter* v. *Carter*, 1 Ves. Sen. 168.

A. gave all his real and personal estate to his wife for life, and after her death, to her son absolutely, chargeable with payment of a legacy of 200*l.* to his daughter, within six months after his death, and with the payment of his debts and funeral and testamentary expenses. There was no personal estate:—Held, that the legacy was charged on the life interest as well as on the remainder of the real estate, and ought, with the arrears of interest for six years, to be raised by mortgage of the property, and that the remainderman ought to be recouped out of the rents and profits, to the full amount of the arrears of interest raised out of the estate. *Makings* v. *Makings*, 1 De G. F. & J. 355.

—— **Residue where Property ceases to exist.**]—Legacies to be paid from a farm when A.'s son attains twenty-one, the farm not being carried on, are not to be paid out of the residue. *Mayott* v. *Mayott*, 2 Bro. C. C. 125.

—— **Contingent Interest where Contingency fails in Part.**]—One devises lands to his son by his second wife in tail male, remainder to his eldest son by his first wife, provided that if the land should come to his eldest son, that then he or his heirs should pay 1,000*l.* to the testator's daughters within four months after the estate should come to them; and in default of payment, the trustees to enter and raise the money. The son by the first wife dies leaving a son; the son by the second wife suffers a recovery of a moiety of the land, and dies without issue, so that the moiety only of the premises comes to the son of the son by the first wife. Though no part of the premises ever came to the eldest son, yet the moiety of the land shall be liable to the payment of the whole 1,000*l.* without any apportionment. *Hooley* v. *Booth*, 2 Vern. 359.

A testator by will gives his moiety of an estate called H. to his sister and her children, and subsequently by a codicil, which purports to give them the whole of that estate if he shall possess it at his death, charges it with a sum of money to legatees; at the date of the will and codicil he was owner of only one moiety of H., but before his death he acquired the other; although the devise fails as to the after-purchased moiety, the charge is good for the whole sum, and equity will make no apportionment. *Lushington* v. *Sewell*, 1 Russ. & M. 169.

—— **Whole Burden thrown on One of Two Estates.**]—A bankrupt, to whom two estates

were devised, charged with the payment of legacies, had mortgaged each of them separately, and the assignees sold the estates subject to the unpaid legacies and the mortgages. One of the estates was sold for 1,000*l.* more than the amount of the mortgage money with which it was charged, and which surplus was sufficient to pay the legacies; but the proceeds of the other estate were scarcely sufficient to satisfy the mortgage on it:—Held, on the application of the mortgagees of the last mentioned estate, that the outstanding legacies should be charged exclusively on the surplus proceeds of the first estate. *Hartley, Ex parte*, 1 Deac. 288; 2 Mont. & Ayr. 496; 5 L. J., Bk. 13.

—— **Leaseholds whether charged with Realty.**]—A., in 1845, devised "all his real estate lying and being within F.," to trustees "to have and to hold unto them and the survivor of them for ever, or otherwise according to the several and respective natures and tenures thereof." He then directed the trustees to sell his real estate, subject nevertheless to legacies; and after directing his debts to be paid out of his personal estate, he directed that if insufficient for that purpose, the deficiency should be paid "out of the rents, issues, and profits of his real estate." He was possessed of freehold property and of leasehold property. Both estates, although not quite contiguous, were occupied by one tenant, at one entire rent. The question arose whether the leasehold property was chargeable pro ratâ with the freehold property, with the legacies:—Held, that the legacies were chargeable on both the freehold and leasehold estates rateably. *Swift* v. *Swift*, 29 L. J., Ch. 121; 1 L. T. 150; 8 W. R. 100—L.C.

A testator devised and bequeathed all his real, freehold and leasehold property in land, houses, or fee-farm rents to his son L., and after giving certain legacies to his four daughters and others, he directed that his said daughters should reside with L. while they remained unmarried, and in case of any of them not agreeing to do so, the testator directed as follows: "I direct that my son L. shall pay to them the annual sum of 200*l.*, said sum to be paid to them or any of them so long as they or any of them shall remain unmarried; and I charge all my real and freehold property with said annual sum of 200*l.*; and in case all my said daughters shall marry, then the said annual sum shall cease." The testator devised and bequeathed the residue of his property, real, freehold, and personal to L., subject to payment of his debts, funeral and testamentary expenses, and appointed L. his executor. The testator died possessed of freehold and leasehold property, as well as ordinary personalty:—Held, that the annuity was charged only on the freeholds, and not on the leaseholds or other personalty. *Greer* v. *Waring*, [1896] 1 Ir. R. 427.

—— **Charged under Mistake.**]—A testator devised his freehold estate to his widow, charged with a legacy to another, and also bequeathed to his widow his personal estate. The widow, by her will, gave a leasehold estate, part of the same property (erroneously describing it as a freehold), to A., subject, in conjunction with the freehold premises, to the legacy; and she devised the freehold premises to B., subject, with the premises devised to A., to the payment of the same legacy:—Held, that the fact of the testatrix having left the estates to A. and B. respectively, in the mistaken supposition that both estates were, under the will of the original testator, subject to the legacy, but which he had charged on the freehold only, was no ground for exonerating the estate bequeathed to A., for there was no reason to presume the testatrix would have apportioned her bounty differently if the mistake had not occurred. *Westcott* v. *Cullifford*, 3 Hare, 265; 13 L. J., Ch. 136; 8 Jur. 166.

—— **English and Foreign Realty.**]—B. gave all his real and personal estate (except his estates in Norway), to trustees to pay debts, legacies, and the incumbrances affecting his estates in England and Norway, and after payment of the debts and the legacies, he bequeathed all "the said residue," but not including his estates in Norway, directing payment thereout of certain sums of money to the persons mentioned. He then devised his estates in Norway to trustees, to pay debts and the incumbrances affecting the estates, if not extinguished out of his other property; and immediately from and after the payment of all his debts and the legacies therein before given by him, he directed his trustees to divide the rents equally amongst his children and the survivors during their lives, and, after the decease of the survivors, he devised his Norwegian estates to his sons in tail male:—Held, that the sums of money given were legacies, and were chargeable in the first instance on the English property, but if that should prove insufficient, then on the estates in Norway in aid of the English property. *Hakewill* v. *White*, 8 L. T. 529; 11 W. R. 609.

—— **Will in Scotch Form.**]—A domiciled Scotchman, by his will, devised and bequeathed to trustees all his real and personal estate, and after directing payment of his debts, testamentary and funeral expenses, and giving various legacies and annuities, directed the residue of his estate to be apportioned amongst certain charities. The testator's personal estate was more than sufficient to satisfy all his debts, testamentary and funeral expenses, and the legacies and annuities; his residuary estate comprised English and Scotch realty. By the law of Scotland, debts, testamentary and funeral expenses, and legacies, are a primary charge on personal estate, and annuities are a primary charge on heritable or real estate. The testator's heir-at-law claimed the English realty as undisposed of, on the ground that by English law it was not liable to contribute to the charities or annuities. It was conceded that the charitable gifts, so far as they were payable out of the English realty, were void:—Held, that the Scotch law of administration applied, and that the English realty, rateably with the Scotch realty, must contribute towards the annuities. *Hewit, In re, Lawson* v. *Duncan*, [1891] 3 Ch. 568; 65 L. T. 48.

Property specifically Devised — Presumption against Charge.] — Where there is a specific devise, or a specific legacy in a will, the presumption is that it is the intention of the testator that the devisee or legatee shall have it as it is given, in its integrity, and without derogation; and a general charge subsequently introduced into the will, which may in terms be capable of comprehending the specific devise or bequest, is not alone sufficient to take it away. A testator residing in Ireland, who was possessed of real and

personal property, made his will in June, 1836, by which he devised freehold estates to trustees for a term of ninety-nine years, to pay an annuity to his wife, and another annuity to one of his sons for life; the estate, after the death of his son, to go to the sons of that son in tail male. He gave other lands, some freehold, some leasehold, to other sons; he created annuities and gave legacies; directed the different properties devised and bequeathed to fall, in certain events, into his residuary estate; and at the end of his will directed that "in case my personal and chattel property shall be inadequate to the payment of the pecuniary legacies bequeathed by this my will, the deficiency shall be paid out of my real and freehold estates, and I hereby charge and encumber the same with the payment thereof." In a codicil he said "I charge and encumber all my estates, of every description, both real and personal, with the following legacies"; and he gave to these legatees a power to distrain on any part of his estates or property, of every description, for the arrears of the interest due on the annuities given by the codicil:—Held, that the legacies were not charged on the specifically devised estates. *Conron* v. *Conron*, 7 H. L. Cas. 168.

There is no distinction between a residuary and a specific devise of real estate; every devise of land being in effect specific, inasmuch as a residuary devise will only pass such real estate as the testator had at the time of making his will, and will not pass as real estate subsequently acquired. When pecuniary legacies are charged upon real and personal estates, and there is a deficiency of personal assets, the real estates, as well those specifically devised as those devised under a general residuary devise, must make good the deficiency. *Spong* v. *Spong*, 1 Y. & J. 300. Reversed 3 Bli. (N.S.) 84; 1 Dow (N.S.) 365.

A mere charge of legacies on all the real and personal estate does not of itself create a charge on any specific devise or bequest; and the presumption, in the absence of the clear expression of intention to the contrary which is necessary to rebut it, is against general legacies being charged on specifically devised lands or on specific legacies. *Campbell* v. *M'Conaghey*, Ir. R. 6 Eq. 20.

—— **Otherwise where Specific Devise Subsequent to Charge.**]—A testator devised and bequeathed all his estates, real, freehold, and leasehold, to trustees, on trust to pay an annuity of 120*l.* a year among three of his children, A., B. and C.; the said annuities to be charged on all his said estates; and after giving certain pecuniary legacies, he devised to his trustees a certain farm of land, held in fee-simple, to be divided between his two sons, P. and M., and devised to his trustees certain other lands to the use that his daughter R. should receive an annuity of 50*l.*, to be charged on the said lands; and subject thereto, to the use of his son P.; and he devised certain other lands to his trustees, to the use that his daughter J. should receive an annuity of 50*l.*, to be charged on the said lands, and subject thereto to the use of his son M. After certain specific bequests, the testator bequeathed all the residue and remainder of his personalty not otherwise disposed of—three-fourths to his sons P. and M., and one-fourth to be divided amongst three of his daughters:—Held, that the annuity of 120*l.* a year was charged upon, and payable out of, all the testator's real, freehold, and leasehold estates, including those specifically devised. *Spong* v. *Spong* (supra) and *Conron* v. *Conron* (supra) distinguished. *Cornwall* v. *Saurin*, 17 L. R., Ir. 595—C. A.

When legacies are by a will charged upon all the testator's real estate, and the will afterwards goes on to dispose specifically of parts of the real estate, the charge will, in the absence of anything to lead to a contrary conclusion, attach upon the lands specifically devised. *M'Carthy* v. *M'Cartie*, [1897] 1 Ir. R. 86.

Legacies were charged upon the personal estate of a testator, and the will provided that if the personalty should be insufficient the legacies should become a charge upon the realty. At the death of the testator the personalty was sufficient to meet the legacies, but at the date when payment was claimed by the legatees it was insufficient:—Held, that the charge on the realty took effect. *Richardson* v. *Morton* (infra, col. 1667) dissented from. *Ib.*—C. A.

—— **Or where Intention Expressed or Implied.**]—A husband, by will dated in 1857, bequeathed to his wife all sums of money that had come to his hands as part of her patrimony for her sole use and benefit, with the option of leaving it invested at 5 per cent. to be paid her quarterly, or if she wished to draw it out, then the property most suitable for sale to be disposed of to raise the amount due to her, being in fact a charge upon the property; and, if she so desired, this, as well as all just debts and obligations due from him, to be discharged as the first act of his executors:—Held, that the wife's patrimony was to be treated as a debt, and a charge on the specifically devised property as well as the rest of the property. *Mannox* v. *Greener*, L. R. 14 Eq. 456; 27 L. T. 408.

Testator directed that all his debts and funeral and testamentary expenses (not mentioning legacies) should be paid out of his personal estate. He then gave a number of legacies, and directed that if one of the legacies should fail, it should fall into his "residuary estate." He then devised all his freehold and leasehold hereditaments in the parishes of B., L., and R., "and all the rest, residue, and remainder of" his real and personal estate, to trustees, upon trust to make a weekly payment to his wife during her life, and subject thereto to invest the residue, and after his wife's decease, as to all his freeholds, and all his leaseholds, and all the residue and remainder of his estate and effects, to stand possessed thereof upon certain trusts. The personal estate, and the real estate other than the real estate in the parishes of B., L., and R., were insufficient to pay the legacies:—Held, that the legacies were a charge on the real estate in the parishes of B., L., and R. *Bray* v. *Stevens*, 12 Ch. D. 162.

A general charge by will of debts and funeral and testamentary expenses, and also legacies upon the whole of the testator's real and personal estate and effects, has the effect of charging the legacies upon specifically devised realty. *Emmerton, In re*, 3 De G. J. & S. 338.

A testatrix bequeathed to her trustees certain specified moneys, upon trust, "after payment thereout, in the event of my predeceasing my husband, of my debts and funeral expenses as well as of my testamentary expenses for the time being," for her nephew; and after giving

certain pecuniary legacies she devised and bequeathed all her real and personal estate not thereinbefore otherwise bequeathed, to trustees, upon trust after her husband's death, to sell and convert, and out of the proceeds, "subject nevertheless to the bequest of moneys to my said nephew hereinbefore contained," to pay her debts, pecuniary legacies, and funeral and testamentary expenses, and invest the residue and stand possessed thereof upon certain trusts. The testatrix predeceased her husband:—Held, that the moneys comprised in the specific gift were primarily applicable to the payment of the debts and funeral and testamentary expenses of the testatrix. *Hastings (Lady), In re, Hallett* v. *Hastings*, 55 L. J., Ch. 278; 54 L. T. 75; 34 W. R. 452.

Marshalling.]—A testator, seised and possessed of real and personal estate, after bequeathing some pecuniary legacies (amongst others 250*l.* to his son C. E.), directed by his will that his trustees should, in the first place, pay out of his personal estate all debts of every kind, including specialty debts, in full exoneration of his real estate. He devised to his wife an annuity for life, and to his daughter and his five sons respectively perpetual annuities, which he directed to be first, second, third, and fourth charges on his real estate, and two small annuities to others. He appointed his son C. E. and another, trustees and executors of his will. The testator's real estate produced 660*l.* a year. It was subject to two mortgages of 6,000*l.* and 1,500*l.* and was sufficient to pay the annuities charged thereon by the will if the mortgages were paid out of the personal estate (8,000*l.*), which was more than sufficient to pay the mortgages and other debts. But if the mortgages were primarily payable out of the real estate, and the personal estate applied in exonerating the real estate therefrom, it might not reach the legacy of 250*l.* to C. E.:—Held, on the construction of the will, that the mortgages were primarily payable out of the lands mortgaged; that the annuities were charged by the will on the real estate alone; and also, that the application of Locke King's Act and the acts amending it did not preclude the annuitants from their equity to marshal the assets. *Buckley* v. *Buckley*, 19 L. R., Ir. 544.

Charge whether on Corpus or Income.]—Legacy given to be paid within one year without interest, and, in case of default or refusal, devise of life estate. The year expired: and on a bill filed, the court decreed a sale of the land to raise the legacy together with interest from the end of the year, and costs of the suit. *Bell* v. *Shelton*, 9 L. J. (O.S.) Ch. 214.

—— **Effect of Words "Rents and Profits."**]—A direction to raise legacies out of the "rents and profits" of a real estate is a charge on the estate itself, and empowers the trustees to raise the money on it. *Londesborough (Lord)* v. *Somerville*, 19 Beav. 295.

Devise of Blackacre, subject to the debts of testator, to trustees, upon trust out of the "rents" and "issues" to pay to his three nieces a sum of 1,000*l.* at twenty-one or marriage, with interest from his death; and in case they should all die before twenty-one or marriage, he gave that sum to his nephew. The testator then bequeathed certain annuities, which he directed to be paid out of the "rents, issues, and profits" of Blackacre, and gave the annuitants power of distress and entry. He next devised ("after payment of the bequests and legacies aforesaid") Blackacre and all other his real and personal estate, subject to his debts, legacies, &c., to the same trustees, upon trust to pay 40*l.* annually for the maintenance of the nephew during minority; and directed the investment during that time of the surplus "rents, issues, proceeds, and profits" of Blackacre, and the other real and personal estate, with power to jointure, and with remainder over, in strict settlement to his (the nephew's) issue. At the date of the will the nephew was nineteen, and the nieces were respectively sixteen, twelve, and ten years of age. The testator left personalty to the value of 100*l.*:—Held, that the sum of 1,000*l.* bequeathed to the nieces might be raised by sale of Blackacre, and was not charged upon the annual rents only. *Spring* v. *Stephenson*, 1 Ir. Ch. R. 132.

A. bequeathed pecuniary legacies, to be paid after three years from his decease, but without interest. He then directed all his residuary personal estate to be accumulated to form a fund for payment of legacies; and in case of deficiency, charged his lands at U. with 1,000*l.* towards such deficiency; and in case of further deficiency, declared that the same should be raised out of the annual rents and profits of his lands at D., and subject thereto, he devised the lands at D. to M. for life remainder to his first, and other sons in tail. The personal estate and the 1,000*l.* being insufficient to pay the legacies:—Held, that the deficiency must be borne out of the rents and profits of the lands at D. as they accrued due, and that the tenant for life could not throw it as a charge on the corpus. *Marsh* v. *Marsh*, 2 Jur. (N.S.) 348.

A. devised land to trustees, on trust for B. (a minor) and his sons, in strict settlement, giving B. a power of charging the lands with 5,000*l.* for younger children, "to be raised by sale or mortgage of a competent part of the lands, or out of the rents and profits." A. then bequeathed legacies amounting in all to 12,000*l.*, to his grand-daughters, and directed that his executors "should place these legacies in some of the most eligible public funds," and accumulate such portions of the annual interest of them as was not required for the maintenance and education of the legatees. He then, after giving some small legacies, declared that if his assets, not thereby specifically disposed of, should prove insufficient for payment of his debts and legacies "it was his will that such deficiency should be made good and supplied by his trustees out of the annual rents and profits arising out of his estates, which he thereby desired that his trustees might receive and apply until such deficiency should be made good thereby, allowing, however, to his grandson B. so much as the trustee should deem expedient and fitting for his education and maintenance"; but if it should happen that there should be a surplus of his personal estate, after payment of his debts and legacies, he bequeathed such surplus among his several grandchildren above mentioned. The personal estate proved insufficient for the purposes contemplated. On the death of the testator, B. and the other grandchildren were made wards of court, and one of the executors acted as guardian. In the accounts and dealings in the matter of the minors, the legacies were treated as charged on the corpus of the estate, and B. paid interest on them until he died,

leaving a son, who refused to pay these charges :—Held, that only so much of the legacies as the personalty was inadequate to pay was at all charged on the real estate ; that the charge was only on so much of the rents and profits of the real estate in the years immediately following the testator's death as would have made up the deficiency ; and that B.'s son was not bound by the dealings in the minor matter. *Scott* v. *Clements*, 8 Ir. Ch. R. 1.

Testator being seised in fee of freehold collieries, for which he received a rent, and also having shares in a leasehold colliery, directed that his legacies should be paid "out of the rents and profits of his collieries":—Held, that the freehold collieries only were charged. *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 441 ; 6 Jur. 658.

Option to Trustees to pay Charges out of Income or Capital.]—By a deed, executed two years before his will, a testator devised estates in Glamorganshire, which comprised a canal, harbour and docks at Cardiff, and also estates in the counties of Bedford, Herts, and Durham, to A., B. and C., upon trusts out of rents and profits and sums to be raised by sale or mortgage, to pay expenses, salaries, mortgage debts, and the residue to the settlor. He empowered the trustees to enlarge, improve, and make additional works at Cardiff, and to manage the estates, with powers of leasing, sale, and mortgage. By his will, dated two months before the birth of his first son, the testator devised the Glamorganshire estates (except Cardiff Castle, park, and lands adjoining) to B. and C. and their heirs for a term of 1,500 years, and subject thereto to the use of his first son for life, remainder to his first and other sons in tail male. The trusts of the 1,500 years' term were declared to be, after payment out of income of certain annuities, of a specified sum for certain repairs, "by mortgaging or otherwise disposing of the term . . . or by, with and out of the rents, issues and profits of the same hereditaments . . . or by one . . . or all of the aforesaid ways and means, or by any other reasonable ways and means" to raise moneys sufficient for the above purposes, and with the moneys to arise from the sale of the estates in Bedford, Herts, and Durham, to satisfy the trusts of such sale. The trustees of the term were empowered to manage and improve the hereditaments comprised in the term in the same manner as the trustees of the deed. Testator then directed that, during the minority of a tenant for life of the Glamorganshire estates, D. and A. should enter into possession and receipt of the rents and profits of the same hereditaments, and thereout keep down the interest on mortgages, and maintain mansion-houses and grounds, and pay the surplus to the trustees of the 1,500 years' term for the purposes thereof, and "subject thereto, and after the trusts of the said term of 1,500 years shall be fully performed or satisfied," apply any annual sum they may think proper for the maintenance of the minor, and invest the surplus and accumulate the income for his benefit on attaining majority. The trusts of the proceeds of sale of the Bedford, Herts, and Durham estates were declared to be (1) to pay debts, including mortgage debts on the Glamorganshire estates ; and (2) to purchase lands to be settled as before. Six months after the birth of his first son, testator died, and during the minority the trustees of the 1,500 years' term laid out upwards of 1,000,000*l.* in enlarging and improving the canal, docks, and harbour, and in other works. This sum was largely paid out of income :—Held, that the expenditure was a charge on the corpus of the estates comprised in the term. *Bute (Marquis)*, *In re*, *Bute (Marquis)* v. *Ryder*, 27 Ch. D. 196 ; 32 W. R. 996.

—— **Timber cut where Time for Payment Limited.**]—Devise of land upon which timber is growing, to A. for life, remainder to B. in fee, paying several legacies within a limited time ; and in default of payment the remainder in fee is devised over to C., he paying the legacies ; upon a bill brought by B., the court gave leave to B. to cut down timber for the payment of the legacies, though it was opposed by the tenant for life, and the devisee over. *Claxton* v. *Claxton*, 2 Vern. 152 ; Pre. Ch. 15 ; Gilb. Eq. R. 338.

—— **Where Gift of Annuity.**]—A testator bequeathed a pecuniary legacy and a life annuity to his widow, and gave all his real and personal estate to trustees, upon trust, subject to the payment of the legacy and annuity, to pay the rents and income to his daughter for life, and he directed that after her death the estate should be held in trust for his grandchild. He empowered his trustees to continue his business and to increase or diminish the real or personal estate employed therein at his death :—Held, that the annuity was a first charge upon the corpus of the real and personal estate. *Webb, In re, Leedham*, v. *Patchett*, 63 L. T. 545.

—— **Bequest of Leaseholds "subject thereto."**]—Bequest of leaseholds "upon trust, out of the rents and profits of the said lands, to pay my just debts, and subject thereto, upon trust to pay out of the rents and profits of the said lands, to my wife Jane Moore, during her life, an annuity or yearly rent-charge of 150*l.* per annum ; and, subject thereto, I bequeath the said lands of S., upon trust to receive the rents and profits, and to apply the same for the maintenance, &c., of my son," and on his attaining twenty-one, to assign him the lands and accumulations (if any) of the said rents and profits, &c. :—Held, that the annuity was a charge upon the corpus of the leaseholds. *Moore's Estate, In re*, 19 L. R., Ir. 365.

—— **Direction to appropriate Fund—Deficiency in Income—Resort to Capital.**]—A testator, after giving various pecuniary legacies, bequeathed to various persons annuities of 1*l.* a week, and he directed sufficient funds to be appropriated in the name of his trustee out of his personal estate to answer by means of the income the payment of the annuities, and he directed that on the dropping of the annuities the appropriated funds should follow the distribution of his residuary personal estate. The income of the personal estate, after payment of the pecuniary legacies, was insufficient to pay the annuities :—Held, that the annuities were payable, so far as necessary, out of the capital of the estate. *Taylor, In re, Illsley* v. *Randall*, 53 L. J., Ch. 1161 ; 50 L. T. 717 ; 33 W. R. 13.

And see ANNUITY.

Remedies of Legatee—Civil and Common Law.]—Suits for legacies charged upon personal estates were originally and properly cognisable in the ecclesiastical courts as a branch of that

testamentary jurisdiction which undoubtedly belongs to them; but legatees instituting suits there, finding the authority of that court inadequate to enforce a full discovery of assets, were frequently driven into equity for that purpose, and therefore, to save circuity of suit, and in ease of the suitor, courts of equity exercised complete jurisdiction in the matter by enforcing the discovery and decreeing payment of the legacy. But in the exercise of this concurrent jurisdiction courts of equity necessarily adopted the law of that forum in which the suit was originally cognisable, and therefore it is that where a suit is instituted in equity for payment of a legacy charged upon the personal estate, if a question arise upon the right of the legatee to demand payment, it is governed by the civil law; whereas, if the legacy is charged on a real estate, the rules of the common law prevail, because in the latter case the jurisdiction of the temporal court is original and exclusive. *Keily* v. *Monck*, 3 Ridgw. P. C. 243.

—— **Right to proceed at Law or in Equity.**]—A married woman, who is entitled to a legacy charged on land, with powers of distress and entry, has a right to file a bill to obtain payment of the legacy, instead of proceeding at law, although the effect may be to give to her an equity to a settlement which she would not otherwise possess. *Duncombe* v. *Greenacre*, 6 Jur. (N.S.) 987; 8 W. R. 657.

—— **Charge remains good as long as Property exists.**]—As long as the fund itself exists upon which a legacy is charged, though it devolve either upon the heir or the executor, yet they take it, subject to the charge. *Hills* v. *Wirley*, 2 Atk. 605.

Where, by a prenuptial settlement, the property of the wife was secured to her, with power of disposition by will, and she bequeathed a portion of the fund to her son, and the residue to her husband, whom she constituted her executor:—Held, that upon his bankruptcy, and a sale of his real estate, the legatee had no claim, by privilege of hypotheque under the colonial (old French) law, against the proceeds in the hands of the sheriff, such fund not appearing to have arisen from any part of the wife's property. *Smith* v. *Brown*, 2 Moore, P. C. 35.

Devise to A., charged with a legacy to B.; A. sells the estate, without having discharged the legacy. On a bill filed by B. against A. for payment of the legacy, decree against the purchaser, with decree over against A., in case upon inquiry it should turn out that no deduction had been made from the purchase-money in respect of the legacy. *Newman* v. *Kent*, 1 Mer. 240; 15 R. R. 110.

—— **Charge good though Devise fails.**]—E. devises lands to his second son T., upon condition that T., or his heirs, should pay to T.'s children 90*l.*, to be equally divided among them, and on default of payment a clause of entry or distress. T. died in the testator's lifetime; the son of the eldest son of the testator entered on the lands as heir-at-law, and sold them. The legacy to the children of T., the testator's second son, is a continuing charge on the land in the hands of the purchaser, and they are entitled to be satisfied for the same, with interest. *Wigg* v. *Wigg*, 1 Atk. 382.

An estate was devised subject to payment of legacies to the plaintiff. The devisee died before the testatrix, and her heir-at-law entered into possession of the property, and in 1847 devised the same to the defendant upon certain trusts. The defendant having refused to pay the legacies, the estate was, on a claim filed by the legatees, ordered to be sold, and the proceeds paid into court. The fund produced by the sale was not sufficient to pay the legacies and the costs of the plaintiff. The court held that the defendant was entitled to costs out of the fund in priority to the plaintiff. *Woollatt* v. *Woollatt*, 4 Jur. (N.S.) 1292.

—— **though Condition becomes Impossible of Fulfilment.**]—A testatrix devises real estate to trustees upon trust, to raise out of the same, by mortgage, a sum sufficient to pay certain legacies, which are made payable twelve months after her decease, and subject to that charge "in trust for R. N. in fee, provided that if R. N. shall not, within six calendar months after my decease, by writing under his hand and seal, &c., accept the devise, and shall not at the same time secure to the satisfaction of the said trustees, or pay to them a sum of money sufficient to satisfy the legacies," the trustees shall stand seised of the real estates upon trust to sell the same, and to distribute the money among the legatees, in proportion to the amount of their several legacies; R. N. died in the lifetime of the testatrix:—Held, that the legatees are entitled only to their legacies, and not to the whole produce of the estate. *Davidson* v. *Davidson*, 3 L. J. (o.s.) Ch. 103.

—— **Remainder Charged with Payment at Future Date—Charge Lost by Sale in Interim.**]—Copyhold hereditaments were devised to A. for life, and, after his decease, the same were devised to B., his heirs and assigns, but subject to the payment of 400*l.* within three years from the death of A. to C., her executors, administrators, or assigns. B. sold the hereditaments for the full value, allowing nothing in respect of the legacy. A. afterwards died, but the legacy was not paid at the end of the three years. The purchaser sold the hereditaments to two persons, in equal shares, one of whom purchased the share of the other, and was admitted to the whole. C., the legatee of the 400*l.*, died, and her executor filed a bill against the party admitted to the copyholds, and against B., praying an account of what was due for the legacy, and a decree directing the defendants, or one of them, to pay. The case against B. was pressed at the bar, but against the other defendant was abandoned:—Held, that, though the will charged the hereditaments with the legacy, it did not charge B. personally with the same, and that, though he accepted the devise, he was not bound to pay the legacy when the three years expired; held, also, that B. was not a trustee for the plaintiff, the representative of C., of so much purchase-money as would answer the legacy. *Jillard* v. *Edgar*, 3 De G. & Sm. 502; 13 Jur. 1114.

—— **Where Charge on Estate contracted to be Purchased.**]—Pecuniary legacy directed to be paid by sale of an estate, which testator had contracted to purchase, is payable out of the testator's general assets, if contract cannot be completed. *Fowler* v. *Willoughby*, 2 Sim. & S. 354; 25 R. R. 219.

—— **Against Executors—Deficiency of Assets for Debts no Answer.**]—A bill being filed for payment of a legacy charged upon land, pursuant to a power, payment was decreed, although the defence set up was, that the assets were deficient for the payment of debts; the court holding that executors cannot make such defence, but that if this question had arisen upon a bill filed by the creditors, it might have received a different consideration. *Frazer* v. *Frazer*, Wall. Lyn. 231.

—— **Where Devastavit.**]—A legacy, payable to the legatee at twenty-one, was charged primarily on the testator's personalty, and on his realty, failing sufficient personal assets. At his death the personal assets were sufficient, but, owing to a devastavit by the executors, became at some subsequent unascertained time inadequate. The legatee attained twenty-one in 1849. The petition was filed on the 26th of January, 1863:—Held, first, that the mere non-enforcement of payment from the executor was no laches to estop the legatee; held, secondly, the real estate of the testator was liable to the payment of the legacy. *Massey, In re*, 14 Ir. Ch. 355.

When a legacy is given to an infant vesting at once, but payable on his attaining twenty-one, and real estate is charged with so much of the debts and legacies as the personal estate shall be insufficient to discharge, the time for determining whether and to what extent the real estate is charged is the death of the testator, and not the time at which the infant attains twenty-one, and if the personalty is then sufficient, the real estate will not be affected by a deficiency subsequently arising from a default of the executor. *Richardson* v. *Morton*, 41 L. J., Ch. 8; L. R. 13 Eq. 123. But see *M'Carthy* v. *M'Cartie*, supra, col. 1660.

—— **Against Purchaser of Property Charged.**]—A legacy was charged on the testator's personal, and if that should prove deficient, on real estate. The personal estate was sufficient at the testator's death, but was distributed without any provision being made for the legacy. The legatee by her marriage settlement settled a portion of the legacy on trusts for herself, her husband, and the children of the marriage who should be living at the death of the survivor of the husband and wife. Afterwards the wife became entitled to the real estate charged by descent, and she and her husband sold it to different purchasers. A bill, filed by her and an infant son, praying to have the legacy declared a charge on the real estate, and to have the money raised, dismissed as against the purchasers. *Beynon* v. *Gollings*, Romilly's Notes of Cas. 132.

—— **Against Mortgagee.**]—If an estate is given to a devisee charged with the payment of legacies, and he mortgages the estate to one person, and afterwards sells it to another, the purchaser will stand in the place of the legatees, but will do so bound in equity to make good the mortgage debt. *Colyer* v. *Finch*, 5 H. L. Cas. 905; 26 L. J., Ch. 65; 3 Jur. (N.S.) 25.

—— **Right of Annuitant to have Estate Realised to Secure Annuity.**]—When a testator bequeaths legacies and annuities, and then gives the residue of his property, after payment of his debts, funeral and testamentary expenses, legacies, and annuities, the annuitants are not entitled as a matter of right to have the estate converted, and a sum sufficient to answer the annuity invested in such securities as the court would approve for the investment of funds under its control; but they are entitled to have the annuities sufficiently secured, for instance by a mortgage of real estate of the testator. A testator, after bequeathing 100*l.* to each of his two executors, directed his executors to pay to his father and his sisters life annuities amounting together to 700*l.*; and he declared that the residue of his property, after payment of his debts and funeral and testamentary expenses, and the legacies and annuities thereinbefore directed to be paid, should be divided amongst his next of kin and heiresses, as though he had died intestate with respect thereto. The testator's estate consisted mainly of two freehold theatres and two leasehold theatres. The freehold theatres were let to tenants on lease at rents respectively of 700*l.* and 1,317*l.*, and produced respectively (after deducting outgoings) net incomes of 629*l.* and 888*l.* The testator was the original lessee of the leasehold theatres at the respective rents of 750*l.* and 25*l.* for the respective terms of eighty years and seventy-one years. Of the eighty years nine years had expired, and of the seventy-one years twenty-six years had expired. Both these theatres were underlet at largely improved rents, and they respectively produced net profit incomes of 2,109*l.* and 186*l.* Each of the leasehold theatres, and one of the freehold theatres, was subject to a mortgage, the mortgage debts together amounting to 12,500*l.* The testator's debts (other than the mortgage debts on the theatres) and his funeral and testamentary expenses and pecuniary legacies had been all paid out of his personal estate, and there remained a balance of 2,000*l.* in the hands of the surviving executor. The annuities had been punctually paid since the testator's death. The annuitants claimed to be entitled to have the leasehold theatres sold, and the mortgage debts paid out of the proceeds of sale, and that a sufficient sum should then be invested, in the mode in which cash under the control of the court would be invested, to provide for the payment of the annuities. The residuary legatees proposed that the executors should raise by mortgage of one of the leasehold theatres such a sum as (with the 2,000*l.* in the executor's hands) would be sufficient to discharge the testator's mortgage debts, and that the annuities should be secured by a first mortgage on the two freehold theatres, the charge of the annuities on the residue of the testator's estate (subject to the new mortgage to be created) remaining undisturbed, with liberty to the annuitants to apply to the court for additional or other security in case the annuities or any of them should fall into arrear; and that, after payment of the interest on the new mortgage and the annuities, the residue of the income of the estate should be divided between the residuary legatees:—Held, on the authority of *Potter, In re* (infra), *Webber* v. *Webber* (post, col. 1693), and *King* v. *Malcott* (9 Hare, 692), that the annuitants were not entitled to have the leasehold theatres sold, but that, the estate having been cleared by the payment of the testator's debts and funeral and testamentary expenses, the annuitants were only entitled to have the annuities sufficiently secured, and that the proposed security would be sufficient. *Parry, In re, Scott* v. *Leak*, 42 Ch. D. 570; 61 L. T. 380; 38 W. R. 226.

The testator gave all his real and personal estate to his son, upon trust to pay thereout weekly and every week to the testator's wife during her life the sum of 1*l.* 10*s.*, and, subject thereto, upon trust for his said son absolutely. The testator had been dead four years, and the weekly payment had been regularly made during all that period. The widow now asked that its future payment should be secured by the sale of the property and the investment of the proceeds. The estate consisted substantially of a leasehold public-house, and the business carried on there, and the total amount of it, if realised, would not have been equal to the amount of the capitalised value of the annuity:—Held, that the property was given to the son absolutely, subject only to the payment of the annuity, and so long as he paid that, he was entitled to the quiet possession of his property, and the widow was not entitled to have it sold. *Potter, In re, Potter* v. *Potter*, 50 L. T. 8.

—— **Annuity in Arrear—Mortgage or Sale of Settled Estate.**]—The court has a discretionary power to order the sale or mortgage of real estate charged with the payment of annuities in order to raise funds to pay off arrears. *Graves* v. *Hicks* (11 Sim. 551) and *Taylor* v. *Taylor* (L. R. 17 Eq. 324) doubted. *Tucker, In re, Tucker* v. *Tucker*, 62 L. J., Ch. 442; [1893] 2 Ch. 323; 3 R. 436; 69 L. T. 85; 41 W. R. 505.

And see ANNUITY.

—— **Right of Legatees to Back Rents.**]—Where a devisee or his assigns have been in possession of real estate charged with the payment of legacies, and the estate proves insufficient to satisfy the legacies, the legatees are not entitled to back rents. *Garfitt* v. *Allen* or *Allen* v. *Longstaffe*, 57 L. J., Ch. 420; 37 Ch. D. 48; 57 L. T. 848; 36 W. R. 413.

Statute of Limitations.]—In an action to raise the amount due on an equitable mortgage, instituted by the mortgagee, lands were sold under the judgment pronounced at the first hearing of the action, and realised more than sufficient to pay the plaintiff's demand and costs. An order was made directing inquiries as to the other incumbrances on the lands sold, and their priorities, under which claims were brought in by legatees entitled to legacies admittedly charged on the lands. The only question being the date from which interest on these legacies should be compounded:—Held, that under the 102nd General Order in Chancery, 1843, the claim of the legatees was a proceeding by way of suit within s. 42 of 3 & 4 Will. 4, c. 47, and that the legatees were entitled to interest on the legacies for six years prior to the commencement of the action. *Archdall* v. *Anderson*, 25 L. R., Ir. 433.

—— **Procedure—Where Adult and Infant Legatees.**]—Where there are adult and infant legatees whose legacies are charged on a real fund, though the adult legatees have a right to have their legacies immediately raised, and for that purpose a sale may be necessary, and the heir offers the residue of the purchase-money to be laid out as a security for the interest of the legacies given to the infants when due, the court will not deprive them, in case of deficiency, of recourse to the real fund. *Dickinson* v. *Dickinson*, 3 Bro. C. C. 19.

—— **Implied Declaration by Court that Legacies are charged.**]—By his answer, a defendant insisted that a former tenant in tail had paid off certain legacies, which he alleged were charges upon the real estate, out of a specified fund; and that the sums so paid off were still charges upon the real estate. By the interlocutory decree, it was referred to the master to take an account of the sums advanced on foot of the specified fund in exoneration of the lands; and whatever should appear to be so advanced was thereby declared to be a charge on the lands:—Held, that this amounted to a declaration that the legacies were a charge on the lands. *Kelly* v. *Lennon*, 1 Jo. & Lat. 305; 7 Ir. Eq. R. 98.

—— **Right of Legatee to Production of Documents identifying Property.**]—The plaintiff was entitled to a legacy which the testator had charged on his estates not in settlement. The defendant stated that the testator was tenant in tail of part of the estate, but did not specify it, and he admitted the possession of a copy of a deed creating the entail, but he stated it did not make out the plaintiff's case:—Held, he was bound to produce it for the plaintiff's inspection, as tending to shew what estates were in settlement. The defendant being entitled to an estate, subject to a charge thereon, belonging to the plaintiff, mortgaged it and delivered the title-deeds to the mortgagees, but he retained copies:—Held, that he was bound to produce the copies, though the mortgagees were not parties to the suit. *Hercy* v. *Ferrers*, 4 Beav. 97; 10 L. J., Ch. 273.

—— **Receiver when Appointed.**]—A testator in possession of lands devised the same to his widow for life, remainder to another tenant for life, with remainders over; and he gave to the plaintiff 200*l.*, which he charged on specified land, part of his lands devised, payable after the widow's death. The widow was possessed for her life, and, on her death, a stranger entered into and kept possession of the lands of the testator. The plaintiff by his bill, to which the tenants for life and in remainder and the stranger were defendants, asked that the 200*l.* legacy might be raised out of the specified land. The tenant for life disclaimed. The stranger alleged a title paramount to that of the testator, and objected that he ought not to be a party:—Held, that the stranger could not be sued in this court by any person claiming under the will, and he was dismissed with costs; and the court declared the plaintiff entitled to his legacy, appointed a receiver, and ordered that the plaintiff should be at liberty to bring such action as he should be advised for the recovery of the specified land in the names of the tenants for life and in remainder upon an indemnity. *Daniel* v. *Davies*, 5 De G. & Sm. 611.

18. ABATEMENT AND PRIORITY.

Priority—Principles.]—The court will not strain to prefer any legacy to another; but where there is a deficiency of assets, will let the general rule of equality take place. Appointing a legacy to be paid at a different time will not give it a preference. *Clark* v. *Sewell*, 3 Atk. 99.

The rule is, that in case of deficiency of assets all annuities and legacies abate rateably, and that the onus lies on the party seeking priority to make out clearly and conclusively that such priority was intended. In deciding upon questions of

priority under a will, the mere circumstance of relationship to the testator is not entitled to much weight; it constitutes but an auxiliary reason for giving priority where the words used in the will favour the notion of priority to a sufficient degree. *Miller* v. *Huddlestone*, 3 Mac. & G. 513; 21 L. J., Ch. 1; 15 Jur. 1043. Reversing 17 Sim. 71.

Primâ facie, a testator must be presumed to intend that all his legacies should be equally paid, and the onus is upon those who contend for a priority to shew that the testator meant to give a preference to a particular legatee. A testator gave 1,000*l.* to trustees, in trust, to pay the interest to his wife during her life, and after her decease he declared his will to be that the 1,000*l.* should become part of his personal estate and applicable to the trusts or payment of the legacies given by his will, and he gave a legacy of 500*l.* in trust for N. M. and his wife, in nearly the same words:—Held, that a priority was given to these two legacies. *Brown* v. *Brown*, 1 Keen. 275.

The circumstance that legacies are payable immediately is not per se sufficient to give them priority over legacies the payment of which is postponed. *Nickisson* v. *Cockill*, 3 De G. J. & S. 622; 32 L. J., Ch. 753; 9 Jur. (N.S.) 975; 8 L. T. 778; 11 W. R. 1082.

One by will gives several legacies, and afterwards in the same will apprehending there will be a surplus, therefore gives further legacies: the legacies in the former part of the will shall have preference in case of a deficiency. One makes a will, then a codicil, and gives legacies by both; on a deficiency they shall come into average. *Att.-Gen.* v. *Robins*, 2 P. Wms. 23.

—— **Legacy to Wife no Exception.**]—Where the estate of a testator is insufficient to pay all legacies in full, a legacy given to his wife to be paid to her immediately after his death, for her immediate requirements, is liable to abatement as well as the others. *Cazenove* v. *Cazenove*, 61 L. T. 115.

A legacy to a wife, though given to enable her to provide a home, and made payable within a short period after the decease, has no priority over other legacies. *Hardy, In re*, *Wells* v. *Borwick* (infra), not followed. *Schweder, In re*, *Oppenheim* v. *Schweder*, 60 L. J., Ch. 656; [1891] 3 Ch. 44; 65 L. T. 64; 39 W. R. 588. And see *Miller* v. *Huddlestone*, supra.

Express Direction—What amounts to.]—A testator, upon his marriage, covenanted to settle certain property so as to secure for his wife a jointure of 400*l.* per annum. This covenant the testator never performed, but directed the trustees of his will to pay the interest of 5,000*l.* to his wife for life, in addition to the provisions made for her by the marriage articles, and that 1,000*l.* of said sum should be paid to such person as his said wife should by deed or will appoint. There were several other legacies bequeathed by the testator. The 1,000*l.* was paid to the widow herself, but no portion of the interest which accrued upon the balance of 4,000*l.*, in consequence of the widow's claim, under the covenant in the marriage articles, having exhausted the whole fund properly applicable for that purpose. Upon the widow's death, her personal representative claimed the arrears of interest out of the corpus of the fund, which was insufficient to pay all the legacies bequeathed by the testator:—Held, upon the true construction of the will, that the interest was given to the wife in priority to the other legacies, and that her personal representative was entitled to be paid the arrears. *Pepper* v. *Bloomfield*, 3 Dr. & War. 499; 2 Con. & L. 198.

Testator directed his trustees to invest a sum of 4,500*l.*, "to be raised out of his personal fortune"; of this sum he gave to his daughter 3,000*l.*, and the remainder to collateral relatives; he then gave his wife 1,000*l.* out of his personal property. The whole personal estate only amounted to 4,500*l.*, and the wife received the 1,000*l.*:—Held, that the collateral relatives were not entitled to have the personal estate accumulated to make up 4,500*l.* above 1,000*l.* *Acheson* v. *Fair*, 2 Con. & L. 208; 3 Dr. & War. 512.

A testator seised of P. and other lands directed all his just debts, funeral expenses, and legacies to be paid by his executors, and devised all his real and freehold estates (save a part devised to his wife) upon trust that his wife and her assigns should, after his decease, receive a rent-charge with power of distress, and that three of his daughters should receive rent-charges with like remedy by distress and entry as provided with respect to the rent-charge to his wife. The testator then bequeathed pecuniary legacies to his children, and left all the residue and remainder of his real, freehold, and personal estates, subject to his debts and the aforesaid legacies and annuities, to the trustees:—Held, that the rent-charges to the daughters were specifically charged on the same lands as the rent-charge to the wife, and had priority over the legacies which were charged by the residuary clause only. *Weir* v. *Chawley*, 1 Ir. Ch. R. 295.

Testator gave legacies to trustees, in trust, for his daughters, for their separate use for their lives, and, after their deaths, for their children. By a codicil, after reciting that he had settled on his daughters fortunes which he was satisfied his property would allow of being increased, he gave to each of them 500*l.*, which he directed not to be settled, but to be paid to them. By a second codicil, he gave to his wife 3,000*l.* in lieu of 1,000*l.* which he had given her by his will. His property proved insufficient to pay the legacies in full:—Held, that the legacies given by the first codicil were postponed to the legacies given to the daughters by the will, and also to the legacy given to the wife by the second codicil. *Stammers* v. *Halliley*, 12 Sim. 42; 5 Jur. 817.

A testatrix who was entitled to half of her sister's residuary estate bequeathed a large legacy, which, if it should fail, she directed should fall "into her own estate." She bequeathed the residue of her property (except that derived from her sister) to A., and the residue of her property, derived from her sister's estate, to B.:—Held, that the latter must contribute with the former to payment of the debts, expenses, and legacies. *Greenwood* v. *Jemmett*, 29 Beav. 479.

One having two sons and a daughter, by will gives to each 2,000*l.* payable at twenty-one, provided, if assets fall short to pay the legacies, the abatement shall be borne out of the sons' legacies. Testator leaves assets to pay, which the executrix wastes; the daughter's legacy shall have the preference. *Marsh* v. *Evans*, 1 P. Wms. 668.

A testator gave to his wife all his furniture and effects, together with the sum of 500*l.* to be paid to her immediately after his decease. He also directed his trustees to raise out of his estate the

sums of 12,000*l.* and 5,000*l.*, and invest the same and pay the interest of the 12,000*l.* to his wife during her life, and the interest of the 5,000*l.* to his brother and sisters during their lives, and after the death of his wife, brother, and sisters, those sums were to fall into the residue of his estate. He then gave his brother and sisters legacies of 6,000*l.* and 2,000*l.*, and gave other smaller legacies. His estate proved insufficient for the payment in full of all the legacies :—Held, that the legacy of 500*l.* to the wife had priority over all the other pecuniary legacies. Held, also, that the legacies of 12,000*l.* and 5,000*l.* had priority over the other legacies. *Blower* v. *Morret*, infra, dissented from. *Hardy, In re*, *Wells* v. *Borwick*, 50 L. J., Ch. 241 ; 17 Ch. D. 798 ; 44 L. T. 49 ; 29 W. R. 834. But see *Oppenheim* v. *Schweder*, supra.

A testator gave and bequeathed to his wife "the sum of 5,000*l.*, to be paid to her out of my estate," and he appointed her and another executors. After certain specific devises and bequests, the testator provided as follows : "Out of the rest, residue, and remainder of my property I give, devise, and bequeath the following legacies," and then followed a number of bequests of money to certain persons. He appointed his wife residuary legatee. In the administration of the personal estate of the deceased by the court, the assets proved insufficient for the payment of all the legacies in full :—Held, that the legacy of 5,000*l.* to the testator's wife was entitled to priority of payment over the other pecuniary legacies bequeathed by the will. *Browne* v. *Malone*, [1897] 1 Ir. R. 571.

—— **Effect of Words—"In the First Place."**]—Pecuniary legacies abate in proportion, notwithstanding a direction in the will that they are to be paid "in the first place," or a direction as to the time of payment. If, however, an intention that any legacies are to be paid in full is to be collected or reasonably inferred, it will be otherwise, as where a legacy is meant as a purchase of dower to which the party is entitled. *Blower* v. *Morret*, 2 Ves. Sen. 420. But see *Hardy, In re*, *Wells* v. *Borwick*, supra.

If priority is contended for as arising on the face of a will between the objects intended to be benefited by the will, the point must be determined by the court ; but if a question arises of priority between the extrinsic incumbrancers, it is a fact to be ascertained by the master. The words in a will in trust, "in the first place," are merely words of method and order, and do not imply priority of payment. *Nash* v. *Dillon*, 1 Moll. 236.

Unless contrary intent clearly appears in will, presumption is that testator intends all legacies to be equally paid. Words "in the first place, I give to A., and then to B., then to C.," not evidence of such intent. Nor words "to A. payable at one month, to B. at six months, and C. at twelve." Nor "in the first place, I direct, &c., to A., then to B., then to C.," nor "I direct that my executors shall, in the first place, &c., to A., in the next place to B., then to C." Expressions in will direct, after payment of debts, "in the next place" certain legacies ; and that trustees should afterwards raise other legacies :—Held, not to give first legatees any priority in payment, but in case of deficiency all shall abate alike. *Beeston* v. *Booth*, 4 Madd. 161 ; 20 R. R. 287.

Legacies directed to be invested, and to become payable and paid in a certain order, with interest from the testator's death. The assets being deficient, the court, on the context, held that they were payable pari passu. A testator, by his will, directed 60,000*l.* to be invested in lieu of 6,000*l.* secured by his marriage settlement, and the interest to be paid to his wife, and after her decease, the principal to be applied as therein mentioned. He then directed sundry legacies to be invested for certain relatives, to be paid within a year after his death, if they should be of age, and if not, upon coming of age, with interest in the meantime ; but the principal sums were not to be paid till after the payment or investment of the 60,000*l.* He then gave other legacies, and directed that the several sums given by his will, and not thereinbefore particularly directed, "should be invested in the order, and become payable and paid in the manner thereinafter mentioned," and that the 60,000*l.* should be the sum first paid and invested, and that a legacy to one of his sisters should be the next paid and invested, and so on : —Held, that, except as to the 60,000*l.*, the priority intended was a priority of administration or realisation of assets, and not of rights and interests ; and therefore (the estate being insufficient) that all the legacies, except the 60,000*l.*, abated pro ratâ. *Dunboyne (Lord)* v. *Brander*, 18 Beav. 313. And see *Brown* v. *Allen*, infra, col. 1678.

—— **Where Estate Proves Sufficient — But Direction for Abatement in Case of Loss.**]—Two legacies, one to a natural brother, the other to a niece, with a direction, that in case of loss in the amount of property (which happened) the same should be reduced, 100*l.* less than mentioned :—Held, notwithstanding there was residue sufficient for the satisfaction in full, that each legacy must, under the circumstances, abate in a sum not exceeding 100*l.* *Dowell* v. *Wilson*, Coop. t. Brough. 504.

—— **But Specific Fund Deficient.**]—A testator bequeathed a debt of 4,000*l.* due from his brother to trustees for his brother for life, and he gave 1,000*l.*, part of the 4,000*l.*, to A. ; 2,000*l.*, other part of the 4,000*l.*, to B. ; and as to the 1,000*l.*, being the remainder of the 4,000*l.*, to sink into his general estate. He directed that if his estate should be deficient, the legacies should abate proportionately ; and if it should be more than sufficient to satisfy the legatees, the legacies should be increased proportionably. At his death, 2,120*l.* only remained due :—Held, that the legacies of 2,000*l.* and 1,000*l.* were specific, and ought to abate. Held, secondly, that A. and B. were not entitled to have the whole 2,120*l.* applied rateably in satisfaction pro tanto of their legacies, but that a rateable proportion of the 2,120*l.* ought to be attributed to the 1,000*l.* directed to sink into the residue. *Ib.* Held, thirdly, that the legacies of 2,000*l.* and 1,000*l.* ought to be increased out of the surplus of the estate, in proportion to the reduced amounts payable in respect of such legacies after the abatement. *Duncan* v. *Duncan*, 27 Beav. 386.

Between General and Residuary Legatees.]—In our law, particular legatees are always preferred to the residuary legatees. Secus, in the Roman law. *Purse* v. *Snaplin*, 1 Atk. 418.

P. assigned by deed to a trustee all his expectations under the will, or as next of kin, of G. deceased, upon trust to pay certain debts and

then for P. for life, remainder to his children; and a power was reserved to P. to revoke by will the trusts of the deed, and to reappoint the same generally. P., by his will, revoked the trusts, and appointed 5,000*l.*, part of the trust fund, to A., his mother; 500*l.* to M., his executor; and the residue to his only son, L. The creditors of the testator having claimed to be paid out of the fund as equitable assets, and thereby reduced the fund so that there was only sufficient to pay the 5,000*l.* and 500*l.* given to A. and M.:—Held, that as the fund was unascertained at the date of the will, the loss caused by payment of creditors was not to be borne by all parties interested in the fund, pro ratâ, but fell exclusively on the residue. *Petre* v. *Petre*, 14 Beav. 197; 15 Jur. 693.

The testator bequeathed all his moneys in government stock, and all his other moneys, on trust to sell so much of the stock as should be sufficient to pay the following legacies. He then bequeathed certain legacies, and then directed that his trustees should expend all the residue of his government stock and other moneys which he should die possessed of, after payment of his legacies, debts, &c., in land:—Held, a gift out of the general residue, and that the legacies should not abate in favour of the devisee of the land to be purchased. *Jackson* v. *Hamilton*, 3 Jo. & Lat. 702; 9 Ir. Eq. R. 430.

A testatrix, after reciting that she was entitled to a legacy of 1,000*l.* under her husband's will, gave the 1,000*l.*, as to 100*l.* part thereof, to A., as to 400*l.* part thereof, to B., and as to all the residue of the legacy of 1,000*l.* and all the residue of her estate, to C. At her death 216*l.* only was due on the legacy:—Held, that A., B., and C. must abate in proportion. *Wright* v. *Weston*, 26 Beav. 429.

Where a testatrix appointed 600*l.* to a trustee to invest and pay 75*l.* to each of her daughters, and to apply the income of the residue for the benefit of her grand-daughter till she attained seventeen, and then to pay 100*l.* more to each of her daughters, and apply the income of the residue for the benefit of her grand-daughter till she attained twenty-one, and then to pay such residue to the grand-daughter for her own absolute use and benefit; and the fund had been diminished by certain costs and was insufficient:—Held, that the gift of the residue to the grand-daughter was not a gift of a fixed sum, but only of what might be left after payment of the fixed legacies, and that, therefore, the legacies to the daughters must be paid in priority, and were not liable to abate pari passu with the residue. *Harley* v. *Moon*, 1 Dr. & Sm. 623; 31 L. J., Ch. 140; 7 Jur. (N.S.) 1227; 10 W. R. 146.

A testator bequeathed leaseholds to a charity. The bequests failed under the Statute of Mortmain, and the property went to the next of kin. He bequeathed the residue of his property, which consisted of pure personalty, to the same charity. It was contended on behalf of the next of kin, that the bequest which they took was specific, and not residuary, and consequently that they were not bound to contribute to the payment of debts and legacies:—Held, that the gift which failed formed part of the residue, and, as such, was bound to contribute, with the residue taken by the charity, to the payment of debts and legacies. *Scott* v. *Forristall*, 5 L. T. 709.

—— **Where Fund Appropriated.**]—A testator bequeathed stock to his executors, subject to his debts, to pay the dividends to his wife for life, and at her death to sell the capital, and out of the proceeds to pay certain legacies, which would exhaust about one-half of the fund, and he made A. his residuary legatee. Thirty years before the death of the tenant for life, the estate of the testator was fully administered by the trustees and executors of his will, and no part of the stock being required for payment of his debts, it was set apart and appropriated for the persons entitled thereto. About the time of the tenant for life's death, a large portion of the fund was lost. Upon a bill by the pecuniary legatees to have the remaining portion applied in satisfaction of their legacies in priority to the residuary legatee:—Held, that as there had been a complete appropriation of the fund, the subsequent loss must fall on the pecuniary legatees in common with the residuary legatee, and therefore that the residuary legatee was entitled to share in the remaining portion of the fund, which must be divided amongst the respective legatees in proportion to their respective interests in the original fund. *Baker* v. *Farmer*, 36 L. J., Ch. 819; L. R. 4 Eq. 382; 17 L. T. 46; 15 W. R. 917. But see *S. C.* L. R. 3 Ch. 537; 16 W. R. 923.

One of several executors, whilst the testator's assets were sufficient for payment of his debts and the several legacies given by his will (which were a charge on his real estate), appropriated two sums in favour of two legatees, and afterwards becoming bankrupt, was found a defaulter to the testator's estate in a considerable sum of money in respect of assets wasted by him. A bill was afterwards filed by one of the residuary legatees against the several other parties interested in the testator's estate and effects, seeking the administration thereof, but containing no power for a direction that the legatees who had received their legacies in full should proportionately abate the same. The master, on reference to him, had, by his report, which had been duly confirmed, found that the two legacies in question had been appropriated by the executor:—Held, that the two legatees, whose legacies had been appropriated, could not be ordered to contribute in respect of the deficiency of the testator's estate to answer the demands upon it. The bankrupt was ordered to pay his ordinary costs incurred since the date of his bankruptcy, and his assignees were dismissed from the suit with costs. *Knight* v. *Knight*, 15 L. J., Ch. 363.

—— **Where Fund subsequently Falls in.**]—When a testator gives trust legacies, and directs that in case of deficiency they shall abate in proportion, and the estate proves deficient, and an abatement is accordingly made, a fund subsequently falling into the estate, from a default in the trusts of the legacies, goes to the residuary legatees, and is not applicable to make up the deficiency of the abated legacies. *Dudman* v. *Shirreff*, 18 W. R. 596.

L., by will, gave to trustees 1,000*l.* upon trust for A. and B. for life successively, with remainder for the children of B. absolutely, but in case all B.'s children should die before attaining the age of twenty-one, he directed that the 1,000*l.* and all securities should become part of his residuary estate. All the residue he gave in trust for B. and the children of L. equally. By codicil he gave one pecuniary legacy, and declared that in case his personal estate at the

time of his decease should be insufficient to pay all the legacies in full, they should abate proportionably. The personal estate was insufficient, and the trustees set apart 598*l.* to answer the 1,000*l.* A. and B. having died, the latter without issue, the trustees appropriated the 598*l.* for the benefit of the residuary legatees:—Held, that the fund must be paid to the legatees whose legacies had abated. *Lyne, In re, Sands* v. *Lyne*, L. R. 8 Eq. 482.

Between Annuitants.]—When a testator's estate is insufficient (after payment of his debts) to pay in full annuities given by his will, the fund must (after payment of costs) be apportioned between the annuitants in the proportion which the sum composed of the arrears of the annuity in each case plus the present value of the future payments bear to each other, and this rule applies in a case in which the annuitants are all living at the time of distribution. A testator gave an annuity of 150*l.* to his widow, and an annuity of 100*l.* to a stranger in blood, and he directed that the second annuity should be paid free of legacy duty, which should be paid out of his estate. After payment of his debts, the estate was insufficient to pay the annuities in full:—Held, that (after payment of costs) the fund must be apportioned as above between the two annuitants; that the legacy duty payable on the sum apportioned to the second annuitant must be deducted from the whole fund, and the balance then divided in the same proportion between the two annuitants. *Heath* v. *Nugent* (29 Beav. 266) followed. *Wilkins, In re, Wilkins* v. *Rotherham*, 54 L. J., Ch. 188; 27 Ch. D. 703; 33 W. R. 42.

Between Annuitants and Residuary Legatees.]—A sum of stock which was directed to be invested to pay annuities, and ultimately to go to a charity, having been reduced from 4 to 3½ per cent.:—Held, that the annuitants were not entitled to be paid their respective annuities in full, either out of the capital or of the released dividends by the falling in of the annuities, but that the reduction of the interest of the stock operated to reduce proportionately the annuities and the charity fund. *Att.-Gen.* v. *Poulden*, 3 Hare, 555; 8 Jur. 611.

A testator gave several life annuities charged upon a particular fund, the income of which he considered to be equal to them in value; and he gave the fund itself over to another person for life, upon the respective deaths of the annuitants; the fund having proved deficient, and the annuitants having suffered a proportional abatement, it was held, on the death of one of them, that the income from the fund released by the falling in of her annuity went over to the tenant for life, and was not applicable to make good the deficiency of the continuing annuities. *Scott* v. *Salmond*, 1 Myl. & K. 363; Coop. t. Brough. 46.

Where a testator's effects are insufficient to satisfy an annuity bequeathed by the will and the pecuniary legacies:—Held, that the annuity ought to be valued, and that the annuitant was entitled at once to the amount of the valuation, subject to an abatement in proportion to the abatement of the pecuniary legacies; and that although the annuitant died before the payment of the annuity in full would have equalled the abated amount of the valuation, the other legatees would have no claim to the surplus of that amount. *Wroughton* v. *Colquhoun*, 1 De G. & Sm. 357; 11 Jur. 940. S. P., *Carr* v. *Ingleby*, 1 De G. & Sm. 362, n.; *Long* v. *Hughes*, id. 364, n.; 7 L. J. (O.S.) Ch. 105.

Between Appointees under Power and Residuary Legatees.]—W. bequeathed 120,000*l.* in trust for the separate use of his daughter B. during the joint lives of herself and her husband; and in case B. should happen to die in the lifetime of her husband (which event took place), then in trust to pay, &c., unto such person as B. should appoint; and in default of appointment, in trust to pay the same, or so much as should not have been appointed, unto and equally between all the children of B. By deed-poll B. appointed 30,000*l.*, part of the 120,000*l.*, in favour of her husband, who after the death of his wife assigned the sum to the executor of W., in part payment of a mortgage debt due to W.'s estate, which proved to be insufficient to pay in full the legacy of 120,000*l.* The master found that the appointee was entitled to the whole of the 30,000*l.* as a certain and specific sum, irrespective of the amount which the estate of W. might produce; but on exceptions to his report:—Held, that the 30,000*l.* was not to be paid in all events, but only rateably, and in proportion with the other part of the legacy of 120,000*l.* *Booth* v. *Alington*, 2 Jur. (N.S.) 945; 4 W. R. 453.

Where a sum of 5,000*l.* was appointed upon certain trusts, subject to a power of appointing to the amount or value of 1,000*l.* each, one of which had been exercised, but the fund proved insufficient:—Held, that the appointees of the 1,000*l.*, and the persons entitled to the residue of the fund, must abate proportionately. *Miller* v. *Huddlestone*, L. R. 6 Eq. 65; 16 W. R. 478.

Specific Legatees.]—In case of deficiency of assets, a specific legatee shall not abate in proportion with pecuniary legatees, but one pecuniary legatee shall abate in proportion with the rest, though his legacy is directed to be paid in the first place. *Brown* v. *Allen*, 1 Vern. 31. S. P., *Webb* v. *Webb*, 2 Vern. 111.

Legacy of 1,500*l.* to be laid out in land shall be taken as land; but if a deficiency of assets then not specific, but shall contribute in proportion. Specific legacy is what vests by assent of executor. *Hinton* v. *Pinke*, 1 P. Wms. 539.

One devises to his wife all his personal estate at W.: this is a specific legacy, and to be preferred to pecuniary legacies in case of deficiency of assets; all the testator's personal estate that was at W. at his death shall pass, though not there at the making the will. *Sayer* v. *Sayer*, 2 Vern. 688; Pre. Ch. 392; Gilb. Exch. R. 87.

Specific legacies, as in some respects they have the advantage, so in others they have the disadvantage, of pecuniary ones. *Ashton* v. *Ashton*, 3 P. Wms. 385.

Testator having a sum of 500*l.* secured by mortgage, bequeathed to defendant 500*l.* to continue at interest on such securities as he should leave at his death, or to be put out on government securities, at the election of his executors. There being a deficiency of assets:—Held, that the 500*l.* legacy was not so specific as that it should not abate with the pecuniary legacies. *Lawson* v. *Stitch*, 1 Atk. 507.

A bequest of a sum of money in a bag, &c., is a specific legacy, and shall not abate with pecuniary legacies. *Ib.*

Specific legatees shall not abate in proportion with the pecuniary, on a deficiency of assets. *Gibson* v. *Scudamore*, Mos. 7. And see *Mullins* v. *Smith*, infra.

—— **Where Direction Express or Implied.**]—By a will reciting that the testatrix was entitled to 2,255*l.* stock, she bequeathed the said sum so standing in her name to a trustee to divide in the following shares and proportions. She then gave specific sums to certain legatees, and directed that these sums, described as amounting to 1,769*l.*, should be paid out of the stock, and that the balance, amounting to 495*l.* or thereabouts, or whatever it might amount to, should be paid to X. The amount of the stock was really only 1,750*l.*:—Held, that the gift to X. wholly failed, and the other legatees could not be called on to abate rateably with him. *Williams* v. *Armstrong*, 12 Ir. Eq. R. 356.

A contribution was directed amongst specific legatees for payment of the debts and costs of suit. One of such legatees became insolvent, and by his nonpayment the fund raised was deficient. The court directed an additional contribution amongst the solvent legatees. *Conolly* v. *Farrell*, 10 Beav. 142.

Devise in trust to sell, but not for less than 10,000*l.*, and to pay several sums amounting to 7,800*l.* and the overplus moneys arising from the sale to A.:—Held, a specific legacy of 10,000*l.*, and the sale producing less, A. and the others to abate; legacies to charity, void by the statute 9 Geo. 2, c. 36, fell into the general residue. *Page* v. *Leapingwell*, 18 Ves. 463; 11 R. R. 234.

Specific bequest of jewels upon trust to sell for the best price obtainable, and to pay thereout two legacies of fixed amounts; there was a residuary bequest, but no other gift of any surplus sale money. The price obtained was insufficient to pay both legacies, but one of them lapsed:—Held, that the other legacy was not liable to abate in favour of the residuary legatee, as it would have done in favour of the other legatee, if his legacy had taken effect. *Page* v. *Leapingwell* (supra) distinguished. *Tunno, In re, Raikes* v. *Raikes*, 59 L. J., Ch. 573; 45 Ch. D. 66; 63 L. T. 23; 38 W. R. 636.

—— **Where Subject of Gift wholly or partially non-existent.**]—Bequest "of 400*l.* East India bonds," under the circumstances, not specific, but a legacy of quantity, to be made good out of the general assets, the testatrix having repeatedly in this bequest omitted the word "my," which she had used in other bequests clearly specific, and having only one East India bond at her death. Bequest of South Sea stock in parcels to a larger amount than testatrix was possessed of held specific, the bequest of the last parcel being called the remaining South Sea stock standing in her name. These legatees must abate in proportion. *Sleech* v. *Thorington*, 2 Ves. Sen. 560.

Specific legacy, if existing, the whole paid, though nothing left for pecuniary, but if not existing the right is gone. *Drinkwater* v. *Falconer*, 2 Ves. Sen. 623.

—— **Specific Bequest of Property charged by Testatrix in her Lifetime—General Charge of Debts.**]—A testatrix, after directing that her debts should be paid as soon as conveniently might be after her decease, specifically devised all her real estate, and specifically bequeathed certain personalty which in her lifetime she had specifically charged with a debt:—Held, that such personalty must be applied in payment of the debt before the real estate could be resorted to, notwithstanding that the direction to pay debts was a constructive charge of debts on the latter. *Butler, In re, Le Bas* v. *Herbert*, 63 L. J., Ch. 662; [1894] 3 Ch. 250; 8 R. 504; 43 W. R. 190.

Between Specific and Residuary Legatees.]—A testatrix by will, "out of the residue of her property," gave a legacy to A. By a codicil she directed her executors "out of the residue of her estate, in case there should be sufficient," to invest a legacy for B. The residue being deficient:—Held, that these legacies must abate pari passu. *Earestaff* v. *Austin*, 19 Beav. 591.

A testatrix bequeathed various sums of her bank stock, part of 9,000*l.* live stock, to several legatees, and all the residue of her said bank stock to C. The stock, at her death, was insufficient to pay the specified sums:—Held, that all these legacies, including the residue to C., must abate in proportion. *Elwes* v. *Causton*, 30 Beav. 554.

A. gave a house and 800*l.* to his daughter for life, and after her death he directed 500*l.* to be paid to her issue, "and that after such payment the remaining part of the principal 800*l.*, that is 300*l.*, and the house," should revert to his "next lawful heirs." The assets were insufficient, and only 400*l.* was paid in respect of the legacy and what had accumulated:—Held, that the legatees of the 500*l.* had no priority over the legatees of the 300*l.*, and that the fund must be apportioned rateably between the two legatees. *Haselwood* v. *Green*, 28 Beav. 1.

A testator desired that every legatee under his will should contribute 1*l.* per cent. out of their legacies to Mrs. W. and her children:—Held, that the specific legatees and annuitants and residuary legatees (both in respect of the residuary personal estate, and of the produce of real estate directed to be converted) were bound to contribute. *Ward* v. *Grey*, 26 Beav. 485; 29 L. J., Ch. 74; 7 W. R. 569.

Demonstrative Legatees.] — Demonstrative legatees must abate with general legatees, and have no right, after getting what they can out of the demonstrative fund, to claim their entire legacies with the other legatees out of the general estate. Demonstrative legatees must get their legacies first out of the demonstrative fund as far as it extends; and the balances only, together with the general legatees, out of the general estate. *Sellon* v. *Watts*, 28 Beav. 579; 9 W. R. 847.

A specific legacy is not liable to abatement for the payment of debts, but a demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. A specific legacy is liable to ademption, but a demonstrative legacy is not. A specific legacy, if of stock, carries with it the dividends which accrue from the death of the testator, while a demonstrative legacy does not carry interest from the testator's death. *Mullins* v. *Smith*, 1 Dr. & Sm. 204, 210; 8 W. R. 739.

Where demonstrative legacies were payable, in a certain order of priority, out of leasehold property held of an ecclesiastical body, under a

lease which was renewable, on payment of a fine, every fourteen years, and by consent of all parties one of the legatees was allowed to continue for a long time in occupation of the leasehold property, paying out of the rent the interest of the other legacy, and the leaseholds were, meanwhile, twice renewed by the executors, without calling upon the legatees to contribute to the fine:—Held, that this course of dealing had destroyed the right of priority. *Severs* v. *Severs*, 17 Jur. 706; 1 W. R. 320.

Legacy to A. of 12,000*l.*, and to B. 4,000*l.*, the latter sum directed to be paid out of money in the hands of the testator's agent. At the time of testator's death, there was a sufficient fund in the agent's hands to answer this legacy; but the general assets did not extend to the payment of both. Legatee of the 4,000*l.* held entitled to be paid by priority. *Acton* v. *Acton*, 1 Mer. 178.

Legacies to one younger child of the sum of 12,000*l.* of my funded property, to be transferred in his name, or employed as it shall appear most beneficial; to another, the sum of 12,000*l.* in every respect the same; to a third, the sum of 12,000*l.*, to be enjoyed by him in every respect as the former; the residue, real and personal, to the eldest son. The legacies to the younger children pecuniary, not specific; the fund, if deficient, to be equally divided among them. *Lambert* v. *Lambert*, 11 Ves. 607; 8 R. R. 253.

Legacies to be paid out of a specific security, which failed:—Held, general upon the circumstances. *Roberts* v. *Pocock*, 4 Ves. 150.

Between Chargees and Devisees of Property Charged.]—A. devised real estate to one for life, with remainder to trustees for a term to raise the clear sum of 10,000*l.* for his younger son; and, subject thereto, he devised the estate in strict settlement. The personal estate, not specifically bequeathed, was insufficient to pay the debts, and thereupon the devised estate and specific legacies became liable to contribute rateably towards the deficiency:—Held, that as between the youngest son and the persons taking the estate subject to the term, the whole amount of contribution of the real estate was to be borne by the latter. *Raikes* v. *Boulton*, 29 Beav. 41.

A testator devised his real estate to the use of his wife during her life or widowhood, with remainder to the use of trustees for a term of 500 years, on trust to raise, by mortgage of the real estate or out of the rents and profits, portions of 5,000*l.* apiece for each of his younger children, with remainders in strict settlement, the testator's eldest son taking the first life estate. The testator's general personal estate was insufficient for the payment of his debts, and, consequently, the specifically bequeathed personal estate and the real estate had to contribute:—Held, that, as between the portioners and the persons entitled to the real estate on which they were charged, the former were not bound to contribute to make good the deficiency. *Raikes* v. *Boulton* (supra) followed; *Long* v. *Short* (1 P. Wms. 403) considered and explained:—Held, also, that, as between the real estate and the specifically bequeathed personal estate, the former must contribute in proportion to its full value, not in proportion to its value less the amount of the portions. *Saunders-Davies, In re, Saunders-Davies* v. *Saunders-Davies*, 56 L. J., Ch. 492; 34 Ch. D. 482; 56 L. T. 153; 35 W. R. 493.

Testator, after making certain specific devises and bequests, gave some pecuniary legacies, and gave all the real and personal estate to which at his death he should be beneficially entitled, or of which at his death he should have any general power to dispose beneficially by will, and not otherwise disposed of, unto A. absolutely. The personal estate not specifically bequeathed was insufficient for payment of debts:—Held, following *Raikes* v. *Boulton* (supra) and *Saunders-Davies, In re* (supra), that as between the pecuniary legatees and the residuary devisee, the pecuniary legatees were entitled to their legacies out of the residuary real estate without any liability to contribute to the payment of debts; that the residuary devisee was bound to contribute rateably with specific legatees and devisees; and in ascertaining the proportion of his contribution, the value of the residuary real estate must be measured not by the value less the legacies to be raised out of it, but by its value independently of the legacies. *Bawden, In re, Bawden* v. *Cresswell*, 63 L. J., Ch. 412; [1894] 1 Ch. 693; 70 L. T. 526.

A testator devised certain property to his daughter M. M. B. absolutely, and devised and bequeathed to his grand-daughter A. E. the sum of 1,000*l.* or 50*l.* per annum, whichever his executors should think fit or most advantageous for her, the said sum of 1,000*l.* or 50*l.* per annum to be paid by his said daughter and to be chargeable and payable out of the property so bequeathed to her. One undivided third of the property was subject to the trusts of a settlement, under which M. M. B. took a life interest, with remainders over; and the testator had no power to dispose of same. In a petition by A. E. and her husband, the petitioners were declared entitled to a perpetual annuity of 50*l.* charged on the property devised to M. M. B. On the death of M. M. B. the person entitled to the one-third in settlement claimed the same. There was nothing in the will to shew an intention that the property was to be enjoyed by the chargee and the devisee of the property itself in aliquot proportions:—Held, that the annuity was not liable to abate, and that A. E. was entitled to be paid the same in full out of the remaining two-thirds of the property. *Saunders-Davies, In re* (supra), followed. *Long* v. *Short* (1 P. Wms. 403) considered. *Roche* v. *Jordan*, [1896] 1 Ir. R. 494.

Between Purchasers and Volunteers.]—Pecuniary legacies, if assets wanting, shall be paid in average; but a legacy given to a wife in consideration that she releases dower shall be preferred. So money bequeathed to buy land, or an annuity, is as a specific legacy, and shall not come in average. *Burridge* v. *Bradyl*, 1 P. Wms. 129. But see *Hinton* v. *Pinke*, *id.* 541.

W. F. gives by will his wife an annuity of 100*l.* for life, and 500*l.*, which, together with the annuity, he declares to be in full for her dower, or thirds, out of his real or personal estate. On deficiency of assets:—Held, the wife should not abate in proportion with the other legatees. *Davenhill* v. *Fletcher*, Ambl. 244.

Where the testator, possessed of freehold estate and copyhold in fee, bequeathed an annuity to his wife, to be accepted in lieu of all dower, and thirds, or other claims she might have otherwise had against his estate, she being his customary heir as to the latter:—Held, entitled to both, and not bound to elect; and the assets being insuf-

ficient to satisfy the annuity and other legacies, that she was entitled to priority, and be paid in full, before pecuniary legacies. *Norcott* v. *Gordon*, 14 Sim. 258; 8 Jur. 679.

A legacy to a widow, in lieu of dower or thirds, at common law or by custom, has no priority over other legacies, where the testator leaves no real estate. *Acey* v. *Simpson*, 5 Beav. 35.

A testator having by a post-nuptial settlement made certain provisions for his wife which were expressed to be in bar of dower, bequeaths to her specific legacies, and a sum of money, adding that what he has so given her, together with the provision made for her by the settlement, should be in lieu of any dower which she might claim; the assets having proved insufficient for the payment of the legacies in full:—Held, that the wife is entitled to priority over the other legatees, and that the legacies given to her ought not to abate proportionably with the other legacies. *Heath* v. *Dendy*, 1 Russ. 543; 5 L. J. (O.S.) Ch. 59; 25 R. R. 135.

A testator by his will bequeathed a legacy to a person between whom and himself accounts had subsisted, on condition of the legatee's executing to his executors a general release of all claims and demands. The legatee executed the release. It subsequently appeared that the assets were insufficient for the payment of all the legacies:—Held, that the legatee was not, by executing the release (it not being established that any debt was actually due to him), a purchaser of his legacy, so as to avoid an abatement with the other legatees. *Davies* v. *Bush*, Younge, 341.

A., noticing that he had been bankrupt in 1822, and had paid only 4*s.* 3*d.* in the pound, and had obtained his certificate, made his will in 1851, and directed his just debts to be paid, in which he included the unpaid-in-full debts in the bankruptcy, and said: "I will and direct my executors and trustees to pay unto the official assignee of the bankruptcy, in trust to pay all who have proved their debts on the commission, so much money as will make the dividend on the estate equal to 20*s.* in the pound on all the debts so proved":—Held, that the official assignee was entitled to receive a sum sufficient to make up 20*s.* in the pound on all the debts proved, notwithstanding that some of the creditors might have died before the testator. *Turner* v. *Martin*, 7 De G. M. & G. 429; 26 L. J., Ch. 216; 3 Jur. (N.S.) 397; 5 W. R. 277. And see *Blower* v. *Morret*, supra, col. 1673.

Charitable Legacies.]—Charitable legacies by the civil law are to be preferred to other legacies. If the spiritual court gives a preference to charitable legacies, in case of deficiency of assets, this court will not grant an injunction. *Fielding* v. *Bound*, 1 Vern. 230.

Legacy to a charity shall abate in proportion with other legacies on failure of assets. *Att.-Gen.* v. *Hudson*, 1 P. Wms. 675.

In case of a deficiency, charity legacies, as well as others, shall abate in proportion; but 3*l.* to the poor of the parish shall be taken as part of funerals, and so no abatement. *Att.-Gen.* v. *Robins*, 2 P. Wms. 25.

Devise of real and personal estate in trust for debts and legacies void, under the stat. 9 Geo. 2, c. 36, as a charge of charity legacies upon the real and leasehold estates, and money on mortgage; but on a deficiency of assets, the other legatees preferred to the heir. *Currie* v. *Pye*, 17 Ves. 462.

A. is entitled to 8,000*l.* in the Chamber of London, and whilst a stop was put to payment there, he made his will, and declares, that when the executors should receive the 8,000*l.*, he gives 2,000*l.* to three hospitals. Afterwards an act passed for settling a fund for paying a perpetual interest for the orphans' debt, and the 8,000*l.* is then worth, to be sold, but 6,300*l.*, yet decreed the whole 2,000*l.* to be paid. *Colwall* v. *Bonython*, 2 Vern. 547.

A testator directed that his debts and legacies (other than charitable legacies) should be paid by his executors out of his impure personalty, and his charitable legacies out of his pure personalty. The pure personalty was insufficient to pay all the charitable legacies in full. In December, 1871, he borrowed 8,000*l.* of his bankers, to be repaid in March, 1872. This sum was placed to his credit on a loan account. He died in February, 1872, having, at the day of his death, 629*l.* standing to his credit on his general drawing account:—Held, that the executors were not bound to pay, out of the impure personalty, the whole amount of the debt due on the loan account at the day of the death, but only the difference between that amount and the amount then standing to the testator's credit on his general drawing account. *Thomas* v. *Howell*, L. R. 18 Eq. 198; 30 L. T. 244; 22 W. R. 676.

A voluntary covenant to secure by will the payment of a sum of money to be applied for charitable purposes cannot be satisfied out of the impure personalty of the covenantor; and the debt created by the covenant must, like a legacy, abate in the proportion of the impure to the pure personalty. *Fox* v. *Lownds*, 44 L. J., Ch. 474; L. R. 19 Eq. 453; 23 W. R. 404.

A testator gave in the commencement of his will various pecuniary legacies, including one of nineteen guineas to a charity, which he directed to be paid out of his personal estate. He then made a general devise and bequest of all his real and personal estate to trustees, who were also his executors, and the trustees of his real estate were to collect and manage the same and receive the rents and profits, with power to grant leases on such terms as they should think advantageous and proper, and with power also, if they should consider it advisable, but not otherwise, to sell his real estate or any part by public or private sale in such manner, at such time or times, and for such prices as they should think proper. He then proceeded to direct that his personal estate should be collected, and that the proceeds of that estate, together with the proceeds resulting from any sale of the real estate, should be invested in the funds. He then gave the income of the whole of his estate, the real estate, if unsold, and of the funds which should be so invested, to his wife for life, and at the death of the wife he directed several other legacies to be paid, including a legacy of 100*l.* to a charity, which he again directed should be paid out of his personal estate; and subject to those legacies and at the death of his wife, and subject to a provision for any child of which she might be enceinte at his death (which failed in fact by reason of there being no such child), he directed the whole income of all his real and personal estate to be paid to his wife's niece for life; and at her death he directed a legacy of 500*l.* to be paid to a charity, which he again directed should be paid out of his per-

sonal estate :—Held, first, that the 500*l.* charitable legacy was not to be postponed to the other legacies, it being clear on principle and settled by authority, that although a legacy is deferred as to its time of payment, it must rank equally with other legacies in the distribution of assets which are directed to be immediately paid, and that the trustees were bound to provide for the payment of the 500*l.* legacy at the time when they applied themselves to the payment of the other legacies. *Nichisson* v. *Cockill*, 3 De G. J. & S. 622 ; 32 L. J., Ch. 753 ; 8 L. T. 778 ; 11 W. R. 1082 ; 2 N. R. 557.

Held, secondly, that the two first given charitable legacies had no precedence over the 500*l.* legacy. Held, thirdly, that the proceeds of sales of parts of the real estate by the trustees, under their power, having proved insufficient for the payment of the legacies other than the charitable legacies, so as to leave the pure personal estate for the payment of the charitable legacies, the case had arisen in which the trustees ought to have "considered it advisable" to sell the real estate, under their power to do so, however discretionary in its form, for the purpose of paying the general legacies, the testator having devoted the proceeds of any sale, when made, to the payment of legacies. *Ib.*

Testator, after directing that his residuary real and personal estate should be applied in payment of certain specified legacies, if there should remain any surplus of the moneys to be appropriated to the object of the will after satisfying the legacies, gave the surplus to a charitable society, the same to be paid out of the funds appropriated as should not consist of lands or mortgages :—Held, that the legacies were payable out of the personal estate savouring of the realty ; and if that were insufficient, out of the proceeds of the realty which had been sold, so as to appropriate to the charity all such pure personalty as might not be required to satisfy the legacies, after application for that purpose of the personalty savouring of realty, and the proceeds of the realty. *Pritchard* v. *Norris*, 4 W. R. 733.

Where there is a general charge of debts on real estate, a legatee is entitled to marshal assets to the amount to which the personal estate has been applied in payment of debts, funeral and testamentary expenses. *Stokes, In re, Parsons* v. *Miller* (67 L. T. 223), approved and followed. *Salt, In re, Brothwood* v. *Keeling*, 64 L. J., Ch. 494 ; [1895] 2 Ch. 203 ; 13 R. 499 ; 43 W. R. 500.

A testatrix, to whose will the provisions of the Mortmain and Charitable Uses Act, 1891, did not apply, gave to a charity "all the rest and remainder of my personal estate whatsoever and wheresoever situate, save and except such parts thereof as cannot by law be appropriated by will to charitable purposes" :—Held, that this did not amount to a direction to marshal, and that the gift, so far as it consisted of things savouring of realty, failed and was divisible among the next of kin. *Edwards* v. *Hall* (ante, col. 1549) followed. *Somers-Cocks, In re, Wegg Prosser* v. *Wegg Prosser*, 65 L. J., Ch. 49 ; [1895] 2 Ch. 449 ; 13 R. 819 ; 73 L. T. 58 ; 44 W. R. 106.

And see CHARITABLE LEGACIES.

Effect of Devastavit.]—A testatrix bequeathed all the residue of her personal estate to trustees, who were also her executors, to invest and pay the income to A. for life, and after his death to pay 1,000*l.* to B., 1,000*l.* to C., and the residue to D., E., and F. The executors ascertained the residue, and invested it as directed by the will. The surviving executor afterwards applied part of the trust fund for his own use :—Held, that the loss which was thus occasioned must be borne pro ratâ by all the legatees ; and that the legatees of 1,000*l.* were not entitled to their legacies in full. *Newman* v. *Williams*, 10 L. J., Ch. 106.

An executor, who was also trustee, having paid to the adult legatees their shares of the then ascertained residue, invested in his own name the shares of infant legatees, for whose maintenance he was bound as trustee to apply the dividends, but did not execute any declaration of trust. He subsequently applied these shares to his own use, after which further assets of the testator's estate fell in :—Held, that they were applicable, in the first instance, in making good the infants' legacies. *Willmott* v. *Jenkins*, 1 Beav. 401.

A pecuniary legatee is entitled to be paid in full out of a dividend payable on a proof made in respect of a devastavit committed by a bankrupt, who is executor and residuary legatee. *Turner, Ex parte, West, In re*, 2 Mont. D. & D. 613 ; 6 Jur. 840. *S. C.*, nom. *Hufton, Ex parte, West, In re*, 11 L. J., Bk. 21.

A residuary legatee, on a deficiency of assets, allowed to come in pari passu, with the other legatees, by reason of the special circumstances of the case. *Dyose* v. *Dyose*, 1 P. Wms. 305. And see *Marsh* v. *Evans*, supra, col. 1672.

—— **On Executor's own Legacy.**]—Where a testator bequeathed to A. and B., two of his three executors, a sum of money to be invested in trust for C. for life, and then to sink into the residue, and A. and B. accordingly invested the money ; but after A.'s death, B. sold out the stock, and applied the proceeds to his own use :—Held, that a legacy given to him by the will, which he had not yet received, but which he had assigned for valuable consideration, was applicable to make good the breach of trust, the approbation of the stock having been defeated by the act of B. *Morris* v. *Livie*, 1 Y. & C. C. C. 380 ; 11 L. J., Ch. 172.

—— **Where Waiver.**] —A testator having directed his trustees and executors, after sale of his estates, to stand possessed of the money arising from the sales, upon trust, in the first place, to invest 400*l.* in trust for his wife for life, in bar of dower, and after her death for W. C. ; and upon further trust, out of the residue of the money, to invest 400*l.* in trust for J. R. for life, and after his death for his children ; and upon further trust, to pay other sums to persons named ; and having bequeathed the residue of his estate to W. C., and the only acting executor having made no investment on the trusts of the will, but having paid interest on the two sums of 400*l.* to the respective legatees, and applied the assets to his own use, and afterwards become bankrupt ; it was held, that by that dealing the two legatees had waived whatever priority the will might have given to them ; and the dividend payable on the whole sum proved under the commission against the executor in respect of the testator's estate was divided among the pecuniary legatees and the residuary legatee, in the proportion of the amount of their legacies and of the residue, as it was computed at the death of the testator,

with interest on each. *Chadwin, Ex parte*, 3 Swan. 380; 19 R. R. 219.

See also *Gyett* v. *Williams*, ante, col. 1641, and *Evans* v. *Harris*, post, col. 1706.

19. ASSENT OF EXECUTOR.

What Amounts to.]—It is not essential to the efficacy or validity of an assent to a bequest that it should confer a legal interest, or affect the mere legal title to the subject of the bequest. *Trail* v. *Bull*, infra.

A small matter will amount to an assent to a legacy. *Noel* v. *Robinson*, 1 Vern. 94; 2 Vent. 358; 2 Ch. Cas. 145; 2 Ch. R. 248.

—— **Assent to Prior of Two Estates.**]—Where a term for years is devised to A. for life, remainder to B., and the executor assents to the devise to A., this is a good assent to the devise over. *Adams* v. *Peirce*, 3 P. Wms. 12. S. P., *Foley* v. *Burnell*, infra.

—— **Acquiescence in Possession.**]—Whether, without any express assent by executors to a bequest of a leasehold estate, the entering of the legatee into possession and receipt of the rents and profits, with the knowledge of and without any objection from the executors, does not amount to an assent by them, quære. *Cole* v. *Miles*, 10 Hare, 179.

—— **Where Legatee Co-executor—Joining in Dealings.**]—Where a leasehold was given to A., the wife, and also an executrix of testator, for life, with remainder to such three persons, B., C. and D., as should be living at A.'s death, and A. was allowed by her co-executors to remain in possession, and one of such executors, who was the husband of B., joined in a deed executed by B., C. and D., whereby they agreed to take the leasehold as tenants in common without survivorship:—Held, that there was no such assent to the bequest as prevented the executors from making a title to purchaser. *Att.-Gen.* v. *Potter*, 5 Beav. 164; 14 L. J., Ch. 16.

—— **Where Legatee Sole Executor—Dealings with Property.**]—The widow of a testator, who was his executrix and also legatee for life of certain leaseholds, with a limitation over on her death to the testator's children, entered into possession of the leaseholds, and received and applied the rents to her own use. From the master's report, it appeared that the widow, during the whole of her life, had been in advance to the testator's estate:—Held, that, under the circumstances, such receipt and application of the rents did not constitute an implied assent to the legacy. *Trail* v. *Bull*, 22 L. J., Ch. 1082. Affirming 1 Coll. C. C. 352.

—— **Assent given in Petition.**]—A personal representative who is also a legatee may, though no assent has been previously given, shew by his petition that he assents to his own legacy. An assent, so testified, will suffice, and may be shewn, not only by an express averment of assent, but even by the frame of the cause petition manifesting that the petitioner sued as legatee. *Quinton* v. *Frith*, Ir. R. 2 Eq. 396.

—— **Evidence of.**]—Entry by an executrix, who is also a legatee of the entire interest in a chattel lease, is evidence, but not conclusive evidence, of her assent to the legacy. *Gleeson* v. *Cooke*, 1 Hog. 297.

Effect of Assent.]—Personal estate vests in the executor, and no legacy comes out of him without his consent. *Abney* v. *Miller*, 2 Atk. 598.

The executor has not a bare authority, but the interest in the thing assigned, for neither residuary nor specific legatees have any interest without the assent of the executors. *Mead* v. *Orrery* (*Lord*), 3 Atk. 239.

At law a legacy does not vest in legatee till the executor's assent; but in equity he will be decreed to deliver the specific legacies, being considered there as bare trustee. *Northey* v. *Northey*, 2 Atk. 77.

—— **By Infant Executor.**] — If an infant executor assents to a legacy, such assent shall be good, if there are sufficient assets to pay the debts; secus if not. *Chamberlain* v. *Chamberlain*, 1 Ch. Cas. 256.

—— **Cannot be withdrawn.**]—Whenever an executor assents to a bequest in his testator's will, there is an end of his interest in the thing bequeathed, and he cannot afterwards dissent. And it is equally true that the executor's assent to the first devise is an assent to the remainder over. *Foley* v. *Burnell*, 4 Bro. P. C. 34.

An executor who has assented unconditionally to a specific bequest of the testator's leasehold estates, is not entitled to an indemnity out of the testator's general estate in respect of his covenants contained in the lease. *Shadbolt* v. *Woodfall*, 2 Coll. C. C. 30; 9 Jur. 229.

—— **On Position of Executor.**]—Upon assenting to a specific bequest given them in trust, executors forthwith became trustees. A testator bequeathed a mortgage, secured by a conditional surrender, and which had become absolute, to his two executors, upon trust to continue and hold it on certain trusts. The executors assented to the legacy, but did not procure themselves to be admitted, and by reason thereof one of them was enabled to receive money and release the estate. The money being misapplied:—Held, that the co-executor had become a trustee, and was liable for his default. The ordinary trustee indemnity clause affords no security to a trustee who neglects to take the necessary steps to secure the trust fund. *Dix* v. *Burford*, 19 Beav. 409.

Where a person, executor and trustee of legacy to be laid out in stock, has fully administered estate and assented to legacy, and retains legacy in his hands, not as assets, but as trustee, he is liable for breach of trust, and ordered to purchase stock at price of time when he was first able to invest it. *Byrchall* v. *Bradford*, 6 Madd. 13; S. C. *id.* 235; 23 R. R. 204.

A legatee is not obliged in every instance to bring a bill against an executor for a recovery of a legacy, for after he has assented, trover will lie. *Williams* v. *Lee*, 3 Atk. 214. And see *Atkins* v. *Hill*, Cowp. 284; *Hawkes* v. *Saunders*, *id.* 289.

Whether an executor, after he has voluntarily assented to a legacy, shall not compel the legatee to refund it. A debt voluntarily paid to a bankrupt shall be paid over again, otherwise if recovered by course of law. *Noel* v. *Robinson*, 1 Vern. 94; 2 Vent. 358; 2 Ch. Cas. 145; 2 Ch. R. 248.

—— **On Position of Legatee.**]—Although the bank is bound to allow the transfer to, or by the

executor of stock, specifically bequeathed, if the executor has not assented to the legacy, yet it does not follow that if he has assented to the legacy the bank is bound to transfer it to the legatee. *Humberstone* v. *Chase*, 2 Y. & C. 209.

A legatee of the share of the mere goodwill of a deceased partner cannot support a bill against the surviving partner to obtain the benefit of his legacy, even after assent by the executor. *Robertson* v. *Quiddington*, 28 Beav. 529. And see *Williams* v. *Lee*, supra.

—— **On Constitution of Suit.**]—Where an executor has not assented to a specific bequest, the persons beneficially entitled are not necessary parties to a suit relating to the property specifically bequeathed. *Const* v. *Harris*, Turn. & R. 514; 24 R. R. 108.

Where a bill was filed against the devisee of the lease, praying that the lease might be declared void, and the defendant insisted that if the lease was set aside the plaintiffs ought to repay the moneys expended by his devisor in the improvement of the premises, the executor of the devisor who had assented to the devise of the lease was not a necessary party to the suit. *Malpas* v. *Ackland*, 3 Russ. 273.

20. Appropriation.

What amounts to—Sufficient Sum set apart with Intent.]—F., having an estate which came to her ex parte maternâ, on her marriage, conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs. By will she directed the estate to be sold, the money to be laid out in the funds, and the trustees to permit the husband to receive the interest for life; then, after the deduction of 3,500*l.* to uses which vested in the plaintiff A., and after payment of 1,000*l.* to G., to pay the residue of the purchase-money to the three defendants, H.; by codicil, she gave the plaintiff, her husband, a power of appointing the 3,500*l.* in case A. should marry without his consent. G. died, living the testatrix, before the codicil made, but F., in the codicil, took no notice thereof. The 3,500*l.* is vested in A., and, the trustees having laid out a larger sum by 17*l.*, with intent to appropriate, it is well appropriated; and A. having married once with her father's consent, his power is gone, and, he consenting to give up his life interest, it was decreed to be paid to the trustees on her marriage settlement. *Hutcheson* v. *Hammond*, 3 Bro. C. C. 128.

—— **Secus where Life Interest intervenes.**]—When stock is left to pay the interest to plaintiff for life, and then, after payment of gross sums, the residue to him, the court will not permit the security to be lessened by laying out a certain sum to secure the legacies, and paying the residue immediately to the plaintiff. *Soundy* v. *Binyon*, 3 Bro. C. C. 258.

—— **Transfer to Trustees for Prior Estate.**]—The circumstance, that a fund in which a party takes a life interest under a will is transferred by the executor to the trustees of that fund appointed by the will, is not necessarily and conclusively a severance of the fund from the bulk of the estate, unless the executor has by such transfer done all that it is incumbent upon him to do in the administration of the fund. Upon a transfer to trustees of a fund bequeathed to them upon trust to pay the interest to a tenant for life, without any bequest of the corpus, or with a bequest thereof of doubtful validity, and which upon construction might fail, so that the corpus would ultimately become part of the residuary estate, the trustees of such fund are not ipso facto trustees for the residuary legatees or the next of kin; but the corpus of the fund must be regarded as assets of the testator's estate unadministered ultra the life estate. The circumstance, that the residue of the estate (omitting the fund so vested in trustees for the tenant for life) has been administered in equity, does not affect the principle, nor is it less applicable because, from the time which has elapsed since the death of the testator, the executor is not a necessary party in the administration of the particular fund, and has not been made a party to the suit. *Pennington* v. *Buckley*, 6 Hare, 451. And see *S. C.*, 11 Jur. 468.

—— **Investment in Securities liable to be paid off.**]—The securities appropriated in satisfaction of a legacy in which infants are interested must be of a permanent character. A testator directed his trustees and executors to invest 15,000*l.* upon such securities as they might in their absolute discretion think fit, and to stand possessed thereof in trust for his widow during her life, with remainder to his children, some of whom were infants. The trustees, by arrangement with the tenant for life, set apart for the purpose of answering the legacy certain securities, some of which were preference stocks, which appeared to be liable to be paid off. The tenant for life being dead:—Held, that the appropriation was not binding upon the children, and that the full sum of 15,000*l.* must not be invested. *Stewart* v. *Sanderson*, 39 L. J., Ch. 337.

—— **Appropriation of Stock for Charity.**]—Stock cannot be appropriated to support a permanent charity, but must be sold and the money appropriated. *Isaac* v. *Gompertz*, 1 Ves. 44.

—— **Appropriation of Mortgage if Security ample.**]—An executor and trustee directed to invest a legacy on mortgage may properly appropriate one of the testator's mortgages in payment of the legacy, but he must ascertain its sufficiency. *Ames* v. *Parkinson*, 7 Beav. 379.

—— **Signing Legacy Duty Receipts.**]—B. and T., as executors, had signed two Legacy Duty Office receipts for the two legacies:—Held, that this did not amount to an appropriation by the executors of the sums required for the legacies so as to discharge the real estate. *Howard* v. *Chaffer*, 32 L. J., Ch. 686; 9 Jur. (N.S.) 767; 9 L. T. 243; 11 W. R. 1057.

—— **Loan of Deeds to Legatee giving Equitable Lien.**]—Executors, who are also trustees, agree to give one of the residuary legatees, as a security for his share, a legal mortgage of real estate, part of the testator's assets, and for the purpose of having the mortgage prepared, they deliver the title deeds to his agents; this gives him an equitable lien on the property, against the executors, though not as against the other residuary legatees. *Hockley* v. *Bantock*, 1 Russ. 141; 25 R. R. 16.

—— **Agreement with Legatee.**]—Case in which an executor had agreed with a legatee that a certain part of a charge on an estate to which the testator was entitled would be paid to her, and it was accordingly reported in a suit as payable to her; but the assets being deficient, in consequence of a devastavit, it was held that the transaction was not an appropriation tantamount to payment to the legatee, so as to give her priority over the other legatees. *Molloy* v. *French*, 11 Ir. Eq. R. 376.

A. being seised in fee of Ardgullan, confessed a judgment, and afterwards, upon the marriage of his son B., conveyed the lands to the use of B. for his life, remainder to the issue of the marriage, and covenanted that they were free from incumbrances. By his will he gave several legacies, and died, having appointed B. his executor, and leaving assets more than sufficient to pay all his debts and legacies. Upon the marriage of C., one of the legatees, a settlement was executed, whereby, after reciting the will of A., and that the legacy of C. was then in the hands of B. as executor, C. assigned the legacy to trustees, of whom B. was one, upon trust for C. for her life, and after her decease without issue, upon trust for the benefit of the judgment creditor and his issue. In 1835 the judgment creditor instituted a suit for payment of his judgment debt out of the real and personal assets of the testator. In 1836 C. and her husband (there being no issue of their marriage) instituted another suit against B. and the persons entitled under their settlement, in default of issue of their marriage, for the appointment of new trustees and an account of the trust funds. And in that suit an order was made, on the consent of B., but without notice to the persons entitled in default of issue of C. and her husband, that B. should transfer to the credit of that cause stock to the value of C.'s legacy, without prejudice to the rights of the parties: and it was ordered that the dividends thereof be paid to C. The stock was accordingly transferred by B., who purchased same with the produce of the sale of part of the assets of the testator, which were outstanding in specie when the bill of 1835 was filed. The assets having been wasted, the children of B., claiming as specialty creditors of A. under his covenant, filed a bill in 1840 to have the stock standing to the credit of C.'s cause applied in payment of the judgment debt:—Held, that the stock had not been appropriated to the payment of C.'s legacy either as against the specialty creditors, or the other legatees of A., but that it still continued assets for payment of his debts and legacies. *Jennings* v. *Bond*, 2 Jo. & Lat. 720; 8 Ir. Eq. R. 755.

Legatee having taken mortgage in part payment, subject to an agreement for payment out of the other assets, and resumption of mortgage:—Held, entitled to benefit of that agreement, accounting for the difference of interest. *Sitwell* v. *Bernard*, 6 Ves. 520; 5 R. R. 374.

—— **Implied Acquiescence in Appropriation by Co-executor.**]—A. R. having bequeathed his personal estate, subject to the payment of his debts, to two trustees, H. and N., upon trust to place out at interest such money as he should die possessed of, and at their discretion to continue at interest the several sums then standing at interest, and out of the produce of his personal property to pay his wife, R. R., a legacy of 4,000*l*., and an annuity of 200*l*. per annum, and the residue to his daughter, appointed his wife, R. R., executrix, and the said H. and N. executors. The testator died in 1797; a settlement was executed on the marriage of the testator's daughter, with T. K., to which R. R. was a party, and in which there was a covenant by all the parties thereto, that the residue should be ascertained and paid over within a year to the trustees of the settlement. H., who had been the banker and agent of the testator, but was indebted to him at the time of his decease, was allowed by the executrix, R. R., to have the sole management of the assets, which, at the time of the testator's death, were sufficient to pay all demands. H. at different times advanced out of the testator's assets several sums, the interest of which T. K. was permitted to enjoy, and in 1812 became a bankrupt, whereby a large portion of the assets was lost. It appeared from his books that he had made entries, appropriating those several sums to the uses of the settlement of 1797. R. R. proved under the commission as executrix, and in the account which was furnished to her by H., and annexed to her disposition, made on the occasion of so proving, referred to the bankrupt's books:—Held, that as it was her duty to have examined those books, she was bound by the entries made therein, and that the appropriations must be considered as made with her privity and concurrence, and, consequently, that she had forfeited her right to be paid the sums due to her under the will of the testator out of the funds so appropriated. *Riky* v. *Kemmis*, Ll. & G. t. Sugd. 101.

—— **Appointment of Receiver to keep down Interest on Incumbrances.**]—On a bill by infant tenant in tail, a receiver was appointed, with an order to keep down the interest of incumbrances out of the rents. He kept down, accordingly, the interest of all but one mortgage, the interest of which (belonging to infant) was never applied for, except small portion for maintenance; the residue of rents paid into court to credit of cause. Tenant in tail coming of age, suffers recovery, and resettles estate, and afterwards dies. Master, by report, having certified that deceased was not bound, while tenant in tail, to keep down interest of incumbrances, and consequently that rents paid into court during time belonging to his personal representatives, partly claiming to be entitled to estate under settlement, petitioned for leave to except to report on following grounds: first, that in case of an infant tenant in tail, interest of incumbrances ought to be kept down out of rents; secondly, that direction to receiver to keep down interest amounted to an appropriation of so much of rents to that purpose; and, thirdly, that deceased, by not claiming fund when of age, shewed intention that it should be appropriated: but it was held, first, that general question would only run in favour of a remainderman or reversioner, and all such rights were in that case barred by the recovery; secondly, that the order was not meant to vary the rights of the real and personal representatives, but to prevent the incumbrancers from being prejudiced by court taking estate into its custody, and also to protect estate from hostile proceedings on part of creditors, and did not amount to appropriation; and, lastly, that there was nothing in circumstances to alter character of property, which, consisting of rents paid into court, and neither applied in payment of interest nor appropriated for such payment, was personal

estate, and to be dealt with as such. *Bertie* v. *Abingdon* (*Lord*), 3 Mer. 560; 17 R. R. 125.

Order for—When made—In General.]—Court will of course order security for a legacy payable at a future day. *Ferrard* v. *Prentice*, Ambl. 273; Dick. 568.

Where legacy is a charge upon personal estate, the court will set apart sufficient sum to answer it, though not payable immediately. *Phipps* v. *Annesley*, 3 Atk. 58.

Admission that there is standing in the names of the executors, upon the trusts of the will, a considerable sum in the 3 per cents., and offering an appropriation, was held sufficient to entitle the plaintiff, a contingent legatee, to move for that purpose; and by consent the order was made as upon admission of assets sufficient to satisfy the plaintiff's demand, to transfer, &c. *Pullen* v. *Smith*, 5 Ves. 21.

Legacy carried over to a separate contingent account, in order to avoid the expense of serving all the parties interested. *Cazalet* v. *Smith*, 11 Beav. 177.

—— **Where Testator's Intention appears.**]—Upon the construction of a will:—Held, that it was the duty of executors to set apart a sum of 4,500*l.* upon a particular trust, and for that purpose, if necessary, to make an immediate conversion of the testator's assets, it being the primary intention of the testator to constitute that trust, also to give maintenance to his infant residuary legatees, although, from other expressions in the will, it might also appear to be his intention that the conversion should not take place till the residuary legatees should attain twenty-five. In default of executing this trust, a receiver was appointed. *Richards* v. *Perkins*, 3 Jur. 168.

—— **Where Testator's Debts not immediately ascertainable.**] — Where the existence and amount of a testator's debts are contingent, and depend upon the result of legal proceedings before a foreign tribunal which are not likely to be speedily settled, the court, in administering his assets, will not be induced by that circumstance to direct an appropriation of the fund in court to answer pecuniary legacies, subject to such demands as creditors may eventually establish. *Thomas* v. *Montgomery*, 1 Russ. & M. 729.

—— **Where Legacy Future or Contingent.**]—The court will not direct a legacy to be raised out of land before the time of payment, although it will secure personal fund for a future or contingent legatee. *Gawler* v. *Standewick*, 2 Cox, 15.

Where legacy is given on contingency, and suit is instituted for administration of estate, court does not direct sum of stock to be appropriated to pay legacy when due, but directs whole fund to residuary legatee, and him to give security for legacy when due. *Webber* v. *Webber*, 1 Sim. & S. 311; 1 L. J. (O.S.) Ch. 219; 24 R. R. 180.

Right of a party, entitled contingently in remainder, to have the trust fund brought into court at the hearing, though there be no imputation against the trustees. *Governesses' Benevolent Institution* v. *Rushbridger*, 18 Beav. 467.

Where a party's interest is a mere possibility, he cannot maintain a bill to secure a legacy. *Davis* v. *Angel*, 31 L. J., Ch. 613; 10 W. R. 685. Affirmed 10 W. R. 722—L. C.

—— **Where Survivorship.**]—Where pecuniary legacies were bequeathed to several persons for their lives, and if any of them should die without issue, their proportions to be divided among the survivors, the sums were directed to be secured in court, and the dividends paid to the legatees for their respective lives, with liberty to any person to apply upon the death of each legatee. *Ranelagh* v. *Ranelagh*, 2 Myl. & K. 441; 1 L. J., Ch. 183.

—— **Where Gifts of Corpus and Income distinct.**]—A testator bequeathed all his property, real and personal, to trustees, to be distributed by them as trustees, in the following manner, i.e., to pay to his daughter A. the interest of 6,000*l.*, at the rate of 5 per cent., for life, and after her death to be divided among the children of A., share and share alike; the portions to be paid to each of the boys at twenty-one, and to each of the girls at her marriage, provided her husband should settle a jointure equal to her portion, but if not, the portion not to be paid, but the interest at 5 per cent. on her own receipt, and the principal to be paid to her children (if any), share and share alike; but if she should die without children, then to be paid to her surviving brothers and sisters, share and share alike; and to pay to his daughter B., the wife of Y., and her three children, the interest of 6,000*l.*, at 5 per cent., i.e., to B. 130*l.*, to her son H. 40*l.*, to her daughter F. 40*l.*, and to her daughter M. 40*l.*, making among them 300*l.* a year; the above payment to continue during the life of B., and after her death the 6,000*l.* to be appropriated among her children in the same manner, and on the same terms and conditions, as required respecting A. and her children; and to pay to his daughter C. 300*l.* a year for life, and after her death 100*l.* a year to her husband Z.; and should C. leave any children, they were to have 6,000*l.* the same as A.'s children; the 100*l.* a year to be paid to Z. to be considered part of the interest: and he gave all the residue of his property to his son, who was one of the trustees, and authorised them to advance any part of his daughters' portions, with their consent, to provide for any of his grandchildren. 1,300*l.* was paid, with B.'s consent, for the advancement of H.:—Held, in a suit instituted by the son, to have sums set apart to provide for the payment of the legacies, and to have the residue transferred to him, that, as the 300*l.* a year bequeathed to B. and her children was a distinct bequest from that of the principal sum of 6,000*l.*, a sum of stock, sufficient to provide for the interest at 5 per cent. on 4,700*l.* (the remainder of the legacy of 6,000*l.*, minus 1,300*l.*, paid to H.), should be set apart during the life of B. *O'Neill* v. *Billing*, 2 Ir. Ch. R. 80.

Subsequent Loss by Breach of Trust.]—Where a testator bequeathed to A. and B., two of his three executors, a sum of money to be invested in trust for C. for life, and then to sink into the residue, and A. and B. accordingly invested the money; but after A.'s death, B. sold out the stock and applied the proceeds to his own use:—Held, that a legacy given to him by the will, which he had not yet received, but which he had assigned for valuable consideration, was applicable to make good the breach of trust, the appropriation of the stock having been defeated by the act of B. *Morris* v. *Livie*, 1 Y. & C. C. C. 380; 11 L. J., Ch. 172.

An executor, who was also trustee, having paid to the adult legatees their shares of the then ascertained residue, invested in his own name the shares of infant legatees, for whose maintenance he was bound as trustee to apply the dividends, but did not execute any declaration of trust. He subsequently applied these shares to his own use, after which further assets of the testator's estate fell in:—Held, that they were applicable, in the first instance, in making good the infants' legacies. *Willmott* v. *Jenkins*, 1 Beav. 401.

—— **By Fall in Stocks.**]—Reference to master on infant legatees' bill, to compute how much stock should be set apart to answer the legatees. Master made his report, but before the order was made, infant became of age; stock had fallen in meanwhile:—Held, he was to be paid legacy in full, without deducting for fall in stocks. *Rock* v. *Hardman*, 4 Madd. 253.

Legacy, payable at twenty-one, having, under direction of court, been invested in annuities which had sunk in value, legatee not bound to accept them in satisfaction of whole legacy. *Alcock* v. *Eames*, Dick. 578. But see *Webb* v. *Webb*, Dick. 746.

Legacy, left to A. on marrying with consent, and till marriage interest to be paid 3*l.* per cent. The executrix lays it out in the funds, and conveys to trustees in trust to pay the legacy, with 3*l.* per cent. interest, and to pay the surplus interest to her. This is not a good appropriation, but the stock having sunk in value, the executrix's estate shall make it good. *Cooper* v. *Douglas*, 2 Bro. C. C. 232.

A testator bequeathed stock to his executors, subject to his debts, to pay the dividends to his wife for life, and at her death to sell the capital, and out of the proceeds to pay certain legacies, which would exhaust about one-half of the fund, and he made A. his residuary legatee. Thirty years before the death of the tenant for life, the estate of the testator was fully administered by the trustees and executors of his will, and no part of the stock being required for payment of his debts, it was set apart and appropriated for the persons entitled thereto. About the time of the tenant for life's death, a large portion of the fund was lost. Upon a bill by the pecuniary legatees to have the remaining portion applied in satisfaction of their legacies in priority to the residuary legatee:—Held, that as there had been a complete appropriation of the fund, the subsequent loss must fall on the pecuniary legatees in common with the residuary legatee, and therefore that the residuary legatee was entitled to share in the remaining portion of the fund, which must be divided amongst the respective legatees in proportion to their respective interests in the original fund. *Baker* v. *Farmer*, 36 L. J., Ch. 819; L. R. 4 Eq. 382; 17 L. T. 46; 15 W. R. 917. But see *S. C.*, L. R. 3 Ch. 537; 16 W. R. 923.

Subsequent Increment.]—A particular sum having been set apart to answer a pecuniary legacy, which was given to one for life, with remainder to his children, and an increase in the value of that fund having taken place, which made its value greater than the amount of the legacy:—Held, that the legatees were entitled to the benefit of the increase. *Kimberly* v. *Tew*, 5 Ir. Eq. R. 389; 4 Dr. & War. 139; 2 Con. & L. 366.

A. B. bound himself to pay 16,000*l.*, on the death of the survivor of himself and wife, on certain trusts, under which, on a contingency, the amount was to revert to himself. A. B. by his will, gave the 16,000*l.*, if it should revert, to trustees, on trust to pay thereout 14,000*l.* to C., and three legacies of 500*l.* each to charities, and "the remaining sum of 500*l.*" to the Foundling Hospital. His wife survived him nine years, and the sum of 16,000*l.* was invested in 25,702*l.* 3 per cents. In 1848 the contingency happened, when the fund reverted, and amounted to considerably more than 16,000*l.*:—Held, that the legatees were entitled to money legacies only, and not to the whole fund. *Loscombe* v. *Wintringham*, 12 Beav. 46. And see *Green* v. *Pigot*, infra.

Securing Legacy to Infant.]—Legacy at twenty-one. If infant dies before, then to executor, the residuary legatee; court will not order legacy to be raised and secured for infant. *Palmer* v. *Maysent*, Dick. 70. S. P., *Starkie* v. *Smith*, Dick. 520.

On a bill by an executor to recover a fund belonging to the testator, it appeared that the testator's debts were paid, and that the fund was bequeathed to infants; the court refused to have it transferred to the executor, but secured it in court for the benefit of the infants. *Orrok* v. *Binney*, Jac. 523.

Legacy to a female infant, to be paid at twenty-one, or marriage, with interest at 4 per cent., but if she die before, to sink into the residue, ordered to be paid into the bank, in order to secure the legacy, and if greater interest made, that it should be for the benefit of the child. *Green* v. *Pigot*, 1 Bro. C. C. 103; Dick. 585.

In some cases an executor may be compelled to give security; as where 1,000*l.* was given to A., to be paid at twenty-one, upon a bill suggesting a devastavit, security was decreed to be given. *Duncumban* v. *Stent*, 1 Ch. Cas. 121.

A. by will gives all his personal estate to his wife for life, and then gives to his grandchildren, T. and F., 100*l.* each, if they attain twenty-one, or marriage:—Held, legacies were not payable till death of wife, but that T. and F. were entitled to security at the above periods. *Young* v. *Burdett*, 5 Bro. P. C. 54.

Testator gives a legacy to child, payable at the age of twenty-three, and made his wife executrix and residuary legatee. She marries again, and dies. Her second husband takes administration de bonis non, &c. Upon a suggestion of insolvency the second husband ordered to give security to pay the legacy when due. *Rous* v. *Noble*, 2 Vern. 249.

Executors, having personal estate of the testator given to them by the will upon trust to lay out upon good and sufficient security for an infant, to be paid on his coming of age, after a decree to account, and after notice by the next friend of the infant plaintiff, lending a part of such personal estate upon mortgage, ordered to pay the same into court; but the motion asking, in the alternative, that the executors might be ordered to replace the amount by so much stock as the same would have purchased at the time of investment, was to that extent refused. *Widdowson* v. *Duck*, 2 Mer. 494; 16 R. R. 206. And see *Willmott* v. *Jenkins*, supra.

—— **Under Legacy Duty Act.**]—Bill for a legatee very nearly of age to secure the legacy, the costs were given out of the estate, but that will not be done in future upon a bill to secure the legacy of an infant; as under the Legacy

Act (56 Geo. 3, c. 52), s. 33, the executor may pay the legacy into court, and the legatee when of age, may petition for it. *Whopham* v. *Wingfield*, 4 Ves. 60.

Where money is lodged with the accountant-general under the Legacy Act, he is bound to invest from time to time the dividends on the principal sum in stock; and the order for investing the principal sum should provide for the costs of investing the dividends. But where the order did not provide for those costs, he was not held responsible for not having so invested the dividends. *M'Mullen, Ex parte*, 7 Ir. Eq. R. 488.

An infant being entitled to a legacy of 50*l*., the executors under the will invested that sum, minus the legacy duty, in 3*l*. per cent. consols, and tendered the amount produced by sale of the stock, with the interest upon it, to the infant upon her coming of age. A bill was filed against the executors by the legatee for the amount of the legacy, with 4*l*. per cent. interest:—Held, that the executors ought to have paid the legacy into court, under the Legacy Act, and a decree was made for the plaintiff, with costs. *Rimell* v. *Simpson*, 18 L. J., Ch. 55.

A testator bequeathed the residue of his personal estate to his executors, in trust for his wife for life, and, after her decease, for his nephews and nieces, whereby legacy duty would be payable at the death of the wife:—Held, that, under the 36 Geo. 3, c. 52, s. 13, the executrix of the surviving executor might, during the life of the widow, transfer the trust fund to new trustees of the will appointed by the court. *Jones's Trust, In re*, 21 L. J., Ch. 566.

A legatee being absent in India, the executors paid his legacy into court, under the statute 36 Geo. 3, c. 52. The legatee, by letter, authorised his brother to receive and the executors to pay it. The court, upon the joint petition of the legatee and the party authorised to receive it, directed the money to be paid. *Candy, Ex parte*, 8 Sim. 189; 5 L. J., Ch. 14.

When executors paid residue into the bank to the credit of infants, under the Legacy Duty Act, 36 Geo. 3, c. 52, and subsequently incurred costs in the Probate Court, repayment allowed to them on petition out of fund so paid in. *Blight, In re*, 21 W. R. 573.

21. Payment.

Presumption of.]—In 1780 the interest of a sum of money was bequeathed to A. for her life, and after her decease the principal to her daughter B. Between 1784 and 1795 proceedings in chancery, in which A. and B. were parties, were instituted against the executor, and a decree for an account was obtained, which was not acted upon. From that time till 1828 no application was made by B. for her legacy, nor did it appear that A. had of late years received her interest. On the other hand, it was stated by the representatives of the executor, and from circumstances it appeared probable, that the legacy was paid by the executor many years ago to A. and B. jointly, or to one of them with the consent of the other:—Held, nevertheless, that payment of the legacy in the mode suggested could not be presumed, such mode of payment being contrary to the presumed duty of the executor. *Prior* v. *Horniblow*, 2 Y. & C. 200.

Order of.]—An executor ought to pay that creditor first who uses the first diligence: so at law, the first judgment shall be preferred, but otherwise as to legatees, for there being no priority among them, their legacies shall be paid pari passu. *Ashley* v. *Pocock*, 3 Atk. 208.

—— **Preference of Legatees to Creditors a Devastavit.**]—Payment by executor of legacies not good in case of deficiency of assets against creditor by simple contract of the testator, and it makes no difference that notice of his demand was not given within the year. It is a devastavit. *Onge* v. *Truelock*, 2 Moll. 45.

An executor will be allowed payments made by him to simple contract creditors of his testator, a bond being in existence, but not payable, but he will not be allowed payments to legatees, notwithstanding he had no notice of the bond. *Norman* v. *Baldry*, 6 Sim. 621.

Executor having paid legacies, stands in a situation in which (at least for the security of the fund) it is not competent to him to allege that debts are unpaid. *Freeman* v. *Fairlie*, 3 Meriv. 38; 17 R. R. 7.

The testator leaves assets sufficient to pay all debts and legacies; the legatees receive payment, which the creditors might also have had, if they had demanded it in time; they lie by for eleven years, and the estate is wasted, yet the legatees shall refund. *Hardwick* v. *Mynd*, 1 Anstr. 112; 3 R. R. 562.

Payment by executor of simple contract debt before breach of condition of bond is good, and no devastavit in case of deficiency of assets, but payment of legacies is otherwise. *Hawkins* v. *Day*, Ambl. 160; Dick. 151.

A specific legacy is not discharged from its liability to pay the testator's debts, although the personalty not specifically bequeathed is more than sufficient for that purpose, and although the specific legacy has been in consequence assigned and delivered by the executor to the specific legatee. *Davies* v. *Nicolson*, 2 De G. & J. 693; 27 L. J., Ch. 719; 5 Jur. (N.S.) 49; 6 W. R. 790.

If an executor acting bonâ fide, and under a conviction, that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them; he will be answerable for the value of those articles with interest at 4 per cent. if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events which he had no reason to anticipate, and the court will direct an account to be taken of the value of the property so possessed by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors. *Spode* v. *Smith*, 3 Russ. 511.

By Charge on Property of Executor indebted to Testator's Estate.]—An executor, indebted to his testator's estate, creates a charge on his (the executor's) own freehold estate in favour of his wife and children, to the amount specified in the testator's will, as part of their share of his residuary estate:—Held, that the wife and children were entitled to the benefit of the charge, although the debt due to the testator's estate remained unpaid. *Stilwell* v. *Mellersh*, 20 L. J., Ch. 356.

To Infant.]—Executors cannot justify paying a legacy payable at twenty-one to the infant, or for his use, except for express necessaries. *Davies* v. *Austen*, 3 Bro. C. C. 178; 1 Ves. 247.

Executor, pursuant to will, pays into the hands of three children, of the respective ages of sixteen, fourteen, and nine years, their legacies of 100*l.* each; the father embezzled the money. On bill for repayment, held that, as the executor made this payment to save a forfeiture of what he himself took under the will, he ought not to pay it over again; but Lord H., afterwards thinking the point doubtful, at his recommendation the defendant paid 50*l.* amongst the three children, who were ordered to release their legacies. *Philips* v. *Paget*, 2 Atk. 80.

A legatee domiciled abroad may, if of age, according to the law of the place of his domicil, receive payment of his legacy, although a minor, according to the law of this country, and a legatee domiciled abroad may be paid his legacy on attaining his majority, according to the law of this country, even if he is a minor, according to the law of his place of domicil. *Hellman, In re*, L. R. 2 Eq. 263; 14 W. R. 682.

When persons entitled to a legacy under a will were minors domiciled in Scotland, and the executor lodged the money so bequeathed in court:—Held, that the money so lodged might be paid out on the joint receipt of the minors and their curator appointed according to the law of Scotland. *Ferguson, In re*, 22 W. R. 762. And see *Deneken, In re*, infra, col. 1703.

To Father.]—Trifling specific bequests given to infant children, ordered to be delivered to their father. *Hill* v. *Chapman*, 2 Bro. C. C. 612.

An infant's legacy of small amount paid to the father under special circumstances. *Walsh* v. *Walsh*, 1 Drew. 64.

A legacy was given to a child ten years old, and the executor paid it to his father for his benefit. The father became insolvent. The executor shall not be obliged to pay it over again. Sed secus, if the executor had taken a security from the father, for then he paid it at his own peril. *Holloway* v. *Collins*, 1 Ch. Cas. 245. But see 1 P. Wms. 285.

Payment to the father, as guardian, of legacy given to a child, ill, though the testator, by parol on his deathbed, directed it. *Dagley* v. *Tolferry*, 1 P. Wms. 283; 1 Eq. Abr. 300. See 1 Ves. 249. n.

N. made a will with certain trusts relating to his real and personal estate, and appointed trustees to carry them into execution. One of these trusts was for the payment of provisions of 2,500*l.* for the younger children, and 500*l.* for the eldest daughter of R., who was one of the executors and trustees under the will. An act of parliament was obtained to carry some of the trusts of this will into execution, and, under this act, lands devised by N. were sold. The trustee under the act was W. On a bill filed against him by the legatee of the 2,500*l.*, he sought to take advantage of the payment by him of that sum to R.:—Held, that R.'s receipt was no discharge of W.'s liability, as, by the terms of the act, he was absolutely bound to pay the debts, and discharge the children's portions, and it was not set up in the answer, nor proved that R. had specifically received this money as trustee for his daughter. *Lawrence* v. *Blake*, 8 Cl. & F. 504.

To Parent, where gift to Parent and Children.]—Legacy given to A., to be divided between himself and his family, is well paid to A. *Cooper* v. *Thornton*, 3 Bro. C. C. 96, 186.

Legacy to a father the better to enable him to provide for his younger children: he consented to secure the capital, but was held entitled to the interest. *Brown* v. *Casamajor*, 4 Ves. 498.

Bequest to A. for her and her children's use: a transfer decreed to A. *Robinson* v. *Tickell*, 8 Ves. 142; 7 R. R. 5.

To Guardian.]—Where an infant is entitled to a vested legacy, payment thereof, during his minority, by the executor to the testamentary guardian is valid, inasmuch as the statute for taking away the Court of Wards and Liveries (14 & 15 Car. 2, c. 19, Ir.; 12 Car. 2, c. 24, Eng.) enables the guardian to give a good acquittance. Such a payment is valid, although the period directed by the testator for payment of the vested legacy to the infant is the attainment of the age of twenty-one years or marriage. Accordingly, where a testator bequeathed to his eight younger children all his property, share and share alike, on their attaining their respective ages of twenty-one years or marriage with the consent of their guardian, and directed that the interest arising from their respective shares should be applied in the meantime to their maintenance and education, and appointed a guardian and an executor:—Held, that a payment, during the minority of the children, of a part of the corpus of the personal estate of the testator, by the executor to the guardian, was a valiant payment. *M'Creight* v. *M'Creight*, 13 Ir. Eq. R. 314.

When persons entitled to a legacy under a will were minors domiciled in Scotland, and the executor lodged the money so bequeathed in court:—Held, that the money so lodged might be paid out on the joint receipt of the minors and their curator appointed according to the law of Scotland. *Ferguson, In re*, 22 W. R. 762.

To Married Woman.]—Legacy bequeathed to a feme covert, payment to her alone not good. *Palmer* v. *Trevor*, 1 Vern. 261.

Testator gave 5,000*l.* stock to a female infant, to be paid or transferred to or settled on her, by his executors, by such deed or instrument in writing as they should think most prudent and proper on her attaining twenty-one. The infant married in the testator's lifetime, and afterwards attained twenty-one. The court ordered the stock to be transferred to her on her sole receipt. *Laing* v. *Laing*, 10 Sim. 315; 9 L. J., Ch. 48; 3 Jur. 1119.

Where a part of a legacy had been paid to a married woman, under circumstances which primâ facie showed that the husband had assented to, or had at least ratified, such payment, it was referred to the master to inquire how much of the legacy had been so paid, and he was directed to give the executors credit for the sums received by the wife, either with the husband's express approbation, or under such circumstances as made her his agent for that purpose. *Moses* v. *Levi*, 3 Y. & C. 359.

A testator who died, and whose will was proved in England, bequeathed a legacy to a married woman, whose domicile, as well as that of her husband, was in Scotland. The husband died in a few months after the testator, without having received the legacy. After his decease the executors of the testator, with knowledge of the before-mentioned circumstance of domicile, paid the legacy to the widow. According to the Scotch law the payment should have been made

to the husband's personal representatives :—Held, that in the absence of proof that the executor knew the Scotch law on the subject, the payment to the widow was a good payment. *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91 ; 12 L. J., Ch. 153 ; 7 Jur. 77.

Where a testatrix bequeathed legacies of 250*l.* each to two French ladies, the wives of French subjects, the court ordered payment of the ladies' legacies to them. *Sutherland* v. *Young*, 5 L. T. 738.

A wife who has obtained a protection order under 20 & 21 Vict. c. 85, s. 21, can give a valid discharge for a legacy to which she became entitled before the date of the order. *Coward, In re*, 44 L. J., Ch. 384 ; L. R. 20 Eq. 179 ; 32 L. T. 682 ; 23 W. R. 605.

To Trustee of Secret Trust.]—A fund bequeathed to A. to be applied in accordance with sealed directions (which had been admitted to probate) was ordered to be paid over to A. instead of being distributed by the court in an administration action. *Hull* v. *Hill*, 4 Ch. D. 97 ; 25 W. R. 223.

—— **Of Charity.**]—A testator directed his executors to invest a sum of money in the 3 per cent. stock, and bequeathed the stock to the treasurer of a charitable corporation in Scotland, in order that the dividends might be applied to the purposes of charity. The court ordered the stock to be transferred to the corporation. *Emery* v. *Hill*, 1 Russ. 112 ; 25 R. R. 11.

Where legacy is given for permanent charitable purposes to trustees not having corporate character, court will not transfer fund to them without reference. *Wellbeloved* v. *Jones*, 1 Sim. & S. 40 ; 1 L. J. (o.s.) Ch. 11 ; 24 R. R. 146.

Charitable bequest to the rector and corporation of W. W. being a vicarage, payment was ordered to be made to the vicar and corporation. *Hopkinson* v. *Ellis*, 5 Beav. 34.

Where sums of stock are given to the churchwardens of a parish, or to the treasurer of a school, the court will not direct the stock to be transferred to them, but to be carried to a separate account, and the dividends to be paid to the churchwardens or treasurer for the time being. *Tyrrell* v. *Clark*, 2 Drew. 86 ; 23 L. J., Ch. 283 ; 18 Jur. 323 ; 2 Eq. R. 333 ; 2 W. R. 152.

To one Legatee in absence of others.]—A party beneficially entitled to one-fourth of a fund belonging to the estate of a testator who had been dead 150 years, having obtained letters of administration de bonis non to the testator, filed a bill for an account and payment of the whole fund ; it appearing that no part of the fund in question was required for the payment of the testator's debts, but that the beneficial interest in the other three-fourths had passed under the residuary bequest in his will, and had belonged successively to the estates of several persons who were named in the proceedings, but who were not represented on the record, the court ordered one-fourth only to be paid to the plaintiff, and the other three-fourths to be paid into court, with liberty to any party interested to apply, giving notice to the attorney-general. *Loy* v. *Duckett*, Cr. & Ph. 305.

To Legatee of Original Legatee Direct.]—In 1815, a sum of 1,000*l.* was bequeathed to J. R. and C. R., in equal shares, to be raised out of the share of E. A. D. in the testator's residue, on the death of his (the testator's) widow. In 1818 J. R. bequeathed his interest in the 1,000*l.* to C. R., and appointed him one of his executors. In 1822, by an indenture reciting that all J. R.'s debts and legacies were paid, C. R. assigned the 1,000*l.* to D. and L., from whom, by divers mesne assignments, the trustees of the Economic Life Assurance Society purchased it for valuable consideration. The testator's widow died, when the legacy fell into possession :—Held, that the whole of it might be paid to the said trustees, and that the 500*l.* which represented J. R.'s share ought not to be paid to his surviving representative, to be handed over to the said trustees. *Revill* v. *Revill*, 3 W. R. 541.

At what Time—In general One Year from Testator's Death.]—Legacies are not distributable till a year after testator's death. *Hill* v. *Chapman*, 1 Ves. 407.

The year allowed for executors, &c., is only for convenience, and does not prevent the vesting. *Garthshore* v. *Chalie*, 10 Ves. 13 ; 7 R. R. 311.

Where testator directs his executors, as soon as they should think proper after his death, to sell so much stock as would produce legacy of 12,000*l.*, legacy is not payable till end of year after testator's death. *Benson* v. *Maude*, 6 Madd. 15.

Where a testator gives to legatees who shall be living at the time of actual distribution, the court will fix a year as the proper period. *Brooke* v. *Lewis*, 6 Madd. 358 ; 23 R. R. 246.

A testatrix directed her trustees, as soon as possible after her decease, to invest in consols such a sum of money as might be necessary to realise such an amount of dividend as would be fully sufficient, with the rent of her land at Kenilworth, at that time payable, to make up the sum of 50*l.* per annum, which she directed to be paid to T. J. during his life, and after his decease the principal to go in the manner pointed out by her will :—Held, that the investment was to take place from the expiration of one year after the death of the testatrix. No provision was to be made for future reduction in the rent of the land at Kenilworth, and no deduction was to be calculated in respect of land tax or other taxes. *Hues* v. *Jackson*, 23 L. J., Ch. 51 ; 2 Eq. R. 462 ; 2 W. R. 83.

—— **Immediately after Admission of Assets.**]—Executors paid some interest on a legacy, and about nine years after testator's death passed their accounts at the Legacy Duty Office, showing a considerable residue :—Held, that the legatee was entitled to an immediate decree for payment of the legacy, without first taking the accounts of the testator's estate. *Whittle* v. *Henning*, 2 Beav. 396.

Upon the constructive admission of assets :—Held, that residuary legatees were entitled to immediate payment of their legacies, and under circumstances with interest beyond the time allowed by the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 40. *Dinsdale* v. *Dudding*, 1 Y. & C. C. C. 265.

Effect of Express Directions.]—Where the testator directed some of the legacies to be paid to infants at twenty-one, and afterwards added that it was his wish, "as far as it may be practic-

able, that all legacies should be paid within six months after her decease":—Held, not to accelerate the time of specified payment, but only where indefinite. *Frost* v. *Capel*, 2 Beav. 184; 9 L. J., Ch. 84.

Direction that particular legacies to children shall be paid at particular time, is not altered by direction subsequent, that all legacies should be paid at another time. *Adams* v. *Clarke*, 9 Mod. 154.

The testator bequeathed his residuary estate to trustees, upon trust to pay the interest thereof, after the decease of a tenant for life, to John, Robert, and Ann, for five years, and at the expiration of that term to pay them 5,000*l.* apiece, and then to pay the interest of the remainder, for a further term of three years, to John, Robert, and Ann, in equal shares; and at the expiration of that time, to pay the whole to John, Robert, and Ann, in equal shares. Soon after the death of the tenant for life, and before the expiration of the five years, John and Robert claimed and obtained from the trustees payment of the whole of their two-thirds of the residuary estate of the testator; but it was held that the husband of Ann was not entitled to immediate payment of her share of the capital, and that he was unable to give an effectual release or discharge for the same. *Harley* v. *Harley*, 10 Hare, 325.

E., being on bad terms with his eldest son, bequeaths him a trifling annuity, and bequeaths to M., the daughter of the said son, "if unmarried, and if she does not marry without the consent of his trustees, the sum of 400*l.*, one moiety to be paid her upon her marriage with such consent, the other moiety in one year after; but if said M. was then married, or should marry without consent, said sum to sink into his personal fortune." M., being unmarried, is not entitled immediately either to principal or interest. *Ellis* v. *Ellis*, 1 Sch. & Lef. 1.

Testatrix, by will, limited certain estates to her daughter O. for life, remainder to first and other sons successively in tail male, remainder to her daughters as tenants in tail general, and if an only surviving daughter, to her in tail general; and in default of all such issue of O., to trustees for 1,000 years, upon trust, to raise certain legacies as she should bequeath by codicil or codicils; and she afterwards by codicil bequeathed certain legacies after the decease and failure of issue of her daughter O. O. died without issue:—Held, that the legacies were payable when the term was to take effect. *Morse* v. *Ormonde* (*Marquis*), 5 Madd. 99; 21 R. R. 284. Affirmed, 1 Russ. 382; 4 L. J. (O.S.) Ch. 158; 25 R. R. 85.

Payment at Age of Eighteen—Infant's Power to give Receipts—Payment out of Court.]—A testator gave a sum of money to be paid to the legatees when they attained the age of eighteen years, and directed that their receipts should be a sufficient discharge, notwithstanding infancy. The fund was in court:—Held, that the money might be paid out to the trustees on their undertaking to remit it forthwith to the legatees, who were still infants, but had attained the age of eighteen years. *Deneken, In re, Peters* v. *Banchereau*, 13 R. 294; 72 L. T. 220.

—— **Where Deferred during Life Interest which lapses.**]—Contingent legacy out of real and personal estate, payable two years after the event. By codicil, the testator reciting that he found his estate would not bear that payment during the life of A., being chargeable with an annuity for her life, declared he revoked that part of his will, and that the said legacy, upon the same event, was to be paid twelve months next after the death of A., and not before. A. dying before the contingent event, the legacy is not payable till the expiration of two years after it. *Wordsworth* v. *Younger*, 3 Ves. 73.

One devises lands to his wife for life, and after death to his son in fee, upon condition to pay his daughter 1,000*l.* within a year after the death of S., with a proviso, that if the money be not paid, the daughter may enter and receive the profits till payment. S. dies, living the wife. The daughter shall have the 1,000*l.* during the life of the mother, and in default of payment, equity will decree a sale of the reversion. *Bacon* v. *Clerk*, 1 P. Wms. 478; Pre. Ch. 500.

Where Deferred During Life Interest by Implication.]—Testator gave a real estate and a sum of stock to A. for her life, and after her death to his brother absolutely, and he gave legacies, which he directed to be paid as soon as convenient after his death to his nephews and nieces, and the residue of his property to his brother absolutely. The brother having died, the testator, by a codicil reciting that fact, and that thereby the devises and bequests to his brother had lapsed, gave an annuity to his brother's widow, and directed his trustees to pay the income of the residue of his personal estate to A. for life, and gave to her all his real estates for life, and after her death to his trustees in trust to sell, and the proceeds to fall into his personal estate; he then gave 10,000*l.* to each of his nieces, in addition to the legacies given to them by the will, and directed that that sum for each of them should be held by his trustees for their separate use, and he gave all the clear residue of his estate (after providing for the before-mentioned legacies, and also those given by his will) to his nephews:—Held, that the legacies given to the nieces by the codicil were not payable till after A.'s death. *Overend* v. *Gurney*, 7 Sim. 128.

Bequests to the sons and daughters of D. of 200*l.* each, also to the children of a son of D. 200*l.* to be equally divided among them, to be paid twelve months after the decease of the testator's widow:—Held, to be postponed as to all the bequests till after the widow's death. *Child* v. *Elsworth*, 2 De G. M. & G. 679.

A testatrix gave two legacies, and directed them to be paid out of a reversionary interest in stock to which she was entitled:—Held, that the legacies were payable when the reversion fell into possession, and that interest was payable from that time. *Earle* v. *Bellingham*, 24 Beav. 448; 27 L. J., Ch. 545; 3 Jur. (N.S.) 1237; 6 W. R. 45.

Testatrix by her will devised all her fee-simple, freehold, and leasehold estates to R. E. for life, remainder to J. E. for life, with remainder, save a certain rent-charge, to the commissioners of charitable donations, in trust to pay the head-rent, and to apply the profits to certain charities specified in the will:—Held, that the charitable bequests were to be paid out of the rents and profits of the property devised, and not out of the general personal estate of the testatrix; and that no charitable trust attached upon the devised estates, until after the death of R. E. and J. E. *Charitable Donations Commissioners* v. *Espinasse*, Fl. & K. 164; 3 Ir. Eq. R. 324.

A. gave one-sixth of his personal estate to A. for life, and afterwards to a charity. He gave four separate sixths to B., C., D. and E. for life, with remainder to the same charity; he gave the remaining sixth to F. for life: and after the death of the survivor of A., B., C., D., E. and F., he gave the whole moneys, and all interest thereafter to become due thereon, to the same charity. F. died:—Held, that the charity was not entitled to F.'s sixth until the death of the survivor of the six legatees, and that there was an intestacy as to the intermediate income. *Stevens* v. *Pyle*, 28 Beav. 388.

A testator gave all his personal estate to his wife for life, and he bequeathed 40*l.* to A., and other pecuniary legacies, all of which were payable at her death. By a first codicil he gave a legacy of 200*l.* to B. (who was not mentioned in the will), and he directed that all things in his codicil should be performed as if the same were so declared in his will. By another codicil he revoked the legacy of 40*l.* to A., and gave her 50*l.*:—Held, that the legacy of 200*l.* was payable at the death of the testator, but that the payment of the legacy of 50*l.* was postponed until the death of the widow. *Giesler* v. *Jones*, 25 Beav. 418.

By his will a testator bequeathed 10,000*l.* upon trust for A. for life, and after her decease for eight persons named, in certain proportions, among whom was B., who was to receive 1,000*l.*; by a codicil to his will the testator gave to B. "2,000*l.* instead of 1,000*l.* as bequeathed by my said will":—Held, that following the general rule, the legacy by the codicil being given instead of that by the will, was subject to the same incidents, and the payment must be deferred until after the death of A. *Collyer, In re, Millikin* v. *Snelling*, 55 L. T. 344.

Testator directed his trustees to hold a residuary fund upon trust for his wife during widowhood, and on her marrying again upon trust to pay her an annuity of 2,000*l.*, and from and immediately after her decease upon trust to pay certain pecuniary legacies, the payment of which was expressly postponed until after the wife's death, and the will contained a gift of the residue of the trust fund. The testator's widow married again:—Held, that the pecuniary legatees were not entitled to payment until the death of the widow. *Tredwell, In re, Jaffray* v. *Tredwell*, 60 L. J., Ch. 657; [1891] 2 Ch. 640; 65 L. T. 399—C. A.

Discretion given to Executors as to Time and Mode of Payment—Legatee absolutely Entitled.]—A testatrix gave to her executors a sum of 1,000*l.* in trust for her brother, to be paid in such sum or sums, share or shares, and at such time and manner as they should think proper, and bequeathed the residue of her property to her executors in trust, as to one-half thereof, for her brother in like manner:—Held, that the brother was absolutely entitled to the legacy and share of residue, freed from the exercise of any discretion by the executors. *Miller, In re, Clancy* v. *O'Callaghan*, [1897] 1 Ir. R. 290.

Power of Deferring, how to be exercised by Executors.]—A testator gave to his five daughters a sum of 6,000*l.* each, to be invested in real or government securities within seven years from his death, such investment to be in the names of the executors, in trust for them or their children:—Held, that the executors were bound to invest the money as soon as they had assets, and not to wait for seven years from the testator's death, the postponement being for the convenience of the estate, and not for the benefit of the residuary legatee. *Varley* v. *Winn*, 2 K. & J. 700; 25 L. J., Ch. 831; 2 Jur. (N.S.) 661; 4 W. R. 792.

Legacy payable at Twenty-one—Attainment of Age by some Members of Class.]—Legacy by a grandfather in trust for the five children by name, and all and every the child and children of his son equally, the shares to be assigned at twenty-one, or upon marriage of the daughters, with power to advance money for putting out all and every, or any of the sons to business. The first attaining twenty-one is entitled to receive his share then. *Prescott* v. *Long*, 2 Ves. 690.

Legacy of stock at a particular age; order made upon the petition of one legatee having attained the age for a transfer of his share to his attorney. *Hill* v. *Chapman*, 11 Ves. 239.

Bequest of a personal fund to such of the children of I. N. as should live to attain the age of twenty-one years; I. N. had three children, two of whom, having attained twenty-one, applied for payment of their shares. Under the circumstances of the case, the court declined to pay over to them any part of the capital, but allowed them to receive the interest of two-thirds, without prejudice to the claim of after-born children of I. N. *Brandon* v. *Aston*, 2 Y. & C. C. C. 30.

A limited fund was given to A. B. until some child of his should attain twenty-one, and 1,000*l.* consols was to be paid thereout to each of his children as they attained twenty-one. The fund was insufficient to provide for all the children. A child attained twenty-one:—Held, that he was, notwithstanding the deficiency, entitled to 1,000*l.* consols. *Evans* v. *Harris*, 5 Beav. 45.

—— **Payment when Age attained notwithstanding Life Interest.**]—A testator having first given a small annuity charged on real estate to A. for life, which he gave over in case of A.'s death, leaving children, among such children, till they should attain twenty-one, and further charged the same lands with the payment of the sum of 100*l.* to the child or children of A., when and so soon as he, she, or they should respectively attain the age of twenty-one:—Held, that the sum was raisable for a child of A. on attaining twenty-one in his lifetime. *Pearce* v. *Catton*, 1 Beav. 352; 8 L. J., Ch. 239.

A testator gave the residue of his real and personal property to trustees to sell and stand possessed of the proceeds to pay the dividends and interest to his wife for life, to be by her expended in or about the maintenance of herself and the maintenance and education of his children, and after the decease of his wife he gave the principal of the estate unto or amongst all his children equally, and to be paid to them as they should severally attain twenty-one, with benefit of survivorship amongst them. There were seven children, and two of them upon attaining twenty-one, while four of the others were yet infants, petitioned jointly with the mother that the amount of their shares might be paid to them for their advancement in the world:—Held, that the shares became vested upon the children attaining twenty-one, and though the court would not usually sanction the payment of the shares, where the whole

income was not ample for the maintenance of the children, yet such a course might be adopted here upon the undertaking of the two children to secure to the mother the dividends which would have accrued in respect of those sums. *Berry* v. *Bryant*, 31 L. J., Ch. 327. And see *Young* v. *Burdett*, ante, col. 1696.

—— **Notwithstanding Contingency still pending.**]—Legacy payable at twenty-one, with proviso to go over, if legatee should at any time become seised of the real estate, to which he was entitled in remainder after an estate tail limited upon an estate for life, subsisting when he became twenty-one. Even supposing there is a contingency left, he must have the legacy at twenty-one; but it may be disputed afterwards upon the happening of the contingency. *Griffith* v. *Smith*, 1 Ves. 97.

—— **Payment ordered before Age attained.**]—Legacy payable at twenty-one ordered to be paid out of money in cause in the name of the accountant-general before the legatee attained that age. *West* v. *Welsh*, Dick. 381.

—— **Payment before Age by Mistake—Recouping Executor.**]—*See* EXECUTOR AND ADMINISTRATOR.

Payment at Twenty-one implied from Gift over.]—Although no time is specified for payment of a legacy given as a portion, subject to a contingeney, provision to go over if legatee die before twenty-one, raises a necessary implication, that it is payable at twenty-one. Legacies to A. and B., and "in case the said A. and B., or either of them, shall become entitled to the said lands (real estate settled in remainder, on the event of C. dying without issue), my intention is, that she or they so becoming entitled shall not have, possess, or enjoy any part of my property; but in case A. and B. shall not become entitled to the settled estate, I leave each of them 300*l*.," with other provisions in the event of dying before twenty-one, or marriage with consent, that the legacies should go over. A. having attained twenty-one and married with consent:—Held, that her legacy became absolutely vested, not liable to be divested, notwithstanding the devolution of the settled estate by the subsequent happening of the event. *Colhoun* v. *Thompson*, 2 Moll. 281.

Where Legatee dies before Time fixed for Payment.]—Legacy payable at twenty-one, with a certain allowance in the meantime. The legatee dies before twenty-one; his administrator not entitled to the legacy till such time as he would have attained twenty-one. *Roden* v. *Smith*, Ambl. 588.

Legacy payable at twenty-one, before which time the legatee dies. If interest is payable, his executor shall have the legacy immediately; if not, he must wait till the legatee would have been twenty-one, and cannot then have the interest. *Crickett* v. *Dolby*, 3 Ves. 13.

Legacy payable at twenty-one, before which time the legatee dies. A person, claiming by limitation over, takes immediately, but the administrator of the infant must wait till the time at which the legacy is payable, unless the whole interest is given. *Id.* 16.

Legacy given to a child, payable when twenty-one; the child dies before; his administrator shall have the legacy, but shall stay for it till such time as the child, if he had lived, would have come to twenty-one. *Anon.*, 2 Vern. 199; 2 Vent. 344.

One has several daughters, and being seised in fee, charges his lands with 1,000*l*. apiece to his daughters, payable at twenty-one or marriage; and if any die, then to the survivors, but no time limited when the additional portion should be paid to the surviving daughters. If one die unmarried before twenty-one the additional portion shall not be paid to the surviving daughters until the deceased daughter should have come to twenty-one. *Feltham* v. *Feltham*, 2 P. Wms. 271.

Legacy of 300*l*. to be paid to A. at his age of twenty-three; if he die before, to go over to B. A. dies before twenty-three. B. shall have it presently. *Papworth* v. *Moore*, 2 Vern. 283.

If I devise a legacy of 100*l*. to A. payable at his age of twenty-one, and A. died before twenty-one, A.'s executors or administrators shall not have the legacy till such time as A. (had he lived) should have attained twenty-one, and my executors shall have the interest at the same time. But if I give a legacy to A. of 100*l*., payable at his age of twenty-one, and if he dies before, then to B., and A. dies before twenty-one, B. shall have the legacy presently, and not stay till such time as A. should have come to twenty-one. *Laundy* v. *Williams*, 2 P. Wms. 478. S. P., *Chester* v. *Painter*, 2 P. Wms. 336.

Legacies are given to A., B. and C., to be paid at their respective marriages, and if any of them die, her legacy to go to the survivors. One of them dies unmarried; the survivors shall not receive her legacy before their respective marriages. *Moore* v. *Godfrey*, 2 Vern. 620.

Where Payment expressly Deferred beyond Twenty-one.]—An absolute vested bequest was accompanied with a direction that it should not be delivered till the legatee attained twenty-five:—Held, that he was entitled to payment on attaining twenty-one. *Rocke* v. *Rocke*, 9 Beav. 66.

Testator gave his residuary personal estate to J. J. an infant, and directed his executors to place it out at interest, to accumulate and to pay the principal to the infant on his attaining twenty-four, and, in the meantime, to allow 60*l*. a year for his maintenance, and the testator gave the residue over on the infant's dying under twenty-one. The court held that the residue was actually given to the infant, and that what followed the gift, was merely directory as to the management of it, and on the infant's attaining twenty-one, allowed the residue and accumulations to be transferred to him. *Josselyn* v. *Josselyn*, 9 Sim. 63.

When a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge. *Saunders* v. *Vautier*, 4 Beav. 115. Affirmed Cr. & Ph. 240; 10 L. J., Ch. 354.

A legacy was given to A., when he should attain twenty-four; at twenty-one he received part, and the executor gave a bond to pay the remainder when A. should attain twenty-four. A. died in the meantime. The court doubted in this case, whether the money received should be repaid and the bond delivered up. *Luke* v. *Alderne*, 2 Vern. 31.

A residuary estate was bequeathed in the first instance to be paid into the hands of the legatee, on attaining the age of twenty-five years, and not till then unless she married; the whole property then to be settled on her and her children; the legatee, on attaining the age of twenty-one unmarried, was held entitled to the income and the accumulations thereof. *Grant* v. *Grant*, 3 Y. & C. 171; 7 L. J., Ex. Eq. 20.

A testator bequeathed one-third of his residue to his daughter, her executors, &c., to be vested at twenty-one, but not to be payable until twenty-five. He declared it should not be subject to the control of any husband, but should devolve and be settled by deed upon her, as a feme sole, and that the income should not be anticipated, and that, until her marriage, she should only be entitled to receive the dividends, and retain the power to bequeath the capital by will. The daughter being unmarried:—Held, that she took absolutely, and was entitled to payment of the fund out of court on attaining twenty-one. *Young's Settlement, In re*, 18 Beav. 199.

Bequest of residue to four sons equally, but the capital not to be divided until they should all become settled in life. The interest of their portions alone to be paid after they were all provided for, until they severally became thirty years old, when the capital to be placed at their disposal:—Held, that the sons were entitled to payment of the capital on attaining twenty-one. *Jacob, In re*, 29 Beav. 402.

Where a vested legacy is directed to accumulate for a certain period, or the payment is postponed for the benefit of the legatee, he is not bound to wait for the expiration of the period, but may, if he have an absolute interest in the legacy, have it paid to him so soon as he can give a valid discharge. *Saunders* v. *Vautier*, 4 Beav. 115. Affirmed Cr. & Ph. 240; 10 L. J., Ch. 354.

Of Stock Legacies—In what Stock.]—Where a testator directed his executors to pay legacies of different sums in 3 per cent. annuities, and at his death possessed stock in consols, new 3 per cent. annuities, and reduced 3 per cent. annuities:—Held, that the executors were bound to pay the legatees in consols. *Watson, In re*, *Warren* v. *Pilgrim*, 12 L. T. 631.

Testator having given to charities legacies, and also a residue in bank stock, and having no bank stock at his decease, but having 3 per cent. annuities which would satisfy the legacies in that shape, and leave a residue, but if sold would not purchase bank stock to satisfy the legacies in that form, a decree taken by consent, that the legacies should be paid in 3 per cents, according to the sums given; an infant not opposing, his legacy ordered to be paid in the same manner; but if the testator's property had been sufficient, the legacies should have been paid in bank stock. *Finch* v. *Inglis*, 3 Bro. C. C. 420.

The testator, by his will, gave to his son a legacy of 20,000*l.* in the joint stock of the 4 per cent. bank annuities of the Bank of England, commonly called "4 per cent. bank annuities;" the only 4 per cent. bank annuities existing at the date of his will were reduced to 3½ per cents. afterwards, and before his death a new stock of 4 per cent. bank annuities was created; the will speaks at the testator's death, and the son is entitled to a sum of 20,000*l.* in the then existing 4 per cent. bank annuities. *Sheffield* v. *Coventry* (*Earl*), 2 Russ. & M. 317. S. P., *Banks* v. *Sladen*, 1 Russ. & M. 216; Tam. 407; 8 L. J. (o.s.) Ch. 101.

—— **Amount.**]—A testatrix bequeathed to her executors such a sum of money as would be sufficient to purchase 2,500*l.* stock, and directed them to pay the dividends thereof to A. for life, and, after A.'s death, "the said principal sum of 2,500*l.* stock" was to fall into the residue, and, after giving some pecuniary and specific legacies, she directed all her legacies to be paid within three months after her decease. In consequence of the testatrix's property being the subject of a suit in chancery, which was not decided till four years after her death, her executors were unable till that time to purchase the stock:—Held, that A. was entitled to have 2,500*l.* (minus legacy duty) purchased, and not merely such a sum as could then be purchased with the money, which would have been sufficient to purchase 2,500*l.* stock at the death of the testatrix, and that she was also entitled to the dividends on that amount immediately from the death of the testator. *Owden* v. *Campbell*, 8 Sim. 551; 6 L. J., Ch. 311.

A testator having, by his will, given an interest for life in a sum of stock to two persons, and the survivor of them, with remainder to another for life, and afterwards to the children of such other person, by a codicil substitutes an annuity nearly equal to the amount of the dividends of the stock, in the place of the first gift; the gift in remainder is not thereby accelerated; but its value is to be computed according to the price of the stock at the time of the testator's death, when, but for the substitution, the gift of the prior life interest would have taken effect. *David* v. *Rees*, 1 Russ. & M. 687.

A testator bequeathed 500*l.* to a person resident abroad, if he should be living at his widow's death. The executors invested 500*l.* in the sum of 600*l.* stock, under s. 32 of the 5 & 6 Geo. 3, c. 52:—Held, upon petition, that this section did not apply to contingent legacies, and the legatee was therefore only entitled to 500*l.*, minus the legacy duty, and not to the 600*l.* stock. *Krans, Ex parte*, 14 L. J., Ch. 453.

Where testator directs executors to convert his property, and invest it in stock, and thereout to pay an annuity of 250*l.* to his widow for life, and after her death gives principal sum that produced the annuity over; and the property be not in fact sold and invested till after widow's death, the legatees over are entitled to so much stock as would produce 250*l.* a year in dividends. *Borrett* v. *Deady*, 3 Madd. 449.

Persons entitled to a perpetual annuity were desirous of receiving a present payment in cash in lieu of the annuity out of funds in court upon which the annuity was charged:—Held, that the amount of cash to be paid to the annuitants was such a sum as at the price of the day (excluding brokerage) would purchase sufficient 2½ per cent. consolidated stock to produce the annuity. *Hicks* v. *Ross*, 60 L. J., Ch. 853; [1891] 3 Ch. 499; 65 L. T. 200; 40 W. R. 172.

—— **Where Rise or Fall in Price.**]—Direction for sale or transfer of stock, without attention to rise or fall, the party must take it as it happens at the time of appropriation. *Pye, Ex parte*, 18 Ves. 141; 11 R. R. 173.

Testator bequeathed a general legacy of 10,000*l.* consols to A. B. There was no deficiency of assets, but, owing to the institution of a suit for

administration of testator's estate, the legacy remained unsatisfied for several years after testator's death, during which consols rose:—Held, nevertheless, that A. B. was entitled to have the full amount of his legacy purchased and transferred to him. *Auther* v. *Auther*, 13 Sim. 439.

—— **Method of Transfer.**]—Executors should transfer stock specifically bequeathed to the legatees without an intermediate transfer to themselves, and they will not be allowed the costs of such a transfer. *Hopkinson* v. *Roe*, 1 Beav. 183.

Of Specific Legacies.]—Specific legacy retained by the executor for assets, but was not wanted, in case of depreciation, the legatee is entitled to the original value. *Chaworth* v. *Beech*, 4 Ves. 566.

If an executor acting bonâ fide, and under a conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them; he will be answerable for the value of those articles with interest at 4 per cent. if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events which he had no reason to anticipate, and the court will direct an account to be taken of the value of the property so possessed by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors. *Spode* v. *Smith*, 3 Russ. 511.

Leaseholds, specifically bequeathed to married women successively for life, for their separate use, with remainder to infants, proved damnosa hæreditas. The court decreed a sale notwithstanding the executors had so far assented to the bequest as to put the first tenant for life into possession. *Lonsdale* (*Earl*) v. *Berchtold* (*Countess*), 3 K. & J. 185; 3 Jur. (N.S.) 328.

And the second tenant for life, who had declined the property in specie:—Held, nevertheless, entitled to a life interest in the proceeds of the sale, and that without such life interest contributing to the charges on the estate which accrued since she became entitled in possession. *Ib.*

It is the duty of executors as far as possible to preserve articles specifically bequeathed according to the testator's wish, and unless compelled they ought not to apply them to the payment of debts. *Clarke* v. *Ormonde* (*Earl*), Jac. 108; 20 R. R. 8, 143.

It is the duty of executors to get in property specifically bequeathed at the expense of the general estate. *Perry* v. *Meddowcroft*, 4 Beav. 197; 12 L. J., Ch. 104.

—— **Right of Selection.**]—If a testator, dying solvent, bequeaths to A. a given number of articles, forming part of a stock of articles of the same description, as, for instance, if he has twenty horses in his stable, and bequeaths to A. six of them, A. has the right of selection. *Jaques* v. *Chambers*, 2 Coll. C. C. 435; 15 L. J., Ch. 225.

A widow devised an acre of land, which was "to be selected by" the devisee, to a clergyman absolutely, and devised all her other real estate to the trustees of her will to convert it into money. By a letter to the clergyman, dated the day her will was executed, but not intended to be, and not, in fact, delivered to him until after her death, she said that it would be gratifying to her memory if he of his own free will would dedicate the acre of land as a site for a church. He did select an acre for that purpose, but subsequently entered into an arrangement with the trustees of her will, whereby the trustees sold the acre so selected, and granted him permission to select another acre in lieu. The clergyman died without having selected another acre:—Held, that the permission to make a second selection was ultra vires, and that the purchase-money produced by the acre originally selected belonged to the personal representatives of the clergyman absolutely. *Littledale* v. *Bickersteth*, 24 W. R. 507.

Of Demonstrative Legacy where part of Fund lost.]—A. is entitled to 8,000*l.* in the chamber of London, and whilst a stop was put to payment there, he made his will, and declares that when the executors should receive the 8,000*l.* he gives 2,000*l.* to three hospitals. Afterwards an act passed for settling a fund for paying a perpetual interest for the orphan's debt, and the 8,000*l.* is then worth to be sold but 6,300*l.*, yet decreed the whole 2,000*l.* to be paid. *Colwall* v. *Bonython*, 2 Vern. 547.

In what Currency.]—Legacies are to be paid in the currency of the country where the testator resided, where there were assets and executors in that and this country also; but legatee residing here not entitled to be paid in the foreign currency. *Bourke* v. *Ricketts*, 10 Ves. 330.

Legacies, no fund being described, to be paid in the currency of the country where the will is made. *Pierson* v. *Garnet*, 2 Bro. C. C. 38; Pre. Ch. 201. See *S. C.*, 2 Bro. C. C. 226.

One by will made in England devises an annuity in trust for his wife out of lands in Ireland, the testator and his wife and the trustee residing in England, the annuity shall be paid in England, and the estate bear the charge of the return. So if one in England gives by will a legacy out of lands in Ireland, the legacy shall be paid in England and in English money. *Wallis* v. *Brightwell*, 2 P. Wms. 88.

Testator gives legacies in money, and dies abroad, where the will was made; currency shall be understood, if sterling is not expressed. Semble, that as to the interest on such legacies, an inquiry ought to be directed to ascertain in what country the fund, out of which the legacy is payable, has been deposited, and interest shall be paid according to the rate of interest in that country. *Malcolm* v. *Martin*, 3 Bro. C. C. 50.

A., living in Antigua, and having a plantation there, devises 50,000 lbs. weight of sugar to the children of B., to be paid by his executors in ten years after his death. The executors not delivering the sugar within the time, on a bill brought by one of the children, decreed the value of the plaintiff's legacy to be computed according to the medium rate of sugars in Antigua, at the end of ten years, and paid with interest from the time it became due. *Symes* v. *Vernon*, 2 Vern. 553.

Legacy in a foreign country, and coin, as sicca rupees, by a will in India, if paid by remittance to this country, the payment must be according to the current value of the rupee in India, without regard to the exchange or the expense of remittance; so as to other countries. *Cockerell* v. *Barber*, 16 Ves. 461.

A testator, domiciled in Jamaica, gave legacies

in Jamaica currency to J. C., H. C., and M. C., persons also domiciled in that island, and desired them to be paid out of the money due to him on certain bonds, which the will specified. At his death, which happened in Scotland in 1790, no such bonds were to be found, but J. C. was then indebted to his estate upon other bonds, in a sum which exceeded the value of his legacy, and which a year after the testator's death, including interest, was equal to the amount of the penalties. In 1794 actions were brought in Jamaica upon these bonds by the testator's personal representatives there, and judgments recovered against J. C. for the full penalties and costs; but no attempt was made to levy execution upon the judgments, and they remained unsatisfied. In 1818 H. C. and M. C. assigned their respective legacies to the plaintiff, who was the personal representative of J. C., the other legatee: and he, in 1821, when administration was for the first time taken out of the testator's estate in England, filed the bill for the purpose of enforcing payment:—Held, that as the legacies were payable out of assets in this country, their value was to be computed according to the standard par of exchange between Jamaica and British currency, and not according to the actual rate at the time of payment. *Campbell* v. *Graham*, 1 Russ. & M. 453; 9 L. J. (o.s.) Ch. 234.

Bond given in Dublin, or not in Jamaica, must be paid in current money; the same with regard to a will. Legatees, living in England, makes no distinction, for the residence of persons devising must decide it. Though testator's effects are partly in Jamaica, and partly in England, yet, as the devise is of a compound residue, without separating the funds, no argument can be drawn from it in favour of the plaintiff. Testator living in Jamaica gave legacies to be paid in sterling money in the first place, and the two legacies immediately following (one of which was to the plaintiff), generally without saying in sterling money; and at the end of the will, several more to be paid in sterling money:—Held, that the plaintiff must make his legacy in Jamaica money, for testator's expressing himself differently shewed a different intention. *Saunders* v. *Drake*, 2 Atk. 465.

Whether in Specie.]—Where a testator devises residuary estate which includes freeholds and leaseholds to one for life with remainder over, neither the use of the word "rents," nor a power of distress given to annuitants, nor both these circumstances together, constitute any sufficient indication of intention that the leaseholds are to be enjoyed in specie. Rule in *Howe* v. *Dartmouth* (*Lord*) (7 Ves. 137a) applied. *Harris* v. *Poyner* (1 Drew. 174; 21 L. J., Ch. 915), and *Craig* v. *Wheeler* (29 L. J., Ch. 374) followed. *Crowe* v. *Crisford* (17 Beav. 507), *Wearing* v. *Wearing* (23 Beav. 99), and *Vachell* v. *Roberts* (32 Beav. 140) not followed. *Game. In re, Game* v. *Young*, 66 L. J., Ch. 505; [1897] 1 Ch. 881; 76 L. T. 450; 45 W. R. 472.

The rule in *Howe* v. *Earl of Dartmouth* (7 Ves. 137) only applies where the testator has given no indication of his intention as to the time of conversion. A discretion given to trustees as to time of sale is an indication of intention that the property should not be immediately converted, and prevents the application of the rule. *Pitcairn, In re, Brandreth* v. *Colvin*, 65 L. J., Ch. 120; [1896] 2 Ch. 199; 73 L. T. 430; 44 W. R. 200.

P. gave all his property to trustees upon trust to pay the income to his mother for life, and after her death to pay legacies, and pay the residue to a charity. The will contained no express direction to convert, but contained a power for the trustees to sell if and when they should think fit. The bulk of the testator's estate consisted of reversionary interests expectant on his mother's death. The mother survived the testator for fourteen years. The reversionary interests were not realised during her life:—Held, that she was not entitled to have the reversions realised on the testator's death; and that her estate had no claim against the trust fund in respect of the income she would have received if this had been done. *Ib.* *And see* CONVERSION AND RECONVERSION.

A testator gave 5,000*l.* to trustees upon trust to spend the same in planting trees upon an estate (of which he was tenant for life) in the places he should designate, if any, and if none he directed his trustees to have regard, in the place and manner of planting, to the wishes of the owner of the estate. He died without designating any place. It was proved that from its position and natural character, the estate could not be planted with profit or advantage:—Held, that the gift was intended for the benefit of the owners of the estate, and that the persons absolutely entitled to the estate were entitled to the money free from any condition. *Bowes, In re, Strathmore* (*Earl*) v. *Vane*, 65 L. J., Ch. 298; [1896] 1 Ch. 507; 74 L. T. 16; 44 W. R. 441.

Enforcing—Right of.]—A legacy, given to a child by a stranger, at the child's death vests in the father by the Statute of Distributions, although he took not out administration to such child. *Grice* v. *Goodwin*, Pre. Ch. 260.

Where a person gives a debt by will to a corporation, it vests in them in law, and they may recover it in the Ecclesiastical Court. *Att.-Gen.* v. *Pyle*, 1 Atk. 435.

Legacy assigned upon certain trusts; trustee, notwithstanding notice of former decree for administration of assets, files bill for payment of legacy. Court refused to assign legacy to him, he having acted improvidently, or to give him costs; and executors refused costs, because they should have moved to stay proceedings, instead of answering trustee's bill. *Packwood* v. *Maddison*, 1 Sim. & S. 232; 1 L. J. (o.s.) Ch. 107.

Action by the husband for a legacy due to his wife does not lie. *Macaulay* v. *Philips*, 4 Ves. 19.

The mere allegation without proof of collusion between the assignees of an insolvent with a debtor, and refusal to sue for a legacy which passed under the assignment, and which, if recovered, would satisfy all the debts, and leave a balance, will not entitle the insolvent to sue for the legacy, although the provisional assignee submits to be bound by the decree, and the suit to be prosecuted in his name; and quære, if such collusion and refusal were proved, if the insolvent could sustain such suit. *Major* v. *Aukland*, 3 Hare, 77; 8 Jur. 16.

—— **By Suit in Equity.**]—Legacies are suable in chancery, which has a concurrent jurisdiction with the Spiritual Court, and a bill may be filed in the exchequer for a legacy. In some cases an executor may be compelled to give security for a legacy; as where 1,000*l.* was given to A. to be

paid at twenty-one; upon a bill, suggesting a devastavit, security was decreed to be given. *Duncumban* v. *Stint*, 1 Ch. Cas. 121.

A legatee is not obliged in every instance to bring a bill against an executor for a recovery of legacy; for after he has assented, trover will lie. *Williams* v. *Lee*, 3 Atk. 224. And see *Atkin* v. *Hill*, Cowp. 284; *Hawkes* v. *Saunders*, Cowp. 289.

Legatees, who have mortgaged their interest in a legacy, will be restrained by a court of equity from prosecuting a suit in the county court to obtain payment from the executors. *Neighbour* v. *Brown*, 26 L. J., Ch. 670.

To a bill against an executor for payment of a legacy, he pleaded that the testator was, at the time of making his will and of his death, domiciled in France, and all the bequests of personal estate affected to be made by his will were, by the laws of that country null and void:—Held, that the plea was not double, as it did not state two bars, but two averments leading up to one bar or conclusion. Although probate of a will is conclusive, so far as relates to the appointment of executors, it is not conclusive as to the validity of the particular dispositions therein contained, and the above plea therefore was held not to be bad on that ground. *Campbell* v. *Beaufoy*, 1 Johns. 320; 28 L. J., Ch. 645; 7 W. R. 513.

—— **Against Executor.**]—If an executor admits that all the testator's debts, &c., have been paid, the court will on motion order the income of balance paid in by the executor to be paid to the person entitled to the residue. *Dando* v. *Dando*, 1 Sim. 510.

A plaintiff claimed a fund which had been given by will, subject to other legacies. There was no allegation that the legacies had been paid:—Held, not a sufficient ground for demurrer. *Rolfe* v. *Gregory*, 8 Jur. (N.S.) 606; 10 W. R. 711.

An executor and trustee having committed a devastavit, precluded from proving under his bankruptcy, and liberty to be given (in the first instance, and without previous application to the commissioners) to a legatee on behalf of himself and others, with a direction that the dividends be paid into the bank, in trust in the matter. *Moody*, *Ex parte*, 2 Rose 413.

A bill was filed by a legatee against the executors of a testator, for the payment of his legacy. Upon the executors paying into court the amount of the legacy, together with costs of the suit to the plaintiff, the bill was ordered to be dismissed against all the executors except one, who was the representative of an incumbrancer of the legacy, and between whom and the plaintiff a question of account was raised in the suit. *Sawyer* v. *Mills*, 1 Mac. & G. 390; 1 Hall & Tw. 569; 19 L. J., Ch. 242; 13 Jur. 1061.

—— **Executor's Representative.**]—An executor paid interest on a legacy, and died. The legatee filed a bill for payment of the principal against the executor's representative. The legatee afterwards presented a petition consenting to abandon his suit, and praying for liberty to prove for his legacy and for the costs of his suit, and of the petition against the executor's estate, in a suit subsequently instituted by creditors of the executor. The prayer of the petition was granted. *Turner* v. *Wardle*, 7 Sim. 80.

—— **Debtor.**]—A residuary legatee cannot have writ of ne exeat regno against a debtor of the testator, on the ground that he colludes with the executor. *Graves* v. *Griffith*, 1 J. & W. 646.

—— **Purchaser.**]—Legatees allowed to follow money of testator laid out in land, &c., by executor. *Ryall* v. *Ryall*, 1 Atk. 59; Ambl. 411 cited.

Evidence of Age required for.]—Where a legacy was given to A., to be paid on her attaining the age of twenty-one years, and in case of her death before that time, was given over, the evidence on which the master made a report as to her age, with a view to allowing her a suitable maintenance, though sufficient for that purpose, may not be sufficient to establish the time of her birth so clearly as to sustain an application for the payment of the legacy. *Anon.*, 1 L. J., Ch. 77.

On Security to Refund.]—A., by will, gives portions to his daughters, but mentions no time when to be paid, but adds a proviso, that his daughters should marry with the consent of his wife, and if any married without such consent her portion to go over. On a bill brought by the daughters for their portions, the court decreed the portions to be paid, but on security to refund if the condition should be broken. *Aston* v. *Aston*, 2 Vern. 452; 1 Ch. R. 164; Pre. Ch. 226.

A. devised 600*l.* apiece to his two daughters, and the residue of his personal estate to his son; and, if either of his children died during their minority, the survivors to be heirs to the deceased by equal portions. The son died, and one sister brought a bill against the executors and the other sister, to have her own 600*l.* and one-half of her brother's personal estate; which was decreed, upon her giving security to pay back her own 600*l.* in case she died during her minority. *Pate* v. *Hatton*, 1 Ch. Cas. 199.

The master by his report found that the estate of the testator in the cause was liable to certain contingent demands, in respect of covenants entered into by the testator for payment of rent, repairs, insurance, &c., of certain collieries and premises held by him and others, under a lease from the Earl of B.; but the liabilities, if any, in respect of the covenants could not be ascertained until the expiration of the lease, in 1855; and that until that time nothing could be done in getting rid of or providing for such liabilities. The residue of the estate, which had been ascertained and paid into court, was ex concessis inadequate to meet the liabilities under the covenants. Upon a bill being filed by the widow of the testator and tenant for life, under his will, of his residuary estate, for payment of the income of the fund to her for life, ordered that the fund should be left in court to accumulate till the expiration of the lease, unless the widow were prepared to give security to refund in the event of the capital proving to be insufficient to meet the liabilities under the covenants. *Fletcher* v. *Stevenson*, 13 L. J., Ch. 202; 8 Jur. 307.

—— **Where one Party has disappeared.**]—Payment order where one party entitled had not been heard of for twenty years upon recognizance to refund. *Bailey* v. *Hammond*, 7 Ves. 590.

A. went abroad in September, 1830; his father died in September, 1833; about twenty months

previous to that time A. was heard of for the last time. The court ordered a share of the father's residue bequeathed to A. to be transferred to his brother, as the sole next of kin of the father living at the father's death, on the brother giving security to refund it in case A. should be living, or should have died after his father. *Dowley* v. *Winfield*, 14 Sim. 277; 8 Jur. 972.

A sum of money was set apart, in 1815, to answer an annuity to a woman then supposed to be resident in India, but who was never afterwards heard of. In 1837, the master having certified, upon presumption, that she was dead, but without finding when she died, the court ordered payment of the principal money to the party entitled to it, subject to the annuity. In 1842, the master having certified, upon presumption, that she had died in 1822, and that no personal representative had been heard of, the court ordered immediate payment to the same party of the accumulations since that time. And in 1847 it ordered payment of the rest of the fund to the same party though resident abroad, upon his giving his personal security to refund in case the annuitant or her personal representative should ever establish a claim. *Cuthbert* v. *Purrier*, 2 Ph. 199.

A testator gave the interest of his residue to W. and his wife, with remainder to the testator's grandchildren. W. died twenty-nine years after the testator, and his wife applied for the income. The court, being unable to decide on her right, in consequence of the absence of some parties, allowed her, in the meanwhile, to receive a portion of the income, on her undertaking to refund if necessary. *Maffat* v. *Burnie*, 16 Beav. 298.

See also EVIDENCE (DEATH, PRESUMPTION OF)—PRACTICE (PAYMENT OUT OF COURT).

Pending Administration Suit.]—Payment in part of a legacy ordered on motion with consent, the fund admitted to be ample. *Pearce* v. *Baron*, 12 Ves. 459.

Where the existence and amount of a testator's debts are contingent and depend upon the result of legal proceedings before a foreign tribunal, which are not likely to be speedily settled, the court, in administering his assets, will not be induced by that circumstance to direct an appropriation of the fund in court to answer pecuniary legacies, subject to such demands as creditors may eventually establish. If, in a suit to administer a testator's assets, it clearly appears that a surplus will remain after discharging all his debts and liabilities, although the exact amount of the surplus cannot be ascertained for a considerable time, the court will, by anticipation, direct proportional payments to be made to pecuniary legatees, as far as that can be done with safety to the creditors. Principles on which such anticipated payments are to be applied in reduction of the claims of the legatees. *Thomas* v. *Montgomery*, 1 Russ. & M. 729.

In a suit for the administration of testator's assets, which were more than sufficient to pay the legacies with interest, it was ordered that the master should ascertain one-fourth of what was due to each of the legatees for principal and interest in respect of their legacies, and that the same should be paid out of a fund in the cause: —Held, that the whole of the interest on the legacies was to be first paid, and then a part of the principal. *S. C.*, 2 Sim. 348.

In a suit instituted in 1814, to administer the personal estate of an intestate who died in 1807, the master reported that no debts had been proved, and, by the decree on further directions in 1817, the whole of the residue was apportioned and distributed; but as the plaintiff was then an infant, his share, amounting to four-ninths of the fund, was retained and carried to his separate account. In 1825 a foreign prince, claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the sum remaining in court; and the plaintiff, coming of age soon after, applied to have that sum paid out:—Held, that the creditor was not precluded by the previous proceedings, or the lapse of time, from tendering such proof before the master; but that every defence should be allowed those which would have been competent upon a new bill; that the debt, if established, must be restricted, as against the fund in court, to that proportion which the plaintiff's share bore to the whole amount distributed, and therefore that, after reserving a sum equal to four-ninths of the claim, the residue of the fund ought to be paid out to the plaintiff. *Greig* v. *Somerville*, 1 Russ. & M. 338.

Where court can be satisfied that the fund is clear, allowance for maintenance will be allowed, pending the account, to the residuary legatee; not if an accounting party. *Warter* v. ——, 13 Ves. 92.

An allowance of income pendente lite, under the 15 & 16 Vict. c. 86, s. 57, will only be made upon the admission by the executors of assets. *Knight* v. *Knight*, 16 Beav. 358.

An order had been made in the cause, by the court, that such a sum of stock as would raise 10*s.* in the pound on certain legacies, should be sold out and paid to the respective legatees thereof, the amount to be verified by affidavit. It was objected, in the accountant-general's office, that the amount to be paid must, under the twenty-eighth order of court, of December, 1833, be specified and expressed in the order; but the court determined that that order did not apply to cases where the amount could not be ascertained at the time the order for payment was made. *Piggott* v. *Garaway*, 9 Sim. 260; 7 L. J., Ch. 243; 2 Jur. 806.

It is not the course of the court to pay annuities charged upon incumbered property, pending the litigation. A testator, by a will of 1805, gave R., one of the plaintiffs, an annuity of 300*l.*, and by a subsequent will of 1812, revoking the former will, he devised the same plaintiff an annuity of 600*l.* per annum. The will of 1805 was admitted to be valid, but the will of 1812 having been impeached, a suit was instituted to establish it. Semble, that R., the annuitant, notwithstanding that in any event she was entitled to an annuity of 300*l.*, was not entitled to an order that the receiver in the cause should pay her, out of the rents of the estate, the annuity of 300*l.* *D'Alton* v. *Trimleston* (*Lord*), 2 Dr. & War. 531.

Where it appeared upon affidavit in an administration suit that the estate was large, with but few debts or charges thereon, the court ordered the jointure of the widow of the testator, and annuities given by his will, to be paid out of the income of the estate before decree, but refused to direct the payment of pecuniary legacies. *Digby* v. *Boycott*, 4 Hare, 444.

Stock of an intestate dead nearly twenty years, being brought into court, an order for selling part thereof for costs in the lunacy of the sole

next of kin, and for applying the dividends for such lunatic's maintenance before any report of the debts of the intestate, was refused. *Radcliffe* v. *Carter*, C. P. Cooper, 250.

Personal Liability of Executor—On Admission of Assets.]—Decree for payment of legacies, made against an executor, without reference to the state of the assets, upon the ground of his having, by his acts and admissions, rendered himself personally liable for the payment. *Barnard* v. *Pumfrett*, 5 Myl. & Cr. 63; 10 L. J., Ch. 124.

H. died in 1811, having bequeathed a legacy to a woman, who afterwards married the plaintiff. In December 1825 the two executors of H. gave the plaintiff a written acknowledgment, whereby they separately and jointly acknowledged that they owed the plaintiff 150*l.* for the legacy, and 50*l.* for interest. In 1835 the plaintiff's wife died:—Held, that, whether the written memorandum amounted to an admission of assets or not, it gave the plaintiff no right of action; that, unless equivalent to an admission of assets, it did not create a personal demand against the defendants enforceable in a court of equity; and that it had not the effect of barring or prejudicing the right of the plaintiff's wife in the legacy, or his title in right of his wife as a legatee. *Holland* v. *Clarke*, 1 Y. & C. C. C. 151.

—— **After Representations to Legatee.**]—An executor denied assets, but his answer disclosed a personal liability for payment of the plaintiff's legacies. The court made an order for immediate payment without directing the accounts to be taken. *Rogers* v. *Soutten*, 2 Keen, 598; C. P. Cooper, 96; 7 L. J., Ch. 118.

One of the legatees had on his marriage assigned a part of his legacy to the trustees of his settlement, covenanting to pay the amount by instalments. The marriage was contracted, and the settlement made on the faith of representations by the executor, that the legacy was substantial and sure, and would be paid, though at a future time:—Held, that the estate of the executors thereby became indebted for the whole amount. *Hutton* v. *Rossiter*, 7 De G. M. & G. 9; 3 Eq. R. 589; 3 W. R. 387.

A legatee charged the share to which he was entitled, under his father's will, to A., who gave notice to the executor. The executor endorsed on the notice that he had no objection to pay the money that might become due to the legatee on the final distribution of his father's property. There was at this time a prior charge, of which the executor had notice, but he did not disclose it to A. The executor, on a subsequent occasion, also represented that the legatee's share would certainly be as much as 1,500*l.*, which estimate turned out to be erroneous:—Held, that the executor was not liable for the suppression of the existence of the first charge, or bound to make good the representation as to the value of the share. *Stephens* v. *Venables*, 31 Beav. 124.

—— **For Payment made Pendente lite.**]—Where an administrator possessed himself of the intestate's goods, and gave legacies, and died, and his executor without compulsion, and pending a suit in right of intestate to recover the goods, paid the legacies; the court will not relieve him, because the payment was voluntary, and with notice of the suit. *Hodges* v. *Waddington*, 2 Ch. Cas. 9.

—— **Where Executor Legatee.**]—Where in a case of election a legatee elected to take under a bequest giving her a life interest in a certain sum which was directed to be invested in stock, with which direction the legatee, who was also trustee of the will, did not comply, but appropriated the money:—Held, that she was responsible for that sum only, and not for what would have been its value at the time of the suit, if invested at the proper time. *Palmer* v. *Wakefield*, 3 Beav. 227.

—— **Where Executor has become Trustee for Legatee.**]—Where a person, executor, and trustee of legacy to be laid out in stock, has fully administered estate and assented to legacy, and retains legacy in his hands, not as assets, but as trustee, he is liable for breach of trust, and ordered to purchase stock at price of time when he was first able to invest it. *Byrchall* v. *Bradford*, 6 Madd. 13, 235; 23 R. R. 204.

Release—What Amounts to.]—An executor contracted with legatees for the purchase of their legacies, which were accordingly assigned to a trustee for him, in consideration of sums of money less in amount than the legacies. It was admitted that the transaction could not be sustained for the benefit of the executor:—Held, that the deed of assignment did not operate as a release of the estate, and could not be upheld as against the legatees who executed it, for the benefit of their co-legatee. *Barton* v. *Hassard*, 3 Dr. & War. 461.

—— **Right to.**]—An executor is not entitled to call for a release and an indemnity from legatees, their receipt alone being a sufficient discharge. *Roberts, In re*, 38 L. J., Ch. 708; 17 W. R. 639. And see *Fortune, In re*, infra.

—— **Effect of.**]—A testator bequeathed two legacies of 2,000*l.* The executor rendered an account of the estate to A., one of the legatees, showing it to be about 1,750*l.* in the whole. The legatee, on receipt of half, executed a general release. Afterwards, there was a further asset of 2,000*l.* belonging to the estate which had been omitted:—Held, that the release was binding pro tanto, and the executor was ordered to pay to A. a moiety of the 2,000*l.* *Anon.*, 31 Beav. 310.

—— **When Given in Ignorance of Rights.**]—A testator bequeathed an annuity of 100*l.* out of money to be invested in the public funds or other good security, the capital, after the death of the annuitant, to be divided equally among his children. Upon the death of the annuitant, in 1843, the administrator paid 2,000*l.* to the children, who executed a release which recited that the administrator had set apart that sum to answer the annuity. Upon bill filed in 1854, after the death of the administrator, to set aside the deed:—Held, in the absence of evidence, that the 2,000*l.* had been invested; and upon proof that the parties had executed the release without professional assistance, and in ignorance of their rights, that lapse of time was no bar to the claim, and that the administrator's estate was liable to make good such an amount as, if invested in consols, would have produced an annuity of 100*l.* *Aspland* v. *Watte*, 1 Jur. (N.S.) 968; 3 W. R. 562.

If on the footing of a supposed illegitimacy the title of the cestui que trust to a legacy is disputed and denied by the trustee, and the

former is thereby induced to accept from the trustee a smaller sum than that to which he is entitled under the will, and by deed to release the trustee from the payment of the legacy, equity will not permit such a transaction to stand. Even without any evidence of fraud, such a transaction is null and void. *Thompson* v. *Eastwood*, 2 App. Cas. 215—H. L. (Ir.)

—— **Costs of.**]—Executors refused to pay a legacy to the legatee until he would execute a release and pay the costs of it. He offered to execute the release, but refused to pay the costs. The executors, therefore, brought the amount of the legacy into court, deducting from it the costs of bringing it into court. On a petition by the legatee to have the money paid out to him :—Held, that the executors had no right to call on him to pay the costs of a release, and that they should pay the costs of the petition. *Fortune's Trusts, In re*, Ir. R. 4 Eq. 351.

22. INTEREST.

General Principles.]—If the circumstances of the gift are such that of itself it will carry interest, it is immaterial whether the testator be silent upon the subject of interest, or generally directs the payment of interest. *Purcell* v. *Purcell*, 2 Dr. & War. 217 ; 1 Con. & L. 371 ; 4 Ir. Eq. R. 558.

Interest on legacies is given for delay of payment, and, consequently, until the day of payment arrives, no interest is, in general, demandable. *Donovan* v. *Needham*, 9 Beav. 164 ; 15 L. J., Ch. 193 ; 10 Jur. 150.

A legatee who has no notice of his legacy till the executor publishes it in the Gazette shall have no interest for it. *Knap* v. *Powell*, Pre. Ch. 11.

Interest was not decreed on a legacy, where it appeared that though not actually appropriated to the legatee, it had been lodged at a bank, where he enjoyed the benefit of it by the banker's remitting to him, in consequence, the interest on a sum of equal amount due by him to the bank. *Bury* v. *Charlevill*, Wall. Lyn. 358.

A testator, who died in 1838, left a legacy to a person of weak intellect. At the end of a year after the testator's death the executors invested the amount in the funds, and regularly invested the dividends arising therefrom. A suit was instituted by the legatee, by her next friend, against the executors, in which the amount of legacy, with 4*l.* per cent. from a year after the testator's death, and the costs of the suit, were claimed :—Held, that the executors were not bound to pay the legacy and interest ; and it was ordered that the stock should be tranferred into court, and that the costs of the suit should be paid out of the testator's general estate. *Pothecary* v. *Pothecary*, 2 De. G. & Sm. 738 ; 18 L. J., Ch. 48 ; 12 Jur. 1016.

On refunding sums paid under an erroneous construction of a will, a legatee entitled to other funds making interest, in the hands of the court, is to be charged with interest ; not a legatee who has no further concern in the estate. *Gittins* v. *Steele*, 1 Swanst. 199 ; 18 R. R. 7, 57.

Interest recovered for a legacy though after a receipt given in full for the legacy, and the principal legacy paid. *East* v. *Thornbury*, 3 P. Wms. 126.

Where Intention shewn.]—The testator gave to each of certain infant nephews and nieces, by name, 400*l.* "with compound interest at 5 per cent. per annum, from the day of their birth, to be settled on their marrying or attaining twenty-one years, whichever may first happen" :—Held, that compound interest at 5 per cent. was to run on each of the legacies from the birthdays of the several legatees till their marriage or majority respectively, and not merely to the day of the testator's death. *Arnold* v. *Arnold*, 2 Myl. & K. 365.

Interest of legacy from death of testator on the intent as to maintenance. *Beckford* v. *Tobin*, 1 Ves. Sen. 300.

Interest from the death of the testator allowed upon legacies payable at a future period to infant grandnephews, upon the intention of the testator that they should be maintained out of the property bequeathed to them. *Leslie* v. *Leslie*, Ll. & G. t. Sugd. 1.

Where Gifts of Capital and Income separate.]—Under a direction to raise 5,000*l.* for the benefit of A. and her issue, followed by a direction to raise and pay interest at 5 per cent. on that sum, to A. during her life, with a gift over to her children of the principal sum : — Held, that interest at 5 per cent. was not to be charged on the estate during the whole life of A., but merely until the 5,000*l.* had been raised. *Cole* v. *Lee*, 20 Beav. 265.

On what Legacies.]—As to whether a specific legacy payable in futuro carries interest, see *Gordon* v. *Rutherford*, Turn. & R. 378 ; 2 L. J. (o.s.) Ch. 50 ; 26 R. R. 183. *Chaworth* v. *Hooper*, 1 Bro. C. C. 82. *Shaw* v. *Cunliffe*, 4 Bro. C. C. 151.

A legacy out of a rent-charge shall carry interest. *Stonehouse* v. *Evelyn*, 3 P. Wms. 254.

Legacy of 50*l.* for a ring is not specific, therefore it shall carry interest like other pecuniary legacies. *Apreece* v. *Apreece*, 1 V. & B. 364.

Charge by will on real estate of simple contract debts of another person, considered as a legacy carrying interest from the death of the testator at 4 per cent. *Shirt* v. *Westby*, 16 Ves. 393 ; 10 R. R. 210.

Direction in a will to pay and discharge all the just and lawful debts owing by a deceased brother at the time of his death :—Held, upon the terms of the will, and looking to the circumstance that the brother had been dead about forty years at the date of the will, to comprise debts, but not interest. *Askew* v. *Thompson*, 4 K. & J. 620.

A testatrix directed her trustees to pay and apply the sum of 800*l.* in and upon the education of her grandson, it being her desire that her trustees should follow all the reasonable suggestions of the infant's father as to the school and mode of learning in which he should desire to have his son educated :—Held, that this was an absolute legacy vesting immediately, and fell within the general rule of legacies upon which interest was payable from a year after the death of the testatrix. *Noel* v. *Jones*, 16 Sim. 309 ; 17 L. J., Ch. 470 ; 12 Jur. 906.

Devise upon trust, by demise, sale, or mortgage, or by rents and profits, to raise, &c., with all convenient speed, after death of devisor, a sum, and subject thereto on other trusts :—Held, interest payable at 4 per cent. from death. *Spurway* v. *Glynn*, 9 Ves. 483 ; 7 R. R. 279.

Legacies charged on a reversion directed to be raised by sale or mortgage, and declared to carry interest from the death of the testator, it not

appearing from the will that the estate charged was a reversion. *Davies* v. *Davies*, Dan. 84.

Legacy to Infant Executor.]—Testatrix by her will appointed an infant one of her executors, and gave to him, as such executor, a legacy of 1,000*l.* :—Held, that as an infant cannot accept the office of executor before attaining twenty-one, the legacy would not carry interest until he attained that age, and also agreed to act as executor. *Gardner, In re, Long* v. *Gardner*, 3 R. 96 ; 67 L. T. 552 ; 41 W. R. 203.

Legacy by Parent or Person in Loco Parentis.] —Legacy from a parent to a child, bears interest before the time of payment, and from the death of the testator, and is the only instance. A legacy from an uncle to a niece, to be paid at twenty-one, or marriage, does not carry interest before the time of payment. *Crickett* v. *Dolby*, infra, col. 1725.

When a legacy is given by a father to a child as a provision, though payable at a future day, yet the child has an immediate right to the interest of the money ; otherwise, if the legatee be a stranger to testator. *Green* v. *Belchier*, 1 Atk. 507.

Portions devised by a father to his younger children, payable at twenty-one or marriage, shall carry interest from his death till that time, if he made no other provision for them : but otherwise, if devised by a stranger, who is under no obligation to provide for them. *Att.-Gen.* v. *Thompson*, Pre. Ch. 337.

A. gives a legacy to his grand-daughter, an infant, to be paid at such time and in such manner, as his wife, who was his executrix, should think fit for his grand-daughter. The executrix lived nearly twenty years after the death of A., and died without paying the legacy. Decreed, the legacy to be paid with interest from the death of A., though no demand made in the lifetime of the executrix. *Churchill* v. *Speake*, 1 Vern. 251.

Where a testator puts himself in loco parentis of the legatee, the legacy will bear interest at 4 per cent. from the death of the testator. *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372 ; 12 L. J., Ch. 420 ; 7 Jur. 572.

A testator who had voluntarily entered into a bond with a parish, to pay a weekly maintenance for a natural child as his own, and had continued such payments up to his death, was considered to have so far placed himself in loco parentis to such child as that interest was payable from his (testator's) death, upon a legacy given by him to such child, to be paid at twenty-one. *Rogers* v. *Soutten*, 2 Keen, 598 ; C. P. Cooper, 96 ; 7 L. J., Ch. 118.

A., amongst other legacies, leaves 1,000*l.* to his niece B. at eighteen or marriage, and gives the residue of his personal estate to be laid out in land, and settled in strict settlement on C. for ninety-nine years, remainder to his first son, &c., in tail ; afterwards A., by codicil, devises that the 1,000*l.* given by his will to his said niece should be made up to 6,000*l.* payable at twenty-one or marriage. The niece was eighteen at the time of the testator making his codicil, and under twenty-one. Decreed she should have the interest of the 6,000*l.* from the death of the testator, and that C. was only entitled to the residue exclusive of the 6,000*l.* *Archerley* v. *Wheeler*, 1 P. Wms. 783 ; 9 Mod. 68 ; 10 Mod. 518 ; Fort. 183 ; Comyns, 381, 513. See note (*z*) *Id.* Affirmed sub nom. *Archerley* v. *Vernon*, 3 Bro. P. C. 89.

—— **Where no Maintenance given.**]—Legacy to a child at twenty-one ; it shall have interest in meantime, especially where no maintenance is provided for it. *Anon.*, 2 Vent. 346.

If the legacy be given by a parent to his child at twenty-one, or marriage, and the child has no other provision, the court will give interest by way of maintenance, though the legacy is not vested. *Heath* v. *Perry*, 3 Atk. 102.

A testator gave to his infant son a legacy of 6,000*l.* and a share of residue. Both gifts were contingent on the child attaining twenty-one, and a provision ceasing at fifteen was made for his maintenance :—Held, first, that a limited allowance for maintenance does not exclude an implied gift of interest on a contingent legacy during the period for which maintenance is not provided :—Held, secondly, that as the benefit of the infant must determine out of which fund he should be maintained, interest was payable on the 6,000*l.* from the time the infant attained fifteen. *Martin* v. *Martin*, 35 L. J., Ch. 281 ; L. R. 2 Eq. 369 ; 14 L. T. 129 ; 14 W. R. 421.

Interest on legacies from the end of one year from the death of testator, except as between parent and child. In the principal case, the legacies being vested, the interest allowed for maintenance equally subject to the mother's reasonable variation. *Coleman* v. *Seymour*, 1 Ves. Sen. 209.

—— **Where Power for Maintenance only given.**]—Legacies to infants, payable at twenty-one, with benefit of survivorship in the event of death under that age, and a power to the executors to apply any part of the legacies towards the maintenance of the legatees, bear interest from the death of the testatrix ; the infants being her cousins, and destitute of other provisions. *Pett* v. *Fellowes*, 1 Swanst. 561.

—— **Where Gift over.**]—Testator gave 500*l.* to his daughter to be paid at twenty-one or marriage, and if she died before either contingency, he bequeathed it over to B. :—Held, that as it is given over, nothing vests in the daughter, and therefore she is not during her infancy, either entitled to interest, or to have the principal secured. *Palmer* v. *Mason*, 1 Atk. 505.

Testator gives part of his stock in trade to R. provided he attained twenty-one ; he dies before twenty-one. The administrator of R. is not entitled to intermediate profits from testator's death to infant's. *Atkinson* v. *Turner*, 2 Atk. 41 ; Barnard. 74.

A., having a niece an infant about the age of seventeen, devised to her the surplus of the personal estate payable at twenty-one, the niece shall have the interest paid her in the meantime, though the surplus be devised over, if the niece died before twenty-one or marriage, the devise over being but a condition subsequent. *Nicholls* v. *Osborn*, 2 P. Wms. 149.

One devises personal estate to his son, and, if his son died within age and without issue, then the personal estate to go to the testator's brother. The son shall have the produce of the personal estate ; and only the capital, in case of the infant's death, &c., shall go to the brother. *Tissen* v. *Tissen*, 1 P. Wms. 500.

A. by will devises 500*l.* to his infant grandson without appointing any time for payment, with

proviso, that if the grandson dies before twenty-one, then the legacy to go over to B.; the grandson shall have the interest of the legacy during his infancy. *Taylor* v. *Johnson*, 2 P. Wms. 204; Mos. 98.

Bequest to grandchildren if they attain twenty-one, with gift over:—Held, that they were entitled to the interest for maintenance during their minority. *Bowden, In re*, 6 L. J., Ch. 146.

The testator gave legacies out of a sum of stock to the grandchildren named in his will on their attaining the age of twenty-one, and if any of them should die under twenty-one, their portion to be equally divided among such of them as should attain twenty-one, but if the whole of his said grandchildren should die under that age, then he gave the interest of the sum of stock to the father of the said grandchildren for his life, and after his decease the principal as therein mentioned:—Held, that the grandchildren were entitled to the interest during their minority. *Boddy* v. *Dawes*, 1 Keen, 362.

Where a testator gives legacies to children, provided they attain twenty-one, with a gift over if the children die before twenty-one, and appoints trustees and guardians to the children, with a request that they will attend to their education, the children are entitled to the interest of their legacies for their maintenance and education, until they attain twenty-one or die under that age. *Mills* v. *Robarts*, 1 Russ. & M. 555; Tam. 476; 8 L. J. (o.s.) Ch. 141.

—— **Exception where Children Adult.**]—The rule as to interest on legacies given to infants by persons standing in loco parentis, does not extend to an adult, though she had during the life of testator received a voluntary annuity from him. *Raven* v. *Waite*, 1 Swanst. 553; 1 Wils. Ch. 204.

A testator made a settlement on his daughter, who was adult, and gave her a legacy by his will:—Held, that the legacy did not bear interest from the death of the testator, but only from the end of the first year after that event. *Wall* v. *Wall*, 15 Sim. 513; 16 L. J., Ch. 305; 11 Jur. 403.

—— **Where Maintenance given—Out of same Fund.**]—Legacy from a parent to child, payable in future; if maintenance is given generally, it shall carry interest; but if an annual sum less than the interest is given for maintenance, the executor paying that shall have the rest. *Crickett* v. *Dolby*, 3 Ves. 17.

A grandfather left a fund in trust for his grandson, absolutely, when he should attain twenty-five, with a gift over if he should die without issue under that age, and provided that a sum not exceeding 200*l.* per annum might be applied for his maintenance. On an application that such sum might be increased to 500*l.* out of the interest of the fund:—Held, that the presumption that the infant was entitled to interest on the fund was rebutted, and that, the testator having fixed a definite sum for maintenance, the court would not exceed it. *May* v. *Potter*, 25 W. R. 507.

A testator, standing in loco parentis, gave to trustees a legacy of 4,000*l.* on trust to pay it to A. B. on his attaining twenty-one. He authorised them to raise it by mortgage of his real estates; and out of the moneys thereby bequeathed to raise such sum, not exceeding the interest at 4 per cent. of the expectant's portion, as to them should seem sufficient for maintenance:—Held, that the legatee, during minority, was entitled to maintenance only, and not to the whole amount of interest on the legacy. *Rudge* v. *Winnall*, 12 Beav. 357; 18 L. J., Ch. 469; 13 Jur. 737.

Devise of real estates to testator's daughter for life, with remainder to his two sons in fee, and in case daughter should leave child living at her death, sons to pay child 200*l.* at twenty-one, and interest meantime for maintenance, &c. Daughter left one child, who died before twenty-one:—Held, child was entitled to interest from mother's death till his own. *Harris* v. *Finch*, M'Cle. 141.

A testator directed his trustees as soon as convenient after the decease of his wife to raise 10,000*l.* for his nephew and infant, and to invest it and apply the income towards his maintenance. The testator had previously given his wife an annuity of 1,000*l.*, payable quarterly. The wife predeceased the testator:—Held, that the infant was entitled to interest on his legacy from the testator's decease. *Pickwick* v. *Gibbes*, 1 Beav. 271; 3 Jur. 101.

C., by his will, devised all his freehold and copyhold estates to his two daughters, A. and M., and all other daughters that he might thereafter have, as tenants in common in fee; he had afterwards another daughter, L.; he then gave directions for another will, by which he gave all his real estates to his two eldest daughters, and a sum of 15,000*l.* to his daughter L. The attorney took the minutes of this second will in writing, but before it was prepared the testator died; these minutes were proved in the spiritual court as a testamentary paper:—Held, first, this paper being proved in the spiritual court is sufficient to pass the copyhold estate; secondly, but is so totally void as to the freehold, that it will not put L. to her election, and she therefore will take her share of the freeholds under the first will, as well as the 15,000*l.* under the second; thirdly, the testator gave the 15,000*l.* to his daughter L., to be paid to her at twenty-one or marriage, without interest for the same in the meantime, but if she died before twenty-one or marriage, then the 15,000*l.* was not to be raised, but was to sink into the residue of his personal estate. And he directed that, out of the interest of the 15,000*l.*, certain sums of money should be applied for the maintenance of L. The interest of this legacy beyond the maintenance is vested in L., and must be appropriated to accumulate for her benefit. *Cary* v. *Askew*, 2 Bro. C. C. 58; 1 Cox, 241. *And see* 8 Ves. 492, 498, 499.

A testatrix gave legacies to J. and R., the legacies to be paid to each on attaining thirty, with a power to the executors to advance part of the income for maintenance, and directed that the surplus should be accumulated, and added to the principal, with limitation over in case of either, or both, not attaining thirty. The will then directed that, in every case in which any person should under the will be entitled to an estate for life in the income of any sum of money, such sum should bear 3 per cent. interest, and no more, until the principal should become payable; and in case any of her personal property should produce a greater amount of interest than that rate, that the surplus should belong to, and form part of, her residuary property:—Held, that the legatees were entitled to have the whole income of the funds in which their legacies

were invested, after providing for their maintenance and education, accumulated for their benefit, and that the interest on their legacies was not to be limited to 3 per cent. *Bayley* v. *Birch*, Ir. R. 4 Eq. 142.

—— **Out of other Funds.**]—Where a father gives a legacy to a child, payable at a future day, and makes an express provision for maintenance out of another fund, the legacy shall not carry interest until the time of payment. *Wynch* v. *Wynch*, 1 Cox, 433.

Upon the ground of an express maintenance, and other indications of the intention the Lord Chancellor inclined to the opinion, that the rule for interest upon a legacy given by a parent to a child till the time of payment, was not applicable; but the bill of the children was dismissed upon circumstances of acquiescence, laches, and the consequent difficulty of taking the accounts. *Mitchell* v. *Bower*, 3 Ves. 283.

The presumption that a legacy given by a person in loco parentis to an infant on his attaining twenty-one, carries interest by way of maintenance in the meantime, is rebutted if the testator makes any other provision for such maintenance. *George, In re*, 47 L. J., Ch. 118; 5 Ch. D. 837; 37 L. T. 204; 26 W. R. 65—C. A.

A legacy to a child carries interest, on the ground of the presumed intention of the parent to fulfil his moral duty of providing for the maintenance of his child; but if he has discharged that duty by providing for the maintenance of the child out of another fund, the legacy does not necessarily carry interest. *Rouse's Estate, In re*, 9 Hare, 649.

A father bequeathed 1,500*l.* to each of his younger children surviving him, to be paid as they should respectively attain twenty-one, or marry with consent; and he directed that out of the profits of his farm annual sums, graduated according to the ages of his children (but considerably less than the ordinary rate of interest on the legacies would have produced), should be allowed for their maintenance up to fifteen, after which period the amount of the allowance was to rest upon the discretion of his executors. The will contained no provision as to interest, and the surplus profits of the farm were to go towards the creation of a fund for payment of legacies:—Held, that the legacies were vested, but that the personal representative of a child dying a spinster under twenty-one was not entitled to payment till the time at which such child would have attained age; and that the legacy did not carry intermediate interest. *Maher* v. *Maher*, 1 L. R., Ir. 22.

Where a legacy, payable at a future period, is given by a parent to his child, interest is payable thereon from the death of the parent, to afford the means of maintenance to the child. The court, however, proceeds on the presumption that the parent would not allow his child to be unprovided for. Where, therefore, the will otherwise provides for the maintenance of the child, the presumption is rebutted, and interest is not payable until after the day of payment has arrived. *Donovan* v. *Needham*, 9 Beav. 164; 15 L. J., Ch. 193; 10 Jur. 150. See *S. C.*, 5 L. J., Ch. 120.

Gift to Illegitimate Children.]—Interest upon a legacy to a wife or a natural child not allowed from testator's death, as it is in the case of a legitimate child, by way of maintenance. *Lowndes* v. *Lowndes*, 15 Ves. 301. *See* 19 R. R. 287, n.

Interest from testator's death upon legacies to his grandchildren, by implication, the object being a provision and maintenance for the legatees, described as infant orphans, and some of them illegitimate. *Hill* v. *Hill*, 3 V. & B. 183; 13 R. R. 175.

On legacies to a natural child of the testator, with directions to apply a competent part of the interest for maintenance, interest is payable from the testator's death. *Newman* v. *Bateson*, 3 Swanst. 689; 19 R. R. 286.

No interest given by way of maintenance upon a legacy, simply to grandchild or natural child. *Perry* v. *Whitehead*, 6 Ves. 546.

Where a legacy is given to a natural child, with direction to apply the interest for his maintenance, the interest is payable from the death of the testator. *Dowling* v. *Tyrrel*, 2 Russ. & M. 343.

Where provision is made by a testator for his illegitimate daughter, by bequeathing her a large sum of money, and she had no other provision:—Held, that she was entitled to interest thereon for maintenance from testator's death. *Russell* v. *Dickson*, 1 Con. & L. 284; 2 Dr. & War. 133; 4 Ir. Eq. R. 339. And see *Rogers* v. *Soutten*, supra, col. 1723.

From what Time payable—General Rules.]—If a legacy be given out of land, it carries interest from the death of the testator, if out of personal estate, it yields interest from a year after testator's death; but if a time of payment be mentioned, then interest from that time. If a legacy be given only out of a reversion or remainder, it shall not yield interest from the end of the year; if out of a personal estate consisting of mortgages, or funds carrying interest, then it shall carry interest from the death of the testator. *Maxwell* v. *Wettenhall*, 2 P. Wms. 27. Sed quære. *See* 1 Sch. & Lef. 11; 9 R. R. 1.

Although a gift or a bequest of a sum of money charged upon lands by deed or will is vested, it will not in general bear interest until it is raisable, unless there is something on the face of the deed or will to shew a contrary intention. If a gift or a bequest of a sum of money charged on land is contingent, and there is no express gift or bequest of interest, interest will not accrue or be payable before the contingency on which the principal is payable takes place. A testator by will, executed in 1853, after a gift of an annuity charged on his real and freehold estate to his wife for life, bequeathed to his nephew 2,000*l.*, and charged the same on his real and freehold estate, with interest thereon at the rate of 5*l.* per cent. from the death of the testator's mother, expressing his intention to be, that the same should not be raised or carry interest during the testator's mother's life, but that the same should be a vested interest in his nephew on his attaining twenty-one, and not before; but in case he attained that age in the testator's mother's lifetime, payment of the principal was to be postponed till his death; and if he died under twenty-one, the said sum was not to be raised or payable:—Held, that such legacy was contingent on the event of the nephew attaining twenty-one, and that interest was not payable on the 2,000*l.* until the nephew attained that age. *Gillman* v. *Gillman*, 16 Ir. Ch. R. 461.

A legacy bequeathed generally, without assigning any time for payment, bears interest only from a year after the death of the testator, though the fund out of which it is to be paid consists of stock and other matters yielding immediate profit. *Pearson* v. *Pearson*, 1 Sch. & Lef. 10; 9 R. R. 1.

Interest of legacies to be computed from a year after testator's death, unless some other time appointed by testator, but he cannot make executor answer interest beyond what the law has done. Estate devised on trust to be sold with all possible diligence, or in reasonable time considered as sold from testator's death. *Hutcheon* v. *Mannington*, 1 Ves. 367; 2 R. R. 115.

General rule for convenience, considering the personal estate to be reduced into possession a year from the death of the testator, and therefore interest upon legacies is given from that period, unless some other is fixed by the will, though actual payment within that time may in many instances be impracticable. *Wood* v. *Penoyre*, 13 Ves. 333; 9 R. R. 185. S. P., *Bourke* v. *Ricketts*, 10 Ves. 333.

Tenant for life of residue, under will, has no claim to interest till one year after testator's death. *Stott* v. *Hollingworth*, 3 Madd. 161.

The rule that general legacies bear interest only from end of a year from the death of the testator, applies to similar legacies under a feme covert's will made in exercise of a power of appointment. *Tatham* v. *Drummond*, 2 H. & M. 262.

—— **Exceptions—Where Legacy payable out of Mortgage Money.**]—Legacies to be paid out of money due on mortgage when recovered. The right to interest at 4 per cent., the mortgage producing 5, does not depend upon the time when the money is recovered. *Wood* v. *Penoyre*, supra.

—— **Annuity.**]—Legacy does not in general carry interest till the end of the year after death. Interest on annuity commences from death, and the first payment is made at the end of the year. *Gibson* v. *Bott*, 7 Ves. 96; 6 R. R. 87. But see *Storer* v. *Prestage*, 3 Madd. 167.

—— **Gift for Benefit of Infant.**]—Interest on a legacy bequeathed in trust to apply the income or the principal, for the benefit of an infant, is payable from the death of the testator. *Chidgey* v. *Whitby*, 41 L. J., Ch. 699.

A contingent legacy, which is given to an infant, and which, or the income of which, the executors are empowered to apply for the maintenance, education, or benefit of the infant during minority, carries interest from the death of the testator, although he may not have stood in loco parentis to the infant. *Richards, In re*, L. R. 8 Eq. 119. And see *Pickwick* v. *Gibbes*, supra, col. 1726.

Gift to Widow of Testator.]—A testator gave 1,000*l.* to his executors upon trust for investment, and to pay the interest as the same should arise therefrom to his widow during her life and widowhood, and after her death or second marriage one moiety to his son absolutely, and the other moiety upon trust for his daughter and issue:—Held, that interest on this legacy did not begin to run until one year after the death of testator. *Whittaker, In re, Whittaker* v. *Whittaker*, 51 L. J., Ch. 737; 21 Ch. D. 657; 46 L. T. 802; 30 W. R. 787.

Under a gift by A. to his wife of 10,000*l.*, "afterwards to go to the understated residuary legatee E.":—Held, that the legacy of 10,000*l.* was given to the wife absolutely, but that interest upon such legacy did not begin to run until after one year from the testator's death. *Percy* v. *Percy, In re*, 24 Ch. D. 616; 49 L. T. 54.

A testator devised and bequeathed his real and residuary personal estate to trustees, upon trust to sell, and out of the proceeds to set apart and invest 2,000*l.*, and permit his wife to receive the income during widowhood. And the testator declared that the provision made for his wife should "be accepted by her in lieu of all claim to dower or freebench":—Held, that interest on the legacy was only payable from the end of a year from the death of the testator. *Bignold, In re, Bignold* v. *Bignold*, 59 L. J., Ch. 737; 45 Ch. D. 496; 63 L. T. 542; 39 W. R. 184.

—— **To Charity.**]—J., by her will bequeathed 100*l.* to ministers and churchwardens, in trust to invest the same, with the approbation of her executors, in land, for certain charitable purposes. The legacy remaining unpaid, application was made to the Lord Chancellor, who directed the master to compute what was due for the said legacy of 100*l.*, with interest at 4 per cent. from the end of one year from the testator's death, the whole to be invested for the charitable purposes mentioned in the will. *Att.-Gen.* v. *Hayes*, 1 Atk. 356.

Charity legacies were given for the erection of a church, parsonage, and schools, which were to be paid as soon as they might be required for those purposes without interest in the meantime. Great delay had occurred in carrying this into effect, in consequence of adverse litigation in respect to their validity:—Held, that the charities were entitled to interest from the end of a year from the testator's death. *Fisher* v. *Brierley*, 30 Beav. 268.

A testatrix directed a church to be built, and as soon as built she gave 5,000*l.* for the endowment of the minister, "but without any interest in the meantime." The building of the church was delayed several years by litigation, and no minister had been appointed. The court declined to decide, in the absence of the minister, whether any interest was payable on the legacy, but intimated that the interest before the appointment of a minister would not form part of the capital. *S. C.*, 32 Beav. 602.

Trust for Sale—Legacies payable out of Proceeds.]—Devise of real estate upon trust for sale, and out of the proceeds of such sale to pay legacies:—Held, that interest on the legacies was payable from the period of a year after the testator's death. *Turner* v. *Buck*, 43 L. J., Ch. 583; L. R. 18 Eq. 301; 22 W. R. 748.

A testator devised his real estate to his wife for life, and after her death to trustees in trust for sale, and out of the proceeds to retain a sum of 1,000*l.* to be held upon the trusts after declared; the residue of the proceeds to be divided into four equal shares, of which one was to be invested and held in trust for his daughter M. for life, with remainder to her children; and similar trusts were declared of the other three shares in favour of his three other daughters and their children. And he declared that the 1,000*l.*, together with interest at 4 per cent. to the date of retainer, should be held upon the trusts

declared of the said one-fourth share in favour of M. and her children. And he empowered his trustees to postpone the sale of his real estate for three years after the death of his wife, and declared that the rents of the unsold real estate should be applied as the income of the proceeds of sale would be applied if the premises had been sold and the proceeds invested. The testator's widow survived him and died. The trustees proposing to sell the real estate about two years and a half after her death, and to retain the 1,000*l.* out of the proceeds as directed by the will, the question arose whether, until such retainer, the 1,000*l.* carried interest at 4 per cent. from the death of the widow, or only from the expiration of one year afterwards:—Held, that the 1,000*l.* carried interest at 4 per cent. from the death of the widow. *Turner* v. *Buck*, supra, considered. *Waters, In re, Waters* v. *Boxer*, 58 L. J., Ch. 750; 42 Ch. D. 517; 61 L. T. 431; 38 W. R. 57.

Where Fund not immediately Disposable—Interest from end of Executor's Year.]—Pecuniary legacies bear interest from the expiration of a year, although the fund may not become disposable till afterwards. *Pearson* v. *Pearson*, supra, col. 1729.

Legacy to A. on condition that she gave 3,000*l.* to purchase an annuity for B. In consequence of a litigation between A. and the residuary legatees, A. did not, for several years, obtain possession of the legacy, which did not, in the meanwhile, make interest. Payment to B., who elected to take the 3,000*l.* in lieu of the legacy, was consequently postponed:—Held, that interest on the 3,000*l.* was payable by A. to B. from the end of a year after the testator's death. *Hertford (Marquis)* v. *Lowther (Lord)*, 9 Beav. 266; 15 L. J., Ch. 126.

—— **From Death of Testator.**]—A., by will, gives 300*l.* to a feme covert without creating any separate trust of it, made payable out of a reversion expectant on an estate for life. The legatee's husband makes an assignment of this legacy to trustees for the benefit of his children, and after, by will taking notice of the legacy, devises it in like manner for the benefit of his children, and makes his wife executrix and dies. The estate for life drops, and the widow applies to the executor of the first testator for the 300*l.* legacy; the widow and executor come to an agreement that she should accept of 200*l.* in full, and the land was sold. The widow joined in the sale, and the 200*l.* was paid, and the widow gave a release; bill brought by the children for the 300*l.* legacy under their father's assigment and will; decreed that the husband had a power to extinguish or release the legacy, and had made a good assignment in equity (though not at law as a chose in action only) which he confirming by his will, had bound his wife the legatee. The widow giving no notice of this assignment, the executor should be answerable for the 200*l.* to the children, but as to the 100*l.* which the executor had drawn her into release, he should stand charged with, for he ought at first to have paid the whole legacy; and though this legacy was charged on a fund which was not immediate for raising it, yet being given to the wife in præsenti, when the fund comes in, it shall carry interest from testator's death, which must likewise go to the children. *Atkins* v. *Dawbury*, Gilb. Eq. Rep. 88. Vide 1 Ch. Cas. 232; 3 Ch. Rep. 90; 1 Rol. Abr. 380.

A testator devised his real estates to the use of trustees for years, on trust for his wife for life, or durante viduitate, and after the decease or second marriage of his wife, and subject as aforesaid, and without prejudice to the same, upon trust to raise out of the lands by sale, &c., for all or any part of the residue of the said term, the sum of 3,500*l.*, which he bequeathed to three persons; and he desired that the said several sums might be paid to the legatees respectively "as soon after his decease as might be convenient," and that in the meantime they should be paid interest thereon at the rate of 5*l.* for each 100*l.* by the year:—Held, that the legatees were not entitled to interest out of the wife's life estate, but that it was to be raised after her decease or marriage out of the residue of the term. *Pennefather* v. *Bury*, 3 Jo. & Lat. 727; 9 Ir. Eq. R. 586.

A testator by his will created a term in his estates upon trusts for raising a jointure and portions, and on further trust, in case of the insufficiency of his personal estate for the payment of debts and legacies, to raise, after his wife's death, a sufficient sum to pay the legacies. Of the legacies he directed some to be paid in any event, and with interest, and others in the event of his leaving no issue, without mentioning interest; he afterwards directed that all the legacies should bear interest from the time they should become payable. He died without issue; the personal estate was exhausted in payment of the debts and the legacies that were to be paid at all events:—Held, that the unpaid legacies were not to be raised till the death of the wife, but that interest on them during her life should be paid out of the rents. *Milltown* v. *Trench*, 4 Cl. & F. 276; 11 Bligh (N.S.) 1.

A testator bequeathed a legacy, "with interest for the same from my decease," in trust to pay the income to A. for life, and then to transfer the capital. Money was paid by the executors from time to time on account of the legacy:—Held, that the legatee for life was entitled to receive such a proportion of such payments as would represent interest on each payment from the date of the testator's death. *Tinkler, In re*, 45 L. J., Ch. 135.

Where Legacy brought into Court.]—If a legacy be brought into court, legatee shall lose the interest while the legacy remains in court; but if the legacy is by the court placed out at interest, legatee shall have such interest. *Maxwell* v. *Wettenhall*, 2 P. Wms. 27.

Where Time fixed for Payment of Legacy.]—Where a legacy is to be paid at a certain day, it shall carry interest from that time if not paid. *Palmer* v. *Trevor*, 1 Vern. 262.

Real estates were directed to be sold at the end of two years, and legacies paid out of the purchase-money:—Held, that interest was payable from that time. *Buxton* v. *Buxton*, C. P. Cooper, 97.

Bond to pay an annuity till a legacy recited to have been bequeathed by the last will of obligor to obligee, should be paid. By a previous will he had given a legacy; but that was revoked by a subsequent will, and a less legacy given, payable six months after testator's death, "over and above the annuity which I have secured to him for his life." The annuity and bond were assigned by the obligee as some provision for his mother, "to be received by her during the life of

the obligor as fully and beneficially as it could have been by the obligee." The bond and assignment were put into the possession of the testator, and continued so till his death. The legatee is entitled to the legacy with interest, if not paid at the time; and also to the annuity for his life in trust for his mother. *Crosbie* v. *Murray*, 1 Ves. 555.

A., living in Antigua, and having a plantation there, devises 50,000 lbs. weight of sugar to the children of B., to be paid by his executors in ten years after his death. The executors not delivering the sugars within the time, on a bill brought by one of the children, decreed the value of the plaintiff's legacy to be computed according to the medium rate of sugars in Antigua, at the end of ten years, and paid with interest from the time it became due. *Symes* v. *Vernon*, 2 Vern. 553.

The testator, by his will, gave several pecuniary legacies, and directed them to be paid within three calendar months after his decease; and by a codicil he directed that two of those legacies, consisting of 30,000*l.* each, should not be paid out of his general personal estate, but should be raised out of the rents and profits of his real estates thereby devised, and of those to be purchased with his residuary personal estate; and until they should be raised and paid, the first tenant for life was not to be entitled to the whole profits but only to a fixed annual sum thereout:—Held, that interest was payable on the two legacies from three months after the death of the testator. *Londesborough* (*Lord*) v. *Somerville*, 19 Beav. 295; 23 L. J., Ch. 646.

A testator gave legacies to his two brothers, and directed that if either of them "die in my lifetime" his legacy should go to his children, but the legacies were not to be paid till six months after his wife's death. By a codicil reciting the effect of his will and the death of one of his brothers, he directed his legacy to be held for the benefit of his widow for life, and after her death the principal to be paid to her children; and he directed that if his other brother "shall die leaving a widow," such widow should have an interest in the legacy given him in like manner as he had directed the legacy of the deceased brother:—Held, that the words "shall die leaving a widow" meant die in the testator's lifetime, and that interest was payable from the death of the widow. *Hood* v. *Hood*, 18 W. R. 88.

A legacy payable at a certain time shall, notwithstanding, carry interest only from the time it is demanded. *Jolliff* v. *Crew*, Pre. Ch. 161.

—— **Gift to Testator's Widow.**]—An annuity left the wife by the husband's will, shall carry interest from the day on which it was payable, and not only from the subsequent day of payment after the arrears incurred. *Litton* v. *Litton*, 1 P. Wms. 543.

Where a testator gives his wife a legacy to be paid to her within three months after his death, in lieu of her jointure, and she elects to accept the legacy, she is not entitled to interest upon it during the interval between the death of the testator and the time of payment. *Elton* v. *Montague*, 1 L. J. (o.s.) Ch. 212.

—— **To Infant.**] — The general rule that a legacy payable in future shall not carry interest before the time of payment, applies to a legacy to infant, payable at twenty-one. The exceptions are, the case of parent and child, the case of a residue, and where from other special circumstances, an intention to give interest clearly appears. *Tyrrell* v. *Tyrrell*, 4 Ves. 1.

Legacies in general do not carry interest but from the day of payment; and although the legacy is given to infants, the exceptions to the rule are where the infant is the child of the testator, and therefore has a right to demand maintenance, and where it clearly appears to have been the testator's intention to give interest in the meantime. In the case of a legacy to a child, let the testator give it how he will, either at twenty-one or marriage, or payable at twenty-one or marriage, and the child has no other provision, the court will give interest by way of maintenance; for it will not presume a father so unnatural as to leave a child destitute. A. bequeathed to five persons 100*l.* apiece, to be paid to them at twenty-one, if they attain that age, and not otherwise; and if they die before, the legacy to be utterly void. On a bill for interest on these legacies, it was held that the legatees not being entitled to immediate payment, shall not have interest, nor the principal secured, till twenty-one. Though a legacy is actually vested, as if given to B. payable at twenty-one, yet it shall not carry interest in the meantime, unless something in the will shews that such was testator's intent. *Heath* v. *Perry*, 3 Atk. 102.

Legacy of 1,000*l.* which devisor had on mortgage on college lease, to be paid when devisee came of age:—Held, first, that it was vested; but, secondly, it should not carry interest from testator's death; and, thirdly, that it was a specific legacy, and chargeable on mortgage. *Chambers* v. *Jeoffrey*, 2 Eq. Abr. 541.

Where a testator bequeathed an annuity to his granddaughter for her life, and directed that if she should die during the lifetime of his widow the annuity should be paid for the maintenance of the children of the granddaughter, and that from and after the decease of his widow and granddaughter the value or the amount of the annuity (such a sum as would produce it according to the then legal rate of interest) should be paid to all and every the child and children of the granddaughter; if more than one, to be equally divided amongst them when and as they should respectively attain the age of twenty-one years, and if there should be but one then the whole to such one child, with a gift over, in case of the death of the granddaughter without issue who should attain the age of twenty-one; the children of the granddaughter are not entitled to the annuity or interest of the fund after the death of the widow and their mother until they attain the age of twenty-one years. *Festing* v. *Allen*, 5 Hare, 575.

Where, by marriage settlement, A. had power to leave 1,500*l.*, and she duly executes power by leaving it to B. at twenty-one, interest shall be given in the meantime. *Mansell* v. *Price*, 2 Eq. Abr. 532.

—— **To Infant Executor.**] — *See Gardner, In re*, supra, col. 1723.

—— **To Illegitimate Children.**] — Testator having three illegitimate children (two sons and a daughter), gave 18,000*l.* to trustees in trust, out of the interest to pay 100*l.* a year for the maintenance and education of each of them during their minorities, and to accumulate the residue and add it to the principal, and to pay one-third of the aggregate fund to each of the sons on his

attaining twenty-one, and out of the remaining third to pay 1,000*l.* to the daughter on her attaining twenty-one, or marrying under that age with the consent of the trustees, and to stand possessed of the residue in trust for her separate use for her life: and the testator directed all the legacies given by his will to be paid within three months after his death. The sons attained twenty-one in the testator's lifetime, and the daughter married under that age with the testator's consent:—Held, that the legacies to the sons and daughters became payable on the testator's death, and consequently that they bore interest from that time. *Coventry* v. *Higgins*, 14 Sim. 30; 8 Jur. 132.

—— **Where Estate not immediately sufficient.**]—A testator bequeathed his personal estate to trustees, upon trust to place out so much money in the funds as would produce a yearly sum of 100*l.*, to be paid to his wife, and then to place out the further sum of 2,120*l.* upon the like securities, and pay the dividends of part thereof to W. H. for life, and afterwards to his children, and the remainder of the 2,120*l.* to other persons named; and the testator declared that, in case his estate should not be sufficient to pay the legacies in full previously to the death of his wife, then such legacies should only be paid in part during the life of his wife, and the same should be made up after her decease. The estate proved to be insufficient to pay the legacies in full during the life of the testator's wife:—Held, that the legatees were only entitled to interest upon the unpaid portion of their legacies from the time at which the remainder should be capable of being paid up. *Holmes* v. *Crispe*, 18 L. J., Ch. 439.

—— **Gift of Remainder.**]—A. was entitled to 7,000*l.*, payable on the death of B. A. by her will bequeathed legacies payable out of the 7,000*l.* B. survived A. thirty-three years:—Held, that the legacies carried interest only from the death of B., and not from the death of the testatrix. The period from which the Statute of Limitations begins to run, and the period from which interest is payable on a legacy, are identical. *Earle* v. *Bellingham*, 24 Beav. 448; 27 L. J., Ch. 545; 3 Jur. (N.S.) 1237; 6 W. R. 45.

Of Contingent Interest.]—A testatrix gave property to which she was contingently entitled to a trustee, and declared "that as soon as proceedings in law and equity shall be terminated, and the same property shall come into his possession, that he shall pay 2,000*l.* to each of my brothers and sisters":—Held, that such a direction was not a general direction to pay a legacy, but was a direction by way of a trust to distribute a trust fund on an event which might not happen for some time after the death of the testatrix, and that interest did not begin to run on these legacies till the termination of the proceedings in law and equity. *Lord, In re*, 36 L. J. Ch. 533. Affirmed 17 L. T. 105; 15 W. R. 1118.

Where Time for Payment of Legacy not definitely fixed.]—Where a testatrix directed her executor to pay the legacies as soon after her death as might be convenient, or within three years if it should suit his convenience:—Held, that the legatees were not entitled to interest on their legacies before the expiration of the three years. *Thomas* v. *Att.-Gen.*, 2 Y. & C. 525.

A., by will in 1699, creates a trust term for twenty-one years, for the payment of debts and legacies, to be paid within five years after his death, and by a codicil devises the same estates to trustees and their heirs, to pay the wife during her life 300*l.* per annum and with the surplus profits, his debts and legacies. The testator's widow did not die till 1736:—Held, that interest on a legacy began at the expiration of the five years, and interest allowed on a simple contract debt from the time it was ascertained by the master's report, and confirmed in 1717. A legacy in its nature carries interest, and there is no distinction between a reversionary estate and any other. *Lloyd* v. *Williams*, 2 Atk. 108; Barnard. 229.

Legacy without any interest to A., if claimed within five years from the testator's death, if not the said sum without interest as aforesaid to B. No claim having been made by A., decreed to B., with interest from the end of five years, at 4 per cent. *Careless* v. *Careless*, 19 Ves. 601; 1 Mer. 384; 15 R. R. 134.

Where Gift immediate but Payment of Legacy deferred.]—A gift of certain legacies, followed, in a subsequent part of the will, by the words, "I wish all legacies to be paid duty free after the death of my father and mother," is an immediate gift with the time of payment deferred, and carries interest with it from the time of the death of the testator. *Humphreys* v. *Humphreys*, 15 L. T. 557; 15 W. R. 391.

Death of Legatee under Age.]—Testator gave to A., B., C., D. and E. 500*l.* each, to be paid to them at their respective ages of twenty-three years, and if they should die before that time, then their respective legacies were to sink into the residue of his personal estate. These legacies do not carry interest, and no maintenance can be allowed to the legatees. *Descrambes* v. *Tomkins*, 1 Cox. 133.

Where a legacy of residue is given in such a way as to vest, but so as to be liable to be divested on a given event, the interest in the meanwhile, and until the devesting, belongs to the legatee. *Barber* v. *Barber*, 3 Myl. & Cr. 688; 8 L. J., Ch. 36; 2 Jur. 1029.

A bequest of a vested legacy, directed to be paid at twenty-one or marriage, and subject to be divested by death before those events (the testator not being in loco parentis), does not carry interest until the time for payment. *Bullen's Trusts, In re*, 12 L. T. 763.

A testator gave his residuary estate to trustees in trust for his sister's younger children equally, and to vest in them at the usual periods; and he directed his trustees, during the minorities of the children, to pay the interest of their shares to his sister, or to the guardians of the children, to be applied for their maintenance and education:—Held, that the sisters were entitled to receive the interest of their children's shares during the minorities of their children. *Berkeley* v. *Swinburne*, 6 Sim. 613; 3 L. J., Ch. 165.

—— **Before Event happens.**]—A testatrix, by her will, directed her executors to pay to F. and G., both then unmarried women, 5,000*l.* each upon their marriage, with all the accumulations of interest thereon from the time of the testatrix's death. The executors set apart sums for the above legacies, and accumulated the dividends.

The will gave the interest of the residue to H. for life, with remainders over. G. died without ever having been married, but having survived H., the tenant for life of the residue:—Held, that the estate of H. was entitled to the interest of the legacy of 5,000*l.* given to G. from the death of the testatrix to the death of H. *Morgan* v. *Morgan*, 20 L. J., Ch. 109; 15 Jur. 319.

—— **Before Time for Payment of Legacy.**]—Bequest of residue payable at a future time, carries interest, though the legatee does not live to receive the principal. *Sisson* v. *Shaw*, 9 Ves. 289; 7 R. R. 190.

Rate—General Rules.]—Interest upon a legacy where no rate is fixed by the testator, is to be calculated at 5*l.* per cent. pursuant to the 209th new rule, although the will be made prior to the 1st January, 1835. *Brown* v. *Brown*, Ll. & G. t. Plunk. 249.

Residuary personal estate of a testator which at the time of his death stood invested in securities not recognised by this court, having been valued by the master as at the period of one year after the testator's death, the court ordered the interest on the value so taken (not exceeding 4*l.* per cent.) to be paid to the tenant for life from the testator's death. *Caldicott* v. *Caldicott*, 1 Y. & C. C. C. 737; 11 L. J., Ch. 158, 414; 6 Jur. 232, 1032.

A testator, domiciled at Bombay, directed his trustees to invest two sums in the government public loans of India or other securities therein mentioned, and to pay the interest to certain legatees. The bulk of the property was invested in Indian securities, producing 5 per cent. interest, but seven years after his death no interest had been paid on the legacies, nor any investment or appropriation made to answer them:—Held, that until appropriation the legacies bore interest at 4 per cent. only. *Bowyer, In re, Bellamy* v. *Bowyer*, 19 L. T. 482.

It was the rule in Lord Hardwicke's time to give interest at 5 per cent. on legacies out of personal estates, and 4 per cent. out of real. It has now long since been altered, and the general rule is, that they shall all carry interest at 4 per cent. from the end of a year after the testator's death. The case of maintenance is an exception. *Bryant* v. *Speke*, 1 Ves. Sen. 171.

From 1725 the court has never allowed more than 4 per cent. interest, in cases of account as to a portion. *Wood* v. *Briant*, 2 Atk. 523.

When legacies are charged on personal estate, and interest is directed to be paid, the court always allows legal interest; but where they are charged on real estate, the rule is to allow 1 per cent. less, as the land is a good security for the principal. *Moore* v. *Moore*, 3 Atk. 402.

General rule that legacies where no interest is given by will, shall carry interest at 4 per cent. only, and from end of year after testator's death, except where given by way of maintenance. *Sitwell* v. *Bernard*, 6 Ves. 520; 5 R. R. 374.

—— **In Special Cases.**]—Interest at 5 per cent. allowed for money paid as legacy for mourning. *Swynfen* v. *Scawen*, 1 Ves. Sen. 99; Dick. 117.

No exception in favour of a wife, as for a child, to the rule that a legacy does not bear interest before it is payable. Claim of 5 per cent. upon a legacy as being out of a capital in trade, not decided. *Stent* v. *Robinson*, 12 Ves. 461.

—— **Where Gift in Exoneration of Mortgaged Property.**]—A testator having an estate subject to a mortgage, bearing interest at 5 per cent., devised it to B., "he paying the mortgage thereon," and he bequeathed to the mortgagee, through his executor, 2,000*l.* to exonerate the estate. The mortgagee foreclosed, and it having been decided that the devisee was entitled to the 2,000*l.*, it was held that he was entitled to interest thereon, after the rate of 3 and not 5 per cent. *Lockhart* v. *Hardy*, 10 Beav. 292.

Compound Interest.]—Subsequent interest on a mortgage to be calculated upon the principal and interest reported due, but upon bonds or legacies on the principal only. *Perkyns* v. *Baynton*, 1 Bro. C. C. 574.

An administrator of an intestate's estate paid to seven out of eight of the next of kin 1,250*l.* on account of each share, and made only small payments on account of the remaining shares. In distributing the residue of the estate, after a lapse of thirty years, the persons claiming the last-mentioned share insisted that, for the purposes of distribution, 1,250*l.* ought to be treated as having been set apart on account of their share, and interest at 4*l.* per cent. to be allowed thereon, and that the small payments ought to be treated as having been made on account of the interest on that 1,250*l.*:—Held, that this would be conferring a benefit in the nature of compound interest on the claimants of the unpaid share, and that the only mode of equalisation which the rules of the court allowed was to charge each recipient with the amount paid to him, together with simple interest at 4*l.* per cent. from the date of payment. *Lambe* v. *Orton*, 33 L. J., Ch. 81; 11 W. R. 1043.

An executor having a gross sum in his hands, made advances to the parties entitled, by way of loan on security, and in one instance made an advance out of his own money, taking a deposit of deeds of the private property of the party to whom the advance was made, at 5*l.* per cent. A decree directed an account of those sums with 4*l.* per cent. interest, but was silent as to interest on the security of the private estate, and did not contain any declaration as to priorities of the trust estate and the executor's own advance; and containing ample directions to deal with the whole estate, reserves further consideration. A petition of rehearing is presented, setting out the decree, and also what had taken place, and seeking to vary the decree:—Held, first, that although a party entitled to a share in an estate does not receive it till years afterwards, he can only have simple interest upon it. That the estate was entitled to sums recovered on securities for sums advanced by the executor in priority to his own claim; and moneys received from the subject of the security by him must go first in satisfaction of the sum due to the estate. Held, also, that where cestuis que trustent elect to take advances made by the executor as loans, they are entitled to the benefit of them at the same rate of interest which they bear, and if they are deficient, cannot turn round and treat them as advances on account. *Ib.*

—— **Where Express Trust for Accumulation.**]—By will, dated in 1825, A. gave "500*l.* to be laid out at interest; and if my sister B. survive

her husband, she to have interest, both what may have accumulated, and during her life. If B. die before her husband, the principal and accumulated interest to be divided equally between her daughters. My remaining property I will have made the most of till B.'s youngest daughter attain twenty-five, when the daughters of B. are to take it; and if but one, she to take it all." The testatrix died in 1831. B. died in 1855, in the lifetime of her husband. B. had one daughter, who attained twenty-five in 1832, and married the plaintiff. On attaining twenty-five she had signed a settlement of accounts with the acting trustee, P., by which only simple interest at 4*l.* per cent. was charged on the residuary estate. P. had retained all the moneys in his own hands:—Held, first, that there was an express trust for accumulating the legacy of 500*l.* at compound interest. Held, secondly, that the memorandum of 1832, regulating the mode of calculating interest on the residuary estate, did not bind the plaintiff (in right of his wife) to calculate the interest on the 500*l.* legacy in the same manner. *Wilson* v. *Peake*, 3 Jur. (N.S.) 155. And see *Bayley* v. *Birch*, supra, cols. 1726–7.

Gift of Residue for Life—Deficiency of Interest on Amount of Legacies, how borne.]—A testator, by his will, gave pecuniary legacies, and bequeathed his residuary estate to M. for life, and then over. The investments of the general estate produced an income amounting, on an average, to less than 4 per cent.; but this income exceeded 4 per cent. on the amount of the legacies:—Held, that the difference between the interest actually produced on the amounts of the legacies, and interest thereon at 4 per cent., should be deducted from the capital of the residue as from the testator's death, and that M. was entitled to the interest actually realised on the net residue. *Massy* v. *Gahan*, 23 L. R., Ir. 518.

Local Interest.]—Money charged on estate in Nevis, held to carry only English interest. The sum which was charged in favour of W. held to be included in the bequest of a larger sum to W.'s younger children, the testatrix supposing that they were entitled to the charge, although it was not the case, and decreed that no more should be raised than the sum bequeathed. *Stapleton* v. *Conway*, 1 Ves. Sen. 427.

Legacy of a sum of money, Jamaica currency, decreed with Jamaica interest from the death of the testator. *Raymond* v. *Brodbelt*, 5 Ves. 199.

Testator gives legacies in money, and dies abroad, where the will was made. Currency shall be understood, if sterling is not expressed. Semble, that as to the interest on such legacies, an inquiry ought to be directed to ascertain in what country the fund, out of which the legacy is payable, has been deposited, and interest shall be paid according to the rate of interest in that country. *Malcolm* v. *Martin*, 3 Bro. C. C. 50.

In the administration, in an English court, of property bequeathed by a testator domiciled in France, the interest payable on legacies given by the will is governed by the law of the country in which the estate is being administered. *Hamilton* v. *Dallas*, 38 L. T. 215; 26 W. R. 326.

By a settlement B. was empowered to charge lands in Ireland with any sum not to exceed 400*l.* a year, as a jointure for his wife, and with any sum not to exceed 2,000*l.* sterling for his younger children. In exercise of the power B. charged the lands with 2,000*l.* late Irish currency, to be vested in and paid to his younger children in equal shares on their attaining twenty-one or marriage: and he directed, in the event of his dying before the shares became vested, that his children should be entitled to interest on their presumptive portions at 5*l.* per cent. by way of maintenance from the time of his death until such portions should be payable:—Held, that the 2,000*l.* carried interest at 5*l.* per cent. Irish currency from the death of B. until the shares of the younger children became payable. *Denny* v. *Denny*, 14 L. T. 854.

Under Decree.]—Practice in Ireland to compute interest on legacies, though the decree does not contain an express direction for the purpose. *Birmingham* v. *Kirwan*, 2 Sch. & L. 447.

Interest not given from the confirmation of the report upon demands liquidated by it, but not bearing interest in their nature, as legacies and arrears of annuities, though both legacies and annuities were charged upon land, and the annuities were not paid out of the rents and profits, as possession was taken by mortgagees, and though one of the annuities was the provision of a widow. *Creuze* v. *Hunter*, 2 Ves. 157; 4 Bro. C. C. 157; 2 R. R. 38.

The allowance of interest upon a legacy charged upon real estate, and due upwards of six years, is to be calculated from the filing of the bill, and not from the date of the decree, though the bill is not filed by the legatee. *Chappell* v. *Rees*, 1 De G. M. & G. 393; 3 Mac. & G. 683; 16 Jur. 415.

A suit having been instituted by trustees of A.'s will, against B., who was his heir, executor and residuary devisee, and several others, for carrying the trusts of the will into execution, was, after the death of B., revived against his real and personal representatives, and C., to whom he had devised for life, and D., to whom he had devised in tail in remainder, and against all the other parties interested under B.'s will; and a decree was made directing accounts to be taken of the personal estates, debts and legacies of A. and B. respectively. By a subsequent decree, certain unpaid legacies of B., and the interest on them, were declared, in the event of his personal estate being found insufficient, to be charged on his real estates, the principal not to be raised until after the death of C., but the interest to be paid out of the rents and profits during C.'s life. On a question subsequently arising between C. and D., whether a fund in court, part of B.'s personal estate, should be applied exclusively in payment of arrears of interest on the legacies, or ratably in payment of the legacies and of the interest, the Master of the Rolls and Lord Chancellor of Ireland made orders directing the fund to be applied exclusively in payment of the arrears of interest; and the Lord Chancellor refused to direct an inquiry as to how much of the fund in court was principal, and how much accumulated interest:—Held, that any question, as to the application of B.'s personal estate, could not be regularly adjudicated in this form of suit between the co-defendants C. and D.; and the orders appealed from were affirmed, with a declaration that they should be without prejudice to any question between C. and D. as to the

manner in which the principal and interest of the legacies should be paid. *Coote* v. *Trench*, 9 Cl. & F. 74.

23. ACCRETIONS AND ACCUMULATIONS.

Accretions—To Specific Legacies—Stocks and Shares.]—Dividends on specific legacy of stock given with the dividends are due from death of testator. *Barrington* v. *Tristram*, 6 Ves. 345.

A., by will, gives 100*l.* South Sea stock to B.; another 100*l.* South Sea stock to C., payable in six months after his death. Before time expired, an addition was made by the company to every 100*l.* stock:—Held, that the legatees were entitled to the additional as well as the original stock. *Mason* v. *Hawkins*, 4 Bro. P. C. 8.

If a specific bequest of shares is made under an impression that they are not subject to any increase, an accidental increase caused by a payment out of the general personal estate of the testator himself will pass to the legatee. *Maclaren* v. *Stainton*, 30 L. J., Ch. 723; 7 Jur. (N.S.) 691; 4 L. T. 715; 9 W. R. 908. Reversing 27 Beav. 460.

A., under the impression that he was not indebted, dealt with his entire estate, and made a specific gift of shares held by him in a company. A suit was afterwards instituted against his executors by the company to which he was found to be indebted. The debt was paid out of the testator's general personal estate, and, in consequence, bonuses were declared upon all the shares of the company. A specific legatee claimed the bonuses in respect of his bequeathed shares:—Held, that the bonuses on the bequeathed shares did not form part of the general personal estate of the testator, but belonged to the specific legatee. *Ib.*

Some of the shares were bequeathed to parties for life, with remainder to other persons:—Held, that the bonuses belonged wholly to the legatees, and not to the estate. *Ib.*

A testator bequeathed all the interest arising out of what money he had in any banks:—Held, that a bonus or extraordinary dividend on the shares of the capital stock of a bank, paid in addition to the usual half-yearly dividend, and out of the net annual profits of the bank for the year, was not an accretion to the capital, and passed under the bequest. *French* v. *Craig*, 8 Ir. Ch. R. 142.

Testator gave several legacies in stock, and directed his executors to transfer stock to the legatees to the amount of their respective legacies, either in consols or reduced annuities, within twelve months after his death. Some of the legacies were not transferred till after twelve months from the testator's death:—Held, that, notwithstanding the discretion, the legacies were specific, and that the legatees were entitled to the dividends from the death of the testator. *Chester* v. *Urwick*, 23 Beav. 402.

A testator, at the time of his death, was entitled to one hundred and twenty shares in the Great Western Railway Company. For thirty-eight of these he had been an original subscriber, and had signed the parliamentary contract, undertaking to pay the amount subscribed within ten years to the directors to be appointed by the Railway Act. The remaining eighty-two shares had been purchased by him as scrip. By the act, which was passed in his lifetime, the directors had power to compel payment of the moneys subscribed, and also to make calls, and to enforce the payment of such calls by action, or otherwise to declare the shares forfeited, and to sell the shares. The act also gave the proprietors of shares the right of sale and transfer, declaring, in effect, that the vendor ceased to be liable for calls after a proper memorial of such sale and transfer. All the calls had not been paid on the shares at the time of the testator's death. After his death the company passed a resolution, declaring that the proprietors of shares should be entitled to two new quarter shares in respect of each whole share. By his will, the testator had bequeathed thirty shares to A. and thirty shares to B., declaring that the legacies should be deemed specific so as to be capable of ademption:—Held, first, that the legatees were entitled to the income of the shares from the death of the testator; secondly, that the legatees were entitled to a proportional number of new quarter shares; thirdly, that the legatees were not entitled to have the deposits and calls on the new quarter shares, or the calls due on the eighty-two whole shares, or semble, the calls due on the thirty-eight original shares, paid out of the testator's general estate; fourthly, that the legatees, and not the executors, had the right of electing out of which class of shares their legacies should be delivered to them. *Jaques* v. *Chambers*, 2 Coll. C. C. 435; 15 L. J., Ch. 225; 16 *Id.* 243; 10 Jur. 151; 11 *Id.* 295.

A testatrix had power to dispose by will of property which she enjoyed under the residuary gift of her brother; a part of this property consisted of 7,000*l.* bank stock, which, after the brother's death, was increased by a bonus to 8,750*l.* The testatrix in her will, made shortly after the bonus was declared, described the bank stock as consisting of 7,000*l.* The court decreed that the 8,750*l.* passed by force of general expressions, which plainly manifested an intention to bequeath all that the testatrix derived from her brother. *Matthews* v. *Maude*, 1 Russ. & M. 397; 8 L. J. (O.S.) Ch. 106.

Legacy of 1,000*l.* stock, held not to pass additional capital given by Bank of England as bonus under 56 Geo. 3, c. 96, subsequent to will and before testator's death. *Norris* v. *Harrison*, 2 Madd. 268.

A testator gave to W. H. and M. H. the amount of the bond he held for 1,000*l.*, "when they got their principal money paid to them, they then to give to their uncle J. B. the sum of 50*l.*, and also their father and mother the sum of 50*l.* each, arising from the bond":—Held, that W. H. and M. H. were entitled to the interest accrued due upon the bond in the lifetime of the testator, as well as to the principal. *Harcourt* v. *Morgan*, 2 Keen, 274.

Under bequests of the interests, dividends and proceeds of a sum in stock to S. for life, and of the stock to A. after S.'s death; but if A. should die before twenty-one, &c., to S., a bonus of the stock given under statute 56 Geo. 3, c. 96, was held to belong to A. as legatee of stock. *Hooper* v. *Rossiter*, 13 Price, 774; 1 M'Cle. 527.

A testator gave all his estates and effects to trustees upon trust, after paying debts and legacies, to employ the residue for the use and behoof of his grandson G. C. and the heirs of the body of G. C. till he or they arrived at majority, when the trustees were to denude thereof in his or their favours; and failing

G. C. or his lawful issue, before either of their attaining to majority, then such residue was to pertain to any posthumous heir male of testator's son T. C. (the father of G. C.), who had just died, at his or the heirs of his body attaining to majority; and failing of him without lawful issue, then to the daughters of T. C. equally. By a codicil he declared that, failing heirs of T. C.'s body, then in place of the residue pertaining to the daughters of T. C. equally it should solely pertain to the eldest heirs female of T. C. and their issue, the eldest heir female through the whole course of succession succeeding always without division, and secluding heirs-portioners. By another codicil, failing G. C. and the heirs of his body, he gave 4,000*l.* to each of his grand-daughters (except the eldest at the time) who should survive him, and the heirs of their bodies. G. C. came of age in 1799, and died unmarried in 1811; and there was no posthumous child of T. C.:—Held, upon the construction of this will and the codicils, affirming the interlocutor of the Court of Session, that G. C. on attaining twenty-one years did not take absolutely, so that on his death the whole residue would become divisible among his next of kin; but that he took only as first substitute in tail, and that upon the failure of the entail (upon his death leaving no heirs of his body) his eldest sister succeeded as heir substitute to him:—Held, further, that the accumulations of interest and profits from the death of the testator until G. C. attained majority belonged to G. C.; as did also some bonuses on bank stock, part of the testator's property, which had been declared a few weeks before G. C. attained majority, but were payable at a day subsequent to that date. *Cuming* v. *Boswell*, 2 Jur. (N.S.) 1005; 4 W. R. 752.

In June, 1865, a dividend of 7 per cent. per annum upon certain shares held by the testatrix was declared payable on the 15th July, 1865, and the 15th January, 1866. She died on the 31st December, 1865:—Held, that the January dividend formed part of the corpus of her residuary estate, and did not pass under a bequest of the annual income of such residuary personal estate. *De Gendre* v. *Kent*, L. R. 4 Eq. 283; 16 L. T. 694.

In the case of a specific legacy of bank stock, if the testator has died a few days before the dividend day, the legatee would take the dividend, although payable in respect of profits earned during the testator's life. *Clive* v. *Clive*, Kay, 600; 2 Eq. R. 913; 23 L. J., Ch. 981.

The dividend on shares in a public company, partly earned before the testator's death, but declared afterwards, belongs entirely to the specific legatee of the shares; and the Apportionment Act, 1870, does not introduce any new rule in this respect. *Whitehead* v. *Whitehead*, R. 16 Eq. 528; 29 L. T. 289.

Tenant for life of bank stock held entitled to a dividend of 5 per cent. interest and profits for the half year. *Barclay* v. *Wainwright*, 13 Ves. 66. And see *Mullins* v. *Smith*, 1 Dr. & Sm. 204, 210; 8 W. R. 739; *Witts* v. *Steere*, 13 Ves. 363; *Clayton* v. *Gresham*, 10 Ves. 288; *Paris* v. *Paris*, 10 Ves. 185; *Brander* v. *Brander*, 4 Ves. 800.

—— **Insurance Policies.**]—The testator, after reciting that he was entitled to a policy of insurance on his life for 2,000*l.*, bequeathed 400*l.*, part thereof, to E.; 100*l.* and 100*l.*, other parts thereof, to two other legatees; and he left "the residue" to J. H. C. At the time of the testator's death, considerable sums by way of bonus were added to the policy:—Held, that the gift of "the residue" of the moneys, payable on foot of the insurance, was residuary and not specific, and that J. H. C. took the entire residue of the proceeds of the policy, including the bonuses, but subject to any liabilities for the satisfaction of which the policy was liable to be resorted to, and that such liabilities were to be borne primarily by the legatee of such residue in exoneration of the specific legatees of the insurance. *Corballis* v. *Corballis*, 9 L. R., Ir. 309.

A testator having two policies upon his life for 1,000*l.* each, by will gave to his wife "the 2,000*l.* insured on his life." Subsequently he surrendered one policy. At his death bonuses were due on the other:—Held, that his widow was entitled to the 1,000*l.*, and also to the bonuses due upon the unsurrendered policy. *Roberts* v. *Edwards*, 33 Beav. 259; 33 L. J., Ch. 369; 9 Jur. (N.S.) 1219; 9 L. T. 360; 12 W. R. 33.

By the rules of an incorporated assurance company each shareholder was required to effect an assurance of a stated amount, and it was provided that one-third of every bonus on the policy should be added to the capital of the company. A shareholder, by his will, bequeathed all and every his shares and interest in this company, and all the advantages to be derived therefrom, and he bequeathed shares in other companies, in reference to which he also used the expression "shares and interest":—Held, that the policy effected by the testator, and the bonus which had been declared thereon, did not pass to the legatee. *Harington* v. *Moffat*, 4 De G. M. & G. 1; 22 L. J., Ch. 775; 1 W. R. 294.

A testator, being possessed of a policy of assurance for 1,000*l.*, on which a bonus of about 400*l.* had lately been declared, gave to his wife his "premium of assurance in the R. Company":—Held, that the bonus alone passed. *Barrow* v. *Methold*, 1 Jur. (N.S.) 994; 3 W. R. 629.

A testator gave specific bequests by his will, and to his niece a leasehold house held for lives, together with a policy of insurance on one of the lives, and all bonuses and additions, she paying the future premiums; and he directed that, if she should be married at his death, the house should be settled on her and her children; and he gave the residue of his personal estate, including his furniture, to L. After the date of the will the testator married, and he then made a codicil giving to his wife all the income, dividends and annual proceeds of his entire estate, and postponing the payment of all legacies and the distribution of all estates vested in him until after her decease. Subject thereto he confirmed and republished his will. A portion of the property consisted of Egyptian 7 per cent. bonds of the nominal amount of 4,000*l.* On a bill by the widow for the administration of his estate, and claiming the enjoyment of all the estate in specie during her life:—Held, that there was nothing to exempt the case from the operation of the rule in *Howe* v. *Lord Dartmouth* (7 Ves. 137), and that therefore the residuary estate, including the furniture and bonds, ought to be converted, and the income paid to the widow. *Macdonald* v. *Irvine*, 47 L. J., Ch. 494; 8 Ch. D. 101; 38 L. T. 155; 26 W. R. 381.

Held, also, that the bonuses ought to be added to the sum insured, and not taken in reduction of the premiums; but that the premiums ought

not to be charged on the rents of the leasehold property, but should be charged upon the policy money. *Ib.*

To Trust of Share in Partnership Business.]—A testator gave his real and personal estate to trustees in trust, to permit his wife to receive "the annual produce, interest, rents, and profits thereof for life," and after her death in trust for A. and B.; and he directed his trustees to carry on his partnership trade in which he was engaged, or such part as they should think proper for the benefit of his wife and those in remainder:—Held, that the widow was entitled to any increase in the value of the testator's capital which took place between the death of the testator and expiration of the partnership; but this decision was reversed on appeal. *Mousley* v. *Carr*, 4 Beav. 49; 10 L. J., Ch. 260.

Pecuniary Legacies.]—A testator by his will gave his real and residuary personal estate upon trust for sale and conversion, and as to the sum of 20,000*l.*, part of the trust moneys, upon trust for his son C. for life, with remainder to C.'s children, giving the residue of the trust moneys between his other two sons, and giving his trustees a discretionary power to postpone the sale and conversion of the estate so long as seemed to them expedient. The trustee, who was one of the residuary legatees, neither paid nor appropriated funds to meet the legacy of 20,000*l.*, but retained the trust estate in its original state of investment, meanwhile paying C. interest at 4 per cent. upon the amount of the legacy. The investments of the estate having risen considerably in value, C. and his children, more than ten years after the death of the testator, claimed to participate in the increase of value, on the ground that the trustee, being a residuary legatee, could not retain profits caused by his own default:—Held, that the residuary legatees must be treated as owners of the estate, subject to a charge thereon of the legacy, and that C. and his children were only entitled to the amount of their legacy with interest at 4 per cent. from the end of the year after the death of the testator. *Campbell, In re, Campbell* v. *Campbell*, 62 L. J., Ch. 878; [1893] 3 Ch. 468; 69 L. T. 134.

A particular sum having been set apart to answer a pecuniary legacy, which was given to one for life, with remainder to his children, and an increase in the value of that fund having taken place, which made its value greater than the amount of the legacy:—Held, that the legatees were entitled to the benefit of the increase. *Kimberley* v. *Tew*, 4 Dr. & War. 139; 2 Con. & L. 366; 5 Ir. Eq. R. 389.

General Residuary Bequest — Stocks and Shares.]—A holder of shares in both departments of the Sun Fire and Life Office bequeathed his personal estate to trustees to permit his wife to receive the dividends, interest, and income for her life, remainder over. He died in December, 1870. In January, 1873, an extraordinary dividend was declared on the life shares for five years previously; and in July, 1873, a "special dividend was declared on the fire shares for the half-year previously":—Held, that these dividends were income, and belonged to the tenant for life. *Hopkins, In re*, 43 L. J., Ch. 722; L. R. 18 Eq. 696; 30 L. T. 627; 22 W. R. 687.

—— **Insurance Policy.**]—A testator, possessed of shares in an insurance company, by his will, dated in 1846, gave his property to trustees for the benefit of his wife for life, and after her death for his children. Two years after his death, namely, in 1848, a bonus was declared:—Held, that the widow, as tenant for life, was entitled to the bonus as income. *Johnson* v. *Johnson*, 15 Jur. 714.

—— **Stock on Farm.**]—General residuary bequest, including a leasehold farm with the stock, to be converted into money as soon as conveniently may be, upon trust to pay the interest, &c., for life, and as to the capital, for the children. The stock considerably increased between the death in April and the sale at Michaelmas; it was decreed that the conversion was in a reasonable time, and the party entitled for life should have interest from the conversion; and as to premises which from a defect in title could not be sold, that being for the interest of all that they should not be sold, a value should be set upon them to carry interest at 4 per cent. from the death. *Gibson* v. *Bott*, 7 Ves. 89.

Under Power of Appointment.]—Bonuses on bank stock are capital. A. had a power of appointment over 7,150*l.* stock; certain bonuses accrued thereon, which were laid out upon stock, upon the trusts and subject to the appointment; and after the accretion of these, A. exercised his power, but only noticed the original stock and the first bonus thus: "And also the said sum of 715*l.* 5 per cent. &c., together with all such further additions, in the nature of profit, to be made to the said bank stock in my lifetime":—Held, that all the bonuses passed under the appointment. *Carver* v. *Bowles*, 9 L. J. (O.S.) Ch. 91. And see *Matthews* v. *Maude*, supra, col. 1742.

What Persons Entitled to—On Stocks and Shares.]—In 1832 a testator bequeathed ten Carron shares to his widow for life, with remainder over. She died in 1847, and in 1854 the executor sold the shares for 10,000*l.* to the manager. After this large sums were recovered from the estate of a former manager, and thereout, in 1858, a bonus of 470*l.* per share was declared, whereupon the executor insisted on setting aside the sale, and obtained an additional 8,000*l.* by way of compromise. A bill by the executor of the widow claiming to be entitled to participate in the 8,000*l.* was dismissed with costs, the court holding first, that the widow's interests (if any) were not comprised in the compromise, and secondly, that the whole bonus belonged to the persons entitled to the shares at the time it was declared. *Edmondson* v. *Crosthwaite*, 34 Beav. 30.

A testator bequeathed East and West India Dock stock to life tenants and others in succession. Some time after his death bonuses were declared upon the stock. On the 8th February, 1865, by an order made in a suit for the administration of the estate, the bonuses were invested in 3*l.* per cent. annuities, and the dividends directed to be paid to the tenants for life. On the 12th January, 1871, that investment order was discharged:—Held, that the bonuses were income, and not capital of the estate, and belonged to the life tenants. *Dale* v. *Hayes*, 40 L. J., Ch. 244; 24 L. T. 12; 19 W. R. 299.

—— **On Insurance Policy.**]—An insurance company by a deed of settlement, was directed to create a reserve fund, and pay no dividend till a

specified amount was realised. This provision was departed from by the consent of a majority of the shareholders, and a bonus was distributed every three years. The company afterwards amalgamated with another company, and it was agreed that 50*l.* per share should be paid upon all shares, and also a proportionate part of the surplus assets. A tenant for life of ten shares in the company, claimed the share of the surplus assets which had been paid over to her trustee as part of her annual income :—Held, that these surplus assets, which must be considered as the reserve fund, were capital, and not income. *Nicholson* v. *Nicholson*, 30 L. J., Ch. 617; 9 W. R. 676. And see *Hebert* v. *Bateman*, 1 W. R. 191.

Where a devisee for life of leaseholds for lives, in the erroneous belief that he was bound to renew, insured the life of the younger cestui que vie in the names of himself and the executors, and paid the premiums, and died, leaving the executors him surviving : — Held, that the insurance moneys were subject to a resulting trust in favour of the devisees under the will, but that the estate of the tenant for life was entitled to the bonuses, but not to be recouped the amount of the premiums. *Browne* v. *Browne*, 2 Giff. 304; 6 Jur. (N.S.) 1143; 8 W. R. 726.

Apportionment.]—Where a testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, and to hold the proceeds upon trust for a person for life with remainders over, and such residue includes outstanding personal estate, the conversion of which the trustees, in the exercise of their discretion, postpone for the benefit of the estate, and which eventually falls in some years after the testator's death—as, for instance, a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy—such outstanding personal estate should, on falling in, be apportioned as between capital and income, by ascertaining the sum which, put out at interest at 4 per cent. per annum, on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; and the sum so ascertained should be treated as capital, and the residue as income. *Chesterfield's (Earl) Trusts, In re*, 52 L. J., Ch. 958; 24 Ch. D. 643; 49 L. T. 261; 32 W. R. 361. S. P., *Beavan* v. *Beavan*, 52 L. J., Ch. 961, n.; 24 Ch. D. 649, n.; 49 L. T. 263, n.; 32 W. R. 363, n.

A testator by his will bequeathed his residuary personal estate upon trust, after payment of debts and legacies, to lay out and invest the residue as therein mentioned, and to pay the income to the plaintiff for life, with remainders over. Part of the residuary estate consisted of a contingent reversionary interest in some settled funds. The testator died in 1832, and the reversion first became saleable in 1846, but it had never been sold. Since 1846 the reversion had enormously increased in value. Upon an application in effect to have the value of the reversion apportioned as between tenant for life and remainderman :—Held, that the principle of *Chesterfield's Trusts, In re* (supra), applied, and that assuming the reversion to have been sold at an agreed price, it must be ascertained what principal sum would, with compound interest from the date of the testator's death, make up the agreed price, and such principal sum alone must be attributed to corpus, and the whole of the rest to income. *Hobson, In re, Walker* v. *Appach*, 55 L. J., Ch. 422; 53 L. T. 627; 34 W. R. 70.

—— **Under Apportionment Act.**]—The word "dividends" in the Apportionment Act, 1870, includes payments by way of bonus or surplus profits to the shareholders of a public company, even though such payments may be only occasional and not strictly periodical: as, for instance, where the payments are made under the deed of settlement of a life assurance society, providing for distribution of a bonus or surplus profits among its shareholders once in every five years, "unless a special meeting of shareholders shall otherwise direct." *Griffith, In re, Carr* v. *Griffith*, 12 Ch. D. 655; 41 L. T. 540.

The words "trading or other public companies" in s. 5 of the Apportionment Act, 1870, includes any public company, but not a private partnership. *Ib.*

A life assurance society, unincorporated, but established in 1843 by a deed of settlement, with a board of directors, 100,000*l.* capital, and list of shareholders, and possessing certain powers and concessions under a special act of parliament passed in 1868, held to be a "public company" within the meaning of s. 5 of the Apportionment Act, 1870. *Ib.*

A bonus or surplus profits accruing on shares in the company specifically bequeathed by a will dated in 1875, held to be apportionable under the Apportionment Act, 1870. *Ib.*

Incidence of Loss—Power to continue Business.]—A. gave all his real and personal estate to trustees upon trust for sale, conversion, and investment, and to pay the income of one-fifth part to his wife for life, and subject thereto, to divide the whole into four parts, and pay the income of one such part to each of his four daughters for life, and after her death to hold such part in trust for her children equally; and he empowered his trustees to carry on any business carried on by him, and directed that the net profits of any business so carried on should, except such parts thereof as the trustees should in their discretion reserve for the purpose of increasing the capital in such business, be treated as income of his said trust estate; and he directed that, should any losses (not being the result of neglect) fall on his trustees in consequence of their carrying on such business, the same should be defrayed out of his estate. The testator left property employed in business, and other property. The trustees carried on the business, and duly invested the other property. For some years the business was successful, and the profits were duly divided among the tenants for life. In a subsequent year losses were incurred, and the trustees claimed that they should be recouped out of the income of the trust estate generally :—Held, that the losses must be borne by the capital of the testator's estate, and not by the tenants for life. *Millichamp, Goodale and Bullock, In re*, 52 L. T. 758.

—— **Bequest of Share of Business.**]—A trader devised and bequeathed to trustees all his real and personal estate, including his share in the

business in which he was a partner, on trust as to one moiety thereof, to pay the annual proceeds (including the net profits of the business) to his daughter for her life, for her separate use without power of anticipation, and after her death the moiety was to be held in trust for her children or remoter issue. He directed his trustees to carry on the business after his death until the expiration of the partnership term, and authorised them to use, not only such capital as he should have in the business at the time of his death, but also such other part of the trust premises as they should think fit. The partnership deed authorised the partners to dispose of their shares by will; it did not provide how any loss in carrying on the business should be borne. The will contained no provision as to the mode in which any loss should be borne as between the persons interested in the testator's estate. It had been the practice of the firm in prosperous years to divide the whole profit among the partners, and in years in which there was a loss to write off each partner's proportion of the loss from his share of the capital. The testator died in 1879. After his death the business was carried on by his trustees in partnership with the other partners. Up to the end of 1880 it was carried on at a profit, and half the testator's share of that profit was paid by the trustees to the daughter. For the year 1881 there was a loss, and the testator's share of the loss was written off from his share of the capital in the books of the firm. For the year 1882 there was a profit:—Held, that the daughter was entitled to receive half that share of the profits which the testator, according to the practice of the firm, would have received if he had been alive, and that, consequently, she was entitled to receive half his share of the profits for the year 1882, without any deduction for the purpose of making good the corpus of the settled share in the interest of the remaindermen. *Gow* v. *Foster*, 26 Ch. D. 672; 51 L. T. 394; 32 W. R. 1019.

Accumulations—Who Entitled to—Where Express Direction to accumulate.]—A testator, after bequeathing to his daughter (a widow) an annuity, and directing his trustees to set apart a sufficient sum of stock to answer the growing payments, bequeathed his residuary personal estate to and to be equally divided between his grandson and grand-daughter (by name) as tenants in common; but in case of the death of the grand-daughter under twenty-one and unmarried in the lifetime of the grandson, or in case of the death of the grandson in the lifetime of the grand-daughter under twenty-one, he bequeathed the whole to the survivor; and after directing payment during the minority of the grandchildren for their maintenance, the testator directed that the clear surplus of the income of his residuary estate should accumulate in the hands of his executors, and be added to the principal of the share of his grandchildren in the residue, and directed that his grandchildren respectively should not be entitled to receive his or her share of the accumulation until after the death of their mother (the annuitant). The grand-daughter married under age, and articles were executed on her marriage, whereby it was agreed, when she became entitled to the absolute and immediate possession of any part of the residuary estate, the same and all accumulations should be settled on certain trusts for the separate use of the wife for life, with subsequent trusts for the husband and children, and a proviso referring to and dependent on the trust for accumulation in the will. On a bill filed by the grand-daughter during her mother's lifetime for a transfer of the fund:—Held, that the direction to accumulate in the will was precarious and ineffectual, and was not rendered otherwise by the settlement, and that the grand-daughter's moiety became capital at her marriage, and that the accumulations since that period belonged to her for her separate use. *Sheffield* v. *Orton*, 1 De G. & Sm. 326.

Where, after a devise for successive estates for life, with remainders in tail, subject to a term of ninety-nine years, the trusts of such term were declared to be that the trustees should, out of the rents and profits of the estates, insure the messuages, and keep the same in good repair during the respective lives of the several tenants for life, and should, during the respective minorities of each and every person thereby made tenants for life or in tail, apply the surplus or residue of the rents and profits for and towards the maintenance and education of the tenants for life or in tail, who for the time being should be entitled in possession to the estates; and in case the whole of the surplus of the said rents and profits should not, during the minority of any such tenant for life or in tail as aforesaid, be applied for his or her maintenance and education, then the surplus thereof was from time to time to be laid out on real or government securities, at interest, in the names of the trustees, upon trust for such person or persons from time to time as for the time being should under the limitations of the will be entitled in possession to the said estates; and if any person who might become entitled in possession or remainder to an estate tail in the estates under any of the said limitations should die under twenty-one, without issue inheritable to such estate tail, then so often as any such event should happen within the period of time in which executory devises were allowed by law to take place, the absolute interest in the moneys so directed to be laid out and invested was to be considered as not having been vested in such person, but the same was to go over to the next taker:—Held, that the first tenant for life in possession of the estates was not absolutely entitled to the accumulations of the rents and profits which had accrued during his minority, but was only tenant for life of such accumulations. *Crosse* v. *Glennie*, 2 Y. & C. C. C. 237; 7 Jur. 274.

Testator devised his estate at E. to trustees, upon trust to apply the rents for the maintenance and support of B. till she should attain the age of twenty-five or marry with consent, and to lay out the surplus of such rents in government securities, that the same might accumulate for the uses and purposes of his will; and from and after the said B. should attain twenty-five, or marry with consent, then to pay her the whole of the rents for her life; and after her decease, upon trust for her children. The testator then gave his estate at S. to the same trustees, upon trust, in case the said B. lived to attain twenty-five, or married with such consent as aforesaid, to let her receive the rents for her life; and, after her decease, upon trust for her children in manner before mentioned. Provided that in case B. should marry without consent, the testator revoked all the devises and bequests in favour of her and her issue. All the residue of his real and personal estate, and likewise his estate and

premises thereinbefore devised for the benefit of B., in case she should die under twenty-five unmarried, and without issue, the testator devised and bequeathed to the trustees in trust for X., Y., and Z. B. attained twenty-five and married with consent. Between the death of the testator and her attaining twenty-five there was an accumulation of the surplus rents of the E. estate, after providing for her maintenance, and an accumulation of the rents of the S. estate:—Held, that she was entitled for her life to the income of the former accumulation, as to which the court did not further declare the right, and absolutely entitled to the latter accumulation. *Greene* v. *Potter*, 2 Y. & C. C. C. 517; 7 Jur. 736.

Testator directed the proceeds of his estate to be invested and accumulated till the youngest child of his brother should attain twenty-one, and then to be in trust for all the children who should then be living, or their issue. All the children except the second in age died without issue before the youngest if living would have attained twenty-one:—Held, that the second, who had attained twenty-one, was entitled to the fund in possession upon the death of the last of the other survivors who died under twenty-one. *Evans* v. *Pilkington*, 10 Sim. 412.

A residue was given to accumulate, and to be in trust for all the children of J. B. other than A., and to be paid on attaining twenty-three, with a gift over in the event of the death of all the children under twenty-three: there were three children, A., B., and C., of whom C. was born three years after the death of testatrix:—Held, that the shares were vested, notwithstanding there was a direction to accumulate till the time of payment, and also, that C. in his own right, and as representing B., who died an infant, was entitled to the whole fund. *Blease* v. *Burgh*, 2 Beav. 221; 9 L. J., Ch. 226.

Bequest of residue, in trust for the maintenance of the testator's five children, the surplus to accumulate for the benefit of the residuary legatees, and subject thereto to pay, &c., the residue in certain shares to the children on attaining twenty-five, but their shares to be vested at twenty-one, and at that age to be entitled to receive all the interest on their "respective shares"; and he authorised advancements to be made to the sons, to be deducted out of their shares, before any "final division." One having attained twenty-one, and received her share of the aggregate fund:—Held, not to retain any interest in the accumulations subsequently accruing during the minorities of the other children. *Routh* v. *Hutchinson*, 8 Beav. 581; 9 Jur. 1051.

—— **Direction to accumulate till Mortgage paid off—Sale of Part by Mortgagees.**]—A testator who died in 1875 devised his estate to trustees, and directed that the rents should be accumulated until the amount of the accumulations was sufficient to discharge the principal money due on mortgages on the estate, and that thereupon the trustees should pay off the same. And he declared that the tenants for life should not be entitled to any portion of the rents until the mortgages had been paid off. There were two mortgages on the estates. The trustees accumulated the rents and paid off one mortgage. The mortgagees of the other mortgage in 1884 sold the part of the estates subject to it for less than the amount of the mortgage debt, and the residue was paid off out of the accumulations of which a surplus still remained:—Held, that the tenant for life was entitled to be let into possession of the rest of the estates, and to payment of the remainder of the accumulations. *Norton* v. *Johnstone*, 55 L. J., Ch. 222; 30 Ch. D. 649; 34 W. R. 13.

—— **Jurisdiction of Court to allow Maintenance—Tenant for Life.**]—A testator directed the income of his real and personal estate to be accumulated for twenty-one years, and gave the accumulated estates to his sister J. C. for life, then to her son W. for life, and after his decease to his children in tail male, and then to her son J. for life, and then to her son A. in tail male. The court directed an annual sum to be paid to J. C. out of the income of the personal estate for the maintenance and education of her three sons. *Havelock* v. *Havelock* (17 Ch. D. 807) followed. *Collins, In re, Collins* v. *Collins*, 55 L. J., Ch. 672; 32 Ch. D. 229; 55 L. T. 21; 34 W. R. 650; 50 J. P. 821.

Where a testator has by his will made a settlement of his estate, subject to a prior trust for the accumulation of the whole income during a term of years not exceeding the legal limit, the court has, in the absence of special circumstances, no jurisdiction to order an allowance to be paid out of the income for the maintenance and education of the person who will, if he is living at the end of the term, be a tenant for life, even if there is no other way in which a provision can be made for his maintenance and education. *Havelock* v. *Havelock* (17 Ch. D. 807) distinguished. *Alford, In re, Hunt*, or *Hurst* v. *Parry*, 55 L. J., Ch. 659; 32 Ch. D. 383; 54 L. T. 674; 34 W. R. 773.

A testator devised his real estate to trustees for a term of twenty years after his death, and, after the expiration of the term, and in the meantime subject thereto, to the use of the plaintiff for life, with remainder to the use of his first and other sons successively in tail, with remainders over. Under the trusts of the term the rents were to be accumulated for a period of twenty years after the testator's death. The income of the testator's residuary personalty was subject to a similar trust. At the end of the twenty years the residuary personalty and the accumulations of the income and of the rents were to be laid out in the purchase of real estate, which was limited to the same uses. The will contained no provision for the maintenance of the plaintiff during the term. He was not the heir-at-law of the testator, but he was the eldest son of a favourite niece of the testator, who had before her marriage lived a good deal with him and had been educated at his expense. The testator was a tenant-farmer. The rental of his real estate was about 440*l*. per annum; his personal estate was about 10,000*l*. An order had been made in the action allowing 300*l*. a year for the maintenance and education of the plaintiff during his minority. After he had attained twenty-one the plaintiff applied for the continuance of the allowance until further order:—Held, that there being no special circumstances, there was no jurisdiction to interfere any further with the trust for accumulation. *Ib.*

A testator devised to trustees real estate, producing an estimated income of 1,300*l*. a year, in trust to accumulate the rents and profits at compound interest for a term of twenty-one years, and at the end of the said term, or as soon

as circumstances would permit, to lay out the accumulations in the purchase of lands, to be settled subject to the said trust term to the use of A. for life; remainder to B., the eldest son of A., for life; remainder to B.'s first and other sons in tail male; remainder to A.'s younger sons (then in being) successively for life; with like remainders to their first and other sons in tail male respectively; with several remainders over. The testator also bequeathed his residuary personal estate (which was above the value of 58,000*l.*) in trust to be invested in the purchase of lands, to be settled to the like uses as were thereinbefore directed in relation to the accumulations of the rents and profits of the lands comprised in the term. The directions as to accumulation contained in the will were repeated in the codicils. A.'s sons were minors. An application was made on behalf of the eldest for an allowance to A. out of the rent, profits, and income for the maintenance of the sons, on the ground that A.'s own means were not sufficient to enable him to educate and maintain them suitably to their prospective position:—Held, that as there was an imperative trust to accumulate, the court could not make an allowance for maintenance. *Havelock* v. *Havelock* (17 Ch. D. 807) not followed. *Kemmis* v. *Kemmis*, 15 L. R., Ir. 90—C. A.

Where no Direction to Accumulate.]—A testator bequeathed to his trustees and executors, the sum of 3,750*l.* Bank of Ireland stock, and directed them to retain it in their names for the purpose of securing the punctual payment of an annuity of 300*l.* to his wife; and after her death he directed the annuity to be paid to the governor and trustees of the Hospital for Incurables, Donnybrook Road, Dublin; and by a codicil he bequeathed the residue of his estate to the trustees for the time being of the Mater Misericordiæ Hospital, Dublin. The dividends on the bank stock were more than sufficient to pay the annuity, and a large surplus had been accumulated and invested by the trustees in three per cent. stock:—Held, on a petition presented by them for the advice of the court, that they were at liberty to pay over accumulations of the surplus dividends to the trustees of the latter hospital as residuary legatees. *Tharel's Trusts, In re*, 13 L. R., Ir. 337.

Accumulations Act, 1892—Effect of.]—The Accumulations Act, 1892, does not invalidate a direction by will that during twenty-one years after the testator's death the net profits of leasehold premises shall be capitalised and become capital moneys of a settlement of realty and subject to the powers of the Settled Land Acts. *Danson, In re, Bell* v. *Danson*, 13 R. 633.

Accumulation, Validity of Trust for.]—*See* PERPETUITY.

And see cases sub tit. ACCUMULATION.

24. INTERMEDIATE RENTS AND PROFITS.

Where Interests Vested Subject to Gift Over.]—Where a legacy of residue is given in such a way as to vest, but so as to be liable to be divested on a given event, the interest in the meanwhile, and until the divesting, belongs to the legatee. A testator, after bequeathing certain shares of his residuary estate (the produce of a mixed fund) to his son and daughter respectively, directed that the interest of the share given to the son should be applied for his maintenance and education till twenty-one, and that after that period he should have power to receive and dispose of such interest till his age of twenty-five, when the whole of the property bequeathed to him was to be at his own disposal. He further directed that half the property given to his daughter should be invested, in trust, for her maintenance, education, use, and benefit, during her life, and for her children, if any, after her decease; and, if there was no issue living at her decease, the said property was to devolve to his son; and in case he was dead also, and had left no issue, the said property was to devolve to his executors thereinafter named. The other half of the property bequeathed to his daughter he directed to be invested for her sole use and benefit till twenty-one, and that the said property should then be at her own disposal; and if either the son or daughter should die under twenty-one, the property bequeathed to the one so dying should devolve to the other; and if both should die under that age, then the property bequeathed to them should devolve to and become the property of the four persons therein named and described, to be divided betwixt them in equal proportions, and their heirs for ever; which four persons he also appointed his executors. One of the four persons named executors renounced probate, and declined to act; and afterwards both the son and daughter died under twenty-one, and without issue:—Held, that the interest which accrued upon the shares of the son and daughter during their respective minorities, so far as it had not been applied to their maintenance and education, vested absolutely in them, and passed to their personal representatives. *Barber* v. *Barber*, 3 Myl. & Cr. 688; 8 L. J., Ch. 36; 2 Jur. 1029.

Where a testator gives legacies to children, provided they attain twenty-one, with a gift over if the children die before twenty-one, and appoints trustees and guardians to the children, with a request that they will attend to their education, the children are entitled to the interest of their legacies for their maintenance and education, until they attain twenty-one or die under that age. *Mills* v. *Robarts*, 1 Russ. & M. 555; Tam. 476; 8 L. J. (o.s.) Ch. 141.

Bequest of stock, &c., and interest and dividends to accrue to testator's two great-nieces, equally to be divided and to be assigned, transferred, &c., to them, when and as they should respectively attain twenty-one, with limitations of their respective shares, on the event of death under twenty-one, to their respective children; survivorship in case of no children, and a direction that the executors should, during the respective minorities of the legatees, receive the dividends, interest, &c., and that so much as should be necessary should be applied for maintenance, &c., and the residue accumulate for their benefits respectively, until they should respectively become entitled to their respective parts. The surplus interest held to go with the principal upon the death of one under twenty-one without children. *Sisson* v. *Shaw*, 9 Ves. 285.

Devise of residue to an infant, payable at twenty-one, remainder over; the infant died under age; the interest from the death of the testator to that of the infant shall go to her representative, not to the remainderman. *Chaworth* v. *Hooper*, 1 Bro. C. C. 82.

A. by will devises 500*l.* to his infant grandson without appointing any time for payment, with proviso, that if the grandson dies before twenty-one, then the legacy to go over to B. The grandson shall have the interest of the legacy during his infancy. *Taylor* v. *Johnson*, 2 P. Wms. 204; Moseley, 98.

Where an interest in personalty is vested in a legatee subject only to being divested by there being issue of a woman who is past the age of child-bearing, the court will order payment of the income to the legatee. *Lowman, In re, Devenish* v. *Pester*, 64 L. J., Ch. 567; [1895] 2 Ch. 348; 12 R. 362; 72 L. T. 816—C. A. And see *Laundy* v. *Williams*, 2 P. Wms. 481.

—— **Where Testator not in Loco Parentis.**]—A bequest of a vested legacy, directed to be paid at twenty-one or marriage, and subject to be divested by death before those events (the testator not being in loco parentis), does not carry interest until the time for payment. *Bullen, In re*, 12 L. T. (O.S.) 763.

—— **Where Trust for Accumulation and Gift over of Capital only.**]—Where legacies are given upon trust to accumulate, the interest and dividends will not pass by a gift over of the principal sums, unless the court is satisfied, by a reference to other clauses of the will, that the interest and dividends were omitted in the gift over by clerical mistake. *Harvey* v. *Cooke*, 4 Russ. 34; 6 L. J. (O.S.) Ch. 84.

Devise of real estate with the residue of the personal estate upon long limitations in strict settlement, including persons unborn. A subsequent direction that none of the devisees shall take or come into possession before the age of twenty-five, was held confined to the actual possession, and not to operate by way of revocation; and therefore, upon the death of the first tenant for life under twenty-five, the accumulation belonged to his personal representative. *Montgomerie* v. *Woodley*, 5 Ves. 522.

A testator bequeathed to trustees the money secured by a mortgage of Tilt Wood in trust for his nephew R. T. B., and after devising the legal estate in the premises, subject to the trusts and equities thereof, to the trustees, proceeded to provide that, "If the said R. T. B. shall not live to the age of twenty-one years, I give the money secured on Tilt Wood and the legal estate therein, subject as aforesaid to the trustees of my will, to become part of my residuary estate." The will further contained a declaration of the testator's intention that the clauses applicable contained in 23 & 24 Vict. c. 145, should apply thereto, but did not otherwise contain any clause relating to the maintenance of infants, or directions as to what was to come of the unapplied income of the estates, shares, and interests under the will. R. T. B. survived the testator, and died under twenty-one. The trustees of the mortgage debt having received and invested (at compound interest) the interest thereupon down to R. T. B.'s death, paid a small sum of uninvested cash, part thereof, into court under the Trustee Relief Act:—Held, on a petition by the trustees of the residuary estate for payment out to them of this money, that the legal personal representative of R. T. B. was entitled to the accumulations of interest down to his death. *Buchley's Estate, In re*, 52 L. J., Ch. 439; 22 Ch. D. 583; 48 L. T. 109; 31 W. R. 376.

Between Death of Testator and Birth of Children.]—Legacy in trust for the children of A., to be equally divided between them with benefit of survivorship, and a provision for maintenance out of the interest: A. having no children at the death of the testator:—Held, that after-born children would take, and that the interest till the birth of a child fell into the residue. *Harris* v. *Lloyd*, Turn. & R. 310; 24 R. R. 68.

Devise of the residue of real and personal estate, after provision made for payment of annuities and legacies, to the child or children of testator's natural daughter, and in case she should die without issue to S. and J.:—Held, the intermediate profits till a child was born should go to the residuary devisees, and not to the heir-at-law. *Gibson* v. *Rogers*, Ambl. 96; 1 Ves. Sen. 485; 4 Ves. 288, n.

Devise of real and personal estate to the first son of A. when he should attain twenty-one, with a direction for his proper maintenance and education. A. having no son at the time of the will, the testator's death, or the decree:—Held, that the profits of the personal estate should accumulate; and that as to the real estate, it was a good executory devise, but that the profits thereof descended to the heir until a son should be born, when they should be applied to his maintenance. *Bullock* v. *Stones*, 2 Ves. Sen. 521.

Rents and profits undisposed of belong to the owner of the inheritance, or persons entitled to the enjoyment. *Hopkins* v. *Hopkins*, 1 Ves. Sen. 268; Cas. t. Talb. 44; 1 Atk. 581. And see *S. C.* as cited in 4 Bro. C. C. 390.

Where on an executory devise the words "all the rest and residue" include intermediate profits. *Gibson* v. *Montfort* (*Lord*), 1 Ves. Sen. 491. And see *Haughton* v. *Harrison*, ante, col. 906.

—— **And Payment of General Legacy.**]—General legatee of "the sum of *l.*, long annuities:—Held, not entitled to dividends accruing before the expiration of a year from the testator's decease. *Collyer* v. *Ashburner*, 2 De G. & Sm. 404.

—— **And Payment of Specific Legacy.**]—Where a testator directs a specific sum to be sold, and a certain sum out of the sale moneys to be paid to A., and the residue to B., each of the legacies is specific, and the legatees are entitled to share the income of the fund from the testator's death between them, in proportion to the values of their respective legacies at that time. *Jefferys' Trusts, In re*, 35 L. J., Ch. 426; L. R. 2 Eq. 68.

—— **And Conveyance of Land adeemed by Contract for Sale.**]—When a testator had specifically devised certain lands, but such lands were contracted to be sold in his lifetime, so that the devise was adeemed:—Held, that the rents received between his death and the conveyance of the property passed to the devisee. *Watts* v. *Watts*, 43 L. J., Ch. 77; L. R. 17 Eq. 217; 29 L. T. 671.

—— **And Completion of Contract to Purchase Lands Mortgaged to Testator.**]—Where a testator, having contracted to purchase an estate and taken a transfer of a mortgage on it, specifically devised it:—Held, that the devisee was not entitled to the interest on the mortgage between the testator's death and the completion of the purchase. *Puxley* v. *Puxley*, 1 N. R. 509; 8 L. T. 570.

Gift to Class—Class still open.]—Bequest of residue of real and personal estate to the children of A., equally with a bequest over thereof to other persons, if A. should die without leaving issue; this is a vested interest, defeasible, and the children, as they are respectively born, shall take the accruing interest equally. *Shepherd* v. *Ingram*, Ambl. 448.

—— **Where some Members have attained Age.**]—T. gave the residue to trustees, inter alia, to lay out one-third part in securities, the interest to accumulate for the benefit of the children of his niece, and if she should survive her husband, and have issue under twenty-one years of age, the trustees were to apply the interest for their maintenance till twenty-one, and upon the children attaining their ages of twenty-one, equal shares of the principal to be transferred to them; the interest accrued between the elder and the younger children coming of age, decreed to be divided between them. *Hawkins* v. *Combe*, 1 Bro. C. C. 335.

A testator gave 200*l.* a year to S. for her life, and after her decease he gave 6,666*l.* 13*s.* 4*d.* consols to be divided equally among such of her children as should attain twenty-one. S. survived the testator, and died, leaving six children, five of whom had attained twenty-one in her lifetime:—Held, that the testator's residuary legatee was excluded from claiming any portion of the dividends of the fund. *Stone* v. *Harrison*, 2 Coll. C. C. 715; 15 L. J., Ch. 421; 10 Jur. 609.

Bequest of a personal fund to such of the children of N. as should live to attain the age of twenty-one years. N. had three children, two of whom having attained twenty-one, applied for payment of their shares. Under the circumstances of the case the court declined to pay over to them any part of the capital, but allowed them to receive the interest of two-thirds, without prejudice to the claim of afterborn children of N. *Brandon* v. *Aston*, 2 Y. & C. C. C. 30.

Under a disposition by will to the children of A. and B., payable at twenty-one or marriage, with a limitation over, upon failure of issue in the lives of A. and B., it was held that all the children without restriction were entitled; and an apportionment being directed and the interest ordered to be paid to those who had attained twenty-one; children born afterwards, though entitled to a share of the capital, were not allowed to claim the bygone interest. *Mills* v. *Norris*, 5 Ves. 335; 5 R. R. 56.

W. J. by his will directed his trustees to hold his residuary estate in trust for his grandchildren, who being sons should attain twenty-one, or being daughters should attain that age or marry, as tenants in common, with provisions for settling the shares of grandchildren born in his lifetime:—Held, that the income belonged to such of the grandchildren as had attained twenty-one at the time when the income accrued, to the exclusion of those who were then still infants; that such infants would not be entitled to any back income on attaining twenty-one. *Jeffery, In re, Burt* v. *Arnold*, 60 L. J., Ch. 470; [1891] 1 Ch. 671; 64 L. T. 622; 39 W. R. 234.

A testator, after giving the income of his residuary estate to his widow during widowhood, after the determination of that interest gave legacies to each of his two sons who should be living at his death and attain twenty-one, and subject thereto, disposed of his residue:—Held, that a son who attained twenty-one after the death of the widow was not entitled to interest on his legacy from her death till he attained twenty-one. *Inman, In re, Inman* v. *Rolls*, 62 L. J., Ch. 940; [1893] 3 Ch. 518; 8 R. 293; 69 L. T. 374; 42 W. R. 156.

—— **Where all existing Members have attained Age.**]—In the case of a bequest to a class, where all the existing objects of it had attained vested interests, they were declared entitled to the annual income of the whole fund, though their shares might be diminished by other objects coming into being. Testator gave a sum of 15,000*l.*, due to him as a charge upon an estate, to his trustees, upon trust after making certain payments thereout to accumulate the interest thereof for twenty years, and at the expiration thereof the trustees to stand possessed of the interest of the said sum, upon trust to make certain payments; and he also directed that the trusts of the sum of 15,000*l.* should be dealt with as the trusts of a certain other term, and that, subject thereto, the said sum and the interest and accumulation should be in trust for a certain class of children; and there was a direction that the capital should sink into the estate upon which it was charged:—Held, that the accumulated interest only of the said sum after payment of the sums charged on it was given to the children specified. *Scott* v. *Scarborough (Earl)*, 1 Beav. 154; 8 L. J., Ch. 65.

Residuary personal estate was bequeathed in trust for all the sons and daughters of A. and B. (who were living), the shares to be vested at twenty-one, though "not payable or transmissible" until the death of A. and B. The will contained powers of maintenance:—Held, that the sons and daughters, on attaining twenty-one, acquired vested interests, subject to the rights of future-born children, and that, after attaining twenty-one, they were entitled, in the life of A. and B., to payment of their shares of the income, though not of the capital. *Ellis* v. *Maxwell*, 12 Beav. 104; 10 L. J., Ch. 266.

A residuary gift to trustees, with a direction to apply such part of the interest as they might deem necessary in the maintenance of all and every the testator's grandchildren, the children of the testator's two sons, until they severally attained the age of twenty-one, and to accumulate the surplus; and when and as each of such grandchildren should attain the age of twenty-one years, to pay to each of them 2,000*l.*; and as soon as all and every the said grandchildren should have attained their ages of twenty-one, to pay and divide the trust fund unto and amongst all and every his said grandchildren:—Held, to be a gift for the benefit of all the children of the testator's two sons, born or to be born, not confined to children living at the death of the testator, and not distributable upon the youngest grandchild for the time being attaining twenty-one; but that, on attaining twenty-one, the grandchildren were entitled to the interest on their presumptive shares, until another grandchild should be born. *Mainwaring* v. *Beevor*, 8 Hare, 44; 19 L. J., Ch. 396; 14 Jur. 58.

—— **Where Class Determined and some Members of Age.**]—A testator bequeathed 20,000*l.* upon trust, after the decease of his daughter (a married woman), for all or such of her children as she should appoint; and in default, for all

her children who should attain twenty-one, in equal shares as tenants in common. He gave powers of maintenance out of the income of the share to which any such child might be presumptively entitled; and powers of advancement to the extent of one-fourth of the portion to which any child should be presumptively entitled. The daughter, by her will, appointed the fund upon trust to raise for each of her two younger children, F. and M., who should attain twenty-one, 2,000*l.*, and subject thereto, as to the whole of the fund, to all her children who should attain twenty-one, in equal shares as tenants in common. She died leaving four children, the eldest of these having attained twenty-one:— Held, that the child who had attained twenty-one was entitled to one-fourth of the income which had accrued since the death of her mother on the whole of the 20,000*l.*, and that she would, after payment to her of her share of capital, be entitled during the minorities of F. and M. to one-fourth of the income of the two sums of 2,000*l.* appointed to them in the event of their attaining twenty-one respectively. *Gotch* v. *Foster*, L. R. 5 Eq. 311.

Future Specific Bequest.] — The income of chattels real specifically bequeathed, pending the vesting thereof, falls into the residue of the personalty. *Hodgson* v. *Beetive* (*Earl*), 2 N. R. 269; 1 H. & M. 376; 32 L. J., Ch. 489; 9 L. T. 18. See *S. C.*, sub nom. *Beetive* (*Earl*) v. *Hodgson*, 10 H. L. Cas. 656; 10 Jur. (N.S.) 375; 10 L. T. 202; 12 W. R. 625.

A testator gives a sum of stock to trustees, which they are to stand possessed of upon trust for D. G. until he shall attain the age of twenty-five years, and are to transfer to him when they, in their discretion, shall think proper; he likewise directs that if D. G. dies without lawful issue before receiving the bequest the stock shall sink into the residue of his, the testator's estate; and he bequeaths the residue to W. F., while D. G. is under twenty-five years of age, and has not had the stock transferred to him, neither he nor W. F. is entitled to receive the accruing dividends; but these dividends must accumulate to accompany the capital in its final destination. *Gordon* v. *Rutherford*, Turn. & R. 373; 2 L. J. (O.S.) Ch. 50; 26 R. R. 183.

Where a legacy depends on a contingency, the intermediate interest between the death of the tenant for life and the contingency happening does not follow the principal, but falls into residue. *Shaw* v. *Cunliffe*, 4 Bro. C. C. 144.

Bequest of 1,000*l.*, the "interest" for A. for life, with power to dispose of the "principal" to her children by will, and if no will, then "the said legacy" to go to her children "at twenty-one years of age." A. died in 1840, and her only child attained twenty-one in 1858:—Held, that he was entitled to the intermediate interest on the legacy. *Thruston* v. *Austey*, 27 Beav. 335.

A testator directed 6,000*l.* to be settled on the marriage of his daughter, and then went on to give it to trustees, with a separate life interest to his daughter; after her death for her children on their attaining twenty-one if the mother should be then dead; but if not, then not till after her decease; and if no child should live to attain a vested interest, then to fall into his residue. And he gave his residue to A. for life, remainder to B.:—Held, first, that the testator had made a positive settlement, and the court could not add to it in any way:—Held, secondly, that the income undisposed of after the wife's death fell into the residue:—Held, thirdly, that it was undisposed-of income merely, and passed as such to the tenant for life of the residue. *Fullerton* v. *Martin*, 1 Dr. & Sm. 31; 29 L. J., Ch. 469; 6 Jur. (N.S.) 265; 8 W. R. 289.

A testator bequeathed a sum of 5,000*l.*, bank annuities, in trust for such child or children of A., a bachelor, as should attain twenty-one, and directed that the same and the income thereof should be transferable and payable to him, her, or them, on their respectively attaining such age; and in case no child of A. should attain twenty-one, he directed the bank annuities and unapplied income thereof to fall into his residuary personal estate, which he bequeathed upon trusts for tenants for life, with remainders over:—Held, that the dividends accruing between the death of the testator and birth of a child of A. fell into the residue as income. *Fullerton* v. *Martin*, supra, followed. *Edmunds* v. *Waugh*, 2 N. R. 408—L.JJ.

Under a bequest in trust for a parent for life, and after her death for her children at twenty-one, with an executory trust over in the event of all the children dying under that age:—Held, that the intermediate income between the death of the tenant for life and that of her only child, who died a minor, belonged to the child. *Ridgway* v. *Ridgway*, 4 De G. & Sm. 271; 20 L. J., Ch. 256; 15 Jur. 960.

A testator devised one-fifth part of his freehold and copyhold estates to the use of his daughter J. for life; with remainder to the use of all and every the child and children of such daughter who should attain twenty-one; with remainder over if there should be no child who should attain that age. He then bequeathed his leasehold estates in trust for the persons entitled to the real estates, and to go in the same manner, or as near thereto as the rules of law and equity would permit; and he gave his residuary estate upon the same trusts as were declared with respect to his real estate, or as near thereto as might be. J. died in 1851, leaving one child only, H., who attained twenty-one in 1860:—Held, that the interim income of the fifth residuary personal estate followed the residue, and became vested in H. at twenty-one. Held, also, that assuming the remainder in the freeholds was contingent, H., on attaining twenty-one, became entitled to the corpus of the leaseholds, there being no rule of law to prevent the testator's intention taking effect as to them. Held, also, that the remainder in the freehold estates was contingent, and, therefore, that the interim income of the leaseholds fell into the residue. *Holmes* v. *Prescott*, 33 L. J., Ch. 264; 10 Jur. (N.S.) 507; 11 L. T. 38; 12 W. R. 636.

The interim income subject to the interim burden of a contingent specific legacy until the happening of the contingency falls into the residue of the testator's estate, or goes to his next of kin, as the case may be. *Guthrie* v. *Walrond*, 22 Ch. D. 573; 47 L. T. 614; 31 W. R. 285.

—— **When Contingency imported by Appointment.**]—C., having power to appoint a money fund to all and every or any child or children of hers, and to the exclusion of any one or more of them, in such shares and payable at such times as she should appoint, and in default of appointment to be equally divided between them, by her will

appointed different sums to several of her children; and reciting that her daughter M. had declared her intention of becoming a nun, and had retired into a convent preparatory thereto, she declared that she deemed her patrimony in that case sufficient for her maintenance, but in case M. should change her mind, and return to her family and friends, she bequeathed to trustees 1,000*l.*, in trust for M. to receive the interest of the same during her life, and at her decease to be divided amongst her children if any; or in either case of her not leaving the convent or not leaving issue, the 1,000*l.* to be divided amongst her three daughters therein named, and she bequeathed to her said three daughters any residue of the fund that might be after paying the several legacies in her will mentioned:—Held, that the power authorised an appointment to take effect upon the happening of a contingency; and that the interest which should accrue on the 1,000*l.*, while the contingency was undetermined, passed under the residuary bequest in the will. *Caulfield* v. *Maguire*, 2 Jo. & Lat. 141; 3 Ir. Eq. R. 164.

Future Specific Devise.] — Devise upon a future contingency, and no intermediate disposition of the rents and profits, a resulting trust for the heir. *Att.-Gen.* v. *Bowyer*, 3 Ves. 725; 4 R. R. 132.

Devise when the devisee attains twenty-one, a resulting trust for the heir until that period, and by the previous death of the devisee, the remainder accelerated. *Chambers* v. *Brailsford*, 18 Ves. 368; 11 R. R. 214.

A. devised lands in trust for B. for life, remainder in trust for his sons successively, remainder in trust for the future sons of C., remainder over, and the testator provided for the disposition of the rents and profits during the minorities of those who were to take in future. B. died in testator's lifetime, and it was decreed, the contingent limitations should enure as executory devises, and that the profits from the death of the testator till the birth of a son of B. should go to the heir; and afterwards, a son being born to B., upon the death of that son it was decreed, that the rents and profits should belong to the heir, until some person should become entitled under the limitations of the will. *Hopkins* v. *Hopkins*, 1 Atk. 581; 1 Ves. Sen. 268; Cas. t. Talb. 44. A corrected copy of this case was stated by Lord Loughborough, in *Habergham* v. *Vincent*, 4 Bro. C. C. 390.

The resulting trust of a freehold, to support remainders of a trust, may connect with the limitation in tail, though not created together with it. There may be a resulting trust under a trust to appoint contingent remainders for the heir-at-law, in the same manner as under an executory devise. *S. C.*, 1 Atk. 597.

Lands were devised in trust to maintain an infant till twenty-three, and then to convey them to him, and if he die before, to convey them to another. The infant is not entitled till twenty-three, and as the estate is not devised over if he dies under, the surplus of profits will go to testator's heir. *Tilly* v. *Simpson*, Moseley, 244.

Term to raise portions, and the trustees to hold the estate till the son attain twenty-one, and then to convey to the son, there being no directions as to the intermediate profits:—Held, that they should go to the heir-at-law as undisposed of; that case was distinguished from the present by reason that the trustees were to convey at twenty-one and nothing given before to the son. *Bland* v. *Bland*, cited Ambl. 96.

A testator devised estates to trustees and their heirs upon trust to accumulate the rents until the expiration of the term of twenty-one years, and after the expiration thereof to stand possessed of the estates in trust for the second and every other younger son successively of his nephew W. in tail male, and failing such issue, in trust for the first and every other son of his nephew H. in tail male, with divers limitations over: and he gave a fund of personal estate to be held on similar trusts. At the expiration of the term W. and H. were both living, and each had an only son:—Held, that until it should be ascertained whether there would be a second son of W., the rents of the real estates and the income of the personal estate were undisposed of, and belonged respectively to the heir-at-law and next of kin. *Wade-Gery* v. *Handley*, 45 L. J., Ch. 712; 3 Ch. D. 374; 35 L. T. 85—C. A.

Devise of a house and appurtenances to wife during widowhood, but that the eldest son, when twenty-one or married, might have it on notice; the wife having married after the death of the former eldest son unmarried, and during the minority, &c., of the existing eldest son, it was declared that he would be entitled to the enjoyment on attaining twenty-one or marriage, upon giving notice; the intervening interest in the premises and appurtenances, being undisposed of, held to fall into the residue of the real and personal estate. *Bridgewater* (*Duke*) v. *Egerton*, 2 Ves. Sen. 122.

Devise of freehold and leasehold estates to trustees in trust by rents and profits, or by sale or mortgage, to pay debts and legacies which his personal estate should not be sufficient for, and, subject thereto, in case J. B. should attain twenty-one, in trust for him, his heirs and executors:—Held, that the rents and profits till J. B. attained twenty-one were not undisposed of, but passed by the devise to the trustees, and were, after payment of legacies, annuities, and interest of the debts, to be applied to sink the principal of the debts. *Popham* v. *Aylesbury*, Ambl. 68. Report of this case corrected in 11 Ves. 662.

Specific Devise of Lands charged with Legacies — Rents received after Death of Testator and before Sale.]—A testator who died in January, 1887, by his will dated in August, 1879, gave his real estate at North and South Collingham and his residuary real estate to his nephew, "he also paying thereout the following legacies: that is to say, the legacy or sum of 1,000*l.* to my trustees to be held by them upon the trusts hereinafter declared concerning the same; the like legacy or sum of 1,000*l.* to the four daughters of my late niece Mary Holroyd in equal shares; and the legacy or sum of 200*l.* to my niece Sarah Woodruff, to whom I give and bequeath the same respectively." The testator directed that such legacies should be paid at the end of six months after the death of his sister, and he directed his trustees to stand possessed of the sum of 1,000*l.* thereinbefore directed to be paid to them and "charged on my Collingham estate," upon certain trusts. The question was, whether the testator's nephew was liable to account for the occupation rent of so much of the testator's real estate at North and South Collingham as was in his possession or occupa-

tion at the date of the testator's decease for the period between that date and the completion of the sale of that estate by the direction of the court, and with any profits made by him in respect of the crops and other produce of the estate during such period:—Held, that the testator's nephew was not a trustee of the legacies for the legatees, but that the same were merely charged on the North and South Collingham estate; and that that being so, he was not liable to account for the back rents and profits thereof. *Oliver, In re, Newbald* v. *Beckitt*, 62 L. T. 533.

Where Fund set apart for Contingent Legacy.]—Where an annuity for a term of years forms part of a residue, the executors, until they can sell it, must invest the payments, and interests of the investments will belong to tenant for life of the residue. Where sums are set apart to answer contingent legacies, the interest of them until the contingency happens is part of the income of the residue. Where the interest of a legacy is directed to be accumulated beyond the legal period, the interest of the legacy and the accumulations after that period, and until the time of payment, is part of the capital of the residue. *Crawley* v. *Crawley*, 7 Sim. 427; 4 L. J., Ch. 265.

Portions of a fund constituting the residuary personal estate of a testator were set apart by his executors to meet contingent legacies payable on infants attaining twenty-one:—Held, that the tenant for life of the general residue was entitled to the income derivable from those portions of the residuary estate set apart until such capital, or portions of it, were wanted for the payment of those contingent legacies in case they should become payable:—Held, also, that the tenant for life was not entitled to the income which might have been derived from what was clearly necessary for the payment of debts and legacies out of the capital of the residue. *Allhusen* v. *Whittell*, 36 L. J., Ch. 929; L. R. 4 Eq. 295; 16 L. T. 695.

Testator ordered his trustees, out of certain funds, to pay to his wife what should be to be returned to her of her portion, and to invest the residue in funds to pay her the interest for life, then to pay the interest to his niece for life, then to pay the principal to her children if any; if not, to the younger children of H. if any; if not, to the defendant W.; and gave the residue of his effects to his wife. The niece and nephew had neither of them children; the intermediate interest from the death of the niece to that of the nephew, shall not follow the principal, but fall into the residue, and go to the wife's executors as personal estate of the testator undisposed of. *Wyndham* v. *Wyndham*, 3 Bro. C. C. 58.

Gift by will of various annuities, with a direction by the testator that a sufficient part of his personal estate should be invested in 3 per cent. consols to meet the annuities, and that on the deaths of the annuitants the amount respectively set apart to answer these annuities were to sink into residue. The testator bequeathed the residue of his estate as to two equal fourth parts thereof to his wife absolutely, and as to the other two equal fourth parts thereof upon certain trusts for the persons in his will named. The testator made a codicil to his will whereby he directed that the annuities should not commence till after the death of his wife. On bill filed by the annuitants asking for a sufficient sum to be set apart to meet these annuities, the question was raised who would be entitled to the income thereof during the life of the widow:—Held, that such income formed part of the residuary estate of the testator. *Cranley* v. *Dixon*, 3 Jur. (N.S.) 531.

A testator appointed executors and trustees, and bequeathed to his trustees the sum of 750*l.* upon trust to pay and divide the same amongst certain persons contingently upon their surviving him and attaining twenty-one; and in default of any such person attaining a vested interest he directed that the 750*l.* and the investments representing the same should fall into his residuary personal estate; and he gave his residue not thereinbefore otherwise disposed of to his trustees upon trust to convert the same, and out of the moneys thereby arising pay his debts and legacies, and invest the residue of the same moneys, and pay the income to his wife for life. The persons contingently interested in the 750*l.* were infants:—Held, that as the 750*l.* was by the terms of the will directed to be set apart for the benefit of the contingent legatees, there was a gift to them of the intermediate income, which was therefore applicable for their maintenance. *Medlock, In re, Ruffle* v. *Medlock*, 55 L. J., Ch. 738; 54 L. T. 828.

The circumstances that trustees are directed to invest a fund and pay the same to legatees upon a contingency, with an accruer clause, and that there is no direction that the fund shall fall into residue upon failure of the trusts, indicate sufficiently that the severance is for the benefit of the contingent legatees, who are therefore entitled to interest or income (as the case may be) until payment. *Medlock, In re, Ruffle* v. *Medlock* (supra) followed. *Snaith, In re, Snaith* v. *Snaith*, 8 R. 561; 71 L. T. 318; 42 W. R. 568.

Where a contingent deferred legacy has been severed from the general estate of the testator, such severance will not entitle the legatee to interim interest thereon unless the severance has been necessitated by something connected with the legacy itself. A testator by will, after giving his real and personal estate to trustees upon trust for sale and conversion and payment of debts and legacies, directed the trustees to stand possessed of the residue of the trust moneys upon trust, in the first place, to pay thereout 1,500*l.* to be equally divided between such of six legatees whom he named as should be alive at the death of A. B.; such shares to be paid to them respectively on attaining twenty-one or marriage. And as to the rest of his residuary estate upon trust for X. Y. A. B. and the six legatees all survived the testator and were still living. The trustees having set apart and invested 1,500*l.* to meet the legacy, X. Y., the six legatees, and the next of kin of the testator, all claimed to be entitled to the income thereof during the life of A. B.:—Held, that such income passed under the gift of the rest of the testator's residuary estate, and that X. Y. was entitled thereto during the life of A. B. *Judkin's Trusts, In re*, 53 L. J., Ch. 496; 25 Ch. D. 743; 50 L. T. 200; 32 W. R. 407.

—— **For Vested Legacy.**]—When a legacy is severed from the residue for the benefit of a tenant for life and a remainderman, the residuary legatees cannot claim the income accruing after the death of the tenant for life, though the

remainderman has not yet attained a vested interest in the legacy. *Kidman* v. *Kidman*, 40 L. J., Ch. 359.

A testatrix directed the trustees of funds over which she had a power of appointment, from and immediately after her death, to stand possessed thereof, to raise thereout 5,000*l*., and to pay the same to the five children of her deceased sister in equal shares, the shares of sons to be paid at twenty-one, the shares of daughters at twenty-one or marriage, and to apply the income arising from the residue of the funds as in the will mentioned:—Held, that this was a vested legacy, that it was severed from the remainder of the trust funds, and that the legatees were entitled to the interest of the fund set apart to answer it. *Dundas* v. *Murray*, 1 N. R. 429; 32 L. J., Ch. 151; 11 W. R. 359.

Under an executory devise of a life interest in real and personal estate, to take effect upon the death of an annuitant, the surplus rents and dividends which accrue due during the life of the annuitant belong to the parties entitled for life. But a specific devise, liable to be resorted to for payment of the annuity, will not contribute pro ratâ to the annuity so as to increase the amounts of the surplus rents and dividends. *Thornton* v. *Thornton*, 3 N. R. 23.

The interim interest from a fund set apart to meet future vested legacies, which do not carry interest in the meantime, is capital and not income of residue, and must, therefore, be invested, and the income only of such investment paid to the tenant for life of the residuary estate. The rule adopted in *Allhusen* v. *Whittell* (supra), in reference to contingent legacies, has no application to vested legacies. *Whitehead, In re, Peacock* v. *Lucas*, 63 L. J., Ch. 229; [1894] 1 Ch. 678; 8 R. 142; 70 L. T. 122; 42 W. R. 491.

—— **For Annuity—Deficiency followed by Surplus—Right to Arrears.**]—A testator gave his whole estate to trustees to sell, and after payment of debts, expenses, and certain legacies, to pay out of the residue two annuities of 400*l*. each to F. and P., and one of 200*l*. to B., for their respective lives. And for the better fulfilment of that purpose, he directed them to vest sufficient capital sums on securities; and if the residue should not be sufficient, to vest whatever residue there might be, and pay the dividends to the annuitants in the same proportions; and if more than sufficient, to vest the surplus, and divide it and the capital sum set apart for the annuities, as the same should become tangible by the death of each annuitant, among other residuary legatees. B. predeceased the testator. The residue did not yield sufficient income every year to pay F. and P. 400*l*. each. On the death of F., her personal representatives and P. claimed payment of all the arrears out of the then enlarged income of the residue:—Held, by the Lords, that F. and P. were entitled to payment of 400*l*. each only in those years in which the income of the residue was sufficient; that when in any year that income was more than sufficient the excess belonged to the residuary legatees; that on F.'s death half the capital of the residue became divisible among them, and then P. became entitled to the income in each year of the other half; but when in any year this income exceeded 400*l*. the excess belonged to the residuary legatees, and neither P. nor F.'s representatives were entitled to any payment of arrears. No benefit accrued to the residuary legatees from the lapse of the annuity to B., except when thereby the income of the residue exceeded the amount of the other two annuities. *Casamajor* v. *Pearson*, 8 Cl. & F. 69.

Future Residuary Bequest.]—Under a bequest of the residue of a personal estate to A., if he attain twenty-one, the profits will accumulate. *Trevanion* v. *Vivian*, 2 Ves. Sen. 430.

Where there is a devise of a residue, with devise over on a contingency, the devisee is entitled to the rents and profits till the contingency happens. *Shepherd* v. *Ingram*, Ambl. 450. And see *Lowther* v. *Cavendish*, *id.* 358.

A residuary estate was bequeathed, in the first instance, to be paid into the hands of the legatee on attaining the age of twenty-five years, and not till then, unless she married; the whole property then to be settled on her and her children; the legatee, on attaining the age of twenty-one unmarried, was held entitled to the income and the accumulations thereof. *Grant* v. *Grant*, 3 Y. & Coll. 171; 7 L. J., Ex. Eq. 20.

Devise to A., an infant, for life, and his first and other sons in strict settlement, with remainders for similar estates; the will farther directed, "during the minority of the A. family," an accumulation of the rents to be laid out on a purchase, "until the minor arrives at the full age of twenty-five years," and then "the heir to take full possession of this estate." A., being residuary legatee, is entitled absolutely to the accumulation. *Bingley* v. *Broadhead*, 8 Ves. 415.

Testator, after bequeathing an annuity and goods to his wife for her life, directs the whole of his fortune, in default of his own issue, and of a second son of his brother, and second son of his sister, to be divided between the plaintiff and the defendant, making the latter the residuary legatee:—Held, that under the words "whole fortune," the interest of the moiety, till the determination of the contingency, did not belong to the plaintiff; and that the residuary legatee was entitled to that and the reversionary interest in the goods left to the wife. *Mitford* v. *Wicker*, 2 Ken. Ch. 61. And see *Green* v. *Elkins*, infra, and *Heath* v. *Perry*, 3 Atk. 102.

Distinction between Profits of Real and Personal Estate.]—A testator gave his real and personal estate to trustees upon trust to pay the income to four persons for life as tenants in common, and after the death of the survivor to sell the real estate and stand possessed of the proceeds and of the stocks, funds, and securities upon which his personal estate should then be invested upon certain trusts for a class of children. By the death of one of the four his portion of the income became released, and was accumulated until the death of the survivor of the four:—Held, that the accumulation of the real estate was undisposed of and passed to the heir, but that the accumulation of the personalty passed as residue to the children. *Drakeley's Estate, In re*, 19 Beav. 395; 2 W. R. 613.

There is a material difference between the profits of a real and personal estate; rents never can become part of the personal estate, but the profits of the personal estate are the estate itself. In the case of real estates, the thing itself is not disposed of, but descends till the contingency happens; personal estate neither descends nor goes to the next of kin, but is vested in the executor. Testator bequeathed

residuary personal estate to his daughter B. (an infant), to be paid to her at twenty-one or marriage; and if she should die before twenty-one or marriage, he bequeathed the same to such son of E. as should first attain twenty-one: and if no son attain twenty-one, then to P. F. died under twenty-one, and unmarried:—Held, that the interest of the residue, from the death of F. to the time it will vest in the son of E., who is an infant, must accumulate, and is part of the residue, till the bequest to the son vests. *Green* v. *Ekins*, 2 Atk. 473.

A residuary devise of realty does not carry with it income not expressly disposed of, but it results to the heir-at-law as undisposed of. Secus, as to personalty, a residuary bequest of which, or of a share of which, carries with it ex vi termini all the income of such residue or share of residue, though not expressly disposed of, for the benefit of the legatees. Therefore, where a testator gave the residue of his real estate to uses commencing with an executory devise to an unborn person, and gave two-thirds of the residue of his personalty to trustees upon trust to invest in real estate, to be settled to uses, which were the same as those declared of his residuary realty:—Held, that the ordinary rule applied to the intermediate income of each class of property. As to the realty, that there was an intestacy as to such income, and it resulted to the heir-at-law. As to the personalty, that there was no intestacy, and that the income should be accumulated, and be added to the corpus to be laid out in land. *Hodgson* v. *Bective* (*Earl*), 2 N. R. 233; 1 Hem. & M. 376; 32 L. J., Ch. 489; 9 L. T. 18. But see *S. C.* varied on appeal as to the residuary personal estate, sub nom. *Bective* (*Earl*) v. *Hodgson*, 10 H. L. Cas. 656; 3 N. R. 654; 10 Jur. (N.S.) 373; 10 L. T. 202; 12 W. R. 625.

Future Residuary Devise.] — The testator devised all his real estate to a trustee, upon trust to pay the rents to A. for life, and after his death, and after the happening of a certain contingency, to settle the estate upon B. A. died before the contingency happened:—Held, that the intermediate rents belong to the heir-at-law of the testator. *Wills* v. *Wills*, 1 Dr. & War. 439; 4 Ir. Eq. R. 531.

Testator devised the residue of his real estate to a trustee in fee, upon trust to accumulate the rents until one of his grandsons should attain twenty-one, and in case his grandson T. should attain that age, upon trust to pay to him the future rents for life, with remainder to his eldest son who should attain twenty-one, remainder in default to another grandson. And the testator bequeathed the residue of his personal estate to the same trustee, upon trust to accumulate until one of his grandsons should attain twenty-one, and then to pay the dividends arising from the aggregate accumulations of his (the testator's) residuary real and personal estate to T. from and after his age of twenty-one for life, and after his decease to pay the principal of such accumulations to his eldest or only son. One of the testator's grandsons attained twenty-one three years before T. arrived at that age:—Held, that the rents of the real estate during the intervening period were undisposed of, and passed to the heir-at-law. *Marriott* v. *Turner*, 20 Beav. 557.

A testator, by his will dated in 1851, after making divers specific devises and bequests, and giving a life interest to his wife in his residuary real estate, devised such residuary real estate, after the death of his wife, to his trustees in trust for his grandson during his life, and from and after his decease in trust for "all and every his child and children who shall attain the age or respective ages of twenty-one years, and his, her, or their heirs and assigns for ever"; but in case there should be no child of his grandson who should attain the age of twenty-one years, then, as to the same residuary real estate, upon trusts over as in the will mentioned. The will contained a gift of the residuary personal estate, but it was distinct from the above devise, and upon different trusts from those declared concerning the real estate, although some of the trusts were the same. The will also contained powers for the trustees to grant leases, and apply the rents and profits of the real estate in making repairs. The testator died in 1853, and his widow died in 1866. The grandson died in October, 1867, leaving an only child, who was born on the 11th February, 1864. The question arose whether the accumulated rents accruing between the date of the death of the testator's grandson and the time when the grandson's only child attained the age of twenty-one years, were undisposed of by the will or passed to such child:—Held, that the accumulated rents belonged to the testator's heir-at-law. Held, further, that the doctrine of attraction, as established by *Genery* v. *Fitzgerald* (infra) and *Dumble, In re, Williams* v. *Murrell* (infra, col. 1771), did not apply. *Williams, In re, Spencer* v. *Brighouse*, 54 L. T. 831.

Real estate was given to F. W. R. in tail; and failing issue, or in the event of F. W. R.'s death before returning from India, it was to sink into the residue of testator's estate, which was given to F. R. The trustees invested rents in real estate at and after the death of testator, and on the death of F. W. R. without issue in India, his personal representative claimed the investments; but held they belonged to the residuary devise and legatee. *Robertson* v. *Dewsbury*, 5 Jur. 260.

A testator devised a freehold to trustees for the benefit of E. for life for her separate use, and after her death upon trusts for such of the children of E. as being sons should attain twenty-one, or being daughters should attain that age or marry. E. died after the testator, leaving an infant daughter who did not marry before attaining twenty-one:—Held, that the legal estate was in the trustees, and the daughter of E. took the property on attaining twenty-one, but the interim rents went to the residuary devisee. *Eddels, In re*, 40 L. J., Ch. 316; L. R. 11 Eq. 559; 24 L. T. 223; 19 W. R. 815.

Future Gift of a Mixed Residue.]—Under an executory devise of a residue of real and personal estate, the intermediate rents and profits of the real estates pass as well as the interest of the personalty. *Genery* v. *Fitzgerald*, Jac. 468; 23 R. R. 121.

Devise of the residue of real and personal estate, after provision made for payment of annuities and legacies, to the child or children of testator's natural daughter, and in case she should die without issue to S. and J.:—Held, the intermediate profits till a child was born should go to the residuary devisees, and not to the heir-at-law. *Gibson* v. *Rogers*, Ambl. 96; 1 Ves. Sen. 485; 4 Ves. 288, n.

A. by his will devised all his lands, &c., and all other his real and personal estate, upon trust

as to the real estate, to repair and let the same, &c. and upon further trust, notwithstanding any limitation of uses or trusts thereinbefore mentioned, at discretion to sell and convey the same, except the messuage given to his wife, and as to the money to arise upon such sales, upon trust to add the same to his personal estate, to constitute a part thereof. The testator then gave the residue of his personal estate, upon trust, after payment of debts, &c., and expenses of management and repairs, to be accumulated, by way of compound interest, until J. C. should arrive at the age of twenty-four years, and then upon trust to convey, assign, &c., to J. C. (upon his giving security, &c., for the regular payment of the annuities thereinbefore bequeathed) all the legal estate and interest in all his freehold, copyhold, and leasehold messuages, lands, &c., and all other his real and personal estate and effects not thereinbefore devised and bequeathed, &c. The testator also directed that his trustees should, for the purpose of J. C.'s education, appropriate out of the income of the testator's personal estate a sum not exceeding 800*l.* per annum until he should attain twenty-one years of age, and afterwards 1,500*l.* per annum until he should attain the age of twenty-four; with limitation over in case J. C. should die without issue before he attained the age of twenty-four:—Held, that the benefit intended to be given to J. C. was the produce of a mixed fund of the real and personal estate of the testator, and that the rents of the real estate until J. C. attained twenty-four did not result to the heir-at-law of the testator as undisposed of, but passed to J. C. as part of the fund given in trust. *Ackers* v. *Phipps*, 9 Bligh (N.S.) 430; 3 Cl. & F. 665. Reversing on this point 5 Sim. 44; 1 L. J., Ch. 96.

T. settled his freehold estates (subject to appointment) on himself in tail, remainder to L. and his sons in strict settlement, remainder to C. for life, provided that if L. or any issue male of his body should become entitled in possession to his father's family estates, then the uses before declared of T.'s estates for the benefit of him or them who should so become entitled, and for the benefit of his or their issue male, should cease, and those estates should go over, as if the person or persons so becoming entitled were dead without issue male. L. having afterwards become entitled in possession to his father's family estates, T. by his will appointed his said estates to H. (the eldest son of L.) and his sons in strict settlement, remainder to the heirs of A., deceased, provided that if any tenant for life in possession under the will should become entitled in possession to L.'s family estates, his interest in the devised estates should cease, and those estates go over to the person next in remainder under the will, as if the tenant for life were dead. The testator devised his copyhold estate upon such trusts as would nearest correspond with the uses and trusts of his freehold estates, and then gave all the residue of his real and personal estates to M. and W., their and each of their heirs, executors, &c., absolutely in equal third parts. On the testator's death, in 1824, H. entered upon his estates under the will, and in 1833 he became entitled in possession to L.'s family estates, and had no son. A bill was filed by the residuary legatees claiming the rents of all the estates accruing between 1833 and L.'s death or his having a son against A.'s heir, who claimed the same rents, and against C. and B. (second son of L.), who claimed adversely to each other the rents of the freehold estates under the limitations in the settlement, in default of appointment of them by T.:—Held, by the Lords, first (partly affirming a decree made on that bill), that the plaintiffs were entitled to the rents of the copyhold estate under the residuary devisee; secondly (partly reversing the decree), that no adjudication could be made in the cause as to the rents of the freeholds, the question as to them being between co-defendants. *Sanford* v. *Morrice*, 11 Cl. & F. 667. And see *S. C.* nom. *Morrice* v. *Langham*, 11 Sim. 260; 10 L. J., Ch. 38; 6 Jur. 334. *S. C.* nom. *Morrice* v. *Sandford* 8 Jur. 967. And see *S. C.* at law, 8 M. & W. 196; 10 L. J., Ex. 289.

Gift by the testator to his wife for her life, or until her second marriage, of the interest of his real and personal estate, which, whether arising from rents or public securities, was to be applied for the benefit of herself and children; and if she married again, he declared that her power and benefit under his will should cease; and when thirty years were expired, he ordered all his property, both freehold and leasehold, to be sold, and two-thirds to be divided among his children living at that period or their heirs, and one-third to be invested for the benefit of his wife; and after her decease, he bequeathed such third to his children then living and to their heirs:—Held, that the gift at the end of thirty years was not liable to objection on the ground of remoteness; that there was no substitution of the legatee created by the gift to the children "or to their heirs," but that the word "or" must be read "and"; and that the children of the testator living at the end of thirty years (who were also the same children as were living at the death of the widow) were entitled to the proceeds of the sale of the estate, and also to the intermediate rents after the death of the widow and before the expiration of the thirty years. *Lachlan* v. *Reynolds*, 9 Hare, 796.

A testator devised his residuary real estate to trustees, on trust to pay the rents to his wife for her life, and upon her death to apply the rents for the maintenance of his daughter, and to accumulate the surplus, and on the daughter attaining twenty-one, to pay to her the accumulations and the future income for her life, and upon her death on trust to convey the residuary real estate unto and equally between all and every her child and children who should live to attain twenty-one, as tenants in common in fee, but in case his daughter should die without leaving any child or children who should attain twenty-one, then on trust to convey the residuary real estate to such person or persons as the daughter should by deed or will appoint. And by another clause the testator bequeathed his residuary personal estate to the same persons as trustees, on the same trusts as those declared of the real estate, except the clause as to maintenance and accumulation. The will contained no disposition of the income of the realty or the personalty during the suspense of vesting. The daughter survived the testator and his wife, and died leaving an only daughter, who was an infant. The testator's daughter had, by her will, exercised the power of appointment in favour of other persons in the event of her leaving no child who should live to attain a vested interest under the trusts of her father's will:—Held, that the testator had in effect mixed up the whole of his property in one mass, and that the rule in *Genery* v. *Fitzgerald* (supra) applied; and that, consequently, the

interim rents of the real estate, until the happening of the contingency, as well as the interim income of the personalty, must be accumulated, and follow the destination of the corpus. *Dumble, In re, Williams* v. *Murrell*, 52 L. J., Ch. 631; 23 Ch. D. 360; 48 L. T. 661; 31 W. R 605. And see *Bective (Earl)* v. *Hodgson*, supra, col. 1767.

25. LEGACY DUTY—*See* REVENUE.

H. J. N.

WINDING UP.

See COMPANY.

WINDMILL.

See EASEMENT.

WINDOWS.

See EASEMENT.

WINE.

See INTOXICATING LIQUORS.

WITNESS.

In Bankruptcy Cases.]—*See* BANKRUPTCY.

In Criminal Cases.]—*See* CRIMINAL LAW.

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WOMEN.

Criminal Law relating to.]—*See* CRIMINAL LAW.

Seduction.]—*See* MASTER AND SERVANT.

Other Matters relating to.]—*See* HUSBAND AND WIFE—INTERNATIONAL LAW.

WOODS AND FORESTS COMMISSIONERS.

See CROWN—PUBLIC OFFICER.

WORDS, CONSTRUCTION OF.

See DEED AND BOND—SETTLEMENT—STATUTE—WILL—and other specific titles.

WORK AND LABOUR.

A. CONTRACTS FOR, 1772.

B. PERFORMANCE OF WORK.

1. *Implied Conditions*, 1780.
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C. PROPERTY IN MATERIALS.

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D. REMUNERATION.

1. *Recovery of*—*Amount*, 1795.
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4. *Completion of Contract*, 1808.
5. *Subject to Certificates*, 1813.
6. *Deductions*, 1827.

E. PLEADINGS AND EVIDENCE, 1828.

A. CONTRACTS FOR.

By Tender and Acceptance—When a Binding Contract.] — A tender and acceptance may amount to a contract, although the acceptance refers to a formal contract to be drawn up afterwards. *Lewis* v. *Brass*, 3 Q. B. D. 667; 37 L. T. 738; 26 W. R. 152—C. A.

A defendant sent in a tender to do work for the plaintiff. The plaintiff's agent replied, accepting the tender, and adding, "The contract will be prepared by," &c. :—Held, that the tender and acceptance formed a complete contract. *Ib.*

A., a railway contractor, met B. and several others, in order to receive tenders with reference to certain work. A. read a specification with reference to the work; after which B. and the others handed in their tenders. B.'s tender was signed with his name; but there was no evidence that it was in his handwriting:—Held, notwithstanding, that such tender, taken with the specification, sufficiently proved the contract. *Allen* v. *Yoxall*, 1 Car. & K. 315.

A contractor sent in a tender to a railway company for the execution of part of the works either with a double or single line of rails. He was informed, in writing, by the engineer of the company, that his tender was accepted; and that intimation was confirmed by the directors, upon his attendance at one of their board

meetings, but no document accepting the tender was executed by the company, in such a manner as to be binding at law; nor was any conclusion ever come to whether there should be a single or a double line. The railway was afterwards abandoned, and the contractor then filed a bill, seeking to have a binding contract executed by the company, or to recover from them the loss which he had sustained in preparing for the works:—Held, upon demurrer, that he had no claim to relief in equity upon the general merits of the case; and that an allegation, unsupported by any additional facts, that the company held money in their hands for the purpose of paying the plaintiff, and were trustees of it for his benefit, under an instrument in writing, was not sufficient to sustain the bill. *Jackson* v. *North Wales Ry.*, 1 H. & Tw. 75; 6 Railw. Cas. 112; 18 L. J., Ch. 91; 13 Jur. 69.

—— **When not under Seal.**]—The agent of a railway company made a verbal agreement with the contractor for the line, that if he would build on the land of the company some cottages more substantially than would be required for his own purposes, and would leave them for the use of the company, then the company would pay him 5,000*l.* The cottages were accordingly built, and when the railway was completed the contractor left them on the land, and the agent of the company made an agreement with the contractor that he should be paid 500*l.* a year for the cottages by way of rent, with an option to the company to purchase them for 5,000*l.* This agreement was confirmed by a resolution of the board of directors. The company paid the 500*l.* a year for some years, and then refused to pay:—Held, that the claim of the contractor being simply for payment of money could not be enforced in the court of chancery; and that though the contractor was unable to sue at law because the agreement was not under seal, he did not thereby obtain an equity to enforce a claim for money. *Crampton* v. *Varna Ry.*, 41 L. J., Ch. 817; L. R. 7 Ch. 562; 20 W. R. 713. *See also* COMPANY.

Held, also, that inasmuch as the contractor did not act in ignorance of the rights of the company, he could not claim compensation for having been induced to build on the land of the company. *Ib.*

—— **When a mere Proposal.**] — Guardians issued an advertisement stating that they would receive tenders for the supply of the workhouse with meat for three months, from thirty to fifty stone (setting out the description of meat), that sealed tenders were to be forwarded, and that all contractors would have to sign a written contract after acceptance of the tender. A butcher wrote to the guardians as follows: "I propose to supply your house with meat according to advertisement for the next six months at 6*d.* per pound." His proposal was accepted, and he was informed that he was appointed butcher, upon which he immediately declined the appointment:—Held, that the transaction amounted merely to a proposal for a contract, and that there was no binding agreement till a written agreement had been signed. *Kingston-upon-Hull Governors* v. *Petch*, 10 Ex. 611; 3 C. L. R. 196; 24 L. J., Ex. 23.

—— **Implied Undertaking to accept Lowest.**]—The defendants issued a circular in which they stated that they had been instructed to offer to the wholesale trade for sale by tender the stock-in-trade of E. & Co., amounting as per stock book to 2,503*l.* 13*s.* 1*d.*, and which would be sold at a discount in one lot. They also stated in the circular the day and the hour when the tenders would be received and opened at their offices. The plaintiffs made a tender which they alleged was the lowest. In an action against the defendants for not accepting such tender:—Held, that the circular was only an invitation for offers, and that there was no implied undertaking by the defendants to accept any tender at all. *Spencer* v. *Harding*, 39 L. J., C. P. 332; L. R. 5 C. P. 561; 23 L. T. 237; 19 W. R. 48.

Evidence of usage in a trade where the plaintiff sent in to N. (the agent of defendants) a tender for the execution of certain buildings:—Held, that the judge was right, on the evidence before him, in concluding that according to the custom in the trade, the plaintiff's being the lowest tender, had been accepted, although N. had no absolute authority to accept the lowest. *Pauling* v. *Pontifex*, 1 W. R. 64.

Work and Labour or Sale of Goods.]—A. ordered of B. a set of artificial teeth, which were by the terms of the contract to be fitted to her mouth; before they were so fitted A. died:—Held, a contract for the sale of goods within s. 17 of the Statute of Frauds; and that B. could not sue A.'s executor for work and labour done and materials provided for the testatrix. *Lee* v. *Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252; 7 Jur. (N.S.) 1302; 4 L. T. 546; 9 W. R. 702.

A printer having agreed to print a work for the defendant printed it but the defendant refused to accept it:—Held, to be a contract for work and labour and not for the sale of goods within s. 17 of the Statute of Frauds. *Clay* v. *Yates*, 1 H. & N. 73; 25 L. J., Ex. 237; 2 Jur. (N.S.) 908; 4 W. R. 557. *See also* SALE OF GOODS.

Agreement not to Tender—Validity.]—Tenders for the supply of stone were invited by a corporation. Four neighbouring quarry owners entered into an agreement to supply the stone in certain proportions inter se, and that the plaintiffs should make the lowest tender to the corporation. The plaintiffs entered into contracts with the other quarry owners to purchase the proportion of stone agreed upon from each. Notwithstanding the agreement, one of the quarry owners sent in a tender, which was accepted by the corporation. The plaintiffs then filed a bill for an injunction to restrain the defendants from supplying the stone during 1875. They demurred:—Held, overruling the demurrer, that the corporation were not necessary parties, and that the agreement was not void, either as against public policy or for want of equity. *Jones* v. *North*, 44 L. J., Ch. 388: L. R. 19 Eq. 426; 32 L. T. 149; 23 W. R. 468.

An agreement having been made between A. and B. not to tender in competition with each other for certain gas tar, A., in answer to an advertisement sent in a mere nominal tender, in consequence of which B. obtained the contract. On the expiration of the contract, fresh advertisements were issued, and a tender by B. was rejected, whereupon A., without communicating with B., sent in a tender on his own account:—Held, that the agreement between them was still pending, and A. was liable to B.

for the breach of it. *Metcalf* v. *Bouck*, 25 L. T. 539.

Mistake of Contractor.]—A builder made a tender undertaking to sign a contract to execute for a sum works described in the rough sketches and verbal explanations of an architect. The architect subsequently sent by special messenger to the builder a contract to perform for the sum named the works delineated and described in the plans and specifications thereto annexed. These differed materially from the works described in the rough sketches and verbal explanations on which the builder had made his tender. The builder, however, signed the contract without any examination, and completed the works according to the plans annexed to it. He afterwards filed a bill in equity claiming to have an account taken of the works executed by him on the basis on which he had made his tender:—Held, that as the mistake under which he had signed the contract was due to his own negligence, and he had not taken proceedings for rectifying the contract as soon as he had discovered it, he was not entitled to any relief in this respect. *Kimberley* v. *Dick*, 41 L. J., Ch. 38; L. R. 13 Eq. 1; 25 L. T. 476; 20 W. R. 49.

Assignment of Moneys due—Contractor Bankrupt—Completion by Trustee—Power to take Work out of Contractor's Hands.]—A building contract provided that payments should be made, as the work proceeded, of such sums on account of the price of the work as should be stated in the certificates of an architect, such certificates to be given at the architect's discretion at the rate of 80 per cent. upon the contract value of the work done at the dates of such certificates, and that the remaining 20 per cent. should be retained till the completion of the work. The contract empowered the building owners, in the event of the contractors committing an act of bankruptcy, to discharge them from the further execution of the work, and employ some other person to complete it, and to deduct the amount paid to such other person for completing the same from the contract price. The contractors assigned a portion of the retention moneys, i.e. the price of work done under the contract retained under the above-mentioned provision, by way of mortgage to secure a debt, and notice of the assignment was given to the building owners. After making such assignment the contractors filed a petition for liquidation, the works then remaining incomplete. A trustee in liquidation and a committee of inspection were appointed. The trustee, in pursuance of a resolution of the committee, completed the work, himself advancing money for that purpose, of which an amount exceeding that of the retention moneys assigned as aforesaid was still unpaid, there being no other assets from which he could be recouped in respect thereof. The trustee and the mortgagees both claim the amount of the retention moneys assigned as aforesaid from the building owners. On an interpleader issue to try the title to such moneys:—Held, that, in the absence of anything to show that the building owners had exercised the power of taking the work out of the contractor's hands, the trustee must be taken to have completed the work under the original contract as trustee of the contractors' estate, and not as a person employed to complete the work in substitution for the contractors; that the assignment of the retention moneys held good as against the trustee; and that the mortgagees were therefore entitled to succeed. *Tooth* v. *Hallett* (L. R. 4 Ch. 242) distinguished. *Drew* v. *Josolyne*, 56 L. J., Q. B. 490; 18 Q. B. D. 590; 57 L. T. 5; 35 W. R. 570—C. A.

Adoption by Trustees.]—A contractor entered into an agreement for the completion of a building at a certain time, in a certain specified manner, and the contractor was to set out the works and be responsible for errors, to provide and employ workmen, to provide and keep at the building a competent general foreman, to provide materials, labour, &c.: also if the contractor should, from any cause not comply with the terms of the contract within three days after being requested to do so in writing, the architect should have power to prevent his further execution of the works, and cause the same to be finished by others. After he had received notice from the employer that he was neglecting and delaying to complete and finish the building, the contractor, on the following day, entered into a composition deed for the benefit of his creditors under s. 192 of the Bankruptcy Act of 1861, and in the form prescribed:—Held, that the trustees of the deed were not at liberty to adopt the contract, containing, as it did, obligations of a personal character. *Knight* v. *Burgess*, 33 L. J., Ch. 727; 10 L. T. 90.

Right of Employer to Re-enter.]—The language of a contract, where it admits of it, must receive such a construction as is consistent with reason and justice; but where it appears from the whole tenor of the agreement that the parties thereto intended, the one to insist upon and the other to submit to, conditions, however unreasonable and oppressive, the court will in such case give effect to them. *Stadhard* v. *Lee*, 3 B. & S. 364; 32 L. J., Q. B. 75; 9 Jur. (N.S.) 908; 7 L. T. 850; 11 W. R. 361.

The plaintiff contracted to execute certain works for the defendants, the agreement containing the following proviso: "That if the works did not proceed as satisfactorily as required by the defendants, they should have power to enter thereupon, pay whatever number of men should be left unpaid by the plaintiff, and set to work whatever number of men they might consider necessary; the amount so paid, and the cost of the men so set to work, to be deducted from whatever moneys might be due to the plaintiff":—Held, that the intention of the parties was, that the defendants, if dissatisfied with the progress of the work, should be at liberty to avail themselves of the terms of the proviso, and deduct from the money due to the plaintiff such sums as had been expended in pursuance thereof. *Ib.*

—— **Sufficiency of Notice.**] — An engineer contracted with a corporation by deed to execute works. The deed contained a clause, by which it was covenanted that the corporation's own engineer should have power to direct the way in which portions of the work should be done; and if it should appear to him that they were not properly executed, and with due expedition, it should be lawful for him to give notice in writing to the plaintiff to alter any improper work, and to supply proper and sufficient materials and labour, and with due expedition to proceed therewith; and if the plaintiff should, for seven days after such notice, fail to comply therewith, then it should be lawful for the engineer to take the

work out of the plaintiff's hands. It appearing to the engineer that the works were not being properly executed, and with due expedition, he gave the following written notice to the plaintiff: "I give notice to you to supply all proper and sufficient materials and labour for the due prosecution of the works, and with due expedition to proceed therewith: and, further, that if you shall, for seven days after the giving of this notice, fail or neglect to comply therewith, I shall as engineer, and on behalf of the corporation, take the works wholly out of your hands:"—Held, that the notice was sufficiently specific. *Pauling* v. *Dover Corporation*, 10 Ex. 753; 24 L. J., Ex. 128.

—— **Injunction to restrain Seizure.**]—By a contract between a contractor and a railway company, under which the former was to execute the company's works, it was provided (amongst other things) that surplus chalk should be the contractor's property, and that if the contractor should in the judgment of the company's engineer fail in the due performance of the contract, the engineer might, by order of the board of directors, take the further performance of the contract out of the contractor's hands, and employ for the purposes of the contract such persons and on such terms and conditions as the engineer should think fit. In alleged exercise of the power conferred by the latter provision the company resumed possession, and took the further performance of the contract out of the contractor's hands, who thereupon filed a bill for an injunction, alleging impropriety of conduct and duress on the part of the engineer, and that the chalk taken would, upon the completion of the work, become the plaintiff's property as surplus, allegations the truth of which was bonâ fide disputed by the company:—Held, that the contract being one where, if the company was wrong, the contractor could be amply compensated in damages, whereas if the contractor were allowed to resume work the court could not enforce specific performance of the contract in order to compel the completion of the works, the contractor was not entitled to an interlocutory injunction. *Garrett* v. *Banstead and Epsom Downs Ry.*, 4 De G. J. & S. 462: 11 Jur. (N.S.) 591; 12 L. T. 654; 13 W. R. 878. See also *Jennings* v. *Brighton Intercepting and Outfalls Sewers Board*, 4 De G. J. & S. 735, n.

A railway company consenting to the removal of its plant by the plaintiffs, the contractors for works, and the latter not having on affidavits made out a case of mala fides on the part of the engineer or the company in determining the contract, a motion for injunction against the company was refused, and the latter was left to assert at law its rights under the agreement. *Waring* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 2 H. & Tw. 239; 18 L. J., Ch. 450; 14 Jur. 613.

A contractor agreed to execute the works of a railway within a certain time, and on being paid in a certain manner, and under a condition that if he failed to proceed with the works as required by the engineer of the company, the contract should be void, and the implements and materials belonging to the contractor should be forfeited. The contractor did not satisfy the engineer of the company, and the company proceeded to take possession of the works. The contractor alleged that the proper payments had not been made to him:—Held, that the court would not restrain the company by interlocutory injunction until the questions between the company and the contractor were decided. *Munro* v. *Wivenhoe and Brightlingsea Ry.*, 4 De G. J. & S. 723; 11 Jur. (N.S.) 612; 12 L. T. 655; 13 W. R. 880.

A contractor agreeing to execute the public works of a company, and binding himself for the due performance of his contract, by forfeitures subjecting himself to the arbitrary decision of a person nominated by the company as to his liability thereto, is not entitled to relief in equity against the forfeiture. *Ranger* v. *G. W. Ry.*, 2 Jur. 787.

In a contract with a railway company for the execution of works, there was a clause empowering the company, after notice, to take possession of the plant and to finish the work; the company acted on this clause:—Held, that this did not furnish ground for a bill in equity as putting an end to the contract, though it might be the subject of an action for damages. *Ranger* v. *G. W. Ry.*, 5 H. L. Cas. 72.

—— **Granting Periods of Indulgence.**]—Under a clause in a building agreement, under which rent had not been paid (and not amounting to a demise), that in case of default in not completing the buildings, at successive periods, the owner should be at liberty to re-enter and seize the materials there, and successive defaults having been made and several periods of indulgence granted, but there was no waiver of the last default, and no alteration of the builder's position to his prejudice, and no default on the part of the owner:—Held, that the owner was entitled to re-enter and seize the materials. *Stevens* v. *Taylor*, 2 F. & F. 419.

—— **Extending Time for Completion.**]—Where a building contract contained a clause empowering the defendants, in the event of the works being delayed by the contractors, to take the contract out of their hands and employ others for the completion thereof; and also a clause enabling the engineer in certain events to extend the time limited for the completion of the contract, and the engineer, in pursuance of the clause, granted such extension:—Held, that it was not competent for the defendants to avail themselves of the power of taking the works out of the contractors' hands, simply on the grounds of delay, till or up to a time within the extended period, or simply on the grounds that the work was not finished before the expiration of that period. But, aliter, if other sufficient grounds were relied on for exercising the power. *Mohan* v. *Dundalk, Newry and Greenore Ry.*, 6 L. R., Ir. 477.

Where the same contract contained a clause enabling the defendants, upon taking the works out of the contractors' hands as aforesaid, to use the plant and materials of any description belonging to the plaintiffs which should be on, or near to, or employed in the execution of the works, without making any payment for the same:—Held, that a defence alleging that the defendants had taken up the works under the terms of the contract for delay, and relying on this clause, was a sufficient answer to an action for the conversion and detention of such plant and materials by the defendants. *Ib.*

Contractors agreed to construct a dock and other works for a railway company. The contract contained the following clauses: "Should the contractors fail to proceed in the execution

of the works in the manner and at the rate of progress required by the engineer, or to maintain the works as hereinafter mentioned to the satisfaction of the engineer, their contract shall, at the option of the company, but not otherwise, be considered void as far as relates to the works or maintenance remaining to be done, and all sums of money that may be due to the contractors, together with all materials and implements in their possession, and all sums named as penalties for the non-fulfilment of the contract, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract." "Time of completion. The whole of the works are to be entirely completed on or before 31st August, 1873, and the contractors will be subject to a penalty of 100*l.* per week for each week the works remain unfinished beyond the time stated." By other clauses, if the contractors failed to complete the works within the period limited, the company had power, without giving previous notice, to take the works out of their hands and employ other contractors; and if the engineer was dissatisfied with the mode of proceeding and progress of the works, he had power to procure and make use of all labour and materials from money due or to become due to the contractors; but this was not to relieve them from their obligation to proceed with the works. The works were not finished on the 31st August, 1873, and the contractors continued working till 22nd January, 1874. On 22nd January, 1874, the company gave notice to the contractors under the above clause to avoid the contract, and afterwards took possession of the implements and materials:—Held, that the clause in question could only be acted on and enforced within the time fixed for the completion of the works, and therefore, the notice of 22nd January, 1874, was not valid and sufficient to avoid the contract, and the company was not justified in taking possession of the implements and materials. *Walker* v. *L. & N. W. Ry.*, 45 L. J., C. P. 787; 1 C. P. D. 518; 36 L. T. 53; 25 W. R. 10.

—— **Exercise of Right to rescind.**]—The exercise of a right of election to rescind a building agreement must be signified in an unqualified manner and within a reasonable time, or, at all events, not after the other party to the agreement has gone to expense in the belief of the right of election not being exercised. *Marsden* v. *Sambell*, 43 L. T. 120; 28 W. R. 952.

A contractor agreed to do certain work according to plans and specifications with a provision that if he was guilty of delay the defendants might give a three days' notice of their intention to employ another person to complete the work, and that at the expiration of the notice the agreement should be void and the amount already paid to the contractor should be considered the full value of the work executed by him up to that time. There was also a proviso as to the scale of payment:—Held, that the power of determining the agreement might be exercised before any payment had been made. *Davies* v. *Swansea Corporation*, 8 Ex. 808; 22 L. J., Ex. 297.

If one of the parties to a building agreement in which a right to rescind is stipulated for, himself rescinds it, he is not entitled to make entry on the premises for the purpose of removing the goods after the date of rescission. *Marsden* v. *Sambell*, 43 L. T. 120; 28 W. R. 952.

—— **Mistaken Claim to rescind.**]—A mistaken claim by one of the parties to such an agreement to rescind it does not ipso facto operate to rescind the agreement, unless the other party claims a rescission on the ground of the mistaken claim. *Ib.*

—— **Restraining Contractor from continuing.**]—Disputes having arisen between a railway company and a contractor employed in making the railway, the company insisting upon a right under the contract, owing to the alleged default of the contractor, to discharge him, take possession of the line and materials, and complete the works itself. The contractor resisted such claim, imputing the backward state of the works to the acts of the company, and held forcible possession. Collisions occurring between the workmen of the two parties, each being charged with impeding the operations of the other, and the completion and opening of the railway for traffic being in the meantime delayed, the court, on the application of the company, restrained the contractor from continuing on the line, or interfering with the operations of the company; directed an account of what was due to the contractor for works and materials done and provided, without regard to the formal certificates of the company's engineer, and without an issue to try whether the company, at the time it proceeded to enter upon the works and remove the contractor, was lawfully justified in so doing; reserving as well the question of the right of the contractor to compensation for loss of profit on unexecuted works, as all other directions, until after the trial and the report. *East Lancashire Ry.* v. *Hattersley*, 8 Hare, 72.

Specific Performance.]—*See* SPECIFIC PERFORMANCE.

B. PERFORMANCE OF WORK.

1. IMPLIED CONDITIONS.

Requisite Skill.]—The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite skill and ability. *Harmer* v. *Cornelius*, 5 C. B. (N.S.) 236; 28 L. J., C. P. 85; 4 Jur. (N.S.) 1110; 6 W. R. 749.

When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes. *Ib.*

One who holds himself out as a valuer of ecclesiastical property, though he is not bound to possess a precise or an accurate knowledge of the law respecting the valuation of dilapidations as between an outgoing and an incoming incumbent, is bound to bring to the performance of the duty which he undertakes a knowledge of the general rules applicable to the subject, and of the distinction which exists between the cases of valuation as between an incoming and an outgoing tenant, and a valuation as between an incoming and an outgoing incumbent. *Jenkins* v. *Betham*, 15 C. B. 168; 3 C. L. R. 373; 24 L. J., C. P. 94; 1 Jur. (N.S.) 237; 3 W. R. 283.

A patent agent is expected to know the law relating to the practice of obtaining patents. *Lee* v. *Walker*, 41 L. J., C. P. 91; L. R. 7 C. P. 121; 26 L. T. 70.

—— **Evidence of Negligence.**]—When a patent agent who was employed to procure a patent,

being not aware of the decision (which makes it necessary, notwithstanding provisional specification has been filed, to take care that the patent is sealed before another patent for the same invention is obtained by a later applicant), delayed four months between filing the provisional specification and applying to have the patent sealed, whereby a subsequent applicant for a patent for the same invention was able to get his patent sealed first, and so prevent such agent from procuring a patent for his employer: —Held, evidence of negligence, for which such patent agent was liable in an action by his employer. *Ib.*

An intending mortgagor, at the request of the solicitors of an intending mortgagee, applied to a firm of valuers for a valuation of the property proposed to be mortgaged. A valuation at the sum of 3,000*l.* was sent in by the valuers direct to the mortgagee's solicitors, and the mortgage was subsequently carried out. Default having been made in payment by the mortgagor, and a loss having resulted to the mortgagee, he commenced an action against the valuers for damages for the loss sustained through their negligence, misrepresentation, and breach of duty. The court being satisfied on the evidence that the defendants knew at the time the valuation was made that it was for the purpose of an advance, and that the valuation as made was in fact no valuation at all:—Held, that, under the circumstances, the defendants were liable on two grounds: (1), that they (independently of contract) owed a duty to the plaintiff which they had failed to discharge; (2), that they had made reckless statements on which the plaintiff had acted. *George* v. *Skivington* (L. R. 5 Ex. 1) and *Heaven* v. *Pender* (11 Q. B. D. 503) followed. *Peek* v. *Derry* (37 Ch. D. 541) discussed. *Cann* v. *Willson*, 57 L. J., Ch. 1034; 39 Ch. D. 39; 59 L. T. 723; 37 W. R. 23. See *Scholes* v. *Brook*, 64 L. T. 674—C. A.

Mortgagees advanced money to a builder upon the faith of certain certificates given by a surveyor. The certificates contained untrue statements, the result of the negligence of the surveyor, but there was no fraud on his part, and no contractual relation between him and the mortgagees:—Held, that the surveyor owed no duty to them to exercise care in giving the certificates, and that he was not liable to them in an action for negligence. *Cann* v. *Willson* (39 Ch. D. 39) overruled; *Heaven* v. *Pender* (11 Q. B. D. 503) distinguished; *Derry* v. *Peek* (14 App. Cas. 337) followed. *Le Lievre* v. *Gould*, 62 L. J., Q. B. 353; [1893] 1 Q. B. 491; 4 R. 274; 68 L. T. 626; 41 W. R. 468; 57 J. P. 484—C. A.

The plaintiff purchased the goodwill, stock, and effects of a business at a valuation, the amount of which was to be fixed by valuers, one to be appointed on each side for that purpose, and in case of difference by an umpire to be chosen by the valuers. The plaintiff employed the defendant as his valuer, and he and the valuer appointed by the vendor fixed between them the amount of valuation. In an action for negligence in making such valuation, by which the value of the goodwill was fixed too high, the plaintiff applied to administer interrogatories to the defendant to ascertain the basis on which he had agreed with the valuer of the defendant to calculate the valuation:—Held, that the defendant had not acted in the matter as an arbitrator, but as a valuer only, and was therefore liable to his employer for negligence, and the plaintiff accordingly was allowed to administer the interrogatories. *Turner* v. *Goulden*, 43 L. J., C. P. 60; L. R. 9 C. P. 57.

A broker made a contract for the seller as follows: "Oct. 26, 1869. Sold by order and for account of Mr. P., to my principals, Messrs. S. H. & Son, to arrive, 500 tons black Smyrna raisins, 1869 growth, fair average quality in opinion of selling broker, to be delivered here in London at 22*s.* per cwt. Shipment November or December, 1869":—Held, that the broker was employed as an arbitrator to determine between the parties any difference which might arise as to the quality of the raisins tendered in fulfilment of the contract; and, consequently, that he was not liable to an action for failing to exercise reasonable care and skill in coming to a decision, he having acted bonâ fide, and to the best of his judgment. *Pappa* v. *Rose*, 41 L. J., C. P. 187; L. R. 7 C. P. 525; 27 L. T. 348; 20 W. R. 784—Ex. Ch.

L., exercising the avocation known among the mercantile community as an average adjuster, was employed by A. and B., under the terms of an agreement, to examine into and decide upon a disputed claim between them as to the salvage and loss of cargo upon a wreck. Having pronounced his decision, with which A. was dissatisfied, A. brought an action for damages, imputing that L. had not used due diligence in ascertaining the facts as to the matters submitted to him, and for negligence in the performance of the duty which he had undertaken for reward. To this L. pleaded that he had decided bonâ fide:—Held, that he was, in reference to the question into which he was commissioned by A. and B. to inquire, in the position of an arbitrator, and that as they must be held to have bound themselves to abide by his award, he in the character that had been imposed upon him by the parties was not liable to an action at the suit of either of them. *Tharsis Sulphur and Copper Co.* v. *Loftus*, 42 L. J., C. P. 6; L. R. 8 C. P. 1; 27 L. T. 549; 21 W. R. 109.

A bill for improving a town and its surrounding hamlets was passed through the Commons, and carried into the House of Lords. In due course the standing orders committee reported upon it, that the notice to the inhabitants, which was the foundation of the bill, was not in conformity with the standing orders in two respects; first, that it did not sufficiently state the intention on the part of the commissioners to take compulsory powers for levying rates; and secondly, that there were compulsory clauses for the purchase of houses and lands, but no application had been made to the owners of the houses and lands for their consent; and thereupon the bill was rejected. Upon an action brought by the parliamentary agents against the promoters of the bill for their costs, they pleaded wilful negligence on the part of the plaintiffs in the conduct of the bill:—Held, that it was a proper question for the jury, whether the standing orders in the first respect had not been virtually complied with, at least in so far as to relieve the defendants from the charge of wilful negligence; and as to the second objection, held, that the standing orders did not apply, because it was impossible to give notice to parties that their land in particular was intended to be purchased, when no land was set out; in which respect the bill had not the same reference to the standing orders as bills for making canals and railways or altering turnpike roads. *Bulmer* v.

Gilman, 4 Scott (N.R.) 781 ; 4 Man. & G. 108 ; 1 D. & L. 367 ; 11 L. J., C. P. 174 ; 6 Jur. 761.

Proper Performance—Condition Precedent to Remuneration.]—Where a person undertakes, and is employed to perform a work of skill and labour, and fails therein, so that his employer derives no benefit from the work, the former is not entitled to recover his demand, as the employer buys both his labour and his judgment, and he ought not to undertake the work, if he does not know whether he can succeed or not. *Duncan* v. *Blundell*, 3 Stark. 6.

If a surveyor makes an estimate which turns out to be incorrect to a considerable amount, through his omitting to examine the ground for the foundation of the work, he is not entitled to recover anything for his plans, specifications, or estimates made for that work. *Moneypenny* v. *Hartland*, 1 Car. & P. 352.

Semble, that although maps, &c., of an engineer may be incorrect, yet he is entitled to a remuneration for journeys made respecting them. *Taylor* v. *Higgins*, 1 L. J. (O.S.) K. B. 19.

In an action on a special contract for work done under the contract, and for work, labour, and materials generally, the defendant may give in evidence that the work has been done improperly, and not agreeably to the contract ; and the plaintiff in that case will only be entitled to recover the real value of the work done and the materials supplied. *Chapel* v. *Hickes*, 2 C. & M. 214 ; 4 Tyr. 43 ; 3 L. J., Ex. 38.

—— **By an Engineer.**]—If an engineer is employed by a committee for erecting a bridge and forming a road to it, to make an estimate of the expense, he is bound to ascertain for himself, by experiments, the nature of the soil, although a person previously employed by such committee, having made the experiments, gives him, by their desire, information of the result. *Moneypenny* v. *Hartland*, 2 Car. & P. 378 ; 31 R. R. 672.

—— **By a Herald.**]—In an action by heralds, for work and labour in making out a pedigree, they are bound to give general evidence of the pedigree being true, unless this has been dispensed with by the defendant. *Townsend* v. *Neale*, 2 Camp. 191.

—— **Action by Contractor no Bar to Action against Contractor.**]—A. having been employed by B. to do work according to a specification, brought an action to recover the price agreed to be paid upon the completion of the work. The action was settled by payment of the whole amount, after which B. brought an action against A. to recover damages for an alleged non-performance of the contract and for an alleged improper performance of the same :—Held, that he was not precluded from maintaining the action by reason of the settlement of the action brought against him by A. *Davis* v. *Hedges*, 40 L. J., Q. B. 276 ; L. R. 6 Q. B. 687 ; 25 L. T. 155 ; 20 W. R. 60.

Incapacity by Act of God.]—Incapacity, by reason of the intervention of an act of God, to perform personal service, is an excuse for its non-performance, notwithstanding a covenant to serve absolute and unconditional in its terms ; because the parties at the time of entering into the covenant must be supposed to have contemplated the continuance of the covenantor's ability to perform the service, as one of the conditions of the contract. *Boast* v. *Firth*, 38 L. J., C. P. 1 ; L. R. 4 C. P. 1 ; 19 L. T. 264 ; 17 W. R. 29.

In contracts to render services purely personal there is implied a condition that the parties will be exonerated from the contract if the performance is prevented by inability resulting from the act of God. *Robinson* v. *Davison*, 40 L. J., Ex. 172 ; L. R. 6 Ex. 269 ; 24 L. T. 755 ; 19 W. R. 1036.

A contract by a musician to play at a concert at a specified time, being a contract dependent on the personal skill of the artiste, is, though no condition is expressed in words, based on the assumption of sufficient health, and is subject to an implied condition that if the musician is, without his own default, disabled by illness to perform, he will be excused. *Ib.*

When Impossible to do Work Properly.]—A workman being bound to do his work in a workmanlike manner, it is no excuse for his doing it so as to be useless, that it was not possible to do it otherwise, unless he told his employer so. *Pearce* v. *Tucker*, 3 F. & F. 136.

In an action for negligence in galvanizing wire sent by the plaintiff to be galvanized by the defendant, it is no misdirection on the part of the judge if he tell the jury that if, when the wire was sent by the plaintiff to the defendant, it was in such a state that he could not galvanize it without spoiling it, it would be negligence on the part of the defendant to galvanize it. *Combe* v. *Simmonds*, 1 W. R. 289.

Plans and Specifications — Warranty.] — A person asking for tenders for the execution of a certain work prepares plans and a specification for the information of intending contractors ; he does not thereby enter into any implied warranty that the work can be successfully executed according to such plans and specification. The contractor for the work cannot therefore sustain an action for damages as upon a warranty should it turn out that he could not execute it according to such plans and specification. *Thorn* v. *London Corporation*, 45 L. J., Ex. 487 ; 1 App. Cas. 120 ; 34 L. T. 545 ; 24 W. R. 932—H. L.

Semble, that the remedy (if any) of the contractor in the event of his not being able to execute the work according to the plans and specifications, will be for compensation as upon a quantum meruit. *Ib.*

The mere employment of an architect to prepare plans and a specification for a house, and to procure a builder to erect it, does not render the employer responsible for the accuracy of the bill of quantities by such architect to the builder. *Scrivener* v. *Pask*, 18 C. B. (N.S.) 785. Affirmed L. R. 1 C. P. 715—Ex. Ch.

—— **Form of.**]—Semble, that it is not a usual course with architects to prepare specifications of the exact quantities of work to be performed by contractors ; but if they do prepare such specifications, they ought to be in detail, to enable parties to judge not only of the gross quantities but also of the quantity of labour to be employed. *Kemp* v. *Rose*, 4 Jur. (N.S.) 919.

2. TIME FOR PERFORMANCE.

When of the Essence of the Contract.]—B. engaged to supply an engine and boilers for a steam vessel of A., in conformity with the drawings and specification furnished by C., the engine to be got under the superintendence of C., and when approved by him at the works, to be delivered by B. into the East India Docks, when B.'s liability would cease. One of the terms contained in the specification was, that the engine should be completed within two months:—Held, that time was of the essence of the contract, and B. was liable to an action at the suit of A. for not delivering the engine and boilers within the two months. *Wimshurst* v. *Deeley*, 2 C. B. 253.

By a building contract, it was agreed that the plaintiffs should, in the most workmanlike manner, and with the best materials, before the 1st of December, 1867, roof in, and before the 15th of May, 1868, completely finish, according to certain specifications, a farmhouse and buildings, but subject to extras, alterations, or additions, which might be made as in the agreement mentioned; and that the time mentioned in the agreement for the completion of the works should be of the essence of the contract, so that if the plaintiffs should not, on the 1st of December, 1867, roof in, and on the 15th of May, 1868, complete and make fit and ready for occupation the works, the plaintiffs should pay to the defendants as and for liquidated damages 3*l.* for every day from and after the 1st of December, 1867, and 15th of May, 1868, until such day as the works should be roofed in and completed, and the defendants might deduct such sum of 3*l.* per day from any moneys which might be due at any time from the defendants to the plaintiffs, or obtain payment of the same in any way they might think fit:—Held, that the plaintiffs undertook to execute not only the works specified, but also all alterations within the time prescribed in the contract, and that it was no implied condition of the contract that the alterations should be such as could reasonably be completed within this time. *Jones* v. *St. John's College, Oxford*, 40 L. J., Q. B. 80; L. R. 6 Q. B. 115; 23 L. T. 803; 19 W. R. 276.

—— **Waiver of Condition.**]—The plaintiff contracted to build cottages by the 10th October, they were not finished till the 15th; the defendant having accepted the cottages:—Held, that the plaintiff might recover the value of his work, on a declaration for work and labour. *Lucas* v. *Godwin*, 3 Bing. (N.C.) 737; 4 Scott, 502; 3 Hodges, 114; 6 L. J., C. P. 205. S. P., *Thornhill* v. *Neats*, infra.

Right to Damages for Default.]—A count stating that, in performing works, the plaintiff retained the defendant, a carpenter, to repair a house before a given day, that the defendant accepted the retainer, but did not perform the work within the time, per quod the walls of the plaintiff's house were damaged, cannot be supported. *Elsee* v. *Gatward*, 5 Term Rep. 143.

3. PENALTIES FOR NON-PERFORMANCE.

Right to Recover—Engineer's Discretion.]—A contractor engaged, by the terms of his contract, to have a line open by the 1st of October. At the end of the specifications annexed to the contract were the words, "The time for the completion of the contract is to be the 1st October, 1864, under a penalty of 50*l.* per week, at discretion of the company's engineer":—Held, that this was a discretion to impose, and not merely to remit; and that, therefore, on behalf of the contractor, there was no liability which could be the subject of set-off by the company in an action by the contractor, until the engineer had actually imposed the penalty. *Munro* v. *Ennis and Athenry Ry.*, 15 W. R. 255.

—— **Grounds of Excuse.**]—To an action for work, the defendant pleaded that it was done under an agreement in writing whereby the plaintiff was to build for him six houses, and completely finish and give up the premises to him on or before a specified day, under a penalty of 1*l.* for each house, for each and every week the works should remain incomplete, and possession withheld after that date, the amount of penalty to be paid out of the moneys which might become due to the plaintiff under the agreement; that the houses remained incomplete, and possession was withheld from the defendant for twelve weeks after and beyond the day stipulated, wherefore he claimed to deduct a certain sum of money. The plaintiff replied, that before any of the penalties had been incurred, it was mutually agreed that the plaintiff should perform other work in and upon the houses, in addition to the work in the first agreement, such additional work to be done within a reasonable time; that the work under the second agreement was so mixed up with the work under the first agreement, being part and parcel thereof, that it became impossible to complete the work in the first until the work under the second agreement was also completed, as the defendant at the time of making that agreement well knew, and that the plaintiff had performed all the work under both agreements within a reasonable time:—Held, a good legal answer to the claim for penalties, on the ground of waiver. *Thornhill* v. *Neats*, 8 C. B. (N.S.) 831; 2 L. T. 539.

A clause respecting penalties, in a contract for the building of a ship, imposed a penalty of 5*l.* a day on B. for every day after a certain day if the ship should not then be delivered to A. The ship was not delivered till long after the day appointed, but a large portion of the delay arose from the interference of A. or his agent:—Held, that no sum in the nature of a penalty was recoverable by A. *Russell* v. *Sa Da Bandeira (Viscount)*, 13 C. B. (N.S.) 149; 32 L. J., C. P. 68; 9 Jur. (N.S.) 718; 7 L. T. 804.

A contractor undertook to execute works, with additions, enlargement, &c., within a specified time, the architect having power to extend the time for completion in proportion to the extra work so ordered. Additions were ordered and executed, and caused delay in completion of the works beyond the time specified, but the architect did not extend the time:—Held, that the contractor was bound to complete the works within the time specified and was liable to pay damages for non-completion within the specified time. *Tew* v. *Newbold-on-Avon School Board*, 1 Cab. & E. 260.

In an action for extras upon a contract for building steamers, the value of which had not been ascertained by the engineer or any third party, the employer pleaded a set-off for penalties for delay, and the contractor replied that the additions ordered made it impossible to complete the vessels in time:—Held, that the set-off for penalties could not be sustained assuming the fact to be as stated in the replication. *West-*

wood v. *Secretary of State for India*, 1 N. R. 262; 7 L. T. 736; 11 W. R. 261. S. P., *Courtnay* v. *Waterford Ry.*, 4 L. R., Ir. 11.

Where, under a building contract the builder agrees to complete certain specified works by a specified date under a penalty for delay, and also undertakes to execute any additional works that may be ordered, if the building owner orders additional works which necessarily delay the completion of the works, he cannot recover penalties for delay, unless the builder has agreed to complete both the specified and the additional works by the specified date. *Westwood* v. *Secretary of State for India* (7 L. T. 736; 11 W. R. 261) followed. *Jones* v. *St. John's College, Oxford* (40 L. J., Q. B. 80; L. R. 6 Q. B. 115) distinguished. *Dodd* v. *Churton*, 66 L. J., Q. B. 477; [1897] 1 Q. B. 562; 76 L. T. 438; 45 W. R. 490—C. A.

—— **Transfer of Contract.**]—By a contract between a waterworks company and a building contractor for the building of a reservoir, it was agreed that the contractor should be liable to certain penalties, as and for liquidated damages, for each day from the date fixed for completion, and the day when the completed works should be delivered to the company. A further clause provided that in certain events the company might terminate the contract, so far as respected its performance by the contractor, but without thereby affecting in any other respect his liabilities, and might enter into possession of the works. The company did terminate the contract, and entered into possession of the works. The defendant, who had been surety for the contractor, then entered into an agreement with the company to complete the works in accordance with the original contract, upon the express condition that nothing in this agreement should be construed to rescind or vary any term in the original contract, but that everything should stand upon the same footing, both during the completion of the works and in finally settling the accounts, as if the latter agreement had not been made. Through no delay of the defendant, but owing solely to the delay of the original contractor, the works were not completed and delivered until some time after the day fixed for completion. The company claimed from the defendant penalties at the rate agreed upon in the original contract:—Held, upon the true construction of the two contracts, that the defendant was liable to the penalties at the rate agreed upon in the original contract. *Yeadon Waterworks Co. and Wright, In re*, 72 L. T. 832—C. A.

—— **Agreement to pay Interest.**]—The plaintiffs claimed in this case to receive from the defendants, the contractors, a sum in their hands, and a further sum for non-completion of the line within the stipulated time. By counterclaim the defendants sought to recover similar sums from the Trustees Corporation on their guarantee. By an agreement of November 21, 1889, the price to be paid for the construction of the works was fixed at the whole capital of the company. The money as received was to be paid to the bankers, and made applicable for payment to the contractors. By agreements of December, 1889, a sale of shares and debentures was arranged, and the bankers guaranteed the interest on the debentures and preference shares up to the time fixed for completion of the works. By agreement of December, 31, 1889, the contractors entered into an undertaking with the company for the payment of such interest. During the progress of the works the business of the bankers was transferred to a limited company, which eventually went into liquidation, and such banking company were allowed to continue as bankers on the guarantee of the Trustees Corporation. The works were not completed for more than a year after the time fixed for completion. Interest on the debentures and preference shares in the meantime became due which was not paid by the contractors, and was paid by the company only so far as concerned the debentures. Subsequently this action was brought, and the matters in dispute were referred to arbitration. The award was made in November, 1894:—Held, on the evidence, that the contractors had not completed within the time fixed, and there was no agreement to relieve them from payment of interest, but that the arbitrator, having found that the company were liable for not taking over the line when it was completed, the contractors were entitled to have the amount for which the company was so liable applied in reduction of the interest. *Alcoy and Gandia Ry.* v. *Greenhill*, 76 L. T. 542.

Set-off.]—*See* SET-OFF.

C. PROPERTY IN MATERIALS.

1. RIGHTS OF EMPLOYER.

Lien on what Materials.]—A railway company entered into a contract (dated December 27th, 1836) with certain builders for building a bridge, all necessary implements and materials to be found by the builders, with power to the company if, in the opinion of its architect, the contractors should not proceed with sufficient expedition, to employ other or additional workmen to complete the works on giving them seven days' notice, and in such case to use the cranes, machines, implements, and materials used on or about the works by the contractors, who were to defray the extra expenses incurred. The contract provided that the company should have a lien upon such machines, implements, and materials as should, for the time being, be in and upon the land, as a security for the completion of the bridge. On the 26th July, 1837, the contractors committed an act of bankruptcy, and a fiat was issued on the 31st. Divers goods, timbers, &c., for building the bridge had been previously deposited by them on it and the land adjoining. These consisted of four kinds:—1. Those actually on the line of the railway. 2. Those upon land adjoining the line (not the property of the company, but inclosed and taken possession of by them under the act). 3. Those deposited upon the line of a temporary railway made by the bankrupts, over land not belonging to the company, for the convenience of conveying materials. 4. A crane erected by the contractors at the end of the temporary railway. On the 31st July the company took possession of all these goods. On the 1st August it gave the seven days' notice, that other workmen would be employed, and on the 2nd they took upon themselves the completion of the bridge, using some of the goods, and retaining the remainder. In trover brought by the assignees for these goods:—Held, that the company had a lien upon the first and second classes, but not upon the third and fourth, which, nevertheless, at the

expiration of the notice, it had a right to retain and use about the work, for the agreement was lawful, not being made in contemplation of bankruptcy. *Hawthorn* v. *Newcastle-upon-Tyne and North Shields Ry.*, 2 Railw. Cas. 288.

Held, also, that these rights of the company were not invalidated by the possession of the bankrupt, under 6 Geo. 4, c. 16, s. 72, he being the true owner; nor by other implements and materials so used having been removed without any objection from the company's authority, the lien being a shifting one, and attaching to such articles as were brought, from time to time, and ceasing as to such only as were removed; nor by the implements and materials not being scheduled. *Ib.*

Absolute Property of Employer.]—A contract by a trader to do certain works contained a clause, that if he should become bankrupt, or delay proceeding with the works, his employer should have power, after seven days' notice to him to proceed, to employ others to do the work. the advances made to the trader before his default should be taken as full payment, and that all tools and materials being upon the works should become the property of the employer. The trader, having delayed to proceed with the works, was served on the 11th April by his employer with notice to proceed. On the 17th April the trader committed an act of bankruptcy; on the 19th April the notice to proceed not having been complied with, his employer took possession of the tools and materials. In June a fiat issued against the trader. In trover by his assignees, against the employer for tools and materials left upon the works by the bankrupt: —Held, that they did not become the property of his employer at the expiration of the seven days' notice, because they had vested in his assignees by relation on the 17th April, before the notice had expired. *Rouch* v. *G. W. Ry.*, 2 Railw. Cas. 505; 5 Jur. 821.

An agreement between a railway company and a contractor provided that, in case the contractor should be guilty of any delay or default in the fulfilment of the contract, the company might take the execution of the works out of his hand, and might use all or any of his plant, materials, or implements; and that in addition to all other rights and remedies which the company might have against the contractor, the company might apply any moneys to which the contractor would otherwise be entitled under his contract towards satisfaction of all losses or expenses occasioned to the company by the delay; and that all the materials, plant, and implements which at the time of such delay or default should be in or about the site of the works, should thereupon become the absolute property of the company, and be valued or sold, and the amount of such valuation or sale credited to the contractor in reduction of the moneys (if any) recoverable from him by the company. The company took the execution of the works out of the contractor's hand under this clause. The contractor brought an action for breach of contract, which, with all matters in difference between the parties, was referred to arbitration: —Held, that the plant and materials did not become the absolute property of the company, unless loss or expense had been occasioned to it; and an interlocutory injunction was awarded to restrain them from removing and selling the plant and materials pending the arbitration. *Garrett* v. *Salisbury and Dorset Junction Ry.*, L. R. 2 Eq. 358; 14 W. R. 816.

—— **Sale of Goods—Delivery—Bankruptcy of Vendor.**]—By the law of Scotland the effect of the appropriation and acceptance of a specific chattel by the contracting parties is to perfect the contract of sale, and to give the purchaser a right to demand delivery, but the property in the chattel does not pass to him until he has obtained delivery under the contract; and s. 1 of the Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 Vict. c. 60), imposes no limitation upon the right of the vendor's creditors to attach goods in his custody until the contract of sale has been so perfected. C. & Son, a firm of engineers, undertook by different contracts to supply and fit up engines in various ships which were being built by the appellants, who were shipbuilders, and advances were made by the appellants as the work progressed. An agreement was subsequently entered into between the parties by which it was stipulated that on payment being made on account of any contract "the portions of the subjects thereof, so far as constructed, and all materials laid down" in C. & Son's yard "for the purpose of constructing the same, shall become and be held as the absolute property of" the appellants, "subject only to the lien of C. & Son" for the "payment of the price, or any balance thereof that may remain due." At the date of this agreement C. & Son were insolvent to the knowledge of the appellants, and the only considerable contracts they had on hand were the contracts with the appellants, which it was then known would result in a loss. It was important to the appellants that the contracts should be completed, and they continued to make advances to C. & Son until the most important contract was completed. After that C. & Son became bankrupt: —Held, that there had been no sale of any specific goods to the appellants within the meaning of s. 1 of the Mercantile Law Amendment (Scotland) Act, 1856, nor delivery of possession, and that the appellants were not entitled, as against the trustee in C. & Son's bankruptcy, to take possession of the materials to be used in carrying out their contracts, which were in C. & Son's yard at the date of their bankruptcy. *Seath* v. *Moore*, 55 L. J., P. C. 54; 11 App. Cas. 350; 54 L. T. 690; 5 Asp. M. C. 586—H. L. (Sc.)

—— **Materials delivered but not fixed—Engineer's Certificates.**] — By an agreement made between the plaintiff company and the defendant, a contractor, for the construction of a railway, it was provided that, once a month, the company's engineer should certify the amount payable to the contractor in respect of the value of the materials delivered, and that such certificates should be paid by the company seven days after presentation:—Held, that the property in the "materials delivered," upon their being certified for by the engineer, passed to the company, though the materials were not fixed. *Banbury and Cheltenham Direct Ry.* v. *Daniel*, 54 L. J., Ch. 265; 33 W. R. 321.

Forfeiture by Contractor—Bankruptcy—Entry by Employer.]—A builder contracted with the trustees of a company to build for them an hotel for a specified sum, and to provide all necessary

materials (except ironwork and papering) to the satisfaction of their superintendent; with a proviso that, in the event of the contractor becoming bankrupt, it should be lawful for the trustees to take possession of the work then already done by him, and put an end to the agreement for the future, paying him a fair proportion for the work actually done. Before the work was completed the contractor (who had received several sums of money on account, to an amount greater than the value of the work done) became bankrupt, having in his workshop some wooden sash frames destined for the hotel, and approved of by the superintendent for that purpose, into which certain pulleys, the property of the trustees, had been inserted; which frames having been brought by the trustees to the hotel, a demand of the sash frames, without mentioning the pulleys, was made by the assignees, to which the trustees returned a general refusal to give them up:—Held, that the property in the sash frames was not vested in the trustees by force of the contract and subsequent approval by their superintendent; secondly, that the circumstances of these pulleys being inserted in the sash frames did not render the trustees tenants in common with the assignees of the entire chattel; thirdly, that the money advanced by the trustees did not give them such a lien on the sash frames as authorised the refusal to deliver them up; fourthly, that, by the true construction of the contract, a property passed to the trustees in such work only as was actually done and affixed to the realty by the bankrupt previously to his bankruptcy; fifthly, that the general demand and general refusal were sufficient evidence of a conversion of the sash frames by the trustees; and that it was not necessary for the assignees to have made a special demand of the sash frames as distinguished from the pulleys. *Tripp* v. *Armitage*, 4 M. & W. 687; 1 H. & H. 442; 8 L. J., Ex. 107; 3 Jur. 249.

A. agreed to build a ship for B. within a certain period, B. paying instalments of the price from time to time; and it was provided, that if A. should fail to complete the ship as stipulated, it should be lawful for B. to enter upon and take possession of the ship (which from the payment of the first instalment was to be the property of B.), and to cause the works to be completed by any persons whom he should employ, using such of the materials of A. as should be applicable to the purpose. A. failed to complete, and B. took possession of the ship. A. committed an act of bankruptcy, and after that B. proceeded to finish the ship, using applicable materials which were in the yard at the time of the act of bankruptcy, but were not then incorporated with the ship, nor had been specifically appropriated by A. for the ship. Some of the materials had been selected by B. before the bankruptcy, and some were piled within the ship, and the rest in a shed adjoining, but none had been actually used before the bankruptcy:—Held, that B. was not entitled to the materials under the agreement, as they had never been used, and therefore that the property in them passed to the assignees of A. *Baker* v. *Gray*, 17 C. B. 462; 25 L. J., C. P. 161; 2 Jur. (N.S.) 400; 4 W. R. 297. See also BANKRUPTCY, vol. ii., cols. 370, et seq.

Right to on Bankruptcy—Protected Transaction.]—A builder contracted with a building club to erect houses for them on their own land. The contract contained a stipulation that, if the contractor should neglect or refuse to proceed with the work in a proper manner to the satisfaction of the architect of the club, or become bankrupt, or insolvent, or otherwise rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the contractor, to appoint other persons to complete the work, and to provide the requisite materials, and also to seize and retain all materials, plant, and implements; provided that the contractor should have drawn money on account of his contract. The contractor commenced the works and carried them on for some time, receiving a considerable sum from the club. On the 30th of May he filed a liquidation petition. On the 2nd of June the architect of the club gave notice to the contractor that, as he had neglected to proceed with the works, they should, on the expiration of two days, employ other means of completing the works, and that he must not remove any materials, implements, or plant from the works, and on the expiration of this notice the club took possession of the materials, implements, and plant:—Held, that the club was entitled, as against the trustee in the liquidation, to retain what they had seized, the seizure being a protected transaction within s. 94 of the Bankruptcy Act, 1869. *Waugh, In re, Dickin, Ex parte*, 46 L. J., Bk. 26; 4 Ch. D. 524; 35 L. T. 769; 25 W. R. 258.

—— **Fraud on Bankruptcy Law.**]—An agreement, dated the 17th of September, 1878, between an owner of land and a builder provided that, in consideration of the rent thereby reserved and certain agreements on the part of the builder, the landowner would, as the builder should erect and completely cover in the messuages thereinafter agreed to be erected by him, demise to him a piece of land for ninety-nine years, at a yearly rent of 300*l.*; and the builder agreed to erect and completely finish forty houses each of a specified value, within fifteen months from the date of the agreement, and vigorously and effectually to proceed continuously with all buildings once commenced by him on the ground, and to accept leases of the land and houses as the same should be erected and covered in. Until the leases should be granted the builder was to hold the premises subject to the payment of the rent, and to the observance and performance of his part of the terms and stipulations of the agreement, and subject to the power of distress and entry in default of any of the stipulations on his part, or on his becoming bankrupt or insolvent, in either of which cases all improvements, materials, and effects on the land, or adjacent thereto, which should not have been actually demised to the builder, should become absolutely forfeited to the landlord, but without prejudice to any right of action which might have accrued to him under the agreement (which was not to be construed as an actual demise), and the landlord was to be at liberty to re-enter and take possession of the ground, premises, chattels and effects, and to relet or sell the same, or otherwise to use and enjoy the same, as fully as if the agreement had never been made. In January, 1879, the builder filed a liquidation petition. At this time there was a large quantity of building materials on the land comprised in the agreement, which had been placed there by the builder. Up to the time of the filing of

the petition the builder had made no default in performing his agreement:—Held, that the provision for forfeiture of the materials to the landlord on the bankruptcy of the builder was void, as contrary to the policy of the bankruptcy law, and that the materials on the land were the property of the trustee in the liquidation. *Jay, Ex parte, Harrison, In re*, 14 Ch. D. 19; 42 L. T. 600; 28 W. R. 449; 44 J. P. 409—C. A. Reversing 49 L. J., Bk. 47.

A shipbuilding contract contained a clause to the effect that if at any time the builder should cease working on the ship for fourteen days, or should allow the time for completion and delivery of the ship to expire for one month without the same having been completed and ready for delivery, or in the event of the bankruptcy or insolvency of the builder, it should be lawful for the buyer to cause the ship to be completed by any person he might see fit to employ, and to employ such materials belonging to the builder as should be then on his premises, and which should either have been intended to be or be considered fit and applicable for the purpose:—Held, that the clause, so far as it related to the bankruptcy of the builder, was a fraud upon the bankrupt law and void as against the trustee. *Barter, Ex parte, Walker, In re*, 53 L. J., Ch. 802; 26 Ch. D. 510; 51 L. T. 811; 32 W. R. 809—C. A.

The buyer having on the liquidation of the builder seized and used materials belonging to him for the purpose of completing the ship:—Held, that such user could not be justified under the contract by a subsequent cesser of work upon the ship. *Ib.*

Liability to Execution.]—A contractor supplied materials to a railway company for the purpose of carrying out his contract. By the terms of the contract it was provided that the materials brought upon the railway should immediately become the absolute property of the company, except that they were to remain under the dominion of the contractor; that, if he should duly complete his contract, the company would give to the contractor, as part of his payment, the unconsumed materials; and that if instead of the contractor the company should use the materials, the company should compensate him in respect of them:—Held, that the materials were not, by the terms of the contract, so absolutely the property of the company as to be seizable by the sheriff under an execution upon a judgment against the company. *Beeston v. Marriott*, 4 Giff. 436; 9 Jur. (N.S.) 960; 8 L. T. 690; 11 W. R. 896.

By a building contract between A., the landowner, and B., the builder, A. was to grant leases on the erection of the buildings, and to assist the building operations by making advances to B., according to the progress of the buildings. The 7th clause of the contract stated that all materials and other things brought on the premises by B. for the purpose of erecting the buildings were to be considered as immediately attached to and belonging to the premises, and were not to be removed therefrom without the consent of A. The 8th clause empowered A. to enter upon and take possession of the land, with all buildings and other materials standing thereon, in case B. should fail to proceed with the completion of the buildings:—Held, that the 8th clause did not qualify the 7th clause, and that the effect of the 7th clause was to give A. such an equitable interest in the materials for the buildings brought afterwards on the land by B. that they could not be taken in execution by a judgment creditor of B. *Brown v. Bateman*, 36 L. J., C. P. 134; L. R. 2 C. P. 272; 15 L. T. 658; 15 W. R. 359. S. P., *Blake v. Izard*, 16 W. R. 108.

Clause vesting Materials in Landowner—Bill of Sale.]—An agreement, by a clause in an ordinary building contract, that all building and other materials bought by the builder upon the land shall become the property of the landowner, is not a bill of sale within the Bills of Sale Act, 1878. *Brown v. Bateman*, (L. R. 2 C. P. 272) and *Blake v. Izard* (16 W. R. 108), followed. *Reeve v. Whitmore* (4 De G. J. & S. 1), and *Holroyd v. Marshall* (10 H. L. C. 191), distinguished. *Reeves v. Barlow*, 53 L. J., Q. B. 192; 12 Q. B. D. 436; 50 L. T. 782; 32 W. R. 672—C. A. *See also* BILLS OF SALE.

Property in or Right of User.]—A contract for executing sewage works made between a contractor and improvement commissioners, provided that all plant brought by the contractor on to the works should be deemed to be the property of the commissioners, and should not be removed during the progress of the work without the written order of their engineer; and in case of suspension of the works by their engineer for any default of the contractor, or of the work being taken out of the contractor's hands, the same should be subject to be used as should be ordered by the engineer in and about the completion of the works. The engineer suspended the works, and the commissioners took possession of the plant and completed the works. The contractor having become bankrupt, and a sum of 2,876*l.* 7*s.* 5*d.* having been certified to be due to the commissioners from him for default under the contract, the commissioners claimed to retain the plant, which was sold by consent for 685*l.*:—Held, first, that the contract gave the commissioners no property in the plant, but only a right of user. *Winter, In re, Bolland, Ex parte*, 47 L. J., Bk. 52; 8 Ch. D. 225; 38 L. T. 362; 26 W. R. 512.

Held, secondly, that this right of user was not such a dealing within s. 39 of the Bankruptcy Act, 1869, as to give them a right to set off the value of the plant against the sum due to them from the contractors. *Ib.*

Construction of Agreement—Substituted Contract.]—A contract for the construction of a railway provided that if the contractor should make default the company might enter and complete the works, and make use of the contractor's waggons, machinery and plant, and also have a lien on the same, with power of sale to reimburse themselves any loss or damage they might sustain by reason of such default. The contractor having become embarrassed, the company made a second contract with him, which provided they should take to and complete the works, and for that purpose should be allowed 10,000*l.*, and the use of all the contractor's plant, &c., which should, on the completion of the works, be restored to the contractor in whatever state it might then be. And this second contract provided that, if it should then be found that anything was due to or from the company from or to the contractor, the amount should be paid by the one to the other within three months after the engineer should have

certified the amount that should be due. And it provided that, "in all other respects the original contract should stand, except so far as it was altered by or should be inconsistent with the second contract." The contractor had made no default down to the date of the second contract. The company completed the works, and the engineer certified that a large sum was due to them from the contractor. The company thereupon refused to deliver up the plant to the contractor, and claimed power to sell the plant, and to reimburse themselves out of the proceeds :—Held, that they were not so entitled, for the provisions of the second contract were in substitution of the corresponding provisions in the first contract; the two instruments were not to be read as one, nor were the clauses of the first, conferring the lien and power of sale, to be taken as incorporated into the second contract. *Hunt* v. *S. E. Ry.*, 45 L. J., C. P. 87—H. L. (E.)

Appropriation by Assent.]—A., a carpenter, contracted with B. to make him a greenhouse for 50*l.* A. completed the greenhouse, informed B. that it was ready, and requested payment. B. paid A. the 50*l.*, and requested A. to keep the greenhouse for him. A. sent the greenhouse to the premises of C., informing him that it belonged to B., and requesting him to take care of it for B.; which C. agreed to do. B. never saw the greenhouse, and knew nothing of its being sent to C. While it remained on C.'s premises, A. became bankrupt:—Held, that the property in the greenhouse vested in B., by his assent to its appropriation to himself. *Wilkins* v. *Bromhead*, 6 Man. & G. 963; 7 Scott (N.R.) 921; 13 L. J., C. P. 74; 8 Jur. 83.

Loss of Subject-Matter.] — A contract was made for new boilers and parts of machinery for a ship, to be paid for by instalments on certificates of the plaintiffs' surveyor. Two instalments of 2,000*l.* were paid, when the ship was lost at sea :—Held, that the contract was substantially one for work and labour to be done by the defendant, and that the two payments of 2,000*l.* each were intended only to be paid on account of a contract to be performed as a whole, and that therefore as a full performance of the contract had been rendered impossible by the loss of the vessel, no property in any portion of the work certified by the inspector to have been properly done, and in respect of which the two sums were so respectfully paid, had passed to the plaintiffs, so as to entitle them to recover in detinue for its detention. *Anglo-Egyptian Navigation Co.* v. *Rennie*, 44 L. J., C. P. 130; L. R. 10 C. P. 271, 571; 32 L. T. 467; 23 W. R. 626.

2. Rights of Person Employed—*See* Lien.

D. REMUNERATION.

1. Recovery of—Amount.

Physician.]—A physician may recover upon an express contract to remunerate him for his attendance. *Veitch* v. *Russell*, 3 G. & D. 198; 3 Q. B. 928; Car. & M. 362; 12 L. J., Q. B. 13.

Barrister.]—So, a barrister, upon an express contract for remuneration, may recover for his services, as an assessor at an election of guardians. *Egan* v. *Kensington Union*, 3 Q. B. 945, n.; 3 G. & D. 204. *But see* Barrister.

Arbitrator.]—So, an arbitrator may recover fees on an express promise, for which he otherwise would have no legal claim. *Hoggins* v. *Gordon*, 1 G. & D. 656; 3 Q. B. 466; 11 L. J., Q. B. 286; 6 Jur. 895.

Accountant—Custom—Clerks.]—On strong evidence of general usage a jury may find that an accountant was entitled to charge at the same rate for his clerks as for himself, even during such portion of the time as he was not himself personally engaged in the work. *Price* v. *Hong Kong Tea Co.*, 2 F. & F. 466.

Members of Society against Committee.]—By the rules of a society for the protection of trade, the professed object of which was to watch the progress of measures through parliament affecting the trade interests, and to protect its members from the practices of the fraudulent and dishonest, the committee had the appointment of the printer and stationer, to be elected from among the members of the society: and to the committee was to be referred the defraying of the expenses, and the applying and the disposing of the moneys of the society. And it was provided by the rules that 10*l.* should be left in the secretary's hands, to meet the current expenses; but that all orders for the payment of money should be drawn by the secretary upon the treasurer at a committee meeting. C. was appointed printer and stationer to the society, and shortly afterwards paid his subscription. The defendants, who were members of the committee, passed the resolutions for the orders for printing and stationery, which were supplied by C.:—Held, that he was not precluded by the rules from suing the defendants, as the rules did not create a partnership between the members of the society; and that it was not to be inferred from the rules that C. looked to the fund and not to the parties who gave the orders. *Caldicott* v. *Griffiths*, 8 Ex. 890; 23 L. J., Ex. 54; 1 C. L. R. 715.

Surveyor's Fees.]—On taxation of a bill of costs, the master allowed an item in respect of surveyor's charges, calculated according to "Ryde's scale," by which a commission of from one-half to 1 per cent. on the amount of the purchase-money, according to the nature of the case, is allowed. A summons to review the taxation in respect of this item was dismissed. *Att.-Gen.* v. *Drapers' Co.*, L. R. 9 Eq. 69; 21 L. T. 651.

No custom exists by which surveyors engaged in compensation cases on the compulsory purchase of property are entitled to be remunerated on a percentage of the sum awarded, according to Ryde's scale. *Debenham* v. *King's College, Cambridge*, 1 Cab. & E. 438.

Quantity Surveyor's Fees.]—The plaintiff, a quantity surveyor, was employed by an architect on behalf of the building owner to take out quantities. The defendant tendered for the work to be done, and in such tender inserted the surveyor's fees among his charges, as payable by him out of the first moneys received by him. His tender was accepted, and he received payments on account. Evidence was given at the trial on behalf of the plaintiff of a custom in the building trade in such cases for the builder to pay the surveyor's fees; but the judge held that there was no privity of contract between the

parties and nonsuited the plaintiff:—Held, that the custom was good, and that the nonsuit must be set aside. *North* v. *Bassett*, 61 L. J., Q. B. 177; [1892] 1 Q. B. 333; 66 L. T. 189; 40 W. R. 223; 56 J. P. 389.

The owner of a house desiring to make alterations, employed an architect to prepare plans. The architect having done so, employed the plaintiff, a surveyor, to take out the quantities which were lithographed, and sent to various builders—including the defendant and his son, who were in partnership—to invite tenders, the circular informing them that the builder whose contract was accepted should pay the plaintiff's fees. The defendant and his son had themselves, previously to the employment of an architect, prepared a plan for the owner, but one with which he was not satisfied. The tender of the defendant and his son was the lowest; but, it being greatly in excess of the expenditure contemplated by the owner, the plaintiff prepared a bill of reduction, but this reduced plan the owner also considered too expensive, and then employed the defendant (whose son had since died) to execute a modification of the original plan prepared in his office. The works were eventually executed by the defendant under a contract, in which it was agreed between the owner and the defendant that the defendant should not be liable for the plaintiff's fees. The plaintiff brought an action for his fees against the defendant, relying on a custom of the building trade, by which the builder whose tender is accepted, or who is employed to carry out the plans, or any modification of them, is directly liable for the surveyor's fees, the owner being liable, if the work is abandoned altogether, or he adopts an entirely independent plan. Evidence to support this custom was given, but one of the plaintiff's witnesses stated that, in his opinion, the liability depended on the agreement between the owner and the builder. The defendant's foreman stated that the works were carried out according to the defendant's own original plan, and that the plaintiff's calculations were not used at all for them. The plaintiff's witnesses stated that there was the strongest similarity between the work as carried out and the plaintiff's reduced plan:—Held, that the plaintiff was not entitled to recover. *Taylor* v. *Hall*, Ir. R. 4 C. L. 467.

Appraiser — Necessity of Licence.] — To a declaration for work the defendant pleaded, that the work consisted of an appraisement of personal property, which the plaintiff appraised in expectation of reward to be therefore paid by the defendant to him, without being duly licensed according to 46 Geo. 3, c. 43:—Held, that the plea was sufficient, without stating that the plaintiff did the work as an appraiser, as it followed the words of the statute. *Palk* v. *Force*, 12 Q. B. 666; 17 L. J., Q. B. 299; 12 Jur. 797.

On Assignment of Contract.]—The defendant contracted with B. and C. for machinery to be made by them for him, and while the work was in progress paid money on account. Before the machinery was finished B. and C. assigned it to the plaintiff. This circumstance was communicated by the plaintiff to the defendant who said that the plaintiff must go on with the work, and that he should see him paid. The machinery having been completed and delivered:—Held, that the plaintiff might sue for the price of such parts of it as had been made by him after the assignment. *Oldfield* v. *Lowe*, 9 B. & C. 73; 7 L. J. (o.s.) K. B. 142.

Two persons contracted with a railway company to execute certain works, and after some progress had been made with the works a judgment creditor of one of the contractors took in execution his share of the plant and effects, which the sheriff sold and assigned to the other contractor; the other contractor assigned the interest of the firm in the contract and all the effects and moneys due or to become due in respect of the same, to a third person by way of security, with power to such assignee to enter on the works and take possession and execute the contract. The assignee afterwards took possession of the works, and proceeded to complete them. The company had notice of the execution and sale by the sheriff of the property of one contractor, and of the assignment to the other, and by the other to the assignee; and the company allowed the works to be continued by the two latter persons respectively, and made payments to them on account. The assignee having, after the insolvency of his assignor, filed a bill in equity against the company for an account of what was due from the company in respect of the contract:—Held, that the subsequent prosecution of the works by the other contractor or his assignee did not necessarily involve any new contract with the company, but was consistent with that theretofore made; and that the contractor, or his assignee, who, without objection from the company, prosecuted the works, could sustain a suit against the company for payment of what had become due from them in respect of the works done under the contract. *Aspinall* v. *L. & N. W. Ry.*, 11 Hare, 325; 1 W. R. 518.

A. and B. having entered into a joint agreement with a railway company to execute a contract for the construction of a tunnel upon the line, A. assigned all his right and interest in the contract to B., and the latter agreed to pay A. a given sum on the completion of the contract. After this agreement had been entered into between A. and B., it became necessary to alter the levels of the line, and B. by agreement with the company, abandoned the contract, and another was entered into between the company and other persons, under which the tunnel at the altered level was completed:—Held, that A. was not in a position, upon the completion of the substituted contract, to maintain an action against B. for the payment of the sum stipulated to be paid by his agreement with A. *Humphreys* v. *Jones*, 5 Ex. 952; 20 L. J., Ex. 88.

A., employed by B. to transport goods to a foreign market, delegated the entire employment to C., who performed it without the privity of B.:—Held, that C. could not recover from B. compensation for such service. *Schmaling* v. *Thomlinson*, 6 Taunt. 147; 1 Marsh. 500. And see *Cull* v. *Backhouse*, 6 Taunt. 148, n.; and *Guy* v. *Gower*, 2 Marsh. 273.

Employment by One Person for Another.]—When one man employs another to do work for a third party, for whose benefit, it is known, the work is to be, and such third party gives instructions about it, there is not, even primâ facie, an implied contract in the first employer to pay: but the question is whether, on the whole, he led the person employed to understand that he, and not the third party, was to

pay for the work. *Chidley* v. *Norris*, 3 F. & F. 228.

A. having a patent for spinning machinery, received an order from B. to have some spinning frames made for him. A. employed C. to make the machines for B., informing B. that he had done so. After the machines had been completed, A. ordered them to be altered; they were afterwards completed according to the new order, and packed up in boxes for B., and C. informed B. that they were ready; but B. refused to accept them:—Held, that C. could not recover the price from B. in an action for work and labour, or materials. *Atkinson* v. *Bell*, 2 M. & Ry. 292; 8 B. & C. 277; 6 L. J. (O.S.) K. B. 258.

Earnings of Personal Labour by Undischarged Bankrupt.]—The plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The plaintiff was adjudicated bankrupt in 1878, and had never obtained his discharge:—Held, that the cause of action for remuneration and damages passed to the trustee, and that the proper course was to add him as co-plaintiff in the action, and give him the conduct of the action. *Emden* v. *Carte*, 51 L. J., Ch. 41; 17 Ch. D. 768; 44 L. T. 636—C. A. Affirming 29 W. R. 600.

2. When Contract Implied.

General Rule.]—Services, however long continued, create no claim for remuneration without a bargain for them, express or implied, from circumstances shewing an understanding on both sides that there should be payment. *Reeve* v. *Reeve*, 1 F. & F. 280.

The plaintiff, in a letter, proposed to take a lease of the defendant's house for a term of years, if the defendant would carry out certain alterations. A correspondence and interviews followed, and it was ultimately agreed that the alterations should be made, the plaintiff to pay 75*l.* towards them. The plaintiff wished to have the drawing-room painted in a particular way, and the defendant consented that the plaintiff should send in his own workmen to paint it, which he accordingly did, and also laid down gas pipes, with the defendant's consent. Ultimately the plaintiff was prevented from taking possession of the house owing to the default of the defendant in carrying out the alterations to be performed by him, and brought an action for breach of the agreement, with the common counts for work done. The correspondence disclosed no agreement sufficient to satisfy the Statute of Frauds:—Held, that the plaintiff could, under the common counts, recover for the value of the work done by the defendant's consent. *Pulbrook* v. *Lawes*, 45 L. J., Q. B. 178; 1 Q. B. D. 284; 34 L. T. 95.

The employing of a professional person implies an undertaking to remunerate him, but the inference may be rebutted by circumstances. *Manson* v. *Baillie*, 2 Macq. H. L. 80.

A defendant employed the plaintiffs to find a purchaser or mortgagee of an estate. Thereupon they went down to the estate, valued it, put it in their books, advertised it in their circulars and in newspapers, and took some journeys, and had communications about it, and ultimately, while negotiating with one N. upon the matter, the plaintiffs and the defendants agreed that a letter should be written by the plaintiffs to N., and that if such letter induced N. to become purchaser or mortgagee, the plaintiffs should be paid 100*l.* N. ultimately became mortgagee, but denied that he was influenced in any way by the letter:—Held, that the plaintiffs could not recover on a quantum meruit for work and labour, with particulars claiming commission as agreed. *Green* v. *Mules*, 30 L. J., C. P. 343.

The plaintiff repaired certain leasehold premises, held by the defendant under a covenant to repair, on a parol promise by the defendant to assign him his lease:—Held, that the defendant upon refusal to assign, was liable to an implied assumpsit to pay the plaintiff for such repairs. *Gray* v. *Hill*, R. & M. 420; 27 R. R. 766.

A lessor contracted to pay his tenant at a valuation, for certain erections pursuant to a plan to be agreed on, provided they were completed in two months: no plan was agreed on, and after the condition broken, the lessor encouraged the lessee to proceed with the work:—Held, that the lessee might recover as for work and labour, on an implied promise arising out of so many of the facts as were applicable to the new agreement. *Burn* v. *Miller*, 4 Taunt. 745; 14 R. R. 655. See also *Thorn* v. *London Corporation*, ante, col. 1784.

Work obtained by Fraud.]—When a person has, by fraud, induced another to perform a service for him, intending not to pay for the performance of it, still there is a liability implied by the law which may be enforced in the same way as an obligation arising out of an express contract. *Rumsey* v. *N. E. Ry.*, 14 C. B. (N.S.) 641; 32 L. J., C. P. 244; 10 Jur. (N.S.) 208; 8 L. T. 666; 11 W. R. 911.

When Written Agreement Unstamped.]—If an agreement cannot be read for want of a stamp, the plaintiff cannot recover the value of the work and labour, although the defendant may have had the benefit of it. *Hughes* v. *Budd*, 8 D. P. C. 478.

Agent's Authority Rescinded.] — When an agent employed for an agreed commission to sell land at a given price succeeds in finding a purchaser at the stipulated price, but the principal, from whatever cause, declines to sell, and rescinds the agent's authority, the latter is entitled to sue for a reasonable remuneration for his work and labour, and is not bound to resort to a special action for the wrongful withdrawal of the authority. In such a case, a contract to pay what is reasonable is implied by law; it is not a question for the jury. *Prickett* v. *Badger*, 1 C. B. (N.S.) 96; 26 L. J., C. P. 33; 3 Jur. (N.S.) 66; 5 W. R. 117.

Promise of a Present.]—A request to a tradesman to shew the defendant's house, and the defendant would make him a handsome present, is evidence of a contract to pay a reasonable compensation for the work and labour bestowed in that service. *Jewry* v. *Busk*, 5 Taunt. 302.

Promise of what is Right and Proper.] — Where a person performed a work for a committee, under a resolution entered into by them, "that any service to be rendered by him should be taken into consideration, and such remunera-

tion made as should be deemed right" :—Held, that an action would not lie to recover a recompense for such work, as the resolution only imported that the committee was to judge whether any remuneration was due. *Taylor* v. *Brewer*, 1 M. & S. 290 ; 21 R. R. 831. S. P., *Briant* v. *Flight*, 5 M. & W. 111 ; 8 L. J., Ex. 189. *Owen* v. *Bowen*, 4 Car. & P. 93.

On a parol contract with a public board to perform work and labour for whatever "recompense the board might allow as right and proper," an action will lie to recover a reasonable recompense, although the board tenders what they consider right and proper. *Bird* v. *M'Gahey*, 2 Car. & K. 707.

Services with a View to a Legacy.]—If a man undertakes to perform services without any view to a reward, but with a view to a legacy, he cannot after the death of a person for whom they were performed set up a demand for such services against the testator's estate. *Le Sage* v. *Cousmaker*, 1 Esp. 187.

A surgeon for several years bestowed surgical attendance on a lady, but, expecting that she would amply compensate him by a legacy, sent in no bill. She died, and left him nothing, whereupon he sued her executors, claiming 500*l*. The jury awarded him 250*l*. The court refused to disturb the verdict. In such a case, to disentitle the party to sue, there must be something more than the mere expectation of a legacy. *Baxter* v. *Gray*, 4 Scott (N.R.) 374 ; 3 Man. & G. 771 ; 11 L. J., C. P. 63.

3. Under Special Contracts.

a. Generally.

Printer—Compositors—Time or Scale.]—An agreement between master printers and journeymen, fixing the amount and mode of calculating the work done and the price to be paid for it, contained the following rule : Standing advertisements or stereo blocks, if forming a complete page, or when collected together making one or more complete pages, in a wrapper or an advertising sheet of a magazine or a review, not to be chargeable ; the compositor to charge only for his time in making them up. The remainder of the matter in such wrapper or advertising sheet, including standing advertisements or stereo blocks not forming a complete page, to be charged for by the compositor, and cast up according to the 8th and 20th articles of the scale as they may respectively apply :—Held, that when there were complete pages containing one of several standing advertisements, the compositor was to charge only for time, but that he was entitled to charge according to the scale whenever a page was composed in part of standing materials and in part of new matter. *Hill* v. *Levey*, 3 H. & N. 702 ; 28 L. J., Ex. 80 ; 4 Jur. (N.S.) 589 ; 6 W. R. 691—Ex. Ch.

Payment in Shares—Winding-up of Company.]—A contractor with a company was by his contract bound, at the option of the company, to accept payment to a certain amount in shares :—Held, that after the company had been ordered to be wound up, the contractor could not be called upon to accept payment in shares, the option not having been exercised till after the winding-up. *Sharon, Ex parte, Alexandra Park Co., In re*, 12 Jur. (N.S.) 482 ; 14 W. R. 855.

Fraud by Employer.]—A. engaged to convey away rubbish for B. at a specified sum, under a fraudulent representation by B. as to the quantity of the rubbish which was to be so conveyed : —Held, that in an action for the value of the work actually done, A. could recover only according to the terms of the special contract ; although when he discovered the fraud, he might have repudiated the contract, and sued B. for deceit. *Selway* v. *Fogg*, 5 M. & W. 83 ; 8 L. J., Ex. 199.

b. Deviations and Alterations.

Payment for—In what Cases.]—Where work is done under a special contract and for estimated prices, and there is a deviation from the original plan by the consent of the parties, the estimate is not excluded, but is the rule of payment so far as the special contract can be traced ; and for any excess beyond it the party is entitled to his quantum meruit. *Robson* v. *Godfrey*, Holt, 236 ; 1 Stark. 275 ; 17 R. R. 629.

Where a tradesman finishes work differing from the specification agreed on, he is not entitled to the actual value of the work, but only to the agreed price, minus such a sum as it would take to complete the work according to specification. *Thornton* v. *Place*, 1 M. & Rob. 218.

A contractor agreed with an incorporated company to do certain works, the contract being under seal. In this contract there was a stipulation that if the company should think proper, at any time, to make any addition to the original works, the company should be at liberty to do so on giving him written instructions for that purpose, signed by the principal or assistant engineer. A verbal arrangement was afterwards made by the principal engineer for the execution of certain extension works, allowing for a variance in the prices, but stipulating, with the exception of that variance, all the provisions of the contract should be considered as applicable to the extension work. This work was executed by the contractor under this arrangement :—Held, that he could not afterwards reject the terms of the contract, and claim remuneration for the work as upon a quantum meruit, nor could he ask in equity for accounts to be taken independently of the contract. *Ranger* v. *G. W. Ry.*, 5 H. L. Cas. 72.

Where work is undertaken on contract at a given price, the employer is not liable to any greater amount by consenting to alterations from the original plan, unless he is either expressly informed, or must necessarily, from the nature of the work, be aware that the alteration will increase the expense. *Lovelock* v. *King*, 1 M. & Rob. 60.

If a builder undertakes a work of specified dimensions and with specified materials, and deviates from the specification, he cannot recover upon a quantum valebat for the work, labour and materials. *Ellis* v. *Hamlen*, 3 Taunt. 52 ; 12 R. R. 595.

If A. agrees to make an article of certain materials for a stipulated price, but puts in materials of a better kind, he is not at liberty on that account to charge more than a stipulated price, nor can he require the article to be returned because the buyer will not pay an increased price on account of the better materials. *Wilmot* v. *Smith*, 3 Car. & P. 453.

Where, in the progress of building work done under a contract, some process more expensive than contracted for was ordered by the architect

with the knowledge of the employer, and the builder's sub-contractor was told it was to be paid extra for :—Held, that there was evidence of a contract to pay him extra for it, and of authority in the architect to make such a contract with him. *Wallis* v. *Robinson*, 3 F. & F. 307.

Alteration of Contract by Architect.]—The plaintiff entered into a written contract with the defendant to build a house on the defendant's land upon certain terms and conditions therein contained, the contract containing certain provisions for payment on the certificates of the defendant's architect, and also as to orders for extra work, the fulfilment of the provisions being, in fact, a condition precedent to the plaintiff's right of payment. The agreement, while in the custody of the architect and after execution by the plaintiff was altered in a material particular, the alteration having reference to the provision with regard to extras. The plaintiff built the house and received payment from time to time for the work so done by him ; the payments were made according to the provisions of the contract, and, in fact, the contract was fully acted on by both parties to it. Payment for extra work under the contract being refused by the defendant on the ground that the plaintiff had not complied with the terms relating thereto, which were a condition precedent to his right to recover for the same, the plaintiff brought an action upon a quantum meruit on the ground that the agreement having been altered by defendant was void, or at least that the defendant could not in any way avail himself of it as against the plaintiff, and that, therefore, the plaintiff could recover on a quantum meruit for extras actually done by him. The written agreement was put in evidence at the trial by the plaintiff himself :—Held, that this being an action on an executed contract for work done on real property, the plaintiff was bound to shew what the terms of the contract were, and that, therefore, the document, though altered in a material part by the defendant's architect, was either still an instrument binding upon the plaintiff, or at least might be looked at to see what the terms were ; and that the plaintiff could not recover on a quantum meruit. *Pattison* v. *Luckley*, 44 L. J., Ex. 180 ; L. R. 10 Ex. 330 ; 33 L. T. 360 ; 24 W. R. 224.

—— **Authority to Vary or Alter.**]—An obligor, who binds himself to perform certain works according to a specification and other detailed and working drawings, to be furnished during the progress of the works, with power for the obligee, by his surveyor, to direct additions or omissions, must, in a plea of performance quoad such parts in which no orders were given by the surveyor to vary and deviate from the original plan, shew an authority in the surveyor to give such directions, or aver that the deviation or variation was an omission or an addition. *Rex* v. *Peto*, 1 Y. & J. 37.

Action on an agreement to build a house according to certain drawings, plans and specifications, and to the satisfaction of the plaintiff, and with the best materials, alleging as breaches that the defendant did not build the house to the satisfaction of the plaintiff, and that he did not perform the work with the best materials ; the defendant pleaded, that he deviated from the drawings by the direction of the plaintiff's architect :—Held, that this plea was bad on general demurrer, the architect not being shewn to be the plaintiff's agent to bind him by any deviation from the drawings. *Cooper* v. *Langdon*, 9 M. & W. 60 ; 1 D. (N.S.) 392 ; 11 L. J., Ex. 222.

A contract for the construction of a railway made between a firm of contractors, and the company formed for the purpose of making and working the railway, provided that the company should not, under any circumstances, be liable to pay to the contractors a greater sum than 1,745,000*l*., and that the contractors should execute and provide, not only all the works and materials mentioned in the first schedule thereto, but also all such other works and materials as in the judgment of the company's engineer-in-chief were necessarily or reasonably implied in and by, or inferred from, such specification, and the plans and sections of the railway and works. The contract also provided that all accounts relating to the contract should be settled by the company's engineer-in-chief, and his certificate of the ultimate balance of the accounts should be final and conclusive on both parties. After the railway had been constructed the contractors filed a bill claiming to be entitled to payment in respect of extra works which they had executed under the directions of the company's engineer-in-chief, alleging that they had done so upon the faith of his promise that they should be paid for the same, but for which he refused to certify: —Held, that the contractors were bound by the contract to complete the railway for a specified sum ; that the company's engineer-in-chief had no power to alter the terms of the contract ; and that the contractors had agreed to abide by the certificates of the company's engineer-in-chief. *Sharpe* v. *San Paulo Brazilian Ry.*, L. R. 8 Ch. 605, n. ; 27 L. T. 669. Affirmed L. R. 8 Ch. 597 ; 29 L. T. 9.

c. Extras.

Contract with Company—Not under Seal.]—An incorporated company entered into a contract, under seal, with A. for the execution of works according to the terms of a specification annexed, which contained provisions for extra work. A. entered upon the work under the superintendence of the company's engineer, and also under such superintendence, and with his approbation, executed extra works, which, however, could not be considered as coming within the provisions of the contract under seal. A. afterwards made a claim upon the company to a much larger amount than that specified by the contract, and the directors paid him a sum generally on account. By 8 & 9 Vict. c. 16, s. 97, the directors of such a company may make parol contracts without the same being reduced into writing, where such contract would, if entered into between private persons, be valid ; and by s. 98, the directors are bound to enter minutes of such contracts in a book ; and, by one of the clauses of the special act of the company under which it was incorporated, three directors constituted a quorum :—Held, that as there was not any evidence that the company had contracted for this extra work under seal, or that the company had entered into a contract for the same under the terms of their special act, or of any general act authorising the same, the company was not liable to A. for the extra work so performed by him. *Homersham* v. *Wolverhampton Waterworks Co.*, 6 Railw. Cas. 790 ; 6 Ex. 137.

A contractor agreed with an incorporated company to do certain works, the contract being under seal. In this contract there was a stipulation that if the company should think proper at any time to make any addition to the original works the company should be at liberty to do so on giving him written instructions for that purpose, signed by the principal or assistant engineer. A verbal arrangement was afterwards made by the principal engineer for the execution of certain extension works, allowing for a variance in the prices, but stipulating that with the exception of that variance all the provisions of the contract should be considered as applicable to the extension work. This work was executed by the contractor under this arrangement:—Held, that he could not afterwards reject the terms of the contract and claim remuneration for the work, as upon a quantum meruit, nor could he ask in equity for accounts to be taken, independently of the contract. *Ranger* v. *G. W. Ry.*, 5 H. L. Cas. 72.

Work comprised in Specification, though not Mentioned.]—A. agreed to build a house for B., who prepared a specification, which contained particulars of the different portions of the work. Under the head of "Carpenter and joiner," there were specified the scantling of the joists for the different floors, the rafters, ridge, and wall, but no mention was made of the flooring. The specification stated that "the whole of the materials mentioned or otherwise in the foregoing particulars, necessary for the completion of the work, must be provided by the contractor." At the foot of the specification A. signed a memorandum, whereby he agreed with B. "to do all the works of every kind mentioned and contained in the foregoing particulars, according, in every respect, to the drawings furnished, or to be furnished, for 1,100*l*. The house to be completed and fit for occupation by the 1st of August, 1858." A. prepared the flooring boards, brought them to the premises, and planed and fitted them to the several rooms, but refused to lay them down without extra payment, because the flooring was not mentioned in the specification, whereupon B. put an end to the contract, took possession of the works, and proceeding to complete the building, used the flooring boards so prepared and fitted by A.:—Held, first, that A. was not entitled to recover for the flooring as an extra, because it was included in the contract, though not mentioned in the specification. *Williams* v. *Fitzmaurice*, 3 H. & N. 844.

Held, secondly, that A. could not maintain trover for the flooring boards left on the premises by him, and subsequently used by B. *Ib.*

When Written Orders stipulated for.]—Where a clause in a contract stipulated that for all extra work written directions should be given, under the hand of the architect:—Held, that a sketch made by the architect, and not signed by him, was not such a direction as complied with the contract. *Myers* v. *Sarl*, 30 L. J., Q. B. 9; 7 Jur. (N.S.) 97; 9 W. R. 96.

When in a builder's written contract it is stipulated therein that any order given for extras shall be in writing, there must be something beyond an order to entitle a person to obtain payment for such extras. *Franklin* v. *Darke*, 3 F. & F. 65; 6 L. T. 291.

A. contracted with B., that B. shall, within a certain time, build A. a ship, complete and ready for sea; and that the price in the contract mentioned should be inclusive of all charges for the ship, finished and fitted perfectly in every respect; and that no charges should be demanded for extras, but any additions which might be made, by order in writing of A.'s agent, should be paid for at a price previously agreed upon in writing. During the progress of the building of the ship, several additions and alterations were made by the direction of A.'s agent, but no written order was given for them. When the ship was nearly completed, A.'s agent gave B. notice that he should require from him a supply of a quantity of articles for the use of the ship. It was stipulated in the contract that the ship should be fitted, formed, and equipped in manner similar in all respects to that which is practised with ships of the same class in her majesty's navy under contracts with the Admiralty. A.'s agent, upon B. at first declining this last-mentioned quantity of goods, afterwards arranged with B. that they might be supplied by B., without prejudice to the question, whether B. was bound to supply them under his contract, and B. supplied them accordingly:—Held, that B. could not recover for extras, alterations or additions made during the course of the performance of the contract, unless where he had received previous written orders, agreeably to the contract. *Russell* v. *Sa Da Bandeira (Viscount)*, 13 C. B. (N.S.) 149; 32 L. J., C. P. 68; 9 Jur. (N.S.) 718; 7 L. T. 804.

As the last-mentioned parcel of goods must be considered to have been delivered on board after the ship was delivered and completed:—Held, that A. was liable for this quantity of goods independently of the contract. *Ib.*

An act empowered a corporation to scour an inland harbour, and they did so by taking up the mud in barges, and letting it out at the mouth of the harbour, so as to be carried down the river. The corporation employed the plaintiff to excavate and remove certain estimated quantities of earth down the river at certain prices, the contract (not noticing the scouring process) providing only for extra work ordered by the engineer of the plaintiff in writing. In consequence of the cleansing process, which was continued while the plaintiff was engaged in the work, the quantity of soil he had to remove was vastly increased by great deposits of mud. The plaintiff applied for and was refused any additional remuneration, and after the work was completed sued the corporation for compensation, but the case of the plaintiff, as stated at the trial, did not shew that the mode of cleansing adopted by the corporation was unusual or unreasonable, and, on the contrary, it appeared rather to be a proper mode of carrying out the powers of the act:—Held, that, as it did not appear that the process was unlawful or wrongful, it was no cause of action. *Rigby* v. *Bristol Corporation*, 29 L. J., Ex. 359.

Account directed of extra works done by a contractor under his contract:—Held, not to authorise an account to be taken of works (other than the specified works) done with the privity of employer without written instructions, but liberty was given to bring an action in respect of works done without such instructions. *Nixon* v. *Taff Vale Ry.*, 7 Hare, 136. Affirmed sub nom. *Taff Vale Ry.* v. *Nixon*, 1 H. L. Cas. 111.

By a contract for the execution of railway works after specifying certain works to be done for a gross sum, it was provided that extra

works which the company or the engineer should by any writing under his hand require to be executed, should be deemed to be included in the contract, and should be paid for at a certain rate, and that the contractor should not be entitled to make any claim for any alteration or addition which he might make without such written and signed instructions :—Held, that a suit for an account of the moneys due to the contractor in respect of works done under the contract was a proper subject of jurisdiction in equity. *Ib.*

A builder agreed, by a written contract under seal, with a board of guardians, to build a workhouse according to a certain plan for a certain sum ; and any deviations from the plan which the board or their architect might order in the course of the work were to be valued in a particular manner, and the value added to or deducted from the stipulated price as the case might be ; but it was expressly provided that no allowance was to be made to the builder for additional work, unless the same should be ordered in writing. After the builder had been paid for all the work done pursuant to the written agreement, he filed a bill against the board, alleging that much additional work had been done with the knowledge and sanction of the board, and on the faith of an assurance from their agent that no written order for it was necessary, and praying an account and payment of what was due in respect of such work. On a general demurrer to the bill :—Held, first, that the subject-matter of the claim was not of itself within the jurisdiction of this court ; and, secondly, that the alleged fraud on the part of the board in taking advantage of the want of a written order to avoid paying for work which they had sanctioned, would not give the court jurisdiction, and that bills to enforce parol contracts within the Statute of Frauds, on the ground of part performance, were different, the court having jurisdiction in those cases over the original subject-matter, viz., the contract, and the question being whether that jurisdiction was ousted by the want of a writing, whereas, here the attempt was to make the want of a writing the ground of jurisdiction. *Kirk* v. *Bromley Union*, 2 Ph. 640 ; 17 L. J., Ch. 127 ; 12 Jur. 85.

—— **Insufficiency of Stamp — Evidence.**]—When work had been done under a written contract not admissible for want of a stamp, evidence of extra work cannot be given without proof of the written contract, and if that is inadmissible the judge cannot look at it for the purpose of seeing whether or not the proposed evidence refers to it. *Buxton* v. *Cornish*, 1 D. & L. 585 ; 12 M. & W. 421 ; 13 L. J., Ex. 91 ; 8 Jur. 46 ; S. P., *Jones* v. *Howell*, 4 D. P. C. 176, and *Vincent* v. *Cole*, 3 Car. & P. 481.

Assessment of Amount—Condition Precedent.]—In a contract for building steamers (to the satisfaction of the engineer), to be completed within six months, with penalties for delay, it was provided that the engineer might allow an extension of time, and might also order additions or alterations by orders in writing, and that the value of such additions or alterations should be ascertained, and added to or deducted from the contract price, as the case might be ; and further, that any dispute or difference as to such additions or alterations should be referred to the engineer, whose decision or valuation should be final. Additions and alterations were duly ordered, and the steamers were not completed in time. In an action for extras, the value of which had not been ascertained by the engineer or any third party, the employer pleaded a set-off for penalties for delay, and the contractor replied that the additions ordered made it impossible to complete the vessels in time :—Held, that the action was not maintainable until the value of the additions had been ascertained. *Westwood* v. *Secretary of State for India*, 1 N. R. 262 ; 7 L. T. 736 ; 11 W. R. 261.

See also ARBITRATION (CONDITION PRECEDENT).

Liability for—Construction of Contract.]—A. agreed to do for B. & Co. all the woodwork on an iron ship which they were building for M. & Co., according to a tender, the whole to be completed for 38,000*l.* The contract or tender contained the following clause : "Any important work not mentioned in this tender that may be required to be done by the owners to be paid for by them, in addition to the amount herein specified." The work was undertaken by A. for B. & Co., upon the faith of a guarantee by C., as follows : "In consideration of your contracting with Messrs. B. & Co. for the woodwork of an iron ship now building by them for Messrs. M. & Co. we hereby guarantee the payment to you according to the contract." The word "important" in the contract was inserted by A. with the consent of B. & Co. after the guarantee was signed by C. : —Held, that the contract bound B. & Co. for extra work done, they being the persons referred to therein as the owners, and that the insertion of the word "important" had no material effect upon the liability of C. under the guarantee. *Andrews* v. *Lawrence*, 19 C. B. (N.S.) 768.

Action by Sub-Contractor.]—A sub-contractor suing an employer for work extra the original contract, must put in that contract, if in writing, and also prove a separate and distinct contract with the employer to do the work sued for. *Eccles* v. *Southern*, 3 F. & F. 142.

Under a Certificate.]—*See* post, col. 1813.

4. COMPLETION OF CONTRACT.

Necessity of—No Claim for Unfinished Work.]—Upon an entire contract—as to repair a damaged chandelier and make it complete for 10*l.*—an action will not lie for the value of a partial repair, though such repair was beneficial to the defendant, and consisted partly in a supply of fresh materials, such materials not having been demanded back. *Sinclair* v. *Bowles*, 4 M. & Ry. 1 ; 9 B. & C. 92 ; 7 L. J. (O.S.) K. B. 178.

Where A. contracts to do work and supply materials upon the premises of B. for a specific sum, to be paid on completion of the whole, A. is not entitled to recover anything until the whole work is completed, unless it is shewn that the performance of his contract was prevented by the default of B. *Appleby* v. *Meyers*, 36 L. J., C. P. 331 ; L. R. 2 C. P. 651 ; 16 L. T. 669—Ex. Ch. Reversing 14 W. R. 835. *See also* ante, col. 1783.

Time for Payment.]—Where A. contracts to do work on materials supplied to him by B. (as where he contracts to survey a parish and to set down the results of such survey in a map, upon paper furnished to him by B.), his right to sue for work and labour is complete as soon as he

has finished the work, and has given B. a reasonable opportunity of ascertaining its correctness; and if (there being no contract for a specific price) he demands more for the work than a reasonable price, and refuses to deliver it except on payment of such larger price, that does not preclude him from suing for and recovering a reasonable price. *Hughes* v. *Lenney*, 5 M. & W. 183; 2 H. & H. 13; 8 L. J., Ex. 177.

Loss of Subject-Matter.]—The plaintiffs contracted with the defendant to erect machinery upon his building and premises, and in his occupation, for a specified sum, and to keep the whole in order under fair wear and tear for two years. When the machinery was only partly erected, a fire accidentally broke out in the buildings, and, without any fault by either party, destroyed both the buildings and machinery then erected thereon:—Held, that the plaintiffs were not entitled to recover anything in respect of any portion of the machinery which had been erected and destroyed, as the whole work contracted to be done by them had not been completed. *Appleby* v. *Meyers*, supra. S. P., *Adlard* v. *Booth*. 7 Car. & P. 108.

An action lies by a shipwright for work and labour done, and materials delivered in repairing a ship, though burnt in dock before the repairs are completed. *Menetone* v. *Athawes*, 3 Burr. 1592.

A contract was made for new boilers and parts of machinery for a ship, to be paid for by instalments on certificates of the plaintiffs' surveyor. Two instalments of 2,000*l.* were paid, when the ship was lost at sea:—Held, that the contract was substantially one for work and labour to be done by the defendant, and that the two payments of 2,000*l.* each were intended only to be paid on account of a contract to be performed as a whole, and that therefore as a full performance of the contract had been rendered impossible by the loss of the vessel, no property in any portion of the work certified by the inspector to have been properly done, and in respect of which the two sums were so respectively paid, had passed to the plaintiffs, so as to entitle them to recover in detinue for its detention. *Anglo-Egyptian Navigation Co.* v. *Rennie*, 44 L. J., C. P. 130; L. R. 10 C. P. 271, 571; 32 L. T. 467; 23 W. R. 626.

Held, also, that the plaintiffs could not recover back the two sums of 2,000*l.* or either of them in an action for money had and received. *Ib.*

Exoneration—Incapacity by Act of God.]—Incapacity by reason of the intervention of an act of God to perform personal service is an excuse for its non-performance, notwithstanding a covenant to serve absolute and unconditional in its terms, because the parties must be supposed to have contemplated the continuance of the covenantor's ability to perform the service as one of the conditions of the contract. *Boast* v. *Forth*, 38 L. J., C. P. 1; L. R. 4 C. P. 1; 19 L. T. 264; 17 W. R. 29.

In contracts to render services purely personal—as, for example, a contract by a musician to play at a concert—there is coupled a condition that the parties will be exonerated from the contract if the performance is prevented by inability resulting from the act of God. *Robinson* v. *Davison*, 40 L. J., Ex. 172; L. R. 1 Ex. 269; 24 L. T. 755; 19 W. R. 431.

Bankruptcy of Contractor before Completion—Substituted Price.]—A member of the Stock Exchange contracted with another member to purchase certain shares. Before completion the purchaser failed to meet his engagements, and was declared a defaulter on the Stock Exchange. By the rules of the Stock Exchange the price of shares, contracted to be bought or sold by such a defaulter, are to be fixed by the official assignee of the Stock Exchange, and the differences paid to or claimed from the assignee:—Held, that the price fixed by the assignee is substituted for the original contract, and is a liquidated sum due under the contract, and, therefore, that a bankruptcy petition may be founded upon a claim for such price. *Ward, Ex parte, Ward, In re*, 52 L. J., Ch. 73; 22 Ch. D. 132; 48 L. T. 332; 31 W. R. 112—C. A.

Performance Prevented or rendered Impracticable by Employer.]—The defendants employed an architect to draw a specification of a building, and he employed the plaintiff to make out the quantities; the plaintiff's work was to be paid for by the successful competitor for the building contract; but a dispute having arisen between the architect and the defendants, they refused to go on with the building, upon which the architect sent in his bill to them, together with the plaintiff's bill for making out the quantities; the defendants paid the architect's account only:—Held, that as the defendants had by their own acts rendered it impossible that the successful competitor should defray the plaintiff's charges, according to the understanding, they were liable to him for the amount of his charges. *Moon* v *Witney Union*, 3 Bing. (N.C.) 814; 5 Scott, 1; 3 Hodges, 206; 6 L. J., C. P. 305. See *Planché* v. *Colburn*, 8 Bing. 14; 1 M. & Sc. 51; 1 L. J., C. P. 7.

Where, by the terms of a contract, a service to be performed by A. for B. is to be paid for in goods, A. cannot declare for the value of the service, but must sue on the special contract. But if B. by his own act renders the delivery of the goods impossible, A. may sue for the value of the service. So if B. allows the goods to be sold under an execution against him. *Keys* v. *Harwood*, 2 C. B. 905; 15 L. J., C. P. 207.

A printer having agreed to print for the defendant a work which was to contain a dedication, to be thereafter sent to him, printed the work, and also the dedication, but on the latter being returned to him revised, discovered for the first time that it contained libellous matter, whereupon he refused to continue the printing of it; and on the defendant refusing to accept or pay for the work, without the dedication, brought an action against him for the price of the work, without the dedication:—Held, that the dedication being libellous, the printer was justified in refusing to publish it, and was entitled to recover the expense of printing the body of the work. *Clay* v. *Yates*, 1 H. & N. 73; 25 L. J., Ex. 237; 2 Jur. (N.S.) 908; 4 W. R. 557.

The defendant, a builder, contracted with the plaintiff, a building surveyor, that if the plaintiff would supply the quantities for a certain projected building, the defendant would, if he was accepted as the building contractor, pay the plaintiff out of the first instalment; the plaintiff furnished the quantities, but the defendant subsequently abandoned the building contract:—Held, first, that it was implied that the defendant should duly proceed with the building contract. *M'Connell* v. *Kilgallen*, 2 L. R., Ir. 119.

Held, secondly, that performance of his contract with the plaintiff having been rendered

impossible by his own act, he was bound to pay the plaintiff for the quantities furnished. *Ib.*

A count stated that, by a deed between the plaintiff and the defendants acting under the Public Health Act, 1848, as the local board of health for a borough, the plaintiff contracted with them that he would execute and complete all the works mentioned in a specification annexed, in and about the constructing a sewer in the town, according to the specification and a plan prepared by a surveyor; the several portions of the works to be completed on or before the time mentioned in the specification, and to the satisfaction of the surveyor. And it was provided that if the plaintiff, from bankruptcy, insolvency, or any other cause whatever, should be prevented or delayed in proceeding with the works, or should not proceed to the satisfaction of the surveyor, it should be lawful for the local board, after three days' notice, signed by their clerk, to be given to the plaintiff of their intention so to do, to employ any other person to complete the work, and, at the expiration of the notice, the deed should, at the option of the local board, become void as to the plaintiff, and the amount already paid to him should be considered the full value of the works executed by him up to that time, and no further claim should be made for contract or additional works, and the materials at that time on the premises should become the property of the board without further payment for the same. And it was provided that one-fourth of the whole amount should be paid when one-third of the works should have been certified by the surveyor to have been completed to his satisfation, another fourth part when two-thirds of the works should have been so completed, another fourth part on completion of the works so certified, and the remaining part within two months from that time. Averment, that the plaintiff in part executed the works, and was ready to complete the works:—Held, that the declaration was good, since there was an implied contract on the part of the defendants to allow the plaintiff to complete the work subject to the provisions for determining the employment in the events mentioned. *Davies* v. *Swansea Corporation*, 8 Ex. 808; 22 L. J., Ex. 297.

—— **Bankruptcy of Employer.**]—A company employed a broker to dispose of their shares, on the terms that he should be paid 100*l.* down and 400*l.* in addition, upon the allotment of the whole of the shares of the company. The broker disposed of a considerable number of shares when the company was wound up:—Held, that the broker was prevented earning the 400*l.* by the act of the company, and was therefore entitled to recover a proportion of the 400*l.* *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C. B. (N.S.) 733; 34 L. J., C. P. 15; 10 Jur. (N.S.) 1129; 11 L. T. 345; 13 W. R. 95.

—— **When Payment Conditional in Certain Events.**]—An agreement was made between the plaintiff, who was an architect, and A., who was possessed of land, by which the plaintiff agreed to lay out the land for building purposes, and to make all the requisite plans, on the condition that he should make A. no charge for such services, but that, in the event of the land being disposed of for building purposes, the plaintiff should be appointed the architect on A.'s behalf, and parties building on the land should pay the plaintiff a percentage on the outlay, provided they did not employ him as their architect; but that, in the event of A. or his executors wishing to dispense with the plaintiff's services at any time, he or they should be at liberty to do so, on remunerating him for his time and trouble in making the preparations. The declaration alleged that the plaintiff had prepared all the plans, according to the agreement, and that the land had not been disposed of for building purposes; and that after the death of A. his executors dispensed with the further services of the plaintiff in respect of the contract, and put it out of their power to dispose of any part of the land for building purposes, whereby the plaintiff claimed to be paid for making the preparations:—Held, that the plaintiff was not entitled to recover, as there was no understanding on the part of A. to dispose of the land for building purposes only; and the land not having in fact been so disposed of, the plaintiff was not, according to the contract, to be remunerated. *Moffatt* v. *Laurie*, 15 C. B. 583; 24 L. J., C. P. 56; 1 Jur., (N.S.) 283; 3 W. R. 252.

Mutual Abandonment.]—The plaintiff agreed with the defendant to prepare and issue advertisements and notices for the purpose of selling tickets to see a procession, and to use his best endeavours in selling them, being paid 10*l.* per cent. upon the proceeds of the tickets sold. The plaintiff issued the advertisements and notices, but before the sale of the tickets the defendant countermanded his authority to sell, and the plaintiff therefore sold none, but sent the applicants to the defendant. The plaintiff then brought an action for the work done:—Held, that he was not entitled to recover in this form of action, it not being shewn that the contract was mutually abandoned. *De Bernardy* v. *Harding*, 8 Ex. 821; 1 C. L. R. 884; 22 L. J., Ex. 340; 1 W. R. 415.

Readiness to Complete — Questions for the Jury.]—In an action by architects whose plans, after having been accepted, are rejected on the ground that the work cannot be done for the amount of their estimates, it is for the jury whether it is an express or implied condition of the contract, that the estimates shall be reasonably near the actual cost. *Nelson* v. *Spooner*, 2 F. & F. 613.

The plaintiffs declared upon a contract, by which they were to manufacture and fix complete for the defendant a copper necessary for the fitting up of a brewhouse, according to a specification; and the defendant was to permit the plaintiffs to put up the work, and pay for the same on the delivery and fixing up thereof; assigning as a breach that the defendant would not permit the plaintiffs further to proceed with and to complete the work, but discharged them therefrom. Upon the trial of an issue on the readiness of the plaintiffs to manufacture and complete the copper, it was left to the jury to say, upon the evidence, which party was in fault in occasioning the contract not to be carried into effect. Held, no misdirection. *Pontifex* v. *Wilkinson*, 1 C. B. 75.

The plaintiff contracted to fit up for the defendant a brewery at the house of a third person, the whole to be fixed complete for a certain sum, nothing being said about the time or mode of payment. When a portion of the

work was done, the plaintiff refused to complete it without security, which the defendant refused to give. In an action against the defendant for not permitting the plaintiff to proceed with or complete the work, or paying for what was done, it was left to the jury to say by whose default the work was stopped. The jury having found a verdict for the defendant the court declined to interfere. *Pontifex* v. *Wilkinson*, 2 C. B. 349.

5. Subject to Certificates.

Architect's Certificate, Effect of.]—In a building contract, the architect's certificate is final, as between the builder and the building owner, but not as between the building owner and the architect himself. *Rogers* v. *James*, 56 J. P. 277—C. A.

When Certificate a Condition precedent.]—In a building contract it was provided that the contract should not be vacated by any additions or alterations, but that the price to be paid for such alterations should be settled by a surveyor, who was to be sole arbitrator in settling such price, and all disputes arising in or about the premises; and the employer agreed to pay certain proportions of the contract price upon receiving a certificate in writing, signed by the surveyor, testifying that certain portions of the building had been done, and his approval thereof, and the balance that should be found due after deducting the previous payments, within two months after receiving the surveyor's certificate that the whole of the works had been completed to his satisfaction:—Held, that the surveyor's certificate was a condition precedent to the builder's right to sue upon the contract in respect of alterations. *Morgan* v. *Birnie*, 3 M. & Scott, 76; 9 Bing. 672.

Where a building agreement contained a proviso that no instalment should be paid, unless the plaintiff delivered to the defendant a certificate, signed by the surveyor of the defendant, that the works were performed according to a specification:—Held, that the want of a certificate was a good defence under the general issue to an action for the instalments. *Milner* v. *Field*, 5 Ex. 829; 20 L. J., Ex. 68.

Upon an application for production by the defendant of an agreement between the plaintiff and the defendant, in order that it might be made a rule of court under the Common Law Procedure Act, 1854, s. 17, it appeared that the agreement was for the erection of four houses by the plaintiff, which were to be inspected by S. and C., or some other architect or valuer, to be appointed by the defendant, who were to give a certificate of the progress and value of the works. The agreement contained a power for the defendant to employ other persons to execute the contract, if "the plaintiff should become bankrupt . . . or if there should be any unreasonable delay or unsatisfactory conduct on his part with regard to the erection of such buildings, or with regard to any work, matter or thing connected therewith: the fact of such delay or unsatisfactory conduct to be ascertained and decided by S. and C., or other the architect or valuer for the time being, against whose decisions there should be no appeal":—Held, rejecting the application, that the agreement was not a "submission to arbitration by consent," within s. 17, as the decision of the architect was not in the nature of a judicial proceeding, but was intended to be the sole foundation of any liability on the part of the defendant. *Wadsworth* v. *Smith*, 40 L. J., Q. B. 118; L. R. 6 Q. B. 332; 19 W. R. 797.

In an action on a builder's contract, which provided that all the works should be left complete and clear, to the satisfaction of the architect, and did not contain any provision for payment by instalments:—Held, that the completion of the works to the satisfaction of the architect was a condition precedent to the builder's right to recover on foot of the contract. *Richardson* v. *Mahon*, 4 L. R., Ir. 486.

Where by a contract an engineer is interposed between the parties to it, and made the absolute judge of the performance of the works, there is no right in the one party to demand payment, and no liability on the other to pay, throughout the contract, unless the condition of obtaining a valuation by the engineer and his certificate has been fulfilled. *Scott* v. *Liverpool Corporation*, 3 De G. & J. 334; 28 L. J., Ch. 230; 5 Jur. (N.S.) 104; 7 W. R. 153.

—— **Condition Waived.**]—By a building agreement between A. and B., it was stipulated that A. should complete for a specified price certain works on certain houses of B., the whole to be completed on a specified day, and to be done to the satisfaction of a surveyor named, upon whose approval payment was to be made. A. failed to complete the work. He sued B. on the agreement for the agreed price, and for a reasonable price according to measure and value. There was evidence, on the trial, that B. had resumed possession of the houses, and was so far enjoying the fruits of A.'s labour:—Held, that there was no evidence in support of the claim, for that he could not recover on the special count, not having fulfilled it; and that the mere fact of B.'s taking possession of his own land, on which the buildings had been erected, or where repairs had been done, or alterations made to a building thereon, did not afford an inference that he had dispensed with the conditions of the special agreement under which the works were done, or of a contract to pay for the work actually done according to measure and value. *Munro* v. *Butt*, 8 El. & Bl. 738; 4 Jur. (N.S) 1231.

Nature and Sufficiency of Certificate.]—Where the architect checked the builder's charges, and sent them to the employer:—Held, that this did not amount to such a certificate of satisfaction as to enable the builder to sue the employer, although he had not objected to pay, on the ground that no sufficient certificate had been rendered. *Morgan* v. *Birnie*, 3 M. & Scott, 76; 9 Bing. 672.

By a contract for building a borough gaol it was provided, that "no alterations should be made without the written authority of the architect, by whom the value of such alterations should be ascertained; and that no allowance for alterations should be made, unless the value of the same was ascertained at the time the work was done, and entered in a book, such entry to be submitted to and approved of by the architect." "That no payments should be made to the contractors, except on the production of a certificate from the architect, that a certain amount of work had been done, and that the architect should deliver his certificate thereof at the end of every fourteen days;" and "that the contractors should be entitled to receive at the end of every fourteen

days the amount for which the architect should have given such certificate, the amount of such certificate to be less, by certain varying proportions, than the value of the work done, until ninety per cent. of the whole should be completed; that no further payments should be made to the contractors until three calendar months after the architect should have certified the completion of the whole work to his satisfaction, when one-half of the remainder should be paid, and the balance at the end of twelve months from the date of the architect's certificate of completion" :—Held, that the architect's certificate of final completion was sufficient, without mentioning the amount remaining due. *Pashby* v. *Birmingham Corporation*, 18 C. B. 2.

A building contract contained a clause for payment of the price of the building by instalments, with a proviso that, before each payment, the architect should certify that the works were carried out to his satisfaction :—Held, that the certificate need not be in writing. *Roberts* v. *Watkins*, 14 C. B. (N.S.) 592; 32 L. J., C. P. 291; 9 Jur. (N.S.) 128; 8 L. T. 460; 11 W. R. 783.

Who disqualified from giving Certificate.]—Where payments to a contractor are to be certified for by the engineer of a railway company, he is not disqualified from so doing on account of his having become lessee of the railway, at a rent depending on the amount so certified for. *Hill* v. *South Staffordshire Ry.*, 11 Jur. (N.S.) 192; 12 L. T. 63—L.JJ.

A building contract contained a clause, appointing the architect arbitrator in respect of extra works; the architect had guaranteed to his employer that the total cost should not exceed a specific sum, but that fact had not been disclosed to the builder at the time when he signed the contract :—Held, that the guarantee was a material fact tending to influence the architect's decision, and as it was not disclosed to the builder, he was not bound by the submission to the architect's arbitration, and the court would perform the part of arbitrator in the matter. *Kimberley* v. *Dick*, 41 L. J., Ch. 38; L. R. 13 Eq. 1; 25 L. T. 476; 20 W. R. 49.

Where a builder by his contract bound himself to abide by the decision and certificates of an architect as to the amounts to be paid for his work, not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a specified amount, although he refused to guarantee that amount, the court did not consider that the decision of the architect made under such a bias as binding, but gave directions so as to ascertain under the authority of the court how much remained justly due to the builder. *Kemp* v. *Rose*, 1 Giff. 258; 4 Jur. (N.S.) 919.

Certificates are not Written Orders.]—A contract for the construction of large iron buildings for a lump sum, contained a clause, that no alterations or additions should be made without a written order from the employers' engineer, and no allegation by the contractors of knowledge of, or acquiescence in, such alterations or additions on the part of the employers, their engineers or inspectors, should be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations and additions. During the execution of the contract the contractors alleged it was impossible to cast certain iron trough-girders of a specified weight, and subsequently, they were allowed to erect girders of a much heavier weight; and the actual weights were entered in the engineer's certificates issued from time to time authorising interim payments. On the completion of the contract the contractors claimed a considerable amount in excess of the contract price for the extra weight of metal supplied :—Held, that the engineer's certificates were not written orders, and the claim was therefore excluded by the terms of the contract. *Tharsis Sulphur and Copper Co.* v. *M'Elroy*, 3 App. Cas. 1040—H. L. (Sc.)

By an agreement under seal between the plaintiff and the guardians of the poor, after reciting that he had proposed to contract to erect a workhouse and perform all the works particularised in a specification prepared by the architects for 5,500*l.*, the plaintiff agreed with the guardians that he would in a workmanlike manner do all the works mentioned in the specification, at the times mentioned, and would completely finish the whole by the 24th June, 1840. That if the architects should think proper to make any alterations or additions in the progress of the works, they should give to the plaintiff written instructions for the same, signed by them; and the plaintiff should not be considered as having authority to do such additional works without such written instructions. And the guardians agreed with the plaintiff that they should pay him 5,500*l.* at the rate of 75*l.* per cent. on the amount of the work done, and the remaining 25*l.* per cent. within thirty days from the full completion of the contract, provided that the plaintiff should not be entitled to receive any payment until the works on which such payments were made to depend should have been completed to the satisfaction of the architects, who should examine and make a valuation of the amount so completed from time to time, and certify the same to the defendants, after which the plaintiff should be entitled to receive the amount of payment at the rate aforesaid, which should be then due in respect of the work so certified to be completed. During the progress of the works, the architects from time to time delivered to the plaintiff certificates in the form of letters signed by them and addressed to the clerk of the board of guardians, stating that the board might safely advance *l.* to the plaintiff on account of works executed. Certificates in this form to the amount of 5,000*l.* were given, but in fact payments were made by the guardians to the amount of 6,300*l.* These payments were made generally in respect of the works actually done, without distinguishing the one description from the other. No written directions were given by the architects for the additional works, except that letters were in evidence signed, some by one of the architects, and others by both, in which allusion was incidentally made to some of the additional works in progress, and containing suggestions as to the mode of executing them, and save also that long after the works were complete, the architects, on the application of the plaintiff, made a valuation of the additional works, which they estimated at 3,133*l.*, and signed a paper stating that to be the amount of their valuation :—Held, first, that the deed, in requiring written directions, meant written directions before the additional work should be done, and that the certificates, letters and final valuation of the architects did not amount to such directions.

Lamprell v. *Billericay Union*, 3 Ex. 283; 18 L. J., Ex. 282.

Held, secondly, that the payments made on the certificates of the architects were to be treated as sums paid on account of whatever the plaintiff might eventually be entitled to recover, and the want of written directions being an answer to any claim in respect of the additional works, he could not apply any part of the 6,300*l.* in satisfaction of them. *Ib.*

Effect of Certificate upon Stipulation for Written Orders for Extras.]—A. engaged B. to build a market house, and the contract and conditions stipulated that no deviations in the way of extras or omissions should be made without the written authority of an architect, and that they should be priced at the contract prices; that no claim should be made for extra or additional works without the production of the written order of the architect, signed when the intructions for them were given; that certain proportionate payments should be made from time to time, on the certificate of the architect, that the sum claimed was a proper one, the architect's opinion to be final as to the value; that if any dispute should arise as to the meaning of the specifications or contract, the architect was to define the meaning, that his decision as to the nature, quantity and quality of the works executed, or to be executed, should be final, and also his decision as regarded the value of the extras and additions, which was to be regulated by the contract of price. The architect gave a certificate that a certain sum, which included extras and additions, was to be regulated by the contract price. The architect gave a certificate that a certain sum, which included extras and additions, was proper to be paid:—Held, that neither party could raise the question of whether or not there was a sufficient order in writing; that a pump, drains, &c., though separately ordered, came within the meaning of works connected with the contract, and that the architect's decision as to their value was final. *Goodyear* v. *Weymouth and Melcombe Regis Corporation*, 1 H. & R. 67; 35 L. J., C. P. 12.

The plaintiff contracted to execute for the defendants specified works, and also all such additional works as should be deemed necessary by the defendants' principal or resident engineer. The contract deed provided that no extra works should be made without an order in writing, signed by the principal engineers or engineer, or by the resident engineer; that such extra works should be valued by such engineers or engineer, having regard to the schedule of prices in the specification, and that the decision of such engineers or engineer should be final as to the value of such extra works; that if any extra works should be ordered, the contractors should send in accounts thereof within one month; and that in default of their doing so, the defendants should not be bound to pay for them. That the defendant should not be bound to pay for any works, except upon the production of a certificate signed by some principal or resident engineer; and that the principal engineers or engineer for the time being should be the exclusive judges of the execution of the works and of everything connected with the contract; and that the certificates under their or his hands or hand should be binding and conclusive on both parties:—Held, that the engineers having given a certificate for the extra works, the defendants were precluded from setting up as defences to the action for the price of the extra works, that the extra works had not been ordered in writing, and that no accounts had been sent in for them, as required by the deed. *Connor* v. *Belfast Water Commissioners*, Ir. R. 5 C. L. 55.

Where a building contract contained a clause that no extras should be paid for unless ordered in writing, and weekly bills delivered for the same, and this had not been done, though extras had been executed:—Held, that the fact that the architect's certificate for the final balance awarded a certain sum in respect of extras did not entitle the builder to recover, beyond the certified sum, for extras in respect of which no written orders had been given nor weekly bills delivered. *Brunsden* v. *Staines Local Board*, 1 Cab. & E. 272. And see *Lapthorne* v. *St. Aubyn*, post, col. 1821.

When Certificate Conclusive.] — Where a contract for the erection of certain works provided that all extras or additions, payment for which the contractor should become entitled to under the said contract, should be paid for at the price fixed by the surveyor appointed by the contractor's employer:—Held, that this provision impliedly gave power to the surveyor to determine what were extras under the contract, and consequently that his certificate awarding a certain amount to be due for extras was conclusive. *Richards* v. *May*, 52 L. J., Q. B. 272; 10 Q. B. D. 400; 31 W. R. 708.

In an action for a balance due under a building contract, with a plea of set-off for penalties incurred by reason of delay, and a replication of hindrance and exoneration on the part of the defendant, evidence of such hindrance and exoneration admitted; but a certificate of the defendant's architect that the balance was due, is conclusive. *Arnold* v. *Walker*, 1 F. & F. 671.

In order to bind a contractor to the certificate or decision of an architect or engineer appointed by the party for whom the work is done, there must be very conclusive language in the contract. *Lawson* v. *Wallasey Local Board*, 52 L. J., Q. B. 302; 11 Q. B. D. 229; 47 L. T. 625. Affirmed, 52 L. J., Q. B. 309, n.; 48 L. T. 507; 47 J. P. 437—C. A.

In an action on a builder's contract, which provided that all the works should be left complete and clear, to the satisfaction of the architect, and did not contain any provision for payment by instalments:—Held, 1st. That the completion of the works to the satisfaction of the architect was a condition precedent to the builder's right to recover on foot of the contract. 2ndly. That he was not entitled to recover for the value of work done, as to which while incomplete, the architect had expressed approval so far as then partially executed, but which was not subsequently completed to the architect's satisfaction. *Richardson* v. *Mahon*, 4 L. R., Ir. 486.

—— **Collusion — Deductions — Defective Work.**]—An action is maintainable by a railway against a contractor for not doing brickwork of the specified thickness, although certified to have been so done by the company's engineers, in collusion with a sub-contractor; but the fraud or neglect of the engineer is material to be considered in regard to the question of damage, though not affecting the right of action against the contractor. *S. E. Ry.* v. *Waiton*, 2 F. & F. 457.

A builder agreed to repair a house according to certain plans and specification, and to the satisfaction of the architect, the work to be done

under the architect's directions. By the specification the builder was to allow for the value of the old lead, and he alleged that he made this allowance in his estimate. The architect certified his satisfaction of the completion of the contract:—Held, that, in an action by the builder against the owner of the house for the money agreed to be paid by the latter, no evidence could be received that the work was not done according to the plans and specification, and that unless he could prove that he had informed the owner or the architect of his having allowed for the old lead in his estimate, he must deduct the value from the amount of his charge. *Harvey* v. *Lawrence*, 15 L. T. 571.

An English company, who owned a railway in Russia, entered into a contract for the manufacture and delivery to them of rails for their railway. The contract provided that a sample should be sent to the company's engineer for approval, before the commencement of the work. It was, however, "to be expressly understood that such approval is not in any way to relieve the contractor from any of the conditions or stipulations contained in this specification." During the progress of the works tests were to be applied by the engineer at his discretion, and the entire contract was to be executed in every respect to the satisfaction of the engineer, "who shall have the power of rejecting any rails or fishing plates he may disapprove on any ground whatever, and whose decision on any points of doubt or dispute that may arise in reference to this contract shall be final and binding on all parties. . . . The engineer will inspect, either personally or by deputy, every stage of the process of the manufacture of the works. . . . This examination at the works is not in any way to commit the company to the approval and acceptance of any rails or fishing plates, which, when delivered, shall not be strictly in accordance with the drawings and specification." After the rails had been delivered to the company and paid for by them, and more than half of them laid down in Russia, it was discovered that they were defective. An action being brought by the company for breach of contract:—Held, that it could not be maintained, as the contract shewed that the parties intended the final expression of the engineer's satisfaction with the entire contract to be conclusive. *Dunaberg and Witepsk Ry.* v. *Hopkins*, 36 L. T. 733.

—— **As to Collateral Question.**]—The plaintiff contracted with the defendants to erect certain buildings. By a clause of the specification. It was agreed that, if the plaintiff should not, according to the determination of the architect, exercise due diligence, the defendants might determine the contract and enter on the works. The architect certified that the plaintiff was not exercising due diligence, and the defendants determined the contract. To an action by the plaintiff for not allowing him to complete the works the defendants pleaded a justification under the clause of the specification; to which the plaintiff replied that his failure to exercise due diligence was caused by their delay and default, and their architect in not providing plans and setting out the land. The defendants rejoined that the non-exercise of due diligence was not, according to the determination of the architect, caused by their default or of their architect:—Held, that under the contract, the architect could not bind the plaintiff by his determination that the defendants had not by their default prevented him from proceeding with the work, and that consequently the replication was good, and the rejoinder bad. *Roberts* v. *Bury Improvement Commissioners*, 39 L. J., C. P. 129; L. R. 5 C. P. 310; 22 L. T. 132; 18 W. R. 702—Ex. Ch.

—— **As to further Claims.**]—On a building contract, whereby additions and alterations were not to avoid it, but to be allowed for at amounts to be named by the employer's surveyor, the contract being made up of a tender framed on quantities calculated by the surveyor, and specifications referred to them, and signed by the builder alone:—Held, that the builder having completed the work, and claimed payment under the contract, could not claim for work as excess of the quantities on which it was based, nor for any additions or alterations beyond the amount allowed by the surveyor. *Coker* v. *Young*, 2 F. & F. 98.

The engineer of a railway company prepared a specification of the works on a proposed railway, and certain contractors fixed prices to the several items in the specification, and offered to construct the railway for the sum total of the prices affixed to the items. A contract under seal was thereupon made between the contractors and the company, by which the contractors agreed to construct and deliver the railway completed by a certain day at a sum equal to the sum total above mentioned. If the contractors failed to proceed with the works the company might take possession and proceed with them; in which case a valuation should be made by the engineer, or if either party required it, by arbitration. The contract contained provisions making the certificate of the engineer conclusive between the parties; and it was provided that all accounts relating to the contracts should be submitted to and settled by the engineer, and that his certificate for the ultimate balance should be final and conclusive; it was further provided that all questions, except such as were to be determined by the engineer, were to be referred to arbitration. The railway was completed and the engineer gave his final certificate as to the balance due to the contractors. The contractors had assigned their interest in the contract to trustees on trust for their creditors and for themselves, in certain proportions. The contractors filed a bill against the company, making claims on several grounds, and praying an account and payment:—Held, that the contractors could not, on mere verbal promises by the engineer, maintain against the company a claim to be paid sums beyond the sums specified in the contract under seal. *Sharpe* v. *San Paulo Ry.*, L. R. 8 Ch. 597; 29 L. T. 9.

Held, also that, although the amount of the works to be executed might have been understated in the engineer's specification, the contractors could not under the circumstances maintain any claim against the company on that ground. *Ib.*

In the absence of fraud on the part of the engineer, and where his certificate has been made a condition precedent to payment, his certificate must be conclusive between the parties. *Ib.*

The defendant contracted to do certain work for the plaintiff, which was to be subject to the approval of an architeet, and no payment was to be made without his certificate. The defendant demanded a larger sum than was certified by the

architect, and brought an action for the amount. The plaintiff filed a bill for an injunction to restrain the action:—Held, that he could as well plead at law as in chancery that the architect's certificate was conclusive under the contract, and there was no equity to justify the bill. *De Worms* (*Baron*) v. *Mellier*, L. R. 16 Eq. 554.

A building contract provided (1) that the builders were not to vary or deviate from the drawings or specifications, or execute any extra work of any kind whatsoever, unless upon the authority of the architect, to be shown, as in the contract stated, and that in all cases where such extras or variations exceeded the sum of 10*l.* the order or plan was to be further countersigned by two members of the building committee; (2) that the contract price should be paid within one month after the architect should be certified in writing that the whole of the said building had been completed and finished to his satisfaction: (3) that the decision of the architect with respect to the amount, state, and condition of the works actually executed, and also in respect of any and every question that might arise concerning the construction of the present contract, or the said plans, drawings, elevations, and specifications, or the execution of the work thereby contracted for, or in anywise relating thereto, should be final and without appeal. On the completion of the work the architect certified that a certain sum was due, which sum included the price of extras above 10*l.* which had not been countersigned as required by the contract:—Held, that the building owners could not resist payment of any part of this sum on the grounds (1) that the architect had by mistake certified for work not done and improperly done; (2) that his certificate included extras for an amount over 10*l.*, the order for which had not been countersigned by two members of the building committee: (3) that the architect had not made sufficient allowances for work not done. *Lapthorne* v. *St. Aubyn*, 1 Cab. & E. 486.

—— **Liability of Surety—Laches of Employer.**]—A surety for a contractor is not discharged from liability, although his position has been altered by the conduct of the employer, where that conduct has been caused by a fraudulent act or omission of the contractor against which the surety has, by the contract of suretyship, guaranteed the employer. *Kingston-upon-Hull Corporation* v. *Harding*, 62 L. J., Q. B. 55; [1892] 2 Q. B. 494; 67 L. T 539; 41 W. R. 19—C. A.

The defendants, as sureties, contracted with the plaintiffs that the contractors for certain works would "well and truly" execute their contract. The contract gave to the plaintiffs a right of superintending the works through their engineer. It also provided for the retention of a certain percentage of the contract price of the works until a final certificate should be given by such engineer, six months after his certificate of the completion of the work. The contractors did portions of the work in a defective manner, and fraudulently concealed the defective work so as to prevent its being discovered. The engineer ultimately gave his final certificate, upon which the retention money was paid to the contractors. In an action brought by the plaintiffs against the defendants as sureties, the jury found that the engineer's certificate for the work done had been obtained by fraud, but also that there was an omission on the part of the plaintiffs to properly superintend the work which led to the scamping of it:—Held, that the mere non-exercise by the plaintiffs of their right of superintendence did not discharge the defendants from their liability as sureties; and, also, that they were not discharged by the fact that the plaintiffs' engineer had given his final certificate, although the work was not properly done, or that the retention money had been thereupon paid, inasmuch as the mere giving of the certificate was not shewn to have altered the position of the defendants for the worse, and both that and the payment of the retention money were procured by a dishonest execution of the work against which the defendants had by their contract guaranteed the plaintiffs. *Ib.*

What matters can be decided by Architect.]—By a contract it was provided, that if any dispute or difference should arise with the contractors in any way relating to the contract, or if any question should arise between any of the several contractors relating to the proposed building, such dispute, difference, or question should be settled by the architect, whose decision should be absolute and final:—Held, that this condition applied only to disputes as to the mode of carrying on the several works, and not to differences between the contractors and their employers as to their claim for extras. *Pashby* v. *Birmingham Corporation*, 18 C. B. 2.

The plaintiff entered into a contract with the defendants to remove 10,000 cubic yards of the bed of the Mersey contiguous to Seacombe Ferry for 5,000*l.*, and to completely finish the work under the direction and to the satisfaction of the defendants' engineer by the 1st of October, 1878, subject to such an extension of time as the engineer might think reasonable, in case a temporary staging then erected on the site of the work should not be removed within such a time as would enable the plaintiff to complete the work by the 1st of October, 1878. The defendants were to make monthly payments on the certificate of the engineer to the amount of 80 per cent. of the value of the work done during each month, and the balance of the sum of 5,000*l.* on the completion of the work. There was also a clause in the contract providing that if any difference should arise between the local board and the contractor concerning the work contracted for, or concerning anything in connection with the contract, such difference should be referred to the engineer, and his decision should be final and binding on the local board and the contractor. The work was completed on the 11th November, 1879, and then a correspondence took place between the plaintiff and the engineer with reference to the plaintiff's claims against the defendant board. The engineer admitted that the plaintiff was entitled to compensation for the expense caused by delay in consequence of the non-removal of the staging, and agreed to allow 15*l.* 10*s.* per day for thirty-eight days, but they could not agree upon the amount due to the plaintiff for extra work and other expenses. In June, 1880, the engineer sent a certificate to the works committee of the defendant board, stating that the work was finished to his satisfaction, and that 1,065*l.* 19*s.* was due to the plaintiff, and the defendants sent the plaintiff a cheque for 962*l.* 6*s.* 2*d.*, being the balance of the sum certified after making certain

deductions. The plaintiff, after giving credit for this sum, brought an action against the defendants for 2,489*l.* 13*s.* 11*d.*:—Held, that it was not a difference concerning a matter in connection with the contract, and as to which the decision of the engineer was conclusive. *Lawson* v. *Wallasey Local Board*, 52 L. J., Q. B. 302; 11 Q. B. D. 229; 47 L. T. 625. Affirmed 52 L. J., Q. B. 309, n.; 48 L. T. 507; 47 J. P. 437—C. A.

A building contract between the plaintiff and the defendants (commissioners of public works), contained the following arbitration clause:—"It is hereby agreed that in case of any difference between the commissioners and the contractor in relation to any of the works, matters, and things herein contracted for, or to the meaning of these presents or to the plans, sections, specifications, descriptions, or particulars, or to any money to be paid or retained, or to any act, matter or thing done, or omitted to be done, by either of the parties hereto, under or by virtue of any of the provisoes, covenants or stipulations of these presents, and whether such difference shall relate to any act done by the commissioners for the purpose of determining this contract . . . then, and in any such case, the same shall be referred to such arbitrator as the commissioner shall appoint, whose decision shall be based upon the provisions of these articles, and shall be final, binding and conclusive upon the parties hereto." The plaintiff alleged that, whilst the works were in progress the commissioners directed some of them to be suspended, and that they directed additional works, not provided for by the contract, to be executed; and in the present action, he claimed; (1) 1,112*l.* 10*s.* damages for the suspension; (2) 3,658*l.* 8*s.* 6*d.* for materials and labour in the additional works; (3) 570*l.* 10*s.* 2*d.* for furniture supplied to the commissioners at their request; and (4) 66*l.* 15*s.* 4*d.* interest on these sums:—Held, that item No. 1 of the claim was clearly outside the submission in the building contract; and the remaining items not being satisfactorily shewn to be within the submission, and all the items being so far connected as to make it doubtful whether complete justice would be done to the parties, uless all were disposed of by the same tribunal, the court, in the exercise of its discretion, refused the application. *Meyers* v. *Soady*, 18 L. R., Ir. 499.

In rebuilding a church, the architect employed by the defendants, after giving them an assurance that the whole of the works should not exceed the sum named, prepared a statement or bill of particulars showing the quantities of the works to be performed by the contractors, and also prepared plans and a specification. The plaintiffs tendered for portions of the works, and their tender was accepted at a fixed sum. The architect then prepared a form of contract, whereby the plaintiffs agreed to do certain things mentioned "according to the plans and the quantities there given by the architect"; and they signed the specification, the conditions of which stated, that if any doubt should arise during the execution of the works, in making out the accounts "the admission or allowance of claims should be judged of, determined, and adjudged by the architect, without reference to any other person," and that "in all matters the decision of the architect should be final." Although no time for completion of the contract was named, it being left in blank, they were to be subject to a penalty if the works should remain unfinished. The plaintiffs performed quantities of works in excess of the quantities stated by the architect in his bill of particulars, and claimed to be paid over and above the fixed sum; but the architect rejected the greater portion of such claims, and debited the plaintiffs with a sum (to which, however, they would not consent) for delay in completing their contract. On a bill for a declaration that the plaintiffs were not bound by the conditions in reference to their claims being adjusted and all matters decided by the architect, that an account might be taken of what was due to the plaintiffs, and that they were not chargeable with any sum in respect of penalty for delay:—Held, first, that there was no ground for imposing the penalty for delay, and secondly, that the plaintiffs were entitled to be paid, in addition to the fixed sum, for all quantities of work done by them beyond the quantities mentioned in the bill of particulars. *Kemp* v. *Rose*, 1 Giff. 258; 4 Jur. (N.S.) 919.

Neglect to Certify—Collusion between Employer and Architect.]—Where a sum of money is agreed to be paid for work and materials, upon the certificate of a third person, if such third person, in collusion with and by the procurement of the person who has agreed to pay, improperly neglects to certify, an action may be maintained against the latter for the agreed sum, notwithstanding the certificate was made a condition precedent to the payment of the money. *Batterbury* v. *Vyse*, 2 H. & C. 42; 32 L. J., Ex. 177; 9 Jur. (N.S.) 754; 8 L. T. 283; 11 W. R. 283.

Although the giving of a certificate by the architect be a condition precedent to a builder's right of payment for work done, the builder may nevertheless recover for the work done if the withholding of the certificate be due to the improper interposition of the employer, who prevented the architect from giving his certificate. *Brunsden* v. *Beresford*, 1 Cab. & E. 125.

A contractor contracted to do certain works for a railway company, and the price was to be paid on the engineer of the company certifying the due performance of the work. The works were completed, but the engineer refused his certificate at the alleged instigation of the company. The contractor filed his bill, charging collusion between the company and the engineer; praying discovery, relief, and payment against the company; and seeking discovery from their engineer and their secretary. All the defendants demurred, but the demurrers were overruled. *M'Intosh* v. *G. W. Ry.*, 2 Macn. & G. 74; 2 H. & Tw. 250; 19 L. J., Ch. 374; 14 Jur. 819.

Where actions were commenced by a builder against his employer for payment of moneys alleged to be due under certain contracts, and where these actions had been consolidated at the instance of the employer, who afterwards commenced, on his part, two actions against the builder for breaches of contract; on a bill by the builder alleging that, through the act of the employer in preventing his getting a conclusive certificate from the inspecting architect, he had been unable to continue his action, and had consequently been driven to equity to obtain an inquiry as to what was due to him:—Held, that he was entitled to such inquiry, without prejudice, however, to any question as to breaches of contract that might arise on his part. *Dabbs* v. *Nugent*, 11 Jur. (N.S.) 943; 13 L. T. 396; 14 W. R. 94.

Bill by a contractor alleging unfair conduct on the part of an architect whose decision was by the terms of the contract made final, and who ousted the contractor and finished the buildings; the court, on proof of such unfair conduct, decreed payment of the balance due on the contract, and relieved the contractor from penalties, declared the architect's decision not binding, and ordered both the architect and the contracting party to pay the costs of the suit. *Pawley* v. *Turnbull*, 3 Giff. 70; 7 Jur. (N.S.) 792; 4 L. T. 672.

The plaintiff covenanted with the defendant (a railway company) to do certain works within a given time to the satisfaction of the engineer of the company, and that if the works should not be so done the company might enter into possession of the plaintiff's plant and complete the works. The company covenanted to pay for the works from time to time during their progress, according to the certificate of the engineer. All disputes were to be referred to the latter. The works were not completed within the period originally limited, and some time afterwards the company gave notice of its intention to enter, under the agreement, and complete the works. The plaintiffs filed a bill, stating that they had done all which they contracted to do, except what the company had prevented them from doing, and that they had not been fully paid for the work done; alleging that the engineer fraudulently and collusively with the company certified a less amount than what was due to the plaintiffs, and praying for an injunction and account. A demurrer for want of equity was overruled, on the ground that the plaintiffs would be entitled to some relief at the hearing, and that the species of fraud alleged in the bill gave jurisdiction to the court, although the plaintiffs had not completed the whole of their work. *Waring* v. *Manchester, Sheffield and Lincolnshire Ry.*, 7 Hare, 482; 18 L. J., Ch. 450; 14 Jur. 613. Affirmed 2 H. & Tw. 239.

Where by contract an award of the architect is final, and is fairly and impartially made, the court will not relieve against it, however severe it may be in its effects; but where the arbitrator is found guilty of unfairness or partiality, the court will relieve against his award. *Ormes* v. *Beadel*, 2 Giff. 166. Affirmed 30 L. J., Ch. 1; 3 L. T. 344; 9 W. R. 25.

Where a contractor, under pressure occasioned by the refusal of the architect to pay what was justly due under the contract, was induced by the architect to enter into a disadvantageous agreement, the court set it aside, though by the terms of the original contract the decision of the architect was made final. *Ib.*

In building contracts a court of equity interferes where there is collusion between the employer and the architect to injure the contractor. *Bliss* v. *Smith*, 34 Beav. 508.

Where, by the terms of a contract, works were to be done for the defendants by the plaintiffs, according to plans and specifications, and to be paid for by instalments, "on production by the contractors to the defendants, or one of them, of the certificate of L., or other the surveyor for the time of the defendants, that they (the contractors) had duly and efficiently performed and completed such works to his satisfaction," and in an action upon this contract, the declaration averred that all things necessary had been done by the plaintiffs, to entitle them to have the certificate of the surveyor, that the work had been duly and efficiently performed and completed to his satisfaction; but that the surveyor had not given such certificate, but had wrongfully and improperly neglected and refused so to do:—Held, that, in the absence of collusion, the plaintiffs were not entitled to recover without producing the surveyor's certificate; nor were the defendants responsible for the refusal of the surveyor to give one. *Clarke* v. *Watson*, 18 C. B. (N.S.) 278; 34 L. J., C. P. 148; 11 L. T. 679; 13 W. R. 345.

Where all complaints as to delays of a vexatious kind are by a contract left to the absolute discretion of an engineer, a court of equity has no power to impose upon either of the parties to the contract any other terms than those which they have prescribed for themselves, and by which they have agreed to be bound; but if the evidence establishes a case of gross misconduct in the engineer, or of wilful neglect or refusal, or absolute incapacity in him to perform his duties, the case might be brought within the jurisdiction of the court. *Scott* v. *Liverpool Corporation*, 27 L. J., Ch. 641; 4 Jur. (N.S.) 402; 6 W. R. 136, 493. *S. C.*, on appeal, infra.

A contractor engaged to execute in a "workmanlike manner" certain buildings for a burial board, to the entire satisfaction of the architect; the payment in respect of the works to be made to the contractor from time to time as the work proceeded, and the balance on the final certificate of the architect that the work had been executed according to the contract. Certificates from time to time had been given by the architect, and the contractor received payments on account. It appeared, subsequently, that parts of the work had not been done in a "sound and workmanlike manner," and the final certificate was withheld. On a bill by the contractor to have it declared that the withholding of the final certificate was a fraud upon the contractor:—Held, that on proof of the "unsound and unworkmanlike manner of the buildings" the withholding of the final certificate was not a fraud upon the plaintiff, although the architect had given certificates from time to time to enable the builder to obtain moneys on account. *Cooper* v. *Uttoxeter Burial Board*, 11 L. T. 565.

A building agreement between the plaintiff and defendant contained a proviso that no instalment should be paid unless the plaintiff delivered to the defendant a certificate signed by the surveyor of the defendant, that the works were performed according to the specifications:—Held, that the want of a certificate was a good defence under the general issue to an action for the instalments, and that the plaintiff was not at liberty to prove that it was withheld by collusion with the defendant. *Milner* v. *Field*, 5 Ex. 829; 20 L. J., Ex. 68.

—— **Action against Architect.**]—When, under a building contract, it was a condition precedent to payment that the builder should execute the works to the satisfaction of a named architect:—Held, that an action could be maintained against the architect for collusively, fraudulently, and to the injury of the builder, refusing to certify that he was satisfied with the works. *Ludbrook* v. *Barrett*, 46 L. J., C. P. 798; 36 L. T. 616; 25 W. R. 649.

Statement of claim set out an agreement under which plaintiff contracted with a company to build for them a hall whereof defendant was employed as architect; defendant was to be

allowed to order additions and deductions, the amounts of which were to be ascertained by him in a certain manner, all matters of dispute were to be left to defendant, and his decision was to be final; plaintiff was to be paid on the certificate of defendant. The statement of claim then alleged that the work was done and the certificate given, but that defendant did not use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff, and neglected and refused to ascertain the amount of the said additions and deductions in the manner aforesaid, and knowingly or negligently certified for a much less sum than was, in fact, the nett balance payable; and further, that defendant refused to reconsider the said certificate and allow plaintiff to point out to him the said errors in the bill of quantities:—Held, that no cause of action against defendant was disclosed by the above statement of claim; defendant's duties involving the exercise of judgment and skill. Per Lord Coleridge, C.J.:—Had the defendant's duties been merely ministerial, the action would have been maintainable. *Stevenson* v. *Watson*, 48 L. J., C. P. 318; 4 C. P. D. 148; 40 L. T. 485; 27 W. R. 682.

A contract for the performance of works contained a provision that if the contractor shall not, according to the determination of the employers' engineer, enable the works to be completed according to the contract, the employers might put an end to the contract, and that the contractor should be paid such sum as the engineer should determine to have been reasonably earned for work actually done. The contract having been put an end to under this provision, the contractor filed a bill in equity against the employers and their engineer, complaining of undue delay on the part of the latter in awarding the amount earned by the contractor, and seeking payment of what was due upon the contract, but did not establish any case of fraud or collusion against the engineer:—Held, that the bill was properly dismissed, with costs. *Scott* v. *Liverpool Corporation*, 3 De G. & J. 334; 28 L. J., Ch. 230; 5 Jur. (N.S.) 104; 7 W. R. 153.

6. Deductions.

On Account of Bad Work.]—If A. employs B. to make bricks for him at a stipulated price per thousand, and B. does so, and some of the bricks are so badly made as to be good for nothing, A. will be entitled to make a deduction for those badly-made bricks out of the stipulated price, and may make such deduction in an action brought by B. for the stipulated price; but if the bricks are badly made in a trifling degree, only so as merely to be less valuable than they otherwise would have been, A., in an action for the stipulated price, will not be entitled to make any deduction on this account. *Pardow* v. *Webb*, Car. & M. 531.

Where a plaintiff declares on a quantum meruit for work and labour and materials, the defendant may reduce the damages by shewing that the work was improperly done, and may entitle himself to a verdict by shewing that it was wholly inadequate to answer the purpose intended. *Farnsworth* v. *Gerrard*, 1 Camp. 38; 10 R. R. 624. S. P., *Grounsell* v. *Lamb*, 1 M. & W. 352; 5 L. J., Ex. 154.

Where a party contracted to supply and erect a warm-air apparatus for a certain sum:—Held, in an action for the price (the defence to which was, that the apparatus did not answer), that if the jury thought it was substantial in the main, though not quite so complete as it might be under the contract, and could be made good at a reasonable rate, the proper course would be to find a verdict for the plaintiff, deducting such sum as would enable the defendant to do what was requisite. *Cutler* v. *Close*, 5 Car. & P. 337.

—— **Not a Set-off.**]—In actions for work and labour, as well as in actions for goods to be supplied according to contract, a defence that the subject-matter of the action is not worth the contract price, by reason of a breach of the contract, is not a set-off in the nature of a cross action. *Mondel* v. *Steel*, 8 M. & W. 858; 1 D. (N.S.) 1; 10 L. J., Ex. 426. *And see* Set-off.

Price of Materials.]—The plaintiff contracted in writing to do work for the defendant, and find the materials for it, for a fixed sum. The defendant afterwards supplied a portion of the materials, which the plaintiff accepted and used up in the work. In an action for the work done by the plaintiff:—Held, that the defendant was entitled to deduct from the damages the value of the materials supplied by him without pleading a set-off. *Newton* v. *Forster*, 12 M. & W. 772.

Re-entry of Employer—Cost of Work.]—The plaintiff contracted to execute certain work for the defendants, the agreement containing the following proviso: "That if the works did not proceed as rapidly and satisfactorily as required by the defendants or their agents, they should have power to enter thereupon, pay whatever number of men were unpaid, and set to work whatever number of men they should think necessary, the amount so paid, and the cost of the men so set to work, to be deducted from whatever moneys might be due to the plaintiff":—Held, that the intention of the parties was that the defendants if bonâ fide dissatisfied, whether with or without sufficient reason, with the progress of the work, should be at liberty to deduct from the money due to the plaintiff such sums as had been expended in pursuance of the said proviso. *Stadhard* v. *Lee*, 3 B. & S. 364; 32 L. J., Q. B. 75; 9 Jur. (N.S.) 908; 7 L. T. 815; 11 W. R. 361.

E. Pleadings and Evidence.

Common Counts.]—When a person contracts to build a house, he is not entitled to recover for the materials on a count for goods sold and delivered. *Cottrell* v. *Apsey*, 1 Marsh. 581; 6 Taunt. 322.

Materials cannot be recovered under a count for work and labour only. *Heath* v. *Freeland*, 1 M. & W. 543; 2 Gale, 140; 5 D. P. C. 166; 1 Tyr. & G. 918; 5 L. J., Ex. 253.

A count for work, labour and materials will enable a plaintiff to recover for attendances as a farrier, and for medicines administered. *Clark* v. *Mumford*, 3 Camp. 37.

A. contracted with B. to build an engine of one-hundred-horse-power for 2,500*l.*, to be completed and fixed by a certain time. The engine was intended for the purpose of pumping a mine, and was composed of various parts, which were made at A.'s factory, and conveyed thence and set up at different times at B.'s colliery, until the engine was completed. A. sued B. for the price, and claimed 3,000*l.* for the price and value of a

main engine and other goods sold and delivered by him to B.:—Held, that the price agreed on could not be recovered under this count, but that the proper form of the count would have been either for work, labour and materials, or for erecting and constructing an engine. *Clarke* v. *Bulmer*, 11 M. & W. 243; 12 L. J., Ex. 463. See *Chanter* v. *Dickenson*, 6 Scott (N.R.) 182; 2 D. (N.S.) 838; 5 Man. & G. 253; 12 L. J., C. P. 147; 7 Jur. 89.

In an action for the price of and the setting up of a fourteen-horse-power steam engine, the last instalment to be paid two months after its completion, it appeared that the degree of power in the engine delivered was not equal to the power mentioned in the contract, and improvements and alterations were made from time to time till the action was brought:—Held, that the common counts would lie. *Parsons* v. *Sexton*, 2 Car. & K. 266.

A. was employed by B. to devise a method of curving metal tubing for the purpose of manufacturing life-buoys, of which B. was patentee:—Held, that A. might recover compensation for the labour and skill, and also the value of the materials employed by him in the course of the work, under a count for work and labour and materials. *Grafton* v. *Armitage*, 2 C. B. 336; 15 L. J., C. P. 20; 9 Jur. 1039.

In an action for work and labour, where there had been a breach of contract on the part of the plaintiff:—Held, that he could not recover a quantum meruit, nor prove that his breach of contract arose from the defendant's default. *Kewley* v. *Stokes*, 2 Car. & K. 435.

A claim for a month's wages by a menial servant, on dismissal, without warning and without cause, cannot be recovered under a count for work and labour. *Fewings* v. *Tindal*, 5 D. & L. 196; 1 Ex. 295; 17 L. J., Ex. 18; 11 Jur. 977.

If the entire work and labour to be done under a contract have been performed, and the benefit of it accepted by the defendant, the plaintiff can recover the value of the work and labour under the common count on a quantum meruit, although the evidence or proceedings in the case may establish that, up to the trial, he insisted on the special contract: it is not necessary that he, before bringing the action, should elect to abandon the special contract. *Savage* v. *Canning*, Ir. R. 1 C. L. 434; 16 W. R. 133.

Under a count for work and labour on a quantum meruit, evidence of skill is admissible. *Bird* v. *M'Gaheg*, 2 Car. & K. 707.

Surety of Testator—Fraud of Testator.]—In an action by executors for work and labour of their testator, money paid by him and on an account stated with him, and for work and labour and money paid by the executors, and on an account stated with them as executors, a plea, that the testator, in consideration of the defendant consenting to act on a provisional committee for a projected railway, agreed to indemnify him from any charges on account of the railway; and the work was done and money paid by the testator, and the account stated with him, in respect of the same, in surveying the line, and that the work was done and money paid by the executors in and about surveying the line, and the account was stated with them in respect of the same work; that all the causes of action accrued after the promise to indemnify, and that the defendant made the promises only in his character of member of the committee; that the railway was abandoned, and the work and payments became of no value, and all sums recovered from the defendant in respect thereof would be lost to the defendant, and he would be damnified to that extent:—Held, a good plea for avoiding circuity of action, since the defendant, on the facts alleged, was entitled to recover from the testator, in his life or from his representatives, as much as they would recover from him. *Connop* v. *Levy*, 11 Q. B. 769; 5 Railw. Cas. 124; 17 L. J., Q. B. 125; 12 Jur. 306.

Another plea alleged that the testator in his lifetime caused the defendant to enter into the contracts by fraud:—Held, a good plea, not only to the first count, but also to the second count, since, if the defendant was induced by the testator's fraud to make the original contract with him, the same fraud procured the implied promise to the executors for the work they had done, and money they had paid in pursuance of that contract. *Ib.*

Evidence.]—In an action for a tradesman's bill, where the work has been done by several persons under him, any of the workmen called may be asked as to the particular sums which they received. *Fricker* v. *French*, 5 Esp. 79.

In an action for work and labour, it is presumptive evidence for the defendant that he was in the habit of paying other workmen employed by him in the same line of business regularly and at stated times, and that the plaintiff had been at such times with the other workmen. *Lucas* v. *Novosilieski*, 1 Esp. 296.

In an action for work done and materials supplied to the defendant in respect of certain dwelling-houses, the question being whether he was really the owner and person interested in the houses, it is competent to the plaintiff to call other tradesmen as witnesses to prove that the defendant had personally given orders to them to do work and supply materials in respect of the same houses. *Woodward* v. *Buchanan*, 39 L. J., Q. B. 71; L. R. 5 Q. B. 285; 22 L. T. 123.

Under a count of quantum meruit evidence of skill is admissible. *Bird* v. *M'Gaheg*, 2 Car. & K. 707.

—— **Production of Documents.**]—When a man is employed to do work under a written contract, and a separate order for other work is afterwards given by parol during the continuance of the first employment, the written contract need not be produced in an action for the second work. *Reid* v. *Batte*, M. & M. 413.

The defendant entered into a contract with H. for the execution, by H., of works at a shed belonging to the defendant. In order to induce M. to supply H. with the castings necessary for the carrying out of this contract, the defendant promised M. to pay her 218*l.* then due to her from H. within six months, provided he had work done by H. as security for the same:—Held, in an action by the executors of M., to recover the 218*l.* under this agreement, that they were bound to shew that work to that amount had been done for the defendant by H., and that for this purpose it was necessary to produce the contract between H. and the defendant, under which the work was executed. *Hill* v. *Nuttall*, 17 C. B. (N.S.) 262; 33 L. J., C. P. 303.

In addition to the agreement, the defendant also undertook to pay M. for such further castings as should be required for his shed, and should be supplied by her on account of H.

Further castings were supplied by M. to H., but as to some of them there was no evidence that they were delivered by H. at the shed:—Held, that there was evidence for the jury to find the defendant liable for these castings under the second agreement. *Ib.*

If an agreement cannot be read for want of a stamp, the plaintiff cannot recover the value of the work and labour to which the agreement refers, although the defendant may have had the benefit of it. *Hughes* v. *Budd*, 8 D. P. C. 478.

When work has been done under a written contract, evidence of extra work cannot be given without proof of the written contract, and, if it is inadmissible for want of a stamp, the judge cannot look at it for the purpose of determining whether or not the proposed evidence relates to it. *Buxton* v. *Cornish*, 1 D. & L. 585; 12 M. & W. 426; 13 L. J., Ex. 91; 8 Jur. 46. S. P., *Jones* v. *Howell*, 4 D. P. C. 176.

A. had built a house for B. under a written contract, not admissible in evidence for want of a stamp; A. sued B. for the value of certain works about the house, alleging them to be extras, and not included in the contract:—Held, that the court could not look at the unstamped contract to ascertain whether those works were included in it or not, and that the plaintiff must be nonsuited. *Vincent* v. *Cole*, 3 Car. & P. 481; M. & M. 257.

—— **Surveyors.**]—Little reliance is to be placed on the evidence of surveyors in a contest as to value. *Waters* v. *Thorn*, 22 Beav. 547.

The court looks with suspicion at the evidence of value derived from the mere opinion given by surveyors, unsupported by any other circumstances. *Cockell* v. *Taylor*, 15 Beav. 103; 21 L. J., Ch. 545.

A surveyor appointed by the parties, at the instance of the judge, to make a report, acts in a quasi-judicial capacity, and ought not to be examined in the action. *Broder* v. *Saillard*, 24 W. R. 456.

J. M.

WORKHOUSE.

See POOR LAW.

WORKMAN.

Lien.]—*See* LIEN.

Trade Unions.]—*See* TRADE.

Other Points.]—*See* MASTER AND SERVANT.

WOUNDING.

See CRIMINAL LAW.

WRECK.

See SHIPPING.

WRIT.

Of Attachment.]—*See* ATTACHMENT.

De Contumace Capiendo.]—*See* ECCLESIASTICAL LAW.

Of Elegit.]—*See* EXECUTION—SHERIFF.

Of Fi. Fa.]—*See* EXECUTION—SHERIFF.

Of Habeas Corpus.]—*See* CROWN OFFICE.

Of Injunction.]—*See* INJUNCTION.

Of Inquiry.]—*See* INQUIRY (WRIT OF).

Of Levari Facias.]—*See* EXECUTION—SHERIFF.

Of Ne exeat regno.]—*See* NE EXEAT REGNO.

Of Possession.]—*See* EXECUTION—SHERIFF.

Of Prohibition.]—*See* CROWN OFFICE.

Of Quo Warranto.]—*See* CROWN OFFICE.

Of Rebellion.]—*See* REBELLION.

Of Scire Facias and Revivor.]—*See* SCIRE FACIAS.

Of Sequestrari Facias.]—*See* ECCLESIASTICAL LAW.

Of Subpœna.]—*See* EVIDENCE.

Of Summons.]—*See* PRACTICE.

YEAR.

See TIME.

YORKSHIRE.

Registration in.]—*See* DEED AND BOND.

YOUNGER CHILDREN.

A. ELDEST SON.

1. *Meaning of Word*, 1833.
2. *Right to Portion or Parental Provision when not taking the Estate*, 1835.
3. *Other Cases*, 1836.

B. YOUNGER SON.

1. *Meaning of Word*, 1838.
2. *Right to Portion or Parental Provision when becoming Eldest.*
   a. In General, 1839.
   b. Where not Taking the Estate, 1841.
3. *Shifting Clauses*, 1844.
4. *Other Cases*, 1844.

C. GIFTS TO FIRST, SECOND, OR OTHER SONS, 1845.

D. DAUGHTERS, 1848.

E. CLASS WHEN ASCERTAINED AND PERIOD OF VESTING, 1850.

F. CLAUSES EXCLUDING CHILD "ENTITLED" OR ELDEST SON FROM A CLASS OF CHILDREN, 1855.

A. ELDEST SON.

1. MEANING OF WORD.

Firstborn.]—"Eldest" and "firstborn" are to be treated as synonymous terms. *Tuite* v. *Bermingham*, L. R. 7 H. L. 634; 24 W. R. 549.

The only son of a marriage cannot succeed to an estate which has been limited to A. and his heirs in tail male, except an eldest son, and does not come in under a proviso giving an estate to A., and "all and every other the son of the body of A., save and except an eldest son." *Ib.*

Except in cases of portions or of a specially qualifying context "eldest son" means "firstborn son." *Meredith* v. *Treffry*, 48 L. J., Ch. 337; 12 Ch. D. 170; 27 W. R. 406.

A testator, by will dated in 1841, devised lands to the use of A. for life, with remainder to the use of "the eldest son" of A. for life, with remainder, after the decease of the eldest son of A., to the use of the eldest son of his body and his heirs for ever; but in case of the death of the eldest son of A. without issue male, to the use of the second, third, fourth, and every other son of A. successively in tail male; and the will contained a proviso that the first, second, third, and every other son of A. should, before receiving the rents of the lands, take and use the name and arms of the testator. The firstborn son of A. was living at the date of the will, but died an infant. C., the second born son of A., was his eldest living son at the time of the death of the testator:—Held, that the word "eldest" must be construed as "firstborn;" and that, subject to his father's life estate. C. was tenant in tail under the will. *Ib.*

Held, also, that the eldest son of A. took by implication an estate tail in remainder after the estate tail of his eldest son. *Ib.*

The eldest son of a man is his firstborn—the primogenitus; and the words "shall become the eldest son" of a person living at the date of a will cannot, without an explanatory context, be extended beyond the lifetime of that person; they are connected with the heirship of, and right of succession to, a living man. *Bathurst* v. *Errington*, 46 L. J., Ch. 748; 2 App. Cas. 698; 37 L. T. 338; 25 W. R. 908—H. L. (E.)

A testator gave real estate to A. for life, and afterwards to her eldest son on his taking the name of M.; but should he refuse to take the name, or A. depart this life without a son, then over. A. had no son at the date of the will, but afterwards had four sons, all of whom had the name of M. given to them at their baptism:—Held, that A. took an estate for life, with remainder in fee to her firstborn son. *Bennett* v. *Bennett*, 2 Dr. & Sm. 266; 34 L. J., Ch. 34; 10 Jur. (N.S.) 1170; 11 L. T. 362; 13 W. R. 66.

One has two sons, A. and B., and three daughters, and devises his lands to be sold to pay his debts; and as to the moneys arising by sale after debts paid, he gives 200*l.* thereout to his eldest son A., at twenty-one, the residue to his four younger children equally. A., the eldest, dies before twenty-one, this 200*l.* shall go to the heir of the testator. *Cruse* v. *Barley*, 3 P. Wms. 19; 2 Eq. Cas. Abr. 543, pl. 15.

Bequest to a daughter's "younger children":—Held, to mean the children other than the eldest in age, and therefore to exclude the eldest child, a daughter, and to include her younger brother, though, under his parents' marriage settlement, the family estates stood settled on him. *Lyddon* v. *Ellison*, 19 Beav. 565; 18 Jur. 1066; 2 W. R. 590.

A testator directed that the income of certain property mentioned in his will should be enjoyed by his wife and his unmarried daughters during their lives, and after the death of the last survivor of his wife and unmarried daughters the principal of the stock should be divided equally among the two eldest children born in legitimate wedlock to each of his sons and daughters. But in case there should be only one child living to any of his married sons or daughters, that that child should receive only the proportion divided equally, according to the number there might be:—Held, that after the death of the widow and unmarried daughters, those children only were entitled to take who were living at the period of distribution, and the property was not vested in those who were priores natu. *Madden* v. *Ikin*, 2 Dr. & Sm. 207; 1 N. R. 11; 32 L. J., Ch. 3; 8 Jur. (N.S.) 1168; 7 L. T. 264; 11 W. R. 2.

"Eldest or only son," primâ facie, mean an individual. See *Domvile* v. *Winnington*, post, col. 1853.

Son taking the Estate.]—Elder son unprovided for, considered as a younger. *Teynham (Lord)* v. *Webb*, 2 Ves. Sen. 198.

Elder son provided for by collateral relations considered as a younger. *Duke* v. *Doidge*, 2 Ves. 203, n.

A father's estate was limited after his death to the eldest son in tail, and the mother's estates were limited after her death to the sons and daughters (other than an eldest son) as tenants in common in tail:—Held, that the rule of construction was the same as to realty and personalty, and that the son of a younger son who had succeeded to the father's estate was excluded from all interest in the mother's estates. *Bayley's Settlement, In re*, L. R. 6 Ch. 590; 25 L. T. 249; 19 W. R. 789. Affirming 39 L. J., Ch. 388. And see *Windham* v. *Graham*, post, col. 1841.

A second born son, who attained twenty-one, and on his father's death succeeded to his title, but died before the period of distribution, was held to be excluded as an "eldest son" from sharing in certain unappointed trust funds. His younger brother, who succeeded him in the title, and was living at the period of the distribution of the funds, was held entitled to share in them. *Rivers's Settlement Trust, In re*, 40 L. J., Ch. 87; 24 L. T. 253; 19 W. R. 318.

In a settlement where there is a clause excluding the eldest son from the benefit of a fund provided for children other than an eldest son, the time for ascertaining who fills the character of eldest son is the period fixed by the settlement for the distribution of the fund. *Collingwood* v. *Stanhope*, 38 L. J., Ch. 421; L. R. 4 H. L. 43; 17 W. R. 537.

In such a case "eldest" is not solely senior in age, for (as stated by Lord Hardwicke in *Duke*

v. *Doidge*, 2 Ves. Sen. 203, n.), "eldership not carrying the estate along with it is not such an eldership as will exclude." *Ib.*

2. Right to Portion or Parental Provision when not Taking the Estate.

Death of eldest Son without becoming Entitled.]—By a settlement for the benefit of younger children, a sum of money was to be raised, after the death of T., for all the children of E. other than an eldest or only son for the time being entitled to certain estates. The eldest son of E. died in his father's lifetime, and E. died in T.'s lifetime. At T.'s death W. was the eldest living son of E., and entitled to the estates:—Held, that the representatives of the eldest son of E. took a share in the money. *Ellison* v. *Thomas*, 1 De G. J. & S. 18; 1 N. R. 37; 32 L. J., Ch. 32; 8 Jur. (N.S.) 1139; 7 L. T. 342; 11 W. R. 56. And see *Chadwick* v. *Doleman*, post, col. 1839. *Johnson's Trusts, In re*, L. R. 2 Eq. 716.

The persons entitled must be ascertained at the time when the money is directed to be raised and divided, and the words of exception attach at that time upon the son who then answers the description, and exclude him only from the class of persons interested. *Ib.*

By a settlement a gross sum was directed to be raised after the decease of the settlor and his wife (tenants for life) for portions for children other than their eldest or only son, equally to be divided:—Held, that the personal representatives of the eldest son, who attained twenty-one, and died in his father's lifetime, were entitled to one share. *Davies* v. *Huguenin*, 1 H. & M. 730; 2 N. R. 101; 32 L. J., Ch. 417; 8 L. T. 443; 11 W. R. 1040.

Held, also, that a daughter who attained twenty-one, and died unmarried in her father's lifetime, was entitled to a share. *Ib.*

Held, also, that the second son, who, during the father's life and after attaining his majority, became the eldest son and succeeded to the settled estate, and the personal representatives of a child who died in infancy, were not entitled. *Ib.*

The only person who is properly described as an eldest son, so as to be excluded from a share of portions for younger children, is the son who eventually takes possession of the estate. *Ib.*

Grandmother, under a power, creates by deed a term to commence after her death for raising money for younger children, as their father should appoint; if no appointment, equally; if but one besides the eldest, then to that one; if none except the eldest, then to him; if no eldest son, then to her own executors. At the date of the deed there was one grandson and one granddaughter. The father afterwards had another son, and died without appointment. The eldest son having died under age:—Held, that the whole sum belonged to the daughter, and that the younger son, having thus become an eldest son, was excluded. Elder son, unprovided for, considered as a younger. *Teynham* (*Lord*) v. *Webb*, 2 Ves. Sen. 198.

By a settlement real estates stood limited to S. for life, and after his death as to part to E., his son, for life, remainder to H., the eldest son of E., for life, and to his first and other sons in tail, remainder to J., the second son of E., for life, and to his first and other sons in tail, with remainders over; and as to the remaining part, to trustees for sale and conversion, the proceeds to be held as personal estate in trust for the children of E., "other than or not being an eldest or only son for the time being entitled under the limitations hereinbefore contained to the manors," &c.—the unsold part of the settled estates—"either in possession or in remainder expectant on the decease of the survivor of S. (the grandfather) and E.," the shares to vest in such of them as should attain twenty-one, or, if daughters, marry under that age, and to be paid at such age or days of marriage, or immediately after the decease of the survivor of S. and E., which should last happen. The father died in the lifetime of the grandfather, and J. (having attained twenty-one) died in the lifetime of both his father and grandfather. S., the second son of E., attained twenty-one in the lifetime of H., and became entitled, as tenant for life in possession, to the unsold part of the settled estates on the death of his grandfather:—Held, that under these circumstances, and notwithstanding the fact that the settlement contained a separate provision for H. by way of rent-charge, his personal representative was, and J., the second son, was not, entitled to share the personal estate with the younger children. *Swinburne* v. *Swinburne*, 17 W. R. 47.

Disentail and Mortgage by Eldest Son.]—A person who is to be excluded from sharing in a portions fund by reason of his being, at a particular time, the eldest son entitled to a settled estate, is ordinarily entitled, if he dies before that time, to share as if he were a younger child; but he is not so entitled when he has concurred, as remainderman in tail, in disentailing the estate and in raising by mortgage thereof money out of which he received a sum equal in value to a younger child's aliquot share of the fund, as he then would, in effect, be taking a double portion. *Fitzgerald's Estate, In re, Saunders* v. *Boyd*, 60 L. J., Ch. 624; [1891] 3 Ch. 394; 65 L. T. 242; 40 W. R. 29.

Right to Portions in General.]—*See* PORTION.

3. Other Cases.

Bequest to Younger Sons—Gift over on Death before Period of Distribution — Next Eldest Brother.]—Bequest to younger sons, as tenants in common; and, if any of them should die before the period of distribution, not leaving any wife or children, his share to go to his next eldest brother, and so on to the youngest. The fifth son having died without leaving a wife or child, his share was held to go to the sixth. *Fitzgerald* v. *Fitzgerald*, 12 Ir. Ch. R. 442.

Eldest Son included under Term Children.]—K., by will, directed his trustees, on R., the eldest son of K., and failing him the next eldest son, attaining twenty-one, to convey certain real estates to R., but in case any of the children conducted themselves so as not to merit the approbation of the trustees, then such children were to have life estates only. K., by codicil, directed his trustees to postpone the conveyance to R. till he attained twenty-five. R. at twenty-three married, with the approbation of the trustees, though they were not parties to his marriage settlement, which settlement disposed

of his interest under his father's will as if it were an estate in fee. When R. attained twenty-five, the trustees, not being satisfied with R.'s conduct, conveyed to him only a life estate in the premises:—Held, first, that the eldest son was included under the term children; secondly, that the trustees were not bound to declare their dissatisfaction until R. attained twenty-five, and that they could not, by having assented to R.'s marriage, preclude themselves from discharging the duty of reviewing his conduct when he attained twenty-five. *Weller* v. *Ure*, 15 L. T. 97.

One gave legacies to each of his younger children, payable at twenty-one, and the residue of his personal estate to his eldest son at twenty-one; and if he die before twenty-one, then to his younger children in succession; and if any of his younger children should die before twenty-one, their respective legacies to go equally to all the survivors; and if all his children should die before twenty-one, then the whole to go to a charity. One of the younger sons died under twenty-one; the other children attained twenty-one:—Held, the eldest son should take his legacy equally with the other younger children. *Hiern* v. *Ley*, Amb. 569.

Bequest of 5,000*l.* out of an estate, equally to testator's children, with remainder in the same estate to his first and other sons; the eldest son shall have a share. *Incledon* v. *Northcote*, 3 Atk. 438.

Future Eldest Sons.]—Gift to the eldest sons for the time being of testator's four brothers in remainder after a life estate:—Held, a vested interest in them as tenants in common. *Harvey* v. *Towell*, 7 Hare, 231; 17 L. J., Ch. 217; 12 Jur. 241.

Gift of Residue to Children—Property Derived Aliunde—Period of Distribution.]—A testator, who had been twice married, and had three sons by the first marriage, and a son and a daughter by the second, gave his residuary estate to his five children, share and share alike, the shares of his sons to be payable at twenty-one, and of his daughter at that age or upon marriage, with a gift over in case of death before the shares became payable; and he directed that in case his three children by his first wife should receive any moneys which should become payable to them as the children of their mother, such moneys should be considered as deduction from the shares of such children, it being his desire that all his children should share and share alike. After the eldest child attained twenty-one, but before any of the rest attained that age, the children of the first marriage became entitled to a fund as children of their mother:—Held, that, as the share of this fund coming to the eldest son could not be deducted from his share of the residue, and it was the intention of the testator that the proviso in his will should operate on all the children alike, no deduction could be made from the shares of the other children of the said marriage. *Stares* v. *Penton*, L. R. 4 Eq. 40.

Direction to Distribute among Brothers and Sisters according to their Needs—Double Share to Eldest Son and Heir.]—A. makes two of his daughters his executrixes, and directs them to distribute a sum of 400*l.*, and also the residue of his personal estate, among themselves, and their brothers and sisters, according to their needs and necessities, as they in their discretion should think fit. The court restrained the exercise of this power by decreeing a double share to the eldest son and heir, looking upon him as a necessitous person. *Warburton* v. *Warburton*, 4 Bro. P. C. 1.

See also WILL.

B. YOUNGER SON.

1. MEANING OF WORD.

Son not taking the Estate.]—Elder son provided for by collateral relations considered as younger. *Duke* v. *Doidge*, 2 Ves. 203, n.

Every one but the heir is a younger child in equity. Younger children are those who do not take the estate. The character of younger children must continue until the time of payment. *Savage* v. *Carroll*, 1 Ball & B. 278. *See* 12 R. R. 32.

If money is bequeathed to younger children, where there are several daughters and a son, who by birth is the youngest, but heir to a fair inheritance, he shall not be considered as a younger child to take the legacy. *Bretton* v. *Bretton*, 3 Ch. Rep. 1. S. P., *Mead* v. *Cave*, 1 Ch. Rep. 224.

When a real estate is so settled that it must, on the death of a parent, go to his eldest son, and provision is made by that parent or by any person in loco parentis, whether by settlement in contemplation of marriage or by will, for the younger children of such parent, courts of equity have considered the presumption, that it was intended to make provision for all the children so strong, as to warrant them in holding that by the word "younger" must have been intended all except the one child who succeeds to the estate. But this does not apply to the case of a will in which the primary intentions of the testator appear to have been to found certain families, or to do something beyond merely making a provision for children. And the circumstance that the will is not of an executory nature will make no difference. *Scarisbrick* v. *Skelmersdale (Lord)*, 4 Y. & C. 78.

Lands were settled to the use of A. for life, remainder to his eldest son B. for life, remainder to C. (eldest son of B.) for life, with remainder to C.'s first and other sons successively in tail, remainder to D. (the second of B.) for life, remainder to D.'s first and other sons in tail, with remainder over; with a power of limiting portions in favour of the children of B., "not being and besides an eldest or other son, who, on the decease of B. and A., shall be entitled to the settled estates"; the portions to vest, in the case of sons, at twenty-one, but not to be raisable in the lifetime of A. and B., or either of them, without consent. B. died first; then C., without issue, but having attained twenty-one; then A.; whereupon D. succeeded to the estates. He attained twenty-one in C.'s lifetime. No portion had been limited or raised:—Held, that neither D. nor C.'s representatives had any title under the portion trusts. *Gray* v. *Limerick (Earl)*, 2 De J. & Sm. 370; 17 L. J., Ch. 443; 12 Jur. 817.

—— **Provision by Parent or Person in loco parentis.**]—The rule, that a limitation in favour of younger children will not operate in favour of a younger child who becomes an eldest son and succeeds to the estates, is confined to cases where the provision is made by a parent or a

person in loco parentis. *Sandeman* v. *Mackenzie*, 1 J. & H. 613; 30 L. J., Ch. 838; 7 Jur. (N.S.) 1231; 5 L. T. 175. S. P., *Hall* v. *Hewer*, Amb. 203.

Where, in a marriage settlement, the husband covenanted to pay 10,000*l.* for the children of the marriage; and, for want of such children, for the children of the wife by a former marriage (other than A., her eldest son) as the husband should appoint; and in default, for all who should attain twenty-one, equally, or, if only one, then for such one younger child:—Held, that the wife could not be considered as purchasing the provision in such a sense as to make her the settlor; and that the settlement was not by a person in loco parentis. *Ib.*

—— **Will of a Grandmother.**]—In the will of a grandmother, "younger children" does not necessarily mean children unprovided for. *Lyddon* v. *Ellison*, 19 Beav. 565; 18 Jur. 1066; 2 W. R. 690. And see *Longfield* v. *Bantry* (*Earl*), 15 L. R., Ir. 101. *Teynham* (*Lord*) v. *Webb*, 2 Ves. Sen. 198.

See also ante, A. 2 & 3.

2. Right to Portion or Parental Provision when becoming Eldest.

a. In General.

General Rule.]—Where there is a sum of money provided for younger children, and one of the younger becomes eldest, he shall have no part of this money: but where the money was, by a private act of parliament, to be appointed among A., B. and C. (naming them), and A. afterwards becomes eldest, he is capable of an appointment in his favour. *Jermyn* v. *Fellows*, Cas. t. Talb. 93. And see *Sandeman* v. *Mackenzie*, 1 J. & H. 613; 30 L. J., Ch. 838; 7 Jur. (N.S.) 1231; 5 L. T. 175. *Reid* v. *Hoare*, post, col. 1854.

Marriage Settlement—Younger Son becoming the Eldest, mentioned by Name in Appointment.]—A. by marriage settlement is tenant for life, remainder to trustees, to raise 4,000*l.* for younger children's portions, as A. should appoint; remainder to his first and other sons in tail. A. appoints the 4,000*l.* amongst his younger children, and particularly 2,600*l.* thereof to B., his second son. The eldest son dies six years afterwards, whereby B. became eldest son, and entitled to the whole estate after his father's death; and thereupon A. makes a new appointment of the 2,600*l.* to one of his daughters. Decreed, the last appointment to take place; the first being made to B. upon a tacit or implied condition, that he should not become the eldest son. *Chadwick* v. *Doleman*, 2 Vern. 528; 1 Eq. Cas. Abr. 343, pl. 8.

Under a power to appoint a sum of money among children, but that the eldest son, or the son possessing the estate, shall have no part of the money; a younger son becoming an eldest is excluded, though mentioned by name in the execution of the power whilst he was a younger son. *Broadmead* v. *Wood*, 1 Bro. C. C. 77.

A. devised to B., for life, remainder to his first and other sons in tail male, remainder over, in trust to convey the premises, or any part thereof, to such child or children of the testator's daughter, and her then husband, other than and except their eldest son for the time being, and the issue male or female of such child or children (except as before excepted), for such estates, and in such shares, and subject to such limitations as she, by deed or will, should appoint; and for want of appointment by her, or for so much as shall not have been appointed by her, then as her husband should, by deed or will, appoint; and for want of such appointment, or for so much, &c., then as their eldest son for the time being shall appoint. The husband by his will (his wife having died without appointing), appointed to his younger sons, by name, in tail with cross remainders in tail; and if all his said younger sons should die without issue, then to his daughters. He died, leaving his sons, the appointees, still younger sons; afterwards one of them became the only surviving son, the rest being dead without issue, and then the trust estate vested in possession by the death of B. without issue male. The daughters of the appointor claimed the estate, considering the appointment to their surviving brother as defeated by his being, as they said, an eldest son for the time being, and so excluded by the will of A.; and the other brothers, the appointees, being dead without issue. But it was decreed by Lifford, Ch., that the appointment to him continued undisturbed; that "time being" meant the time of the appointment being made; that the appointees were as if named in the will of A., and that the daughters could only claim under the appointment of their father, who limited it to them in the event of all his sons, the appointees, dying without issue, which did not happen. *Jones* v. *Cope*, Vern. & Scriv. 29.

—— **Advancements in Satisfaction—Advances received by Younger Son becoming the Eldest.**]—Portions by settlements for younger children, living at the death of the survivor of the parents; with a proviso, that advancements should be in satisfaction, unless the contrary is declared. The father by will, desiring the settlement may be punctually complied with, made a residuary disposition of real and personal estates among the younger children; directing that what they may have received in his life shall be brought into the account, so as to make them all equal; construction upon the whole, that advancement in marriage, or otherwise, though not the grammatical construction, is within the proviso; and, equality being the object, an arrangement was made upon that principle. One of the younger children, having become the eldest, and therefore owner of the estate, between the death of the parents, after advances received in satisfaction of the portion in the former character, is to be considered a younger child in the account. *Leake* v. *Leake*, 10 Ves. 477.

Persons specifically included in Class of Younger Children.]—A testator devised real estate on trust after the death of his wife in strict settlement on his four sons, A., B., C. and D., and their issue male successively. He bequeathed a legacy of 14,000*l.* after the death of his wife to be paid to his "younger children," namely, B., C., D., E., F., G., H., K. and L. (the six latter being his daughters), in equal share, so that the share of each of his said younger children should be absolutely vested at twenty-one, whether the preceding trusts should be determined or not. A. and B. died in the lifetime of the testator's widow without issue male. C. attained twenty-one in the lifetime of B., and on the death of the widow became tenant for life under the will of the real estate:—Held, that he was entitled to a share in the legacy

of 14,000*l.* *Prytherch, In re, Prytherch* v. *Williams*, 42 Ch. D. 590; 61 L. T. 799.

Eldest Son excluded by Name.]—A testator bequeathed 20,000*l.* to his son A. for life, with remainder, "in case F., the eldest son of A., shall be living," to F. for life, with remainder to his children, and in default of children to the other sons of A. successively, in strict settlement. He also bequeathed a share of the residue to A. for life, with remainder to "all the children of A., except F." F. died in the lifetime of A., unmarried, when B. became the eldest son of A., and entitled on A.'s death to a life interest in the legacy of 2,000*l.*:—Held, that, notwithstanding B. having become the eldest son, he was entitled to a share in the residue, and that the representatives of F. were excluded. *Wood* v. *Wood*, L. R. 4 Eq. 48; 15 W. R. 389.

Character to be Ascertained when Portions Vest.]—A son who, when he attained twenty-one, was a younger child, but, by the subsequent death of his elder brother, in the lifetime of his parents, becomes an eldest son before the time fixed for the payment of the younger children's portions, is entitled to his share of portions which are directed to vest in the younger sons at twenty-one, though not payable till after the death of the parents; there being enough in the settlements by which the portions were provided, to shew that the character of younger child was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable. *Windham* v. *Graham*, 1 Russ. 331: 25 R. R. 62. And see *Loder* v. *Loder*, 2 Ves. Sen. 531.

Portions not Raisable.]—By marriage settlement lands were limited to the husband and wife successively for life, remainder to the first son of the marriage and the "heirs" of such first son, remainder to the second, third and every other son of the marriage and their respective heirs, with remainder to the issue female of the marriage and their heirs, as tenants in common, subject, "in case there should be a son, and a younger child or younger children" of said marriage, to a charge of 1,000*l.* for such younger child or younger children. There was issue of the marriage an only son, who survived his father, but died in the lifetime of his mother, and three daughters:—Held, first, following *Doe* d. *Littledale* v. *Smeddle* (2 B. & Ald. 126; 20 R. R. 377), that under the settlement the son took an estate tail, and the daughters estates as tenants in common in fee; secondly, that the daughters having succeeded to the estates in fee, under the limitations in the settlement, the portions were not raisable. *Smith's Estate, In re*, 27 L. R., Ir. 121.

b. Where not taking the Estate.

Death before Entering into Possession.]—A younger child becoming the eldest son, but not living to enter into possession of the estates, remains a younger child for the purpose of receiving a portion. *Sing* v. *Leslie*, 2 H. & M. 68; 4 N. R. 17; 33 L. J., Ch. 549; 10 Jur. (N.S.) 794; 10 L. T. 332.

Revocation of Uses—New Uses Declared.]—When, under a power in a marriage settlement, uses are revoked, and new uses declared, whereby a younger child, who has since become an eldest son, takes, through the mere bounty of the donor, property which, but for such revocation, he would have taken as eldest son under the settlement, he does not thereby cease to be entitled to the portion of a younger child under the settlement. *Wandesforde* v. *Carrick*, Ir. R. 5 Eq. 486.

Estate Tail Barred by Eldest Son—Portions subsequently Payable.]—A., on his marriage, settled real estates on himself for life, then to parties for a term to raise portions for his younger children, and subject thereto to his first and other sons in tail. The portions were to vest in sons at twenty-one, but to be payable after the death of the husband and wife. G., the second son, attained twenty-one, after which W., the eldest son, having barred the entail, died without issue, and subsequently the portions became payable:—Held, that G., although the eldest at the period of distribution, was entitled to a share of portions for younger children. *Adams* v. *Beck*, 25 Beav. 648.

—— **Exclusion from Bulk of Estate.**]—A second son, becoming the eldest son in the lifetime of his father, who was tenant for life, with remainder, subject to trusts for younger children's portions, in strict settlement, was prevented from taking an interest in the bulk of the estate by reason of a disentailing deed executed by his father and elder brother:—Held, that he was entitled to a share of the portions provided for younger children, notwithstanding a proviso for accruer, in the event of a younger son becoming an eldest son; the court being of opinion, that, in being excluded by the disentailing deed, he was in effect excluded by the settlement, of which the disentailing deed was necessarily an incident, and the intention was clear to exclude none from the portions who were excluded by the settlement from taking the bulk of the estate. *Macoubrey* v. *Jones*, 2 K. & J. 684.

The case of *Peacocke* v. *Pares*, infra, observed upon. It is in conflict with *Spencer* v. *Spencer*, infra, and not to be followed as an authority. *Ib.*

Where the bulk of an estate is limited in strict settlement, and by the same settlement portions are provided for younger children, no child taking the bulk of the estate by virtue of the limitations in strict settlement can take any benefit from the portions, whether the settlement does or does not contain an express provision to exclude him from a share in the portions. But where a younger child becomes the eldest without taking any part of the estate, whether or not he is entitled to share in the portions, is a question of intention. *Ib.*

Construction of a clause of accruer "in case of any younger son becoming an eldest or only son." *Peacocke* v. *Pares*, 2 Keen, 689; 6 L. J., Ch. 375; 1 Jur. 575.

An estate was limited to A. for life, with remainder to his first and other sons in tail; and a term was created, for raising portions for younger children, to be interests vested in sons at twenty-one, but payable after the death of A.; and it was provided, that in case any of the younger sons should become an eldest or only son, his portion should accrue to the other children. A. had two sons, B. and C., and one daughter; B. attained twenty-one, and suffered a recovery, whereby he destroyed C.'s estate in remainder. B. died in 1807, leaving C., an

infant, to whom he devised the estate for his life. A. died in 1833:—Held, that C. was not entitled to participate in the portion. *Ib.*

Where estates were limited in a settlement for a term to raise a certain sum for portions of all the children of the marriage (except an eldest or only son), to be vested and paid at such times as the husband should appoint, and in default of his appointment, at twenty-one, but not to be paid until after his death, with a proviso, if any son should become an eldest or only son before the time appointed for payment of his portion, that, then, and in default of any such appointment, his share should go to the others; the eldest son attained twenty-one, and afterwards, with the father, suffered a recovery, and re-settled the estates to the use of the father for life, remainder to the son in fee; the other children, a son and three daughters, all attained twenty-one, and the eldest died intestate and without issue, and the father appointed the sum amongst the surviving son and three daughters, directing that the shares should vest on the execution of the deed, but not to be paid until after his death; and the second son also died before his father:—Held, that the share so appointed to him did not go over to the sisters. *Spencer* v. *Spencer*, 8 Sim. 87; 5 L. J., Ch. 310.

By a settlement executed in 1800, on his first marriage, A. was seised of an estate for life in certain lands, with remainder to his first and other sons in tail, with power to charge the lands with 2,000*l.* for such purposes as he should think fit, and with 1,000*l.* for his children by any after-taken wife. He also became entitled by subsequent events to two sums of 500*l.* and 1,000*l.* charged on the lands by the same deed. There was no issue of the first marriage. By a settlement executed in 1809, on his second marriage, he charged the lands with 2,000*l.* and 1,000*l.* under the powers, and assigned that 2,000*l.*, and 500*l.* and 1,000*l.*, to trustees in trust, if there should be two or more younger children or daughters, to be divided amongst them, after the death of their father and mother, as he should by deed or will appoint, and in default of appointment equally; and if there should be no issue of the marriage or issue only one son, or there should be issue one or more daughter or daughters, or one or more younger children who should die before the time of payment of the portions, then as to the 2,000*l.*, 1,000*l.* and 500*l.* in trust for A., his executors, &c. There was issue of the second marriage two sons and a daughter (B., C. and D.). The eldest son, B., joined A. in suffering a recovery of the estate, and, by a deed of 1834 it was conveyed subject to a term, to the use of A. for life, remainder to the use of B. for life, remainder to the first and other son of B. in tail, remainder over. The trusts of the term were to raise, by sale or mortgage, 12,500*l.* to be disposed of as A. and B. or the survivor, should appoint, which was raised. A. appointed 250*l.* of the sums of 500*l.*, 1,000*l.* and 2,000*l.* to D., and the residue to C., and afterwards B., the eldest son, died without issue, whereupon C. became entitled, subject to the charge of 12,500*l.*, to a life-estate in part of the lands, the remainder having been sold for payment of incumbrances:—Held, that the appointment of the 500*l.*, 1,000*l.* and 2,000*l.* did not become void by C. becoming an elder son, entitled to the lands under the deed of 1834. *Tennison* v. *Moore*, 13 Ir. Eq. R. 424.

See also PORTION—WILL.

3. SHIFTING CLAUSES.

Younger Son.]—In construing a will, the words "younger son," used by the testator in a proviso for the shifting, in certain events, of an estate thereby devised, are to be taken in their plain and ordinary sense as meaning "younger in order of birth," unless it satisfactorily appears from other parts of the will that they were used by the testator in another sense. *Wilbraham* v. *Scarisbrick*, 1 H. L. Cas. 167.

Younger Son or Daughter.]—A testator, after directing two estates, A. and B., to be settled upon his children in strict settlement, except that as to estate B. the first limitation was to his second son and his issue, T., the eldest (who was to take under the first limitation as to estate A.), being named last, directed that the settlement should provide that if W. and C. (naming the other children except T.), or any subsequently born sons or daughters, should become entitled to the A. estate, and any "younger son or daughter" of the testator or any issue of such younger son or daughter should be then living, the uses in the estate at B. to the child who, or whose issue, should so become entitled, should cease:—Held, that the words "younger son or daughter," in the shifting clauses, were to be construed distributively, viz. a son younger than a son, or a daughter younger than a daughter, and the estates to shift from sons to sons and from daughters to daughters, and not from sons to daughters according to seniority. *Scarisbrick* v. *Eccleston*, 5 Cl. & F. 399—H. L. (E.)

"Become the Eldest Son."]—E. devised his estates to R. the second, J. the third, and C. the fourth sons of his brother-in-law Sir T. S. (entirely passing over W., the eldest son), and to their sons successively in tail male. By a name and arms clause he directed that as any one became entitled under the will he should assume the name and arms of E. He then introduced a shifting clause, that in case R., or J., or C. "should become the eldest son" of Sir T. S., the E. estates should go over to the next in remainder under his will. The testator died in 1819. Sir T. S. survived the testator. W., the eldest son, succeeded his father in the S. baronetcy, and in the paternal estates; and disentailed and sold them. On his death without issue R. succeeded to the baronetcy. He had long before complied with the name and arms clause in the testator's will, and was in possession of the E. estates. R. died without male issue, and J., the third son, then claimed the E. estates:—Held, that he was entitled to them, for that upon the true construction of the will he had not "become the eldest son" of Sir T. S., and the shifting clause had therefore not taken effect. *Bathurst* v. *Errington*, 46 L. J., Ch. 748; 2 App. Cas. 698; 37 L. T. 338; 25 W. R. 908—H. L. (E.)

See also VESTED, CONTINGENT AND FUTURE INTERESTS.

4. OTHER CASES.

Younger Son becoming Eldest.]—Younger son becoming an eldest, entitled to take eo nomine. *Bridgewater* v. *Egerton*, 2 Ves. Sen. 122. S. P., *Stevens* v. *Pyle*, 30 Beav. 284; post, col. 1851.

Construction of an obscure will; first, that the income only, not the capital, was disposed

of; secondly, that the disposition was in favour of the younger children, excluding the eldest. *Sansbury* v. *Read*, 12 Ves. 75.

A. made a voluntary settlement of lands (subject to an annuity of 100*l.* to his youngest son), in trust for his eldest son and his heirs, which settlement did not contain any power of revocation; the eldest son being dead, the father made another voluntary settlement of the same lands to the use of himself for life, remainder to his youngest son for life, remainder to trustees to preserve, &c., remainder to first and other sons of youngest son in tail. The first deed came into the hands of the eldest son's heir, and the other to the second son, who brought a bill to set aside the first. Both sons having been otherwise provided for, it was held, that though both deeds were voluntary, yet the consideration of being a younger child was not sufficient to set aside the first deed. *Clavering* v. *Clavering*, 7 Bro. P. C. 410.

Youngest construed as Only.]—Bequest to the youngest child of A., if she should have any child or children within a certain period; if no child or children within that period, over; her eldest child, being the only one within that period, is entitled. *Emery* v. *England*, 3 Ves. 232

See also WILL (GIFTS TO PERSONÆ DESIGNATÆ, &c.).

C. GIFTS TO FIRST, SECOND, OR OTHER SONS.

In General.]—Second-born son may take under a limitation "to the first son," he being so at the time. *Lomax* v. *Holmden*, 1 Ves. Sen. 290.

A. devised the whole of his fortune equally to be divided between any second or younger sons of his brother S., and his sister T. The sister has one younger son, but the brother has none:—Held, that the youngest son of the sister was entitled to the whole. *Wicker* v. *Mitford*, 3 Bro. P. C. 442.

The limitation in remainder in a settlement was to the second son of a person who was living at the date of the settlement:—Held, that the second son living at that date was entitled. *Saunders* v. *Richardson*, 18 Jur. 714.

A. devises in trust for his daughter for life, remainder to the second son of her body in tail male, and so to every younger son, with remainders over. There were two sons, B. and C.; B. died, and, after his death, C. was born. C., though an only son, shall take, he being the second son in order of birth, and, as the will is worded, not to be excluded. *Trafford* v. *Ashton*, 2 Vern. 660.

Devise to B. F. for life; remainder to the second, third, fourth and other sons of B. F., except the first or eldest son, in tail male successively: remainder to F. S. B. F. had no issue at the time of the decease of the testatrix, but afterwards had four sons, of whom the second and third were living at the same time, and the second and fourth were also living at the same time; but at the decease of B. F. the fourth son only was living:—Held, that the remainder to the second and other sons of B. F., except the first or eldest son, was vested upon B. F. having two sons living at the same time, and was not subject to be divested by subsequent events, and consequently that the fourth and only surviving son of B. F. took an estate tail under the devise. *Driver* d. *Frank* v. *Frank*, 8 Taunt. 468. Affirming 3 M. & S. 25; 15 R. R. 385; 2 Moore, C. P. 519 And see *Fen* d. *Lowndes* v. *Lowndes*, 4 Burr. 2246.

Although the words "to be begotten" do not in their primary legal sense point to futurity, yet they will be held to do so if such an intention can be gathered from the will. *Langston* v. *Langston*, infra, and *Blake, In re*, infra, distinguished. *Ib.*

Bequest of the dividends of stock, in trust for the testator's nephew, son of his younger brother B. for life; unless under the will he should become entitled to the testator's real estate in America, devised to B. and his first and other sons in strict settlement, in remainder after similar estates to the testator's next brother A., and his issue male; and in that event, and so from time to time afterwards, or, if any future possessor should bar the entail by recovery or other means, as to the capital, for such person as shall be heir apparent or expectant next to the person then in possession; or, if he should have joined in barring the entail, for the persons next in succession to him. After the death of A. the title of his eldest son to the estate being in consequence of the American Revolution confiscated in 1779, upon the death of the son of B., the second son of A., his eldest son having no issue, was held entitled to the dividends of the stock, while his elder brother should have no issue male. *Penn* v. *Barclay*, 14 Ves. 122.

Testator by his will directed that the fourth part of the net annual income of his property, which was personal, should be paid in quarterly payments to the eldest son of E.; and that on his decease the quarterly payment of his annuity should be continued to his heir-at-law; and failing the latter by death, so on in like manner as long as there should be an heir:—Held, that this was an absolute gift of one-fourth of the property to the eldest son of E. Testator by his will directed the income of one-half of his personal estate to be paid in equal shares to the eldest sons of his sisters E. and M. At the date of the will, an eldest born son of M. was living, but he afterwards died in testator's lifetime, leaving a second born son of M. surviving him. After his death, and with knowledge of it, the testator, by a codicil, directed the trustees of his will to divide a certain sum among all the children then living of his sisters E. and M., with the exception of the two provided for in his will:—Held, that the second born son of M. took the share given by the will to her eldest son. *Thompson* v. *Thompson*, 1 Coll. C. C. 388; 8 Jur. 889.

Limitation to "Every other Son or Sons"—"To be Begotten."]—A testator devised real estate to his second son for life, with remainder to his first and other sons in tail male; with remainder to the testator's third son for life, with remainder to his first and other sons in tail male; with remainder to the testator's fourth, fifth and every other son and sons to be begotten, born or en ventre sa mère at the time of his decease, respectively in tail male; with remainder to the testator's daughters begotten or to be begotten equally as tenants in common in tail. All the testator's sons except the eldest having died without issue male, the eldest son claimed the estate:—Held, that, having regard to the various limitations in the will, the eldest son was excluded from taking under the expression "every other son." *Locke* v. *Dunlop*, 57 L. J., Ch. 1010: 39 Ch. D. 387; 59 L. T. 683—C. A. Affirming 36 W. R. 41.

Upon a will devising lands in trust to be conveyed and settled to the use of L., the devisor's eldest son, for his life, remainder to his second, third, fourth, fifth and all and every other the son and sons of the body of L., lawfully to be begotten, severally, successively and in remainder, one after another, as they and every of them should be in seniority of age, and priority of birth, and the heirs male of their bodies respectively :—Held, upon the words and context of the will, making provisions inconsistent with the intention that a first son of L. should be excluded, that such first son took an estate in the lands in tail male. *Langston* v. *Langston*, 8 Bli. (N.S.) 167 ; 2 Cl. & F. 194—H. L. (E.) S. P., *Clements* v. *Paske*, 2 Cl. & F. 230, n. And see *Grattan* v. *Langdale*, 11 L. R., Ir. 473.

By marriage settlement lands were limited to the use of the first son of the body of B. on the body of P. (his future wife), lawfully to be begotten, and the heirs male of the body of such son, with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of B. to be begotten severally and successively, one after another, as they and every of them should be in seniority of age and priority of birth, in tail male :—Held, that the eldest son of B. by his second marriage (there being no issue of his marriage with P.) was entitled to the lands as a tenant in tail in preference to the second son of such marriage. *Blake's Settlement, In re*, 19 W. R. 765—C. A. (Ir.).

And see *Hebblethwaite* v. *Cartwright*, Cas. t. Talb. 31 ; *Hewet* v. *Ireland*, 1 P. Wms. 426 ; Gilb. Eq. R. 145 ; *Doe* d. *James* v. *Hallett*, 1 M. & S. 124 ; 14 R. R. 417 ; *Almack* v. *Horn*, 1 H. & M. 630 ; 1 N. R. 535 ; 32 L. J., Ch. 304 ; 8 L. T. 415 ; 11 W. R. 505 ; *Langston* v. *Pole*, 5 Bing. 228 ; 2 M. & P. 490 ; 7 L. J. (O.S.) C. P. 1. *S. C.*, in equity, Tam. 119 ; 7 L. J. (O.S.) Ch. 185.

"Other Child."]—A testator, after bequeathing his personal estate to trustees upon trust for sale, and after devising a freehold estate to his eldest son G., and providing for his maintenance during minority out of the rents and profits, directed his trustees to invest the proceeds of the sale of his personal estate, and to apply the income arising therefrom, and the rents and profits of his residuary real estate, towards the maintenance and education of "all his children living at his death or born in due time afterwards" ; and directed that when his youngest child should attain the age of twenty-one his trustees should "sell all his real estate, except the estate devised to his son G. . . . and divide the proceeds equally between his daughters, E., M., F., S. and A., and his sons F. and W., and such other child or children as might be living at his decease, or born in due time afterwards" :—Held, that the eldest son G. was entitled to share in the proceeds of sale of the real estate. *Tavernor* v. *Grindley*, 32 L. T. 424.

"Seventh or Youngest Child."]—Legacy to the seventh, or youngest child, of A. A. had six children at the testator's death, and had another, who died at the age of two months ; afterwards the plaintiff was born, and was the seventh child living, but eighth in order of birth ; other children were born afterwards. Under these circumstances the youngest child is entitled to the legacy, and not the plaintiff. *West* v. *Lord Primate of Ireland*, 2 Cox, 258 ; 3 Bro. C. C. 148.

Gift to "Next Surviving Son."]—A testator directed his trustees to receive the rents of all his real estate for maintenance of all his children during the minority of H., his youngest child, and on her attaining twenty-one, he gave to five of his sons, whom he named in descending order of birth, estates tail in five several portions of his real estate respectively. And he provided that in case any of these five sons died "during the minority of H. as aforesaid, or in the event of any of them dying without having such lawful issue as aforesaid, and either before or after their or his share should be divisible," then the share of the deceased son should accrue to the testator's "next surviving son according to seniority of age and priority of birth" :—Held, first, that on the death of one of the five sons during the minority of H., though leaving issue inheritable, the gift over took effect. *Eastwood* v. *Lockwood*, 36 L. J., Ch. 573 ; L. R. 3 Eq. 487 ; 15 W. R. 611.

Held, secondly, that having regard to the order in which the sons were named, "next surviving son" meant next in order according to the testator's arrangement. *Ib.*

See also SETTLEMENT.

D. DAUGHTERS.

Eldest Daughter.]—An elder daughter, where there is a son, is accounted a younger child in a court of equity. *Heneage* v. *Hunloke*, 2 Atk. 456. S. P., *Beale* v. *Beale*, 1 P. Wms. 244 ; *Pierson* v. *Garnett*, 2 Bro. C. C. 38 ; Pre. Ch. 201. And see *S. C.*, *Id.* 226.

Where, by articles before marriage, it was agreed that a principal sum should be paid to trustee for benefit of younger children, and that certain freehold houses should be conveyed, after previous particular estates, to the younger child or children, in tail general ; and, by indenture of same date, the houses were settled to uses of the articles ; the husband and wife left a daughter, their eldest child, and a son :—Held, that the daughter was entitled to the principal sum, and the freehold houses ; for an elder daughter, where there is a son, is accounted a younger child. In an ejectment the daughter could not have recovered ; for, being the eldest, she would not, at law, be construed a younger child ; but, in a court of equity, as the articles are executory, they must be carried into execution agreeably to the intention of the parties. *Ib.*

Testatrix directed that her land at M. should, as the rents became due, be equally divided amongst the youngest of her son's children ; the son left four daughters (one of whom was his eldest child) and a son :—Held, that the daughters, including the eldest, took an estate in fee in the land, it appearing, by the context of the will, to be the testatrix's intention to exclude an elder son only. *Hall* v. *Luckup*, 4 Sim. 5.

Under a gift of the residue, for such child of testator's daughter as should first attain the age of twenty-one years, for his or her absolute use and benefit, the eldest child, a daughter, was held to take, notwithstanding many passages of the will created a doubt as to that being the testator's intention, he having given that daughter a legacy, and, by a codicil, declared that the furniture in a certain house which he had given (subject to a previous life estate) to the eldest son, should, after the death of the tenant for life, be held upon and for the same trusts and purposes as he had declared concerning his residuary per-

sonal estate. *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 441 ; 6 Jur. 658.

Devise, in default of issue male of A., to the first daughter living at the death of the testator, who should attain twenty-five, for life, with remainder to her first and other sons in tail male ; remainders over ; subject to a trust for debts and accumulation of the surplus rents and profits, until a son or daughter should first come to the actual possession of the estates or receipt of the rents : after that period such person to take the surplus rents ; and the surplus of the accumulation, after payment of the debts, to be paid to such person or persons, who by the limitation should first come to the actual possession of the estates, or receipt of the rents and profits. A daughter living at the death of the testator, and having attained twenty-five, entitled to possession of the estate and to the accumulated fund. *Barker* v. *Barker*, 12 Ves. 409.

By marriage settlement, certain lands were conveyed to A. (the intended husband), his heirs and assigns ; and in case A. should die, leaving one or more son or sons on the body of his intended wife to be begotten, the elder of such sons, and the heirs male of his body, being always preferred to take place before the younger, with full liberty for A. "to make such reasonable provision as he should think fit for such younger child or children" ; and in case A. should die leaving no son, and that there should be one or more daughters, then to such daughter or daughters (if more than one) on their attaining their respective ages of twenty-one years, their heirs and assigns, share and share alike. There was issue of the marriage eight children, four sons and four daughters ; and A. by his last will and testament, in pursuance of the power contained in the marriage settlement, charged the lands with the sum of 1,500*l.*, to be divided amongst the younger children of the marriage in manner therein mentioned. The first taker having disputed the right to charge in favour of daughters, on a bill filed by one of the daughters to raise her portion of the 1,500*l.* :—Held, that the power was well exercised, and as the intention of the settlement was evidently to provide for all the children, as well daughters as sons, that the court would effect that intention, and support the appointment, by transposing the clause creating the power, and that containing the limitation to the daughters in the event of there being no son, whereby the words "such younger children" would include both sons and daughters. *Fenton* v. *Fenton*, 1 Dr. & Wal. 66. But see *Flemyng's Trusts, In re*, post, col. 1854. *Smith's Estate, In re*, ante, col. 1841.

Eldest Daughter excluded.] — A testatrix bequeathed her residuary estate to trustees upon trust for her daughter for life, with remainder to the "younger children" of her said daughter, the shares of sons to be paid at twenty-one, and those of daughters at twenty-one or marriage ; with a direction to invest the shares of daughters, and pay them the income for their separate use from the time of marriage or upon their attaining twenty-one, so that the capital of each daughter's share should pass to the children of such daughter ; with such trusts or remainders, in the event of there being no such issue, as the trustees should think proper : — Held, in the absence of evidence shewing an intention on the part of the testatrix to place herself in loco parentis towards her grandchildren, that the eldest child, a daughter, was excluded, and a younger child, a son, who succeeded to the family estates, was entitled to a share. *Lyddon* v. *Ellison*, 19 Beav. 565 ; 18 Jur. 1066 ; 2 W. R. 690. And see *Jones* v. *Cope*, ante, col. 1839 ; *Teynham* (*Lord*) v. *Webb*, 2 Ves. Sen. 198.

Gift to Younger Children other than Heir-at-Law.]—A settlement was made on the marriage of I. S., of two shares in the New River water, to I. S. for life, remainder to his wife for life, and after their decease, one share was limited to such of the younger children as should not be heir-at-law, or for want of such issue, to the sisters of I. S., and their children, as I. S. should appoint ; but in the case of no issue of I. S., or if he should make no appointment, the same was limited to the sisters, and the children of one of the sisters, under whom the plaintiff claimed, in such manner as they were entitled to one whole share. If there had been only one child, it would have been excluded by the words, "other than such as shall be heir-at-law" ; or if there had been several daughters, as they would have made but one united heir, they would have been excluded ; or if both sons and daughters, and reduced to only one child, that child could not have taken. *Townsend* v. *Ash*, 3 Atk. 336, 338.

E. CLASS WHEN ASCERTAINED AND PERIOD OF VESTING.

See also preceding subdivisions.

Death of Testator.] — Bequest of 3,000*l.* to Jane, the wife of C., for the use of her younger children, to be distributed as she should appoint, in default equally to all Jane's children by C., being born at the time of the will and death of the testator. It was held, vested as a present legacy to them, subject to variation as between them, but not to extend to her children by a future marriage. The period of vesting being as above, one who was a younger child at the testator's death, and became an elder afterwards, was held entitled. *Coleman* v. *Seymour*, 1 Ves. Sen. 209.

Legacy to the "eldest child of A.," who was alive at the date of the will, but died before the testator :—Held, to mean the eldest child living at the testator's decease. *Harris's Trusts, In re*, 2 Eq. R. 1110 ; 2 W. R. 689.

Under a trust for A. for life, "and after her death, to be divided equally between her younger children" :—Held, first, that the children took vested interests at their births, and secondly, that the character of youngest child was to be determined at the period of vesting, and not that of distribution. *Adams* v. *Roberts*, 25 Beav. 658.

Under a will directing the transfer of stock among all the children of the testatrix's daughter, except an eldest son, a second son having become the eldest living by the death of his elder brother, who survived the testatrix, is not entitled to a share, although an estate limited to his elder brother did not descend to him. *Matthews* v. *Paul*, 3 Swanst. 328 ; 2 Wils. Ch. 64 ; 19 R. R. 207.

Held, that under a bequest to the younger children of A., an only surviving younger child was upon the whole will entitled ; and the second, having become the eldest, was excluded. *Lincoln* (*Lady*) v. *Pelham*, 10 Ves. 166 ; 7 R. R. 370.

Happening of Contingency.] Legacy of 300*l.* to E., to be paid at twenty-one or marriage ; but if she died before, then to the younger children

of F. E. having died unmarried, under twenty-one :—Held, to vest in such of the younger children as were living at that time. *Ellison* v. *Airey*, 1 Ves. Sen. 111.

Devise and bequest to A., and after her decease, leaving any child or children her surviving, who should attain twenty-one, to pay her share "to her eldest child, his executors, administrators and assigns," with a gift over in default of such child :—Held, that A.'s eldest child, who died in A.'s life, did not take, but that the second child, who survived her mother, was entitled. *Stevens* v. *Pyle*, 30 Beav. 284.

A testatrix, who died in 1819, bequeathed a legacy to accumulate in trust for the eldest daughter of A. B., to be paid at twenty-one, and if none, to the eldest daughter of C. D., payable in like manner. A. B. never had a daughter, and died in 1851. C. D. had a daughter G., born in 1821, and who died in 1827, and other daughters :—Held, that the representative of G. was entitled to the legacy, and to the accumulations accrued down to 1827, together with simple interest thereon from that time to the day of payment in 1852. *Bryan* v. *Collins*, 16 Beav. 14.

Death of Tenant for Life.]—Where there is a devise of real estate to A. for life, with remainder to his eldest son, and A. has B., his eldest son, at the time of the date of the will, who afterwards dies, and A. leaves another child, C., his eldest son. Quære, as to the construction of such a devise ; but, semble that C. would take. *Spurrell* v. *Spurrell*, 22 L. J., Ch. 1076 ; 17 Jur. 755.

A limitation by settlement of a fund vested in trustees, upon trust to pay the income to M. for life, and after her death, "to pay or transfer the capital to all her children (except her eldest or only son), in equal shares, at their respective ages of twenty-one years," confers a vested interest on all the children of M. who attain twenty-one, although they may die before the period of division. *Theed's Trusts, In re*, 3 K. & J. 375 ; 26 L. J., Ch. 514.

A younger son attained twenty-one, and then became the eldest by the death of his elder brother before the period of division :—Held, that as there was no reason shewn by the settlement for excluding the eldest son, such as his accession to another estate, the share that was vested in the younger son was not divested by his becoming the eldest. *Ib.*

The character of "eldest son" is, in ordinary cases, to be ascertained at the period of vesting, and not of payment. *Adams* v. *Adams*, 25 Beav. 652.

Bequest to A. for life, and afterwards in trust for her children who, not being an eldest or only son, should attain twenty-one. In 1854, after G., the second son, had attained twenty-one, the eldest son died, and the second son thereupon became eldest. The tenant for life died in 1857 :—Held, that G., though an eldest son at the time the fund became payable to the children, took a share. *Ib.*

Construction of will, that under a bequest to the children of A., a second son of three at the death of the testator and the tenant for life, who became the eldest before the age of twenty-one, till which it was subject to survivorship, was, upon the whole will, not entitled. *Bowles* v. *Bowles*, 10 Ves. 177.

Provisions made by Strangers.]—In cases of provisions made by strangers, the time for ascertaining the class of younger children is in general the period of vesting, not the period of distribution, as in settlements by parents. *Sandeman* v. *Mackenzie*, 1 J. & H. 613 ; 30 L. J., Ch. 838 ; 7 Jur. (N.S.) 1231 ; 5 L. T. 175.

Youngest Child attaining 21.]—A testatrix gave to the eldest son of her daughter Eliza, and of her husband, E. L., who should be living at the time of her own decease, ten guineas, adding that she left him no larger sum, because he would have a handsome provision from the estates of her late husband and of his own father (who was still alive) ; and she gave the residue of her property to her executors, upon trust, as to one moiety thereof, to pay and divide the same unto and amongst all the children of her daughter Eliza, who were then in being or should be thereafter born, except her eldest son, or such of her sons as should, by the death of an elder brother, become an eldest son, equally to be divided amongst them, and the survivors or survivor, when the youngest should arrive at the age of twenty-one years. At the death of the testatrix, her daughter Eliza had five children, and the eldest son was provided for from the estates in the will mentioned, and he received the ten guineas, but died without issue before the youngest child attained twenty-one. The second, who then became an eldest son, did not succeed to the provision which had been made for the eldest son :—Held, notwithstanding, that he, being the eldest son at the time the youngest of the children attained twenty-one, was excluded from any share in the moiety of the residue. *Livesey* v. *Livesey*, 2 H. L. Cas. 419 ; 13 Jur. 371. Affirming 13 Sim. 33 ; 15 L. J., Ch. 357.

Death of Survivor of Several Tenants for Life.]—A testator gave personal property, upon the death of the survivor of several tenants for life, "to be divided equally between the two eldest children born in wedlock of each" of his sons and daughters ; but if there should be only "one child living" to any of his married sons or daughters, that child to "receive only the proportion divided equally according to the number there may be" :—Held, that "the two eldest born" meant the two actual eldest living at the date of distribution, and the representatives of a deceased eldest, and a deceased second eldest, were excluded. *Madden* v. *Ikin*, 2 Dr. & Sm. 207 ; 1 N. R. 11 ; 32 L. J., Ch. 3 ; 8 Jur. (N.S.) 1168 ; 7 L. T. 264 ; 11 W. R. 2.

Settlement—"Eldest Son for Time being entitled."]—By a settlement made in 1820, on the marriage of Mr. and Mrs. C., certain funds were settled upon trust, after the death of the survivor of them, for their children or child, "other than and except an eldest son for the time being entitled," under a will, recited in the settlement, to a property at N. D., "for an estate in tail male in possession or remainder immediately expectant upon the death" of C. ; the fund to vest in such children or child at twenty-one. C. was tenant for life of the property at N. D. There were three children, a son, E. C., and two daughters. The son, in the father's lifetime, concurred with him in barring the entail in the property at N. D., which was thereupon resettled, the son taking only an estate for life after his father's death, but taking also out of the property an immediate provision of 500*l.* a year :—Held, that, although the time

of distribution of the trust funds was the proper period for ascertaining who was the "eldest son" to be excepted out of the settlement as being entitled under the will as tenant in tail in possession to the estates at N. D., and, although at that time E. C. was only entitled to those estates as tenant for life, and so did not strictly answer the description of the child to be excluded, yet, as he had already acquired the larger interest in the landed property, and had dealt with it as it seemed good to him, he was by the terms of the settlement excluded from taking any portion of the trust funds. *Collingwood* v. *Stanhope*, 38 L. J., Ch. 421; L. R. 4 H. L. 43; 17 W. R. 537.

—— **"Eldest or only Son."**]—By a marriage settlement, real estate of the husband's father was limited (subject to life estates to the father and to the husband, and to a jointure to the wife) to the first and other sons of the marriage successively, in tail male. By another deed, in which the settlement was recited, real estate of wife was limited, subject to her life estate, to the use of all and every the son and sons, other than an eldest or only son, and daughter and daughters of the marriage, equally, as tenants in common in tail, and if any such younger son or daughter should die, and there should be failure of issue of his or her body, or in case any such younger son or sons should become an eldest or only son before attaining twenty-one, then the share of such son or daughter, as well original as accruing, should go over to the survivors or survivor or others or other of the younger sons or daughters, to be divided between them (if more than one) equally, as tenants in common in tail, and, if but one such son or daughter, the whole was to go to him or her in tail:—Held, that the period of distribution of the wife's estate was the time at which the class to participate in it was to be ascertained, and that, consequently, a younger son of the marriage, who succeeded to the paternal settled estates after he attained twenty-one, but who died in his mother's lifetime, was not entitled to any share in his mother's settled estate. *Bayley's Settlement, In re*, L. R. 6 Ch. 590; 25 L. T. 249; 19 W. R. 789. Affirming 39 L. J., Ch. 388. S. P., *Rivers' Settlement Trust, In re*, 40 L. J., Ch. 87; 24 L. T. 253; 19 W. R. 318. And see *Windham* v. *Graham*, 1 Russ. 331; 25 R. R. 62; ante, col. 1841; and *Smyth, Ex parte*, 12 Ir. Ch. L. 487.

Sir C. D. (who died in 1857), by deed in 1852, appointed a fund to trustees in trust for his daughter Lady W., for life, and after her death in trust for the child or all the children, "except an eldest or only son," if more than one, of Lady W., who should attain twenty-one or marry; and failing such trusts then over. Lady W. died in 1883, having had four children only, viz., Thomas, her eldest born son, who attained twenty-one in January, 1869, and died in April following; Sir F. W., who attained twenty-one in 1880; Helena, who attained twenty-one in 1865; and Edith, who died in infancy, in 1864; so that the fund vested in Helena (subject to let in other children) in the lifetime of the eldest born son, and before he attained twenty-one. At the date of the deed certain estates stood limited under a settlement, to which Sir C. D. was a party, to the use of Sir T. W. (the husband of Lady W.) for life with remainder to the issue of the first and other sons of Sir T. and Lady W. in tail male. In March, 1869, Sir T. W. and his son Thomas disentailed the estates, and limited them to the appointees of both, or of the survivor. The joint power was not exercised: but after the death of Thomas, Sir T. W. by will appointed the estates to Sir F. W. for life, with remainder to his sons in tail male. Upon Lady W.'s death, Sir F. W. claimed half the fund, and Helena, the whole of it:—Held, that, if the expression "eldest or only son" was to be read as referring to a son entitled under a settlement to settled estates, the time for ascertaining the excluded son would be the time for distributing the younger children's portions; but that if that expression was to be read according to its natural meaning, the time of vesting would be the time for exclusion. *Domrile* v. *Winnington*, 53 L. J., Ch. 782; 26 Ch. D. 382; 50 L. T. 519; 32 W. R. 699.

Held, also, that the words "an eldest or only son" primâ facie mean an individual, and that as there was an eldest son in existence when the provision vested in Helena, the clause of exclusion applied to him, and its operation was exhausted, so that any other son who attained twenty-one was entitled to take; held, therefore, that Sir F. W. was entitled to one-half of the fund. *Matthews* v. *Paul*, supra, col. 1850, observed upon. *Ib.*

—— **Estates Sold under Paramount Title.**]—By a marriage settlement an estate was settled on the wife and husband successively for life, with remainder to trustees for a term of 600 years, and subject thereto to the first and other sons in tail. Other estates were settled free from the portions term, but subject to prior charges which entirely absorbed them. The trusts of the term were if there should be any child, or children, of the husband and wife other than or besides an eldest or only son, who by virtue of the limitations should for the time being be entitled to the hereditaments and premises to raise for the portions of such child or children, other than or besides such eldest or only son, 5,000*l.*, to be vested in such of them as the husband and wife, or the survivor, should appoint, and in default of appointment equally. There were three children of the marriage, two sons and a daughter. In 1841 the estate was sold, under a paramount title, and produced a sum of about 2,400*l.* In 1842 the eldest son died an infant. In 1882 the surviving tenant for life died and the portions became payable. There had been no appointment. The younger son who had become the elder and had attained twenty-one claimed to take a share with his sister of the 2,400*l.*:—Held, that the effect of the settlement was to give 5,000*l.* to the sister as a first charge on the estate, and the rest of the estate to the brother, and whether the value of the residue were more or less than the portion, or, as in this case, nothing at all, the brother had no right to claim any share in the prior charge. *Reid* v. *Hoare*, 53 L. J., Ch. 486; 26 Ch. D. 363; 50 L. T. 257; 32 W. R. 609.

—— **Money Fund for Younger Children.**]—By settlement executed on the marriage of F. with H., a sum of 1,000*l.* the fortune of the wife, H., and 923*l.* 1*s.* 6*d.* the property of the husband, were vested in trustees in trust for F. for life, and after his decease in case he survived his wife (which event happened) in trust to pay

and assign said funds among his children other than and besides an eldest or only son, as he should appoint, and in default of appointment then upon the trust declared concerning the trust fund secured by the term of 500 years for the benefit of F.'s younger children thereinafter mentioned; but if there were no such child or children as those for whom said trust fund was to be provided then in trust for F.'s father. By the same settlement certain lands were conveyed to the use of F. for life, remainder subject to a trust term of 500 years to the use of his first and other sons in tail male; remainder to the daughters, as tenants in common, in tail, with remainders over. The trusts of the term of 500 years were declared to be, that if there should be any child or children of the said F. other than and besides an eldest or only son who by virtue of the limitations before mentioned, should for the time being be entitled to the lands, then that the trustees should raise for such child or children other than or besides an eldest or only son, as aforesaid, the sums mentioned, 6,000*l.* if one such child, 8,000*l.* if two, and 10,000*l.* if three or more. There were two other clauses as to the vesting of these portions, which contained the words "other than or besides an eldest or only son for the time being entitled as aforesaid," and an advancement clause which contained the words "other than and except an eldest or only son for the time being entitled as aforesaid." There was issue of the marriage, two daughters only, both of whom died in F.'s lifetime, leaving children who became entitled on F.'s death to the settled lands:—Held, first, that the clauses in the settlement dealing with the money fund must be read as providing for children other than and besides an eldest or only son; secondly, that there not being any son of the marriage, the daughters did not come within the description of "a child or children other than and besides an eldest or only son," and that consequently the money fund of 1,923*l.* 1*s.* 6*d.* passed to F.'s father under the ultimate trust. *Flemyng's Trusts, In re*, 15 L. R. Ir. 363.

Gifts to a Class when Youngest Attains Twenty-one.]—*See* WILL.

F. CLAUSES EXCLUDING CHILD "ENTITLED," OR ELDEST SON FROM A CLASS OF CHILDREN.

Son "Entitled upon his Father's Decease."]—A testator bequeathed a legacy of 2,000*l.* upon trust for a married daughter, F., for life, then for her husband for life, and after the death of the survivor for such persons "related by blood" to F. as she should appoint; and in default of appointment to transfer the same to such persons as would be "the personal representatives" of F. in case she had died sole and unmarried. By a codicil, the testator, in reciting the bequest, referred to these trusts as being trusts for the benefit of his daughter's "relations and next of kin." F. died in the testator's lifetime:—Held, that by the "personal representatives" of F. were meant the persons who were her statutory next of kin at the testator's death. *Grylls' Trusts, In re*, L. R. 6 Eq. 589.

By the codicil the testator declared that 1,000*l.*, part of the 2,000*l.*, should be held for the absolute use and benefit of his son, H., but if he should be dead when the 1,000*l.* should "descend and come" to him under the trusts therein contained, then that the same should be paid to all the children of H. "except the one entitled to any real property upon his father's decease," share and share alike. Upon the death of H., in 1862, after the testator's death, his eldest son became next tenant for life in remainder of the settled estates, expectant on the death without issue of the then tenant for life in possession, which happened in 1863. The surviving tenant for life of the legacy died in 1867:—Held, that the eldest son of H. was excluded from participation in the 1,000*l.* *Ib.*

"Entitled" in Possession.]—A testator devised his real estate in trust for his nephew A. for life, with remainder to A.'s first and other sons successively in tail male; and failing such issue in trust for the testator's brothers B. and C. successively for their lives, and their sons successively in tail male; and failing such issue (in the events which happened) in trust for the testator's nephew D. in tail male. The testator bequeathed his residuary personalty equally among his nephews and nieces, except A. or other the person or persons entitled to the testator's real estates by virtue of the limitations therein-before contained. A. died unmarried in the testator's lifetime; C. survived the testator, but died unmarried; B. was sixty-eight years old at the time of the proceedings being taken, and had never been married:—Held, that D.'s expectation of a succession to the testator's real estate being contingent only, was not sufficient under the provisions of the will to disentitle D. to a share in the residuary personalty. *Umbers* v. *Jaggard*, L. R. 9 Eq. 200; 18 W. R. 283.

A testator gave Blackacre to his son F. for life, remainder to his eldest grandson, R., for life, remained to his (R.'s) first and other sons in tail, and in default of such issue to his second grandson, W., for life, remainder to his first and other sons in tail, and in default of such issue to his third grandson, F., for life, remainder to his first and other sons in tail, remainders over. The testator charged Blackacre with legacies of unequal amounts, in favour of his grandsons W. and F., to be paid as and when they attained twenty-one, with power to the trustees to advance the whole or part of the legacies for their benefit. The will contained a proviso that if either W. or F. should become entitled to an estate for life in Blackacre, then the legacies should not be paid, but should sink into Blackacre. R. died a bachelor, in the lifetime of F., the father, whereupon W. became tenant for life in remainder of Blackacre. He attained twenty-one:—Held, that the words in the proviso, "become entitled" meant "become entitled in possession," and that as at the time when he attained twenty-one his father was living, W. was entitled to have his legacy raised and paid. *Chorley* v. *Loveland*, 33 Beav. 189; 9 L. T. 596; 12 W. R. 187.

—— **Only son born after Forfeiture by Tenant for Life—Accumulations.**]—F. devised real estate in strict settlement, with a proviso that if any person entitled in possession for an estate for life or in tail to the hereditaments so devised should fail to reside for six successive calendar months in every year in the mansion house on the estate, the estate of him and his issue should cease, and the hereditaments immediately thereupon go over to the person next entitled in remainder as if the

person so failing to reside were then dead without leaving any issue inheritable under such entail. She bequeathed the residue of her personal estate, in case the tenants for life should be or become at her death beneficially entitled in possession to the hereditaments so devised, and should have any children other than an eldest or only son or daughter beneficially entitled under the limitations aforesaid for an estate tail in remainder immediately expectant on the decease of his or her parent, in trust for such children as the tenant for life should appoint; and in default of such appointment, for "all and every the children or child of such tenant for life, other than and beside an eldest or only son or an eldest daughter entitled as aforesaid." The first tenant for life under the limitations of the will incurred the forfeiture consequent on failure to reside for the term prescribed by the will. After the forfeiture he married and left one child:—Held, that such child was entitled to the residuary personal estate, as he was not "an eldest child entitled as aforesaid," his remainder having been destroyed by the forfeiture incurred by his father prior to his birth. *Johnson* v. *Foulds*, 37 L. J., Ch. 260; L. R. 5 Eq. 268. And see *Townsend* v. *Ash*, ante, col. 1850.

By a will made in 1802, a testator gave his residuary personal estate to A., B. and C., successively for life, and after the death of the survivor in trust for all the children of B. who should live to attain twenty-one (other than and except the eldest and second sons if any, and any other child who should by virtue of the limitations thereinafter contained, be entitled in possession to his, the said testator's manors, &c., thereinafter mentioned, or the rents and profits thereof); and by his will the testator appointed the said manors, &c., in case D. should die without issue, to B. and C. successively for life, with remainder to first and other sons (except an eldest son) of B. successively in tail male, with remainder to the first and other daughters of B. successively, in tail male. In the events which happened, E., a daughter of B., became entitled to the manors, &c., as tenant in tail in remainder expectant on the death of D. and C., and joined them in suffering a recovery in 1823, and in making a re-settlement of the estate, reserving the life interests to D. and C., with remainder to trustees, for the benefit of B. for life, with remainder to her intended husband, with remainders over for the benefit of the issue of the marriage. E. died in the lifetime of C.:—Held, that E.'s personal representative was entitled to a share of the residuary personal estate of the testator. *Wyndham* v. *Fane*, 11 Hare, 287; 1 W. R. 467.

Bequest to Children at Twenty-five—Gift over of Eldest Son's Share if he succeeded to Inheritance—Time of Vesting.] — Testator, by his will, gave two-thirds of his residuary personal estate to belong to and to be given up to his child or children in the proportions therein named on their coming to the age of twenty-five years; provided that if his eldest son should thereafter come to the inheritance of the landed property of the testator's father or eldest brother, his share of the two-thirds above stated was to be made over to his brothers and sisters:—Held, that the eldest son of the testator on attaining twenty-five years of age without having then come to the inheritance mentioned, became entitled to his share of the two-thirds of the residuary personal estate under his father's will. *Glyn* v. *Glyn*, 26 L. J., Ch. 409; 3 Jur. (N.S.) 179; 5 W. R. 241.

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